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## **The boundaries of EU citizenship: reflections on borders, citizenship and sovereignty**

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### ***Borders and EU citizenship seen from critical migration studies***

Migration, borders and sovereignty have become inseparable companions. Human mobility captured by the legal notion of 'migration' is perceived as doing something to the state, its sovereignty and accompanying understanding of membership as national. What exactly this 'something' is remains debated in scholarship but generally revolves around the demise of the nation state and accompanying 'national' forms of belonging epitomised by citizenship/nationality or, at the very least, their transformation under conditions of globalization. Elspeth's scholarship has aptly engaged with these issues and with a view to understand the role played by law in these processes. One of her main contributions has been the framing of their analysis from the perspective of the individual migrant and his/her legal standing under the label of 'critical migration studies'.<sup>2</sup> This is a bold and unusual move in (legal) migration scholarship, which remains concerned with the state as the main actor and object of inquiry, its right to regulate migration across its borders, the state's transformation as a result of migration, the impact of migration on inter-state relations etc. Until recently, Elspeth's interest has been the EU since it has set out a particular vision of dealing with human mobility among its Member States as a fundamental freedom - the free movement of persons – which was later refashioned as EU citizenship. Its realization rests on the idea of building an ever-closer union among the participating states with a view to create a space without internal borders in which the nationals of the Member States can move freely. Scholarship has amply debated how the effacing of internal borders rests on the hardening of EU's external borders. Elspeth has been one of the authors that have critically engaged with the notion of 'fortress Europe' as failing to capture the complexity of the border and its transformation into a filtering device; borders remain open for the bona fide migrant epitomised by tourists and businessmen, while filtering out the male fide migrants, usually the terrorists and the poor.<sup>3</sup> This points towards borders as polysemantic categories of inquiry and the fallacy of truth claims based on simple dichotomies of inside/outside.<sup>4</sup>

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<sup>2</sup> E. Guild (2009) *Security and Migration in the 21<sup>st</sup> Century*, Polity.

<sup>3</sup> E. Guild (2011) Equivocal claims? Ambivalent Controls? Labour Migration Regimes in the European Union, in Guild and Mantu (eds) *Constructing and Imagining Labour Migration. Perspectives of Control from Five Continents*, Asghate, pp. 207-228.

<sup>4</sup> R.B.J. Walker (2010) *After the Globe, Before the World*, Routledge.

In this short contribution, my focus will be on EU citizenship as a site for observing and analysing the relationship between the state, borders and sovereignty. Elspeth's emphasis on the individual migrant as bearer of rights is at home within the EU context, even more so after the introduction of EU citizenship and the proclamation of the right to free movement as a fundamental, individual and directly effective right given by the EU to the nationals of the Member States. In relation to the EU, Elspeth's work repeatedly stresses the reversal of the traditional position of international law, where states have a sovereign right to control entry into state territory; rather, EU citizens hold a right to enter one of the other Member States and that state has a limited power to reject entry or residence.<sup>5</sup> This constitutes a fundamentally different starting point from where to conceptualize migration that is grounded on EU citizens' legally enforceable rights of entry and residence.

My interest in the boundaries of EU citizenship is not linked with borders as lines or spatial constructions; rather I am interested in the conceptual boundaries of EU citizenship as the sites of struggles over the ownership, matter and direction of this notion. What I want to explore here is how some of the functions of borders – to differentiate, to delimitate, to define who belongs, to include/exclude – are played out in the notion of EU citizenship. What can we learn about the notion of EU citizenship when we interrogate it from its conceptual boundaries? Who is in and who is out of the reach of EU citizenship? This interrogation builds on an on-going discussion about the nature of EU citizenship – citizenship or migration status - that Elspeth has started in the research performed by the Centre for Migration Law in Nijmegen and which we hope to continue.

### ***Deconstructing the relationship between EU citizenship and state sovereignty***

The analysis below is informed by a number of insights that for reasons of space I can only summarise here.<sup>6</sup> First, citizenship studies posit citizenship to be a bounded notion that relies, among others, on law to draw boundaries between those who are part of the community and those who are not. Secondly, the community is understood as a national one, while migration is seen to put pressure on the national character of membership as it constantly pushes for expansion of the community to the detriment of its cohesion. Thirdly, citizenship is a notion born out of contestation and struggles over the inclusion of parts of society into its franchise; the development of national citizenship alongside the establishment of the national state as the main form of political actor shows that these struggles can be legal, symbolic, political etc. and involve the stabilization of the fringes and of boundaries as means to ensure the viability of citizenship as a political construct. Critical legal scholars have described modern citizenship as being about the extension of the citizenship franchise to the poor as a pacifying move to ensure the stability of the social contract.<sup>7</sup> Finally, in this contribution I focus on legal contestation as it emerges from the jurisprudence of the ECJ in relation to EU citizens and their claims. This approach builds on

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<sup>5</sup> E. Guild (2004) *The Legal Elements of European Identity. EU Citizenship and Migration Law*, Kluwer Law International.

<sup>6</sup> S. Mantu (2015) *Contingent citizenship. The law and practice of citizenship deprivation in international, European and national perspectives*, Brill:Martinus Nijhoff, pp. 1-21; 328-346.

<sup>7</sup> S. Mantu (2017) Alternative views on EU citizenship, in C.A. Grutters, S. Mantu & P. Minderhoud (eds.) *Migration on the Move – essays on the dynamics of migration*, Leiden: Brill Nijhoff, pp. 225-246.

research undertaken with Elspeth in the ENACT project where we approached the ECJ as a site of citizenship enactment where understandings of what a citizen is are challenged and where EU citizenship is acted upon and constructed as the fundamental status of the nationals of the Member States.<sup>8</sup>

I will explore the boundaries of EU citizenship in relation to three sets of issues associated with state sovereignty and which loosely correspond to the three elements in Weber's definition of the state as encompassing a territory, a population and bureaucracy that engages in legitimate exercise of power - for my purposes here, I understand this last element as being about the governance of territory and people. These themes are also linked with some of the main criticisms voiced in scholarship around the time of the introduction of EU citizenship: its failure to include TCNs within its personal scope; its reliance on state nationality and its persistence in treating economically active and inactive mobile EU citizens differently in respect of residence and social rights. My aim is to understand if and how EU citizenship changes the exercise of sovereignty in these areas and with what consequences for EU citizens. My three areas of inquiry are:

1. control over presence on state territory – static EU citizens and TCN family members
2. rules of membership attribution – who is/can remain a national of an EU Member State?
3. redistribution of resources as linked to the governance of people and territory – who can rely on the welfare state?

### ***Control over presence on state territory***

A state's right to control the presence of foreigners on its territory is seen as an attribute of state sovereignty that is recognized by international law. It is also understood as the reverse side of the national's right to be present on state territory (Article 12 ICCPR). Thus, in relation to the territory of their state of nationality, nationals enjoy a right to enter and reside that is linked to their status as nationals; to enter and reside within that same territory, foreigners require state permission. EU law grants EU citizens a right to enter and reside in another EU state (Article 21 TFEU and Directive 2004/38) and limits the possibility of the host EU state to end this right by spelling out a limited number of grounds for expulsion – public policy, public security and public health – and situations in which residence can be terminated. Moreover, EU law offers material and procedural safeguards that EU states must observe as a matter of EU law when extinguishing rights.<sup>9</sup> From the perspective of a state's right to control the presence of foreigners on its territory, EU citizens enjoy a position that is much closer to that of state nationals than non-EU foreigners who remain the main subject of state control. Despite the growing Europeanization of migration legislation and the adoption of common rules on non-EU migrants, the Member States retain a tighter grip on this latter group's access to and mobility within the EU than on EU citizens. Concerning expulsion, the ECJ has confirmed the special position enjoyed by

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<sup>8</sup> S. Mantu and E. Guild (2013) Acts of citizenship deprivation: ruptures between citizen and state, in E. Isin and M. Seward (eds) *Enacting European Citizenship*, Cambridge University Press, pp. 111-123.

<sup>9</sup> S. Mantu (2018) Expulsion of own nationals: what implications for EU citizenship?, Nijmegen Migration Law Working Papers Series, no 2018/06, Nijmegen: Radboud University Nijmegen.

(long-term resident) EU citizens in contrast to Turkish nationals stemming precisely from the introduction of EU citizenship and the distinctiveness of the EU project.<sup>10</sup>

However, the manner in which the ECJ has interpreted the Treaty and secondary law provisions on EU citizenship has led to the extension of the protection stemming from EU citizenship to TCNs in their capacity as family members of EU citizens. The ECJ has ruled that in order to enjoy family reunion with an EU citizen, it was immaterial if the TCN family member had entered the territory of the host Member State irregularly.<sup>11</sup> It was the position of the EU citizen exercising free movement rights that mattered and whether the family member fell in one of the categories sanctioned by EU law (Articles 2 and 3 of Directive 2004/38; Article 10 Regulation 492/2011). This jurisprudence has constantly expanded and now includes EU citizens who return to their Member State of nationality and wish to bring along a family member: where the exercise of free movement rights has been genuine and family life created or strengthened during that genuine exercise of free movement rights, the Member State of nationality must allow the family member to enter and reside with the national EU citizen as a matter of EU law.<sup>12</sup>

Traditionally, the application of EU citizenship provisions on free movement and residence required the person to move from her/his state of nationality; it was primarily in the territory of another EU state that EU citizenship became relevant and its rights were activated.<sup>13</sup> In its latest jurisprudence, the Court extends the reach of EU law to static EU citizens who have never moved. Their position in law is no longer captured exclusively by their status as nationals; it is a combination of 'national' and 'EU citizen' that dictates the legal regime applicable to their family reunification claims. As EU citizens, the nationals of the Member States may rely on the rights pertaining to that status including against the Member State of which they are a national.<sup>14</sup> Although Article 20 TFEU does not give autonomous rights of residence to TCNs, in certain exceptional circumstances a right of residence must nevertheless be granted to a TCN who is a family member of an EU citizen if as a consequence of such a refusal, the EU citizen would be obliged in practice to leave the territory of the EU as a whole, denying him the genuine enjoyment of the substance of the rights conferred by virtue of the status of EU citizen.<sup>15</sup>

Initially, it seemed that EU citizenship transforms state sovereignty over territory in respect of EU citizens but leaves intact that sovereignty when it comes to TCNs and EU citizens who reside in their state of nationality (either because they have never moved or because they have returned there). ECJ jurisprudence disproves both of these assumptions as EU citizenship expands the pool of persons over whose entry and residence the Member States can no longer claim an exclusive right of control. In its expansion to capture EU citizens and their family members, EU citizenship creates a direct link between the EU citizen and 'EU

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<sup>10</sup> Case C-371/08 *Ziebell*, EU:C:2011:809.

<sup>11</sup> Case C-127/08 *Metock*, EU:C:2008:449.

<sup>12</sup> Case C-456/12 *O&B*, EU:C:2014:135 ; Case C-457/12 *S&G*, EU:C:2014:136.

<sup>13</sup> For example, the right to diplomatic protection is an exception, as it is to be enjoyed while outside the territory of the EU.

<sup>14</sup> Case C-304/14 *CS*, EU:C:2016:674, para 24.

<sup>15</sup> Case C-164/14 *Rendon Marin*, EU:C:2016:675, para 74; Case C-133/15 *Chavez-Vilchez*, EU:C:2017:354.

territory' as the space within which this status and the rights attached to it are to be enjoyed.

### ***Rules of membership attribution***

Nationality attribution – the rules prescribing the acquisition and loss of state nationality are part of the state's sovereign right to define membership in the national community. For states, having a defined citizenry is important for asserting their external sovereignty as well as their domestic capacity to extract resources (taxes, performance of military services etc.). EU citizenship retains not only a symbolic link to state nationality, but also a functional one. Article 20 TFEU states that EU citizenship is held by the nationals of the Member States and is additional to state nationality without replacing it. Declaration no 2 on nationality of a Member State<sup>16</sup> formalises the position of the Member States that view nationality as within their reserved domain (sovereignty) since EU citizenship remains dependent on the definitions supplied by the Member States concerning who is a state national for the purposes of EU law.

Although the EU has no competence in respect of state nationality and EU citizenship is an additional status, the ECJ has ruled that where nationality decisions taken by the Member States affect the rights conferred and protected by EU law, national rules have to be interpreted and reviewed in light of EU law, even if they comply with international law. In other words, the Member States must have due regard to EU law in the exercise of nationality powers.<sup>17</sup> The exact implications of having 'due regard to Community law' (now Union law) have been constructed on a case by case basis but at its core is the idea that the nationality rules applied by the Member States may be modified or not applied when they constitute a breach of EU law.

ECJ's inroads into state sovereignty over nationality attribution involve a delicate ballet. On one hand, the ECJ remains tributary to an understanding of nationality as an emotional bond, rather than a legal one, which translates into a cautious review of the objectives pursued by the Member States when deciding what principles of attribution to use. For example, in *Kaur*<sup>18</sup>, the UK could legitimately provide the exclusion of certain categories of British citizens from the scope of EU citizenship in line with its history as a colonial power without clashing with EU law. In *Rottmann*, the ECJ held that states could legitimately seek to protect public interests linked to fraudulent naturalizations by allowing for withdrawal of nationality even if this leads to loss of EU citizenship and statelessness. In *Tjebbes*<sup>19</sup> the Dutch state can legitimately seek to limit dual nationality in case of habitual residents abroad even if such measures lead to loss of EU citizenship. On the other hand, there is a clear recognition of the fact that loss of state nationality has EU implications that national authorities have to streamline into their nationality procedures and discuss alongside

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<sup>16</sup> Declaration no 2. on nationality of a Member State annexed to the final act of the Treaty on European Union together with the decision of the Heads of State and Government, meeting within the European Council at Edinburgh on 11 and 12 December 1992.

<sup>17</sup> Case C-369/90 *Michelletti*, EU:C:1992:295; Case C-135/08 *Rottmann*, EU:C:2010:104.

<sup>18</sup> Case C-192/99 *Kaur*, EU:C:2001:106.

<sup>19</sup> Case C-221/17 *Tjebbes*, EU:C:2019:189.

national interests.<sup>20</sup> Proportionality and individual assessment play a crucial role in legitimizing state nationality decisions from the perspective of EU citizenship. For individuals, the Court's position adds an extra layer of protection against loss of nationality as it requires national authorities to check compatibility with EU law as an additional element.

The most remarkable aspect of the Court's case law is the shifting point of reference in dealing with nationality: it no longer is state sovereignty, but EU citizenship as a status worthy of protection. This process starts with *Rottmann*, where the ECJ ruled that a national measure of citizenship deprivation leading to loss of EU citizenship 'falls, by reason of its nature and its consequences, within the ambit of European Union law'.<sup>21</sup> EU citizenship offered the Court the tools to break away from the script of international law that views nationality as an exceptional field of law within the sovereignty of the state where very little or no interference is acceptable. What happens in the EU context is that the rules no longer reflect only national interests but also EU ones and the two can diverge as EU citizenship becomes a status worthy of protection on its own. What we notice is not simply loss of state sovereignty over deciding who is a member of the national community but a transformation of sovereignty practices to include the EU level into decision making over membership attribution and the protection of the rights stemming from EU citizenship.

### ***Redistribution of resources***

Ferrera describes the welfare state as a basic political good – an instrument serving the purpose of facilitating social cooperation, managing conflicts, sustaining generalized compliance and thus, ultimately keeping the polity together.<sup>22</sup> Welfare states are also territorial and bounded constructs meant to serve the national community. Despite the existence of EU rules addressing social security coordination, there is no harmonized EU welfare state; rather there are twenty-eight national welfare states. The extent to which mobile EU citizens have a right to access the welfare system of their host state and be included in the pool of persons entitled to redistribution of resources via the payment of social benefits remains a salient and contested issue. When introduced in 1992, EU citizenship was seen as relevant only for those who already enjoyed rights under than Community law measures for economically active persons (workers, self-employed or service providers), including equal treatment with nationals in the social sphere. The position of economically inactive citizens is more complex: they enjoy free movement rights but their exercise remains conditional on financial self-sufficiency, at least for the first five years before they acquire a right of permanent residence. They also enjoy equal treatment based on Article 18 TFEU and Article 24 of Directive 2004/38 but exceptions from the general rule are envisaged. The requirement for self-sufficiency complicates matters further since requests for social benefits risk being interpreted as evidence of lack of resources.

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<sup>20</sup> Ibidem.

<sup>21</sup> *Rottmann* para 42.

<sup>22</sup> M. Ferrera (2018) The European Social Union: how to piece it together, in Vanhercke B., Ghailani D., and Sabato S. (eds), *Social policy in the European Union: state of play 2018*, Brussels, European Trade Union Institute and European Social Observatory .

In its first decade, EU citizenship underwent a process of expansion that saw the strengthening of the legal position of economically inactive EU citizens as the social rights attached to their status started to be taken seriously by the Court. According to the ECJ, EU citizens can expect to enjoy a certain degree of (financial) solidarity when exercising their free movement rights. This process started with the *Martinez Sala*<sup>23</sup> case and was taken further in the *Grzelczyk* case, where the court ruled that the applicable law 'accepts a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary'.<sup>24</sup> To reach this conclusion, the CJEU relied on the fact that the Maastricht Treaty had introduced EU citizenship, which was described as destined to be the fundamental status of nationals of the Member States, and a new chapter devoted to education and vocational training. The Court's expansive interpretation of the rights of economically inactive EU citizens started to slow down after the start of the economic crisis of 2008 and at the moment it can even be described as having been halted as a result of restrictive interpretations given by the Court to the rights of mobile EU citizens in cases such as *Brey*, *Dano* or *Alimanovic*.<sup>25</sup> The Court's recent jurisprudence emphasizes that those EU citizens who are entitled access to the welfare state must reside legally in line with the conditions set out in Directive 2004/38 - if they are not workers, self-employed or permanent residents, they need to have sufficient resources not to become a burden on the host state. In *Brey*, asking for social benefits was seen as an indication that the person does not meet the sufficient resource condition of Article 7 Directive 2004/38, while in the *Dano* case this had become a certainty.<sup>26</sup> This leads to the rather moot situation where social solidarity is only reserved for those who are financially self-sufficient and do not have to rely on solidarity claims.

Awarding access to the host state's welfare state as a matter of EU law remains a contested aspect of EU citizenship, especially because of its potential to undercut national mechanisms of social redistribution. Despite an expansionist jurisprudence in the area of social rights, the reach of solidarity remains different depending on the legal category under which one exercises free movement rights: EU citizens exercising mobility rights as economically active persons enjoy a larger degree of social and financial solidarity with the nationals of the hosts state than their economically inactive counterparts. The increasing politicization of EU mobility as 'poverty migration' questions the desirability of EU citizens' mobility and addresses it through the lens of EU citizens being burdens on the host welfare state. In light of these developments, one can question EU citizenship's capacity to expand the boundaries of the welfare state. Yet, notwithstanding exceptions from equal treatment for economically inactive EU citizens, jobseekers and students prior to the acquisition of permanent residence and ECJ's retreat on social solidarity, the general position that requires the inclusion of mobile EU citizens into the welfare systems of their host states as a matter of EU law creates a form of social citizenship with supranational features that is not matched in international law. While ECJ jurisprudence can be seen as an expression of the

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<sup>23</sup> Case C-85/96 *Martinez Sala*, EU:C:1998:217.

<sup>24</sup> Case C-184/99 *Grzelczyk*, EU:C:2001:458, para. 44.

<sup>25</sup> Case C-140/12 *Brey*, EU:C:2013:565; Case C-333/13 *Dano*, EU:C:2014:2358; Case C-67/14 *Alimanovic*, EU:C:2015:597.

<sup>26</sup> S. Mantu & P. Minderhoud (2017) EU citizenship and Social Solidarity, *Maastricht Journal of European and Comparative Law* 24 (5), pp 703-720

failure to develop a fully-fledged normative model of welfare entitlement that completely escapes the national, EU citizenship nevertheless opens up national welfare systems towards certain categories of EU citizens and demands their equal treatment.

### ***Conclusions***

The changes brought by EU citizenship to the manifestations of state sovereignty in relation to territory, population and the welfare state point towards changing power relations between the EU and its Member States that affect the position of individuals as they become inscribed into the supranational. The traditional argument is that as a result of EU making inroads into state sovereignty, the Member States lose their sovereignty in favour of the EU, become weaker in the process and less capable of delivering their part of the social contract. In my view it is better to speak of transformation of state sovereignty as a result of EU citizenship being superimposed on state nationality. This leads to a changed relationship between the individual and the territory which s/he inhabits as well as to changed terms of engagement between the individual and the administration in relation to claiming legal identity or social rights. New sovereignty practices develop as a result of the shrinking or enlarging of EU citizenship and the fact that the borders of state nationality are not coterminous with those of EU citizenship.

The boundaries of EU citizenship are flexible enough to capture not only the mobile but also some static EU citizens and their TCN family members who can benefit from the rights of EU citizenship. While formally excluded, they nonetheless are inside the sphere of EU citizenship. EU citizenship brings along additional layers of protection in relation to family reunification or retention of state nationality that are made possible by a shift in how the holder of the right is legally constructed: no longer only a national citizen, but also an EU one. This shift requires a reframing of the boundaries between national and EU spheres of competence. These boundaries remain contingent as shown by the discussion on the welfare state and the politicization of EU mobility as poverty migration. EU citizenship encapsulates the possibility of escaping national fringes by using EU rights to overcome one's national exclusion. However, legal and political developments confront us with the disturbing possibility that when exercising EU citizenship rights the national poor do not escape their condition, instead they are transformed into 'EU poor', equally vilified and excluded. Formally included, they turn out to be in practice excluded from the ideal of EU citizenship as a citizenship status that requires equal treatment. This makes the boundary an interesting vantage point to reflect on the wider construct as there is no clear inside or outside.