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Robert Schuman Centre for Advanced Studies
Global Citizenship Governance

Should EU Citizenship Be Disentangled from Member
State Nationality?

Edited by Liav Orgad and Jules Lepoutre

European University Institute

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Robert Schuman Centre for Advanced Studies

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Global Citizenship Governance

The project explores the international norms and structures for granting citizenship. It has six objectives: [1] to investigate the history of naturalisation and what it can teach us about 21st-century challenges; [2] to identify the recent legal developments and establish the most up-to-date legal standards in the field of naturalisation law that, taken together, may form the basis for International Citizenship Law (ICIL); [3] to set out the theoretical foundations and justifications for the establishment of ICIL; [4] to analyse the normative and structural implications derived from an-ICIL approach for future citizenship regimes; [5] to examine the future of citizenship – how technology can and should remodel the way citizenship is governed; and [6] to explore the interrelationship between ICIL, global migration, and constitutional identity. In essence, the project seeks to formulate international standards by which states can admit migrants without fundamentally changing their cultural heritage and slipping into extreme nationalism. The outcome can serve as a basis for a future reform in international law, EU law, and national legal systems.

The project is structured around three core research areas: [1] Global Citizenship Technology (CitTech); [2] Global Citizenship Compact (GCC); [3] Cities, Migration, and Membership (CMM). For more information: <http://global-citizenship.eui.eu>.

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Abstract

Should EU citizenship be disentangled from Member State nationality? Certainly, says Dora Kostakopoulou. By no means, argues Richard Bellamy. In the 2nd Global Citizenship Governance Forum, we have asked a number of eminent scholars to take sides in this timely and important question. Under the current legal regime, each Member State has the power to lay down the conditions for acquisition and loss of citizenship based on national interests, without necessarily taking into account a European (or other states') interests. The Forum challenges the empirical and normative assumptions underlying such a regime and examines the idea of autonomous European citizenship, free of Member State citizenship, from historical, conceptual, comparative, and legal perspectives. Overall, the Forum addresses some of the fundamental problems of European Union citizenship and reflects on alternative remedies – their political feasibility, legal implications, and the future of Union citizenship after Brexit.

Kickoffs by Dora Kostakopoulou and Richard Bellamy; *contributions* by Jean-Thomas Arrighi, Rainer Bauböck, Richard Bellamy, Dimitris Christopoulos, Jelena Džankić, Eva Ersbøll, Oliver Garner, Dimitry Kochenov, Dora Kostakopoulou, Jules Lepoutre, Willem Maas, Liav Orgad and Daniel Thym; *rejoinder* by Dora Kostakopoulou.

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Keywords

Citizenship – EU Citizenship Law – European citizenship – Nationality – Access to Citizenship – Citizenship Deprivation – Brexit

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Who Should Be a Citizen of the Union? Toward an Autonomous European Union Citizenship

Dora Kostakopoulou*

European unification has transformed Westphalian states obsessed with ‘power politics’ (i.e., the ability to make war) and has institutionalised peace and harmonious cooperation among states, nations, regions, groups and individuals. European Union citizenship (Eurozenship thereafter) has made former enemies into associates and co-citizens and has enhanced the living standards of European societies, as well as the life options of Europeans. By so doing, it has changed people’s understanding of what politics can do and who the ‘co-citizens’ are. States and their bureaucracies have had to adjust to the new context within which they have to operate.

This transformation is now met with resistance from nationalist forces and right-wing political parties in Europe. While it is true that nationalistic populism on both the right and the left of the political spectrum poses threats to the European Union edifice and, by praising the existence of ‘hard’ or ‘harder’ borders in an attempt to stem (increasing) human mobility, narrows political cooperation and hardens human relations, it, nevertheless, fails to convince. It presents neither an ideological programme nor a coherent solution to contemporary challenges. It is easy for elites to create collages of popular resentments and ‘anti-s’ in times of austerity, terrorist attacks and the mass exodus of people from war zones, and to arouse anti-migrant sentiments and other ugly passions among the population, but it is very difficult to maintain them. Time reveals the illusions and always exposes lies. And when political discourses and programmes become lies, they perish.

Refusing to believe that political constraints outweigh political possibilities in the present historical conjuncture, I argue that the time is ripe for the disentanglement of Eurozenship from Member State nationality. Since the mid-1990s I have defended this reform. But my argument for an autonomous Eurozenship in this debate unfolds in two steps which are presented in the subsequent two sections. In the first section, I explore the incremental disentanglement of EU citizenship from the nationality law of Member States, while in the second section I reconstruct Eurozenship, that is, I present the configuration of an autonomous EU citizenship law which can co-exist with EU citizenship cum Member State nationality.

Before going any further, however, a room must be made for a few remarks of a general kind. I should mention at the outset that I do not take issue with the broader debate about a federal future for the European Union and whether embarking upon the reconstruction of Eurozenship will threaten or weaken the salience of the Member States or their competence in this area. Nor is my discussion influenced by the intergovernmentalism v. supranationalism dilemma. In my view, this dualism underestimates the connectivity among overlapping layers of governance and their dynamic relations. The European Union legal order does not begin where domestic law ends. Nor does it only occasionally rub off the boundaries of domestic legal orders which are self-contained and self-determined. Although the Brexit discourse and political negotiations resurrect the old-fashioned way of thinking about state sovereignty and control, one cannot but observe the difficulties of implementing in reality backwards looking notions of sovereignty.

Accordingly, my argument for an autonomous EU citizenship stems from the endogenous gaps, contradictions and tensions inherent in its present institutional form and the failure of the Member States to correct the hardship and unnecessary human suffering that these gaps and contradictions have created. If readers share this diagnosis, then they might agree with me that there is a duty on the part of the EU to step in and to correct malfunctions and deficits. The duty of European institutions derives from their

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role as upholders of the EU citizenship norm and the values of the EU (Article 2 TEU) and promoters of the well-being of its peoples (Article 3(1) TEU).

Step 1: The incremental relative autonomy of Eurozenship

Article 20 TFEU presents the link between Member State nationality and EU citizenship: ‘every person holding the nationality of a Member State shall be a citizen of the Union.’ The Member States have competence in determining nationality and the EU recognised and respected this for decades. When it became apparent that EU citizens were facing impediments in the exercise of the fundamental freedoms of free movement and residence, the Court of Justice of the EU ruled in 1992 that while the determination of nationality falls within the exclusive competence of the Member States, this competence must be exercised with due regard to the requirements of Community law.¹ Almost two decades later, when another EU citizen faced the misfortune of becoming stateless in Europe and thus losing his Eurozenship, Mr Rottmann, the Court had to become a “reviewer of the regulatory choices” of the Member States.² The Grand Chamber then reiterated that the Member States have the power to determine the conditions for the acquisition and loss of nationality but, as far as EU citizens are concerned, the exercise of that power is amenable to judicial review in the light of EU law, particularly when the loss of the status of EU citizenship is at stake. Germany’s withdrawal of Mr Rottmann’s citizenship following a fraudulent naturalisation application which had resulted in the loss ex-lege of his Austrian citizenship rendered an EU citizen stateless and thus a non-EU citizen. But sadly, the Court remained silent on the issue of statelessness and the role that the EU could play in its elimination or diminution in the 21st century.

But why should statelessness lead to the loss of Eurozenship? Since the bond that European Union citizens have with the EU is a direct one, that is, they derive rights from the Treaties directly which are not contingent on the Member States’ approval, there is no reason to assume that in the absence of a Member State nationality Eurozenship should automatically vanish. And given that statelessness is an externality generated by states without the affected individuals’ consent, protecting all those facing legal (de jure) or real (de facto) loss of nationality by allowing them to enjoy the protection of EU law and free movement would prevent rightlessness. Statelessness has a “corrosive, soul-destroying impact on the lives of all those affected”³ and its avoidance has been elevated into an international norm.⁴ This coupled with the EU citizenship norm could justify the EU’s intervention.

Additionally, there are other types of denationalisation or loss of citizenship for a variety of reasons. Acquisition of nationality can result in the automatic loss or withdrawal of one’s original nationality and, in certain Member States, long-term residence abroad results in loss of citizenship. If a dual national has a third-country nationality in addition to an EU nationality, long-term residence abroad will result in his/her dis-identification as an EU citizen.⁵ Furthermore, states often reclassify individuals, create various nationality categories, make it difficult for people to obtain passports and adopt legislation authorising the revocation of citizenship thereby divesting people of Eurozenship.⁶ Such decisions

¹ Case C-369/90, *Micheletti and Others v. Delegacion del Gobierno en Catania* [1992] ECR I-4329.

² Case C-135/08, *Rottmann* [2010] ECR I-1449, para 48.

³ Leclerc and Colville, cited in Bradshaw, J. (2016), ‘Stateless in Europe’, in Ferreira, N. & Kostakopoulou, D. (eds.), *The Human Face of the EU*, 269. Cambridge: Cambridge University Press. Mr Thomas Hammarberg, the Council of Europe’s Commissioner for Human Rights, has urged states to take action; ‘No one should have to be stateless in today’s Europe’, 9 June 2008, Human Rights in Europe: Time to Honour our Pledges.

⁴ European Convention on Nationality [1997] ETS 166; The Convention on the Reduction of Stateless persons [1961] UN Treaty Series 989.

⁵ Case C-221/17, *Tjebbes and others* [2019].

⁶ The reader may recall the legislative reforms in Estonia and Latvia in 2004 and the 18.000 ‘erased’ permanent residents in Slovenia. I am grateful to Johanna Hasse for highlighting the situation of 214.000 non-citizens of Latvia who have not attained Latvian citizenship post-independence. Ms Veronia Corcodel also pinpointed the de facto denationalisation of

shatter individuals' lives and affect 'the nature and consequences' of Eurozenship. As such, they should be able to trigger its relatively autonomous application.

Brexit and the likelihood of mass deprivation of Eurozenship rights, including those of 1.2 million UK nationals living in EU Member States, highlight the need for a reform. More than one million UK nationals who have activated their fundamental right to free movement and residence will be deprived of their EU rights without their consent owing to the (slim) majority's preference for the UK 'taking back control', whatever this might mean, and thus leaving the European Union. From a normative as well as democratic (I believe the principle of majority rule does not have an unlimited scope in constitutional democracies: it excludes the power to alter rights and fundamental freedoms or to deprive numerical minorities of their rights) point of view, this is quite problematic. Equally problematic is any state-induced de-citizenisation. So, when individuals' EU citizenship status is at risk owing to national authorities' decisions to withdraw nationality, one can imagine a reformed Article 20 TFEU stating:

"Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. However, loss or absence of a Member State nationality would not automatically result in the forfeiture of Union citizenship, if the loss of EU citizenship is at stake."

The insertion of the last sentence in Article 20(1) TFEU stems from the *effet utile* of European Union law (the principle of effectiveness) and the fundamental status of Eurozenship in the Union legal order. It does not limit the Member States' competence in the determination of nationality, but it recognises the relative autonomy of Eurozenship when its loss is at stake.

Step 2: Belonging in the EU and an Autonomous EU Citizenship

If one is not afraid of radicalism, he or she could contemplate an autonomous Eurozenship. Unlike the option outlined above in relation to 'de-citizenisation' cases, an autonomous EU citizenship would encompass access and require the adoption of rules on independent access to it. Member States have no reason to resist it because there is no competence encroachment: the provision "every person holding the nationality of a Member State shall be a citizen of the Union" would continue to apply. But it would have to be complemented with a disjunctive clause: "*every person holding the nationality of a Member State or declared as an EU citizen shall be a citizen of the Union.*"

The category of persons 'declared as EU citizens' is intentionally broad to include any class of persons connected with the EU. Such a reform adds nothing to Eurozenship cum Member State nationality and it is not inconsistent with it. What it means is that the EU would also have the power to make an independent determination of the EU's citizenry. In other words, Eurozenship would be co-determined. Notably, a variant of such a reform has been advocated since the establishment of Union citizenship by the Treaty on European Union (in force on 1 November 1993); civil society organisations, academics and policy practitioners have argued for the possibility of grounding Eurozenship on domicile in the territory of the Union.⁷

Conditioning EU citizenship on domicile for a period of five years in the territory of the Union would make the social fact of community membership a true determinant of belonging, end the exclusion of twenty million long-term resident third-country nationals, and remedy the lack of uniformity in the application of EU law owing to differing naturalisation requirements in the various Member States. In

Moldovans, who were given Romanian passports as minors, by Romanian authorities prior to the adoption of legislation in 2017.

⁷ It was suggested by the European Union's Migrants Forum in its proposals for the revision of the TEU at the 1996 IGC. For early normative justifications of this policy option, see Kostakopoulou, D. (1996), 'Towards a Theory of Constructive Citizenship in Europe', *Journal of Political Philosophy* 4 (4): 337–358; Monar, J., 'A Dual Citizenship in the Making: the Citizenship of the European Union and its Reform' and Rubio-Marin, R., 'Equal Citizenship and the Difference that Residence Makes', in La Torre, M. (ed.) (1998), *European Citizenship: An Institutional Challenge*. Boston: Kluwer.

sum, it would bring about normative coherence, legal certainty and simplified, principled membership rules in the Euro-polity. It would also supplement the Member States' efforts to respond to internal diversity in an effective manner.

In addition to including long-term resident third-country nationals in the EU, an autonomous EU citizenship would also ensure that all children born in the EU, who might not be able to inherit a Member State nationality, would automatically be EU citizens. In this way, they would be able to participate in European societies as equals and to benefit from the EU internal mobility rules. Belonging to the EU would be a practice⁸ and a feeling of being included and taking part as a respected and equal member in a political community of law, democracy and human rights.

Residence or domicile, regardless of nationality, would be the main criterion for the acquisition of EU citizenship. There is hardly any need for EU institutions to reinvent the wheel for the implementation of this criterion because EU law has made five-year periods significant for a number of rights and freedoms enjoyed by third-country nationals (Dir. 2003/109) and for the acquisition of permanent resident EU citizen status (Dir. 2004/38). The question that remains is whether the EU would have to adopt additional requirements by designing a European Union naturalisation regime. Here, I would like to suggest caution. Naturalisation law and policy have a specific historical pedigree and justification that do not necessarily fit with a political community based on law and political principles, such as the European Union. And although it would not be in the interest of any political community to offer citizenship to all those who have committed human rights violations, apart from above mentioned residence-based criterion and the absence of convictions for serious crimes, I would not suggest the adoption of other naturalisation requirements, such as participating in civic integration courses, linguistic competence tests, oaths and so on.⁹ Designing a Euro-naturalisation regime would make Eurozenship resemble national citizenship and, at the same time, fuel national sensitivities and fears about the latter's replacement by the former in the future.

UK nationals affected by Brexit could opt for this mode of autonomous Eurozenship. Highly skilled third-country nationals, who view the acquisition of national citizenship either via the normal route or by investment as a means of having access to the European internal space, would also find this option attractive. For them, it could be that national membership is only instrumental: entry into geographically bounded Member States opens the gate for entry into the European Union space and territory. Accordingly, the EU would provide the basis for an inclusive concept and practice of Eurozenship for third-country nationals, be they UK nationals qua former EU citizens (if Brexit takes place), long-term residents in the EU, or newcomers who regard Eurozenship as inherently valuable. Such an inclusive Eurozenship would not interfere with national legislation. It would simply mean that the Member States would no longer have the exclusive privilege of granting Eurozenship.

By escaping state management and the imposed link with state nationality, Eurozenship would be reclaimed as the cornerstone of European integration and of a community which allows all its inhabitants to engage as equals in shaping the institutions and laws that govern them. Allowing the Member states to retain their definitional monopoly over nationality but ending their definitional monopoly over EU citizenship and thus giving European institutions a say in determining the EU's citizenry would signal the emergence of a progressive and humane EU citizenship law for the EU's constituent demoi.

⁸ Wiener, A. (1998), *Building Institutions: The Developing Practice of European Citizenship*. Oxford: Westview; Isin, E. & Saward, M. (2014), *Acts of Citizenship*. Cambridge: Cambridge University Press.

⁹ For the opposite view, see O'Keeffe, D. (1994), 'Union Citizenship', in O'Keeffe, D. & Twomey, P. (eds.), *Legal Issues of the Maastricht Treaty*, 87–107. West Sussex: Wiley. My reservations were noted in 'European Citizenship and Immigration After Amsterdam: Openings, Silences, Paradoxes', *Journal of Ethnic and Migration Studies* 24 (4): 646–647.

On Mushroom Reasoning and Kostakopoulou's Argument for Eurozenship

Richard Bellamy*

Dora Kostakopoulou makes a spirited case for an autonomous status of European Union citizenship – one that is not related to the possession of citizenship of a Member State. However, while I sympathise with some of the concerns lying behind this proposal, I regard it as a misguided way of addressing them that is based in its turn on a misunderstanding of the nature of citizenship and of the EU and its achievements – albeit one shared by a number of the EU's prime actors as well as certain of its foes.

The core of her argument is the questioning of the link with state citizenship. Her reasoning is that this linkage is redundant given “the bond Union citizens have with the EU is a direct one, that is, they derive rights from the Treaties directly which are not contingent on the Member States' approval, there is no reason to assume that in the absence of a Member State nationality Eurozenship should automatically vanish.” Moreover, she contends, her case is independent of discussions of the character of the EU as supranational or intergovernmental or the broader debate about the desirability of some kind of federal structure of the EU.

In what follows I shall question all these claims, along with the assumptions on which they rest. In an analogous way to Hobbes's infamous account of the natural state in which he asks the reader “to look at men as if they had just emerged from the earth like mushrooms and grown up without any obligation to each other,”¹ it would appear that Dora proposes an account of the Treaty and the attendant rights it grants individuals as similarly emerging ‘like mushrooms’ and involving no special obligations among states and their peoples. Yet, just as commentators have questioned whether one can really ignore the role of women and families when thinking about how ‘men’ – male or female – ‘emerge’, and the profound consequences for any account of their rights once one factors these vital elements in, so I doubt if one can think of Treaties or the statuses they create without giving some thought to their creators and the relationship between them and the resulting rights.

Once we give up on the mushroom account, then European citizenship can be seen to arise out of what *Wightman* has acknowledged to be a voluntary association of states.² The rights deriving from this status are for the most part supplied by the Member States themselves and reflect the new relationship they have chosen to establish with regard to each other. In particular, they involve a norm of non-discrimination on the basis of nationality. However, what makes that norm applicable is that it is reciprocal, and is grounded in mutual recognition and respect for the distinct citizenship regimes of the Member States, including by the individuals concerned. Meanwhile, the EU itself only exists as a creature of the contracting states – its competences are those that have been conferred upon it by them, and the decisions made by EU institutions in the exercise of these powers are for the most part delivered by these same states. Much as Rousseau spoke of the Social Contract as bringing about a ‘remarkable change’ in the individual parties to that agreement,³ so one can regard the Treaties as involving a remarkable and welcome change in the character of the associated states. However, that change is produced by their involvement in a civic union that involves special obligations among them and their citizens. Outside that Union, as the UK is painfully discovering, such obligations no longer pertain.

I suspect Dora's account is driven in part by Brexit and the imminent removal of European citizenship from British citizens. As a British citizen working in Italy whose German wife works in Britain, I am all too aware of the many personal difficulties and anxieties the fateful decision of my fellow citizens

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¹ Hobbes, T., ‘On the Citizen’, in Tuck, R. & Silverthorne, M. (eds.) (1998), *Hobbes On the Citizen*, 102. Cambridge: Cambridge University Press.

² Case C-621/18, *Wightman v Secretary of State for Exiting the European Union* [2018].

³ Rousseau, J.-J. (1762), *The Social Contract*, Book 1 Ch. VIII.

has created, even for those of us who are comparatively very privileged. However, while I believe that the UK and the EU should honour their existing commitments and continue respectively to recognise the rights to residence and to work of EU citizens currently living and working in Britain and of British citizens currently living and working in the EU, I see no argument for British citizens to continue to possess EU citizenship once their state has withdrawn from the EU and has ceased to sustain the rights associated with that status as a Member State. Individual British citizens who desire to retain this status have the possibility – indeed, in my view the obligation if they remain as long-term residents in a EU Member State – to acquire citizenship of the appropriate Member State, and to assume the full obligations of the association of Member States of which they wish to be a part.

Dora talks of the desirability of “escaping state management and the imposed link with state nationality” and seeks to make domicile or birth “the main criterion for the acquisition of EU citizenship,” rejecting the need for additional naturalisation requirements as appropriate for “a political community based on law and political principles.” Yet, such mushroom reasoning ignores the extent to which law and principles are created and identified and subsequently sustained by the agreements of individuals who cooperate socially and politically to uphold them as a people. They derive from the establishment of a common political authority within which individuals collaborate as citizens and consent to settle their disagreements through participation in shared political practices. Citizenship of a state provides what Hannah Arendt termed the “right to have rights,”⁴ because outside such a political community it is impossible for any individual to claim rights other than by exerting or threatening force against others. Security and the avoidance of domination of the weak by the strong only come about through the establishment of the very forms of sovereignty that Dora sees as “backwards,” and that allow for the settled forms of democratic decision-making that give rise to the rule of law. The EU does not possess sovereignty because it is not itself a state. But that is not because it has replaced states or gone beyond them – quite the contrary. It is because the EU is the creation and creature of its Member States and operates through their sovereign systems. On this analysis, Dora’s proposal would be more coherent if she was advocating that the EU become a state by acquiring sovereign powers currently held by the Member States, although this would open up her argument to other objections of a different sort. However, that would involve taking a stand on the supranational vs intergovernmental and the emerging federal EU debates, which she wishes to stand aloof from. I doubt that is possible.

State-based accounts of citizenship need not ignore the important issues she raises regarding statelessness and duties towards the citizens of other states. On the contrary, as a matter of normative and logical consistency, what one might call ‘civic’ states have an obligation to acknowledge citizenship of a democratic state capable of securing rights as what Jeremy Waldron has called “the right of rights,”⁵ to which all individuals should be entitled. Such an acknowledgement lies behind not only state duties to offer hospitality and the prospect of citizenship to asylum seekers fleeing failing or oppressive states, but also their duty to recognise and show equal concern and respect to the citizenship regimes of other states. Indeed, the EU’s legitimacy and much of its success has lain in the way it has helped stabilise the post-war citizenship regimes of formerly authoritarian states, and fostered their mutual recognition and respect, not least – as I noted above – through the establishment of EU citizenship and the norm of non-discrimination on the basis of nationality. Yet, as I have remarked already, the related and most valued rights are, for the most part, not rights that are offered by EU institutions – the notable exception being the right to vote in European Parliament elections – but rights that are upheld by the constituent states. However, I agree that the migration crisis has witnessed a reprehensible failure on the part of Member States to honour their moral obligations to secure ‘the right of rights’ for many desperate individuals. But I see Dora’s proposal as part of the problem rather than the solution.

The popular backlash against the EU that currently exists (not just in the UK but across the EU) derives in large part from growing inequality and the erosion of solidarity within states, and the

⁴ Arendt, H. (1958), *The Origins of Totalitarianism*, 296. Orlando, FL: Harcourt Brace (new edition).

⁵ Waldron, J. (1998), ‘Participation: The Right of Rights’, *Proceedings of the Aristotelian Society New Series* 98: 307–337.

association of these developments with the single market and the failure to redistribute some of the gains of freeing up markets to those who have come under pressure from, or been unable to take advantage of, the opportunities and benefits they provide. The austerity measures imposed by creditor states on debtor states within the Eurozone have served to exacerbate this dissatisfaction. Such measures have not simply proven economically and politically misguided, but also represent a failure to honour the founding compact of the EU to mutually uphold and foster the citizenship regimes of Member States and their democratic constitutional orders that render them possible. Offering citizenship of the EU, thereby allowing individuals to benefit from the social and legal systems of Member States without taking on the responsibilities of national citizenship, can only serve to further erode civility and solidarity among the citizens of Europe – be it within their respective states, between the Member States, or towards non-Europeans.⁶

⁶ Much of the argument of this short piece draws on arguments that are elaborated much more fully in my book (2019, forthcoming) *A Republican Europe of States: Cosmopolitanism, Intergovernmentalism and Democracy in the EU*. Cambridge: Cambridge University Press, especially chapter 5. The diagnosis of our current impasse is also developed in the Epilogue to Bellamy, R. & Castiglione, D. (2019, forthcoming), *From Maastricht to Brexit: Democracy, Constitutionalism and Citizenship in the EU*. Colchester: ECPR Press; Lanham: Rowman and Littlefield.

A Relative Dissociation of Union citizenship From Member States Nationality Needs to Mean Something More Than Long Term Residence Status

Dimitris Christopoulos*

A good cause

Dissociating Union citizenship from Member States nationality law recognises and consolidates the assumption that people holding a *genuine link* to the EU have the right to possess its citizenship, regardless of whether their state of residence is willing to offer it to them. Therefore, I have a principled disagreement with the argument of Richard Bellamy –according to which, offering individuals citizenship of the EU, without the concomitant requirement that they take on the responsibilities of national citizenship, can only serve to erode civility and solidarity further. On the contrary, I believe that granting the status of European citizenship beyond Member State nationality, in a period noted by the emergence of far-right populism targeting migration as the major threat for European civilizational unity is a win-win solution both for its bearers and the EU itself.

What are the normative arguments for Union citizenship?

One such argument could be the promotion of social cohesion. The acquisition of Union citizenship could enhance social cohesion for the majority of individuals by allowing equal opportunity to maximise on the profits of the status. However, within the given circumstances in the EU, where the moral legitimacy of the Union is questioned and social cohesion is rather fragile, this position may face the counter argument: that the relative dissociation of state nationality and Union citizenship would function as a factor of weakening social cohesion. Given these current circumstances, the “social cohesion” argument to be unconvincing and, concede to, Bellamy’s point. As every utilitarian argument, and other forms of consequentialism, the core question is whether actions are morally right or wrong depending on the effects and not on the principles. Nonetheless, there do have a problem here. We can be confident that criminals or terrorists, for example, do not act for the benefit of social cohesion. Yet, depriving them of their nationality is a flagrant violation of human rights, and why such policies have not yet been adopted, despite being seriously considered in France proceeding the Charlie Hebdo attacks.

If a utilitarian perception of ‘social cohesion’ dictating the greatest good for the greatest number does not fit the circumstances, could a liberal argument of “individual rights” be more plausible? This argument could be shaped as follows: the EU has created its own public legal sphere that stands independently from national ones and is – to a greater or lesser extent – superior to them. A right to citizenship in this sphere – in relative autonomy from national belonging is not only welcomed but necessary. This seems more-or-less Dora Kostakopoulou’s argument. Yet, here I can also predict the counter-argument, that national citizenship acquisition is not a human right resulting from the autonomy of the subject, but a right deriving from a sovereign decision of a State to include or exclude.

After all, one could argue that the status of “long-term residence” was created exactly to fulfil the need to cover the demand of an additional legal threshold to cover the aliens in question. Therefore, I am not convinced that the dissociation of Union citizenship from state’ nationalities acquisition can derive from an “individual rights” argument. As this argument is institutionally absorbed, in a way, by the status of long-term residence.

Then, what remains to justify the thesis?

In my view, the only argument that could reasonably justify the extension of Union citizenship to long-term citizens is a *republican democratic argument* that has already been put forward for the normative justification of state nationality acquisition. An individual may not be subjected to legislation

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which they did not have the chance to (dis)approve, according to the fundamental norms of the majority principle in a democratic polity.

What we see within the EU is a legal order that originally had been created by the States' sovereign will, and ever since its creation, has acted in relative autonomy from them. This transformation is both a factual and normative development. The EU legislation influences human lives, one could argue, even more than national ones. Moreover, national orders have limited means to control it. Therefore, the normative grounds for developing a conceptual and legal space for Union citizenship, relatively dissociated from the Member States nationalities, is the classic inescapable democratic argument. According to this argument, being subjected to the rules of a polity entails the necessity of being in a position to influence them in one way or another.

After all, the idea of a Union citizenship, which would exist complementary to Member State nationalities and long-term residence status only, has real meaning if it expands to people residing permanently and lawfully within the EU without being nationals of the Member States. Otherwise, what would it mean in practice to hold a Union citizenship next to one's "long-term residence" status? How can one influence the European public order by not being a state national and only holding the Union citizenship? What is the point of having a "citizenship" that offers nothing more than long-term residence?

The only answer is that this is possible by participating in the elections that take place within the framework of the European Union, that is the elections for the European Parliament. This would be, in my eyes, a meaningful step forward in the direction of creating an extra sphere of democratic political belonging:

"I can't vote for the Parliament of the country I live in, but at least I can vote and influence decisions at the EU level by my vote at the EP elections. After all, this bothers me also, not to say more since my fate is related to its decisions."

... and a politically feasible goal

Now we come to the core of our question. Can we do it? And what is the best way for trying? I see here the following arguments.

First, convergence and harmonisation of nationality acquisition legislation appears to be a far too ambitious project. For the time being, the only achievement regarding harmonisation of procedures of acquisition and loss is the European Convention on Nationality of the Council of Europe, which was the first time that an international treaty attempted to indicate on which grounds for acquisition and loss of nationality are acceptable. Yet, as we know nationality is sealed at the heart of sovereignty. This makes it unlikely that nationality acquisition within European legislations could be harmonised in the foreseeable future. It is worth formulating the objective, but we need to be reasonably modest as far as our expectations are concerned. Nationality legislation at the Member State level is by definition heterogeneous – due to the plural histories of nation building on the Old Continent – and therefore difficult to touch.

Additionally, we should bear in mind that nationality acquisition harmonisation today in the EU could be a risky project since it might easily lead to a backlash of restrictive options. Harmonisation of national citizenship legislations is not an objective *per se*. It is a means which serves the political objective we put forward for the kind of polity we want to see. If the objective is to harmonise national legislations to a common denominator which would reflect the wishes of the Italian, Hungarian, or Polish – and who knows which other – governments in the future, my answer is "no thank you."

The second argument one could put forward is that by introducing a Union citizenship, which would result in increasing the political rights of voting for the European Parliament, one contributes to the strengthening of the European idea. Strengthening the EP adds value to a democratic supra-national

institution in a period where the EU is struggling in terms of moral identification by Europeans. In practice, such an idea could easily come as a EP resolution which could concentrate the consensus of at least four political groups in the European Parliament after the June 2019 elections: the Socialists, the Liberals, the Greens and the United Left.

What are we challenging then? State autonomy in matters of nationality, in particular within the European Union, is slowly questioned, yet far from eroding, or even weakening. There is, therefore, no movement towards a *droit de la nationalité européenne*. From this perspective, I see grounds for advocating for a EU Directive on Citizenship: it needs prudence, patience and attention, but it is worth giving a try.

The Case Against an Autonomous ‘EU Rump Citizenship’

Daniel Thym*

In the debate between Dora Kostakopoulou and Richard Bellamy, I agree with most of the propositions put forward by Dora in her introductory paragraphs: that EU citizenship allows former enemies to meet and live in harmony; that nationalistic populism should be rejected; and that the prospect of Brexit remains depressing. Nonetheless, I disagree with her proposal to move towards an autonomous EU citizenship.

To complement the contributions by other authors, my intervention will have an institutional focus by considering questions of positive law, citizenship governance, and legitimacy. It will demonstrate why I regard the proposal as being politically unfeasible, legally unnecessary, and conceptually incomplete. My suggestion would be not to invest our energy in pipe dreams at a time when the EU is in desperate need of (more) realistic reform proposals.

The Constitutional Pitfalls of a Citizenship Directive

Dora remains vague about how her proposal of an autonomous EU citizenship law should be realised. Her comments on ‘Step 2’ speak about EU rules to be adopted. Others have suggested that the proposal should be realised by means of a Directive on Citizenship.¹ It sounds theoretically quite easy: the EU would adopt another directive, like so many others. In practice, however, such a realisation might prove tremendously difficult.

Why? Several actors might disagree. Not least as a result of the subtle changes introduced in the aftermath of the 1992 Danish referendum, in which the Danish population voted against the Maastricht Treaty – the vote led to the well-known formulation in today’s Article 9 TEU that “Citizenship of the Union shall be additional to national citizenship and shall not replace it” – it will be an uphill legal battle to argue that the EU Treaties comprise a supranational legislative competence for harmonising the acquisition and loss of nationality or EU citizenship. The absence of such a competence is one reason why the Court has proceeded carefully when dealing with nationality law. Judgments such as *Micheletti* or *Rottmann* established some limits, but remained cautious nonetheless.

A full-blown Citizenship Directive would require Treaty change or activation of Article 25 TFEU, which would have similar consequences in practice. As we know, Treaty amendments are subject to a completely different set of procedures than the adoption of secondary legislation. There are multiple veto players.

It seems to me that this is more than a practical nuisance, since the centre of attention shifts away from the supranational debate in Brussels to domestic fora. To achieve a Treaty change, one has to politically convince actors and discursive forums at the national levels, which are often side-lined in supranational debates.

Firstly, any expansion of EU citizenship would probably have to survive another Danish referendum, along with the lines of the 2015 vote on the new Europol decision, which would have altered slightly the contours of the 1992 Edinburgh compromise and which was rejected by the Danish population. Secondly, national governments and parliaments might disagree. Hungary is only the most extreme example of a country in which the parliamentary majority might not be happy if it was told that third-

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¹ Jessurun d’Oliveira, H. U. (2018), ‘Brexit, Nationality and Union Citizenship: Bottom Up’, *EUI Working Paper RSCAS* 2018/49.

country nationals living in Hungary are to be naturalised as Hungarians or EU citizens as a matter of EU law.

Thirdly, you might even encounter the opposition of the German Constitutional Court, which, in its ruling on the Lisbon Treaty, stated somewhat ambiguously that the rules on ‘Staatsbürgerschaft’² are subject to the constitution’s eternity clause (even though we should note that the scope of the caveat is not crystal clear, since it fluctuates semantically between the more formal rules on the acquisition and loss of nationality, called *Staatsangehörigkeit* in German – and the substantive rules governing the status of citizens in the body politic, the *Bürgerschaft* or Citizenship). Common supranational rules might encroach the constitutional identity of the Federal Republic and be blocked by a veto from Karlsruhe.

In short, the politics of citizenship law are against legalistic discourses. Political dynamics would differ markedly from what abstract legal debates about the wording of the Treaties suggests. It will require more than a deal between the Council and the European Parliament or a consensus among a group of pro-European academics. One would have to engage in a pan-European debate about the merits and pitfalls of EU citizenship. The example of the Constitutional Treaty and the Brexit referendum shows that this is easier said than done.

Limited Practical Relevance of Citizenship Law

It seems to me that the debates about EU citizenship are defined by a double exaggeration: on the one hand, academic commentators tend to overstate its practical significance and, on the other hand, some colleagues tend to underestimate the symbolic dimension beyond hard legal developments.

The argument about limited practical effects is primarily about rules on the acquisition and loss of nationality or EU citizenship, which would be relevant primarily for third-country nationals living in Europe. When it comes to third-country nationals, we should be careful not to confuse naturalisation (or the direct conferral of EU citizenship) with basic questions of immigration and asylum laws.

European jurisdictions follow a step-by-step approach when initial admission gradually gives way to more robust statuses. Nationality or EU citizenship is the last step in this process. Under Directive 2003/109/EC, most immigrants acquire a secure residence status with widespread equal treatment after five years. For such long-term residents, the added value of citizenship is limited from a practical perspective. Studies in Germany show that many migrants with a secure status do not even bother to apply for nationality even though they would fulfil the requirements for naturalisation.³

The secure status established under Directive 2003/109/EC is no novelty. It has existed for many years in most jurisdictions and coincided, in countries like Germany, with restrictive *ius sanguinis* rules.⁴ As a result, inspecting the naturalisation regime alone can give an incomplete and sometimes false impression of the immigration practice.

The same applies for Brexit: if you are concerned with a pragmatic solution securing the rights of EU citizens in the UK and of British nationals in the EU, there is no need to embark on a politically sensitive, procedurally complicated, and normatively loaded debate about the direct conferral of EU citizenship. From a practical perspective, the EU and the UK resolve 95% of all problems through advanced rules on immigration statuses in the exit agreement.

To sum up, if academic observers are concerned with immigrant admission, residence security and equal treatment, nationality law often is a secondary side aspect, which needs to be complemented with

² BVerfGE 123, 267 – *Lissabon*.

³ Lämmermann, F. (2009), ‘Einbürgerung – Aktuelle Entwicklungen und Perspektiven’, *Zeitschrift für Ausländerrecht und Ausländerpolitik* 29 (9): 289–296.

⁴ *Ibid.*

closer inspection of immigration and asylum regulations. These rules are highly complex and many of us shy away from studying them. But if the concern lies on practical effects, the academic debate cannot evade doing so.

The Symbolic Relevance of Citizenship Law

I do not claim that debates about citizenship and nationality are about practical effects only. Rather, the normative dimension seems to be the primary reason why academics and the broader public love discussing nationality law and EU citizenship. Citizenship law can be a reflection of the collective self-perception of European societies and the European Union at large. It allows to articulate normative visions about the direction to be taken. Dora's kickoff is a perfect example.

My own experience from the German context is that the same applies to domestic debates. Discussions about the *ius soli* and double nationality have limited effects for residence security or equal treatment, which third-country nationals acquire on the basis of long-term residence status anyway, but academics and the broader public embrace these debates nonetheless – and rightly so – since they serve as a projection sphere for how we define membership and identity.

It seems to me that the main added value of most citizenship debates is the symbolic dimension. It guides and reinforces changing self-perceptions of European societies, which welcome third-country nationals as equal members – an effect that technical rules on long-term residence status cannot bring about.

The Limits of Legal and Institutional Change

The symbolic dimension pervades Dora's kickoff and has defined the history of EU citizenship from the beginning. Arguably, the normative imaginary that the very term 'citizenship' conveys in many European languages was an important reason why heads of state or government agreed on the introduction of EU citizenship in Maastricht. Citizenship serves as a projection sphere for political visions of a good life and a just society and it was, in the case of the EU, a symbolic expression of the ambition to move towards some sort of federal Europe.

The Treaty of Maastricht used this normative reservoir despite the absence of widespread legal changes, thereby nurturing the initial criticism among academics that the new rules were just a "label," an "empty gesture" or a sort of "cynical public relations exercise on the part of the High Contracting Parties."

Along similar lines, the famous dictum by the Court that citizenship was 'destined to be' the fundamental status arguably hinted at the forward-looking potential and, in the beginning, it seemed that Luxembourg might realise the dream of a 'real' European citizenship by means of court judgments.⁵

I have explained in the introductory chapter to the book 'Questioning EU Citizenship', which I edited⁶, that such an instrumental use of supranational law as an engine for social change is not specific to the citizenship regime. It defines much of the integration process, including the single market programme, the Charter of Fundamental Rights or the erstwhile project of a Constitutional Treaty.

⁵ Thym, D. (2016), 'Frontiers of EU Citizenship. Three Trajectories and their Methodological Foundations', in Kochenov, D. (ed.), *EU Citizenship and Federalism. The Role of Rights*, 705–730. Cambridge: Cambridge University Press.

⁶ Thym, D. (ed.) (2017), *Questioning EU Citizenship. Judges and the Limits of Free Movement and Solidarity in the EU*. Oxford: Hart Publishing.

While some projects were successful, the Constitutional Treaty and the Brexit referendum remind us that Treaty changes, new legislation and innovative judgments alone cannot bring about an enhanced degree of identity and solidarity. Supranational citizenship law is thus not a self-fulfilling prophecy.

That is not to say that the law or court judgments are irrelevant. They express basic choices of societies and legal developments partake in the constant reconstruction of societal and individual self-perceptions. But the law and court judgments cannot change them single-handedly. To win the argument, innovative court rulings need to be embedded in social structures and political life – in the same way as the success of nation-building in Italy or Germany in the late 19th century was not the result of nationality laws alone.

If legal developments are not embedded in social practices and political life, they can remain a ‘hollow hope’. We all know that the context is, unfortunately, not very supportive at the moment. I therefore suggest not to invest too much energy into a project which is politically sensitive, procedurally complicated, and normatively loaded. Let’s focus, instead, on more realistic reform proposals which help the EU to overcome the ongoing crises.

If You Want to Make EU Citizenship More Inclusive You Have to Reform Nationality Laws

Rainer Bauböck*

Dora Kostakopoulou rightly spots some deficits in the current construction of EU citizenship, but she asks the wrong questions about these deficits and her answers would therefore aggravate rather than resolve the problems. She asks: “Why should statelessness lead to the loss of Eurozenship?” The better question would be “Why should the EU tolerate that Member States produce stateless people?” She proposes “that all children born in the EU, who might not be able to inherit a Member State nationality, would automatically be EU citizens.” The better proposal would be to make sure instead that all children born and raised in a Member State become citizens of that state and thereby also EU citizens.

EU citizenship has a serious democratic deficit and this is the lack of minimum standards for the rules of acquisition and loss of Member State nationality, from which EU citizenship is derived. Dora proposes to guarantee maintenance of EU citizenship in case of involuntary loss of Member State nationality and to provide independent access to EU citizenship on grounds of birth or long-term residence in EU territory. This might considerably worsen the conditions for addressing the democratic deficit. Member States would argue that their policies of deprivation or exclusion are no longer of any concern to the other Member States and the EU institutions if these policies do not determine who is a EU citizen because alternative routes to that status are provided by the EU itself. Once Member State nationality has been disconnected from EU citizenship, nationalist governments would not only gain further leeway for illiberal citizenship policies; they would also be provided with new scapegoats: ‘rootless’ EU citizens whose rights are not grounded in their belonging to a Member States of the Union, but are imposed by “Brussels” as a restriction on national sovereignty.

A further problem with Kostakopoulou’s proposal is that it creates two classes of EU citizens: those who possess the nationality of a Member State and those who don’t. The latter could include most immigrants from third countries and their children born in the EU, whose incentives for naturalisation would be as low as they currently are for EU citizens residing in other Member States. These “independent Eurozens” could only vote in local and EP elections but would be excluded from participating in the domestic politics of the country where they have settled for good. They would also not be equally represented in EU legislation since they cannot vote for the governments that sit in the Council of the EU.

I share Richard Bellamy’s general objections against Kostakopoulou’s approach. In federal democracies or unions of democratic states, such as the EU, citizenship at one level must be derived from citizenship at the other level. The reason for this is that the two levels of government are constitutionally intertwined. In a federal state, the derivation is downwards: the citizens of the federation are also citizens of the federated provinces, states, regions or cantons. In a union of states, the derivation is upwards: the citizens of the Member States are also citizens of the Union.

This is not a general feature of multilevel democracy. For example, citizenship at the local level is not necessarily derived from national citizenship. EU law provides mobile EU citizens with voting rights in local elections, but not in provincial or national ones. And 12 EU states grant municipal voting rights also to third-country nationals, creating thereby precisely the kind of residence-based citizenship at local level that Kostakopoulou wants to have at supranational level.

But why can and should local citizenship be disconnected from national citizenship, while Union citizenship must stay connected? The reason is that federations and unions consist of potentially independent polities that have agreed to become interdependent by pooling their sovereignty. They form

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composite polities entangled in a constitutive relation with their members that does not exist between states and municipalities. In *democratic* federations and unions, the higher level of government represents citizens both directly (through federal or supranational parliaments) and indirectly (through legislative bodies representing the constitutive polities, such as the EU Council or territorial chambers of federal parliaments). Equality of political citizenship and democratic legitimacy in such composite polities requires that each citizen at one level must also be a citizen at the other level. If either the higher or lower level government can produce its own citizens that are not recognised also as citizens at the other level, the construction becomes dangerously unhinged.

The upshot of my argument is, first, that citizenship rights cannot be so easily disconnected from citizenship as a status of full and equal membership and, second, that we need to consider carefully the constitutive features of membership in a particular type of polity. Much liberal thinking about citizenship suffers from a “*ius-ex-machina*” delusion by forgetting how rights must be generated through democratic institutions that themselves need to be seen as legitimate by their citizens.

This does not rule out extending rights beyond citizenship status. Liberal democratic states and the EU itself grant long-term resident third-country nationals a status of quasi-citizenship that entails equality with full citizens with regard to most rights apart from those of participation in national and EU elections and unconditional rights of return to the territory and diplomatic protection abroad. Such an unbundling of citizenship and rights is fully compatible with retaining the link between national and EU citizenship status and the core right of political participation entailed by it. A similar response has been found for Brexit. Current UK citizens in the EU and EU citizens in Britain will retain their quasi-citizenship rights of residence, employment and non-discrimination in social welfare, but they will no longer have the previous status of membership. This is what is required in order to make the collective right to exit from a voluntary union of states meaningful. If UK citizens could retain EU citizenship after their country has left the Union and is no longer involved in making EU law, they could also vote in EP elections and authorise thereby legislation that does not apply to their country.

While my argument largely agrees with Bellamy’s critique, I am not sure he will share my conclusion. It is precisely because the two levels of citizenship are linked that EU Member States should reform their nationality laws in order to bring them in line with liberal and democratic standards. As a union of liberal democratic states, the EU must maintain the rule of law and democratic standards of free and fair elections that are currently jeopardised in some Member States. For the same reasons, such a union cannot tolerate either that Member States abuse their exclusive powers to determine their own nationals by arbitrarily depriving nationals of their citizenship, by excluding long-term residents from access to naturalisation, by passing on their citizenship to successive generations born abroad without any tie to their ancestors’ country of origin, or by selling it to investors looking for a tax haven. State sovereignty allows them to do much of this without violating international law. But pooled sovereignty in the EU is not compatible with such wide leeway for states to determine their own nationals since they produce EU citizens that all other Member States must accept not merely as residents and workers but also as participants in the collective self-government of the Union.

Let Third-Country Nationals Become Citizens of their Host Member State and the European Union

Eva Ersbøll*

Dora Kostakopoulou warmly argues for an EU citizenship reform that will disentangle EU citizenship from Member State nationality and, thus, create an autonomous Eurozenship status directly accessible by third-country nationals. Dora's arguments stem from the gaps, contradictions and tensions inherent in the present EU citizenship's institutional form, in particular due to the lack of uniformity in the application of EU law owing to differing naturalisation requirements in the various Member States. Dora argues that, if readers share this diagnosis, they may agree that there is a duty on the part of the EU to step in and correct malfunctions and deficits. She points to the "duty of European institutions," derived from their role as upholders of the EU citizenship norm and promoters of the well-being of the Union's peoples.

I agree with Dora's diagnosis, and I agree that the EU – and EU Member States – should act to rectify shortcomings of the Union citizenship construction that largely unconstrained allows inequality in regard to access to the status of Union citizenship and rights attached to it. However, I cannot subscribe to Dora's solution.

In my opinion, the suggested reform is not the right cure to the shortcomings of the present Union citizenship practice – leaving out the question on the realism and practicability of implementing such a reform, which will require a treaty amendment (to which I will return at the end of this contribution).

First, I find it imperative that long-term third-country nationals and their descendants in the EU can obtain both citizenship with full rights in their host Member State and Union citizenship with Union citizenship rights in the EU. Citizenship is founded on a special bond of allegiance to the state and reciprocity of rights and duties, and EU citizenship may be seen as inter-state citizenship that unites the People of Europe – to quote Advocate General Poiares Maduro in *Rottmann* (C 135/08).

Second, I think that there is a shared responsibility between the Union, EU institutions and EU Member States to solve the problems stemming from Member States' differing citizenship legislation. Still, the primary responsibility lies within the Member States; in the long term, they have a common interest in solving the problems. As pointed out by Richard Bellamy, Member States have conferred competences upon the Union, and the Member States are upholding the most valued Union citizenship rights.

Dora's proposal for a reform that disentangles Eurozenship from national citizenship will not necessarily improve resident third-country nationals' opportunities for becoming citizens of their host Member State. Instead, I would suggest that the Member States within the institutional framework of the EU cooperate to reach an agreement on the adoption of a more uniform legislation on acquisition and loss of their citizenship and thereby Union citizenship. I concede that such an approach has been wishful thinking for years, and that there is a risk that some Member States will focus on restrictive options. Nevertheless, I think it is too early to give up on this possible solution.

Harmonising citizenship legislation was proposed for the Nordic states in the 1940s when it was discussed to establish a Nordic Union with a Nordic citizenship. The association Norden ("The North") asked the head of the Danish Interior Ministry's Citizenship Office to examine the different possibilities for establishing a common Nordic Union citizenship, as outlined in a booklet "Nordic Citizenship."¹

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¹ Larsen, K. (1944), *Nordisk Statsborgerret*. Copenhagen: Foreningen Norden.

As in the case of the EU, the national identity of the five Nordic states was considered an obstacle for introducing a common citizenship. Rather, the author of the booklet suggested establishing a (Nordic) Union citizenship that followed from national citizenship. Since the acquisition of one of the Nordic states' citizenship would have implications for the other Nordic states, the author found that the five states' citizenship legislation should be harmonised. He found the significant differences between the states' regulations unsustainable. For example, it was untenable that in one Member State, a foreigner might easily acquire citizenship, and thereby Union citizenship, and move to another Member State where he or she would be entitled to enjoy better rights than granted for foreigners born and raised in that state. The booklet includes an analysis of solutions chosen by other states that had formed unions and comparisons between the citizenship legislation of the five Nordic countries to identify the best practices and suggest new common rules and new forms of cooperation.

Eventually, the Nordic states did not create a Nordic Union as other major issues took precedence by the end of the Second World War. Still, Denmark, Norway and Sweden established a joint committee to draft (roughly) uniform bills on acquisition and loss of citizenship. In order to lay down (almost) uniform legislation, each country had to make a number of compromises. The committee proposed that the acquisition of one of the countries' citizenship by a citizen of another should be facilitated by entitlement and be based on residence. It also recommended that birth and residence requirements could be satisfied by birth and residence in any one of the countries. The three countries agreement on these rules was later superseded by an agreement among all five Nordic countries.

Similarly, a harmonisation of the EU Member States' citizenship legislation might ameliorate the situation of resident third-country nationals. I realise that it will be more difficult to reach an agreement among the 27 EU Member States due to the high number of states and their plural history of nation-building. Still, an effort to reach an agreement on citizenship cooperation should be made.

In so far as Member States would engage in formal cooperation on harmonisation of their citizenship legislation, notably with expert consultation, I contend that the states will be more careful when exercising their competence in the citizenship area and more observant when considering possible side effects (cf. European Parliament resolution of 16 January 2014 on EU citizenship for sale).²

I have a few additional comments on the realism in getting Dora's proposal for an autonomous Eurozenship adopted. Dora considers that Member States have no reason to resist it "because there is no competence encroachment." Member States would retain their competence, and at the same time, the EU would have the power to make an independent determination of EU citizenry. Conditioning EU citizenship on domicile for a period of five years in the territory of the Union would make the social fact of community membership a true determinant of belonging and end the exclusion of 20 million long-term resident third-country nationals.

Being a citizen of Denmark, I predict that some Member States may find very good reasons to resist the proposal. Denmark may serve as an example because the Danish population voted "no" to the Maastricht Treaty, which led to a national compromise that again led to the Edinburgh Agreement and four Danish opt-outs from the Treaty, among others on Union citizenship and Justice and Home Affairs-cooperation (JHA).

As the Amsterdam Treaty specified that Union citizenship would complement and not replace national citizenship, the Danish opt-out on Union citizenship is no longer of any practical meaning. Alas, the JHA opt-out is. It means, among other things, that Denmark is not bound by the long-term residence Directive.³ Therefore, Denmark has been able to adopt very strict requirements for acquisition of a permanent residence permit, among others eight years residence in Denmark and regular, full-time employment or self-employment in Denmark for at least three-and-a-half years during the last four

² European Parliament resolution, *EU citizenship for sale*, 2013/2995(RSP) (16 January 2014).

³ Council Directive 2003/109/EC of 25 November 2003.

years. In addition, the Danish Parliament is presently discussing a bill on revocation of residence permits for refugees and their family (in case of improved conditions in their country of origin).

A co-determined Union citizenship introduced by a Treaty change can hardly avoid interfering with the strict Danish aliens legislation. Therefore, such an amendment has limited chances for gaining Danish support. It will probably not have to survive a Danish referendum. Its destiny is likely to be decided by the Danish Parliament.

A Dysfunctional Eurozenship? The Question of Free Movement

Jules Lepoutre*

Dora Kostakopoulou's proposal to disentangle European citizenship from Member States nationalities is legally dysfunctional. Member States never agreed to grant European citizens an absolute right to free movement within the European Union (EU) territory. Thus, in case of a public policy breach, or lack of sufficient resources, citizens can be expelled by their host state to their state of nationality. Accordingly, the whole framework regulating mobility within the Union hinges upon Member States' nationality status – in accordance with Directive 2004/38/EC. Therefore, a European citizenship model autonomous from Member States' nationality cannot work within the context of free movement. Should we end the debate, then, and take Richard Bellamy's side? Not necessarily. Dora Kostakopoulou's Eurozenship can be both improved and approved, and below I offer a few options for doing it.

The first (sensitive) option: full freedom of movement for every European citizen

The first option to make Eurozenship functional is to give citizens unconditional freedom of movement within the EU territory. This would involve removing every limitation, such as sufficient resources or respect for the public policy. In other words, every citizen would have, by design, an absolute right to settle wherever he or she wants, for an indefinite period. Is this feasible? In principle "yes," subject to the need to extend the right of permanent residence to every European citizen (irrespective of the length of residence) and repeal the restrictions related to public policy, public security, and public health. It would require a few amendments to the Directive 2004/38/CE that the Parliament and the Council could carry on. Is this politically achievable in the current state of affairs? Probably not.

Such a move, from limited to absolute freedom of movement, already occurred in other associations of states. In the United States, the Supreme Court ruled that states could restrict freedom of movement, for instance, to avoid "the moral pestilence of paupers, vagabonds, and possibly convicts."¹ A century later, in 1941, the Court overturned its judgment, holding that states were no longer able to limit the freedom of movement – "the peoples of the several States must sink or swim together."² Similarly, in Switzerland, the Federal Constitution used to give every Canton the right to expel convicted or indigent citizens. Until 1943, the Canton of Geneva was still strongly in favour of such restrictions, fearing to become "a garbage filled with individuals considered undesirable elsewhere."³ In 1975, however, the Helvetic Confederation abolished all limitations to the freedom of movement by referendum and established thereby in the Constitution that "[E]very Swiss citizen can settle in any place in the country." These two cases illustrate how federal solidarity can (slowly) evolve and progress.

What is the EU situation: Is it reaching a point close to the United States in 1941, or Switzerland in 1975? There is no definitive answer to this question, but some evidence suggests that distance still needs to be covered. Member States are still using deportation measures to remove European citizens. In some cases, deportation policies are widely advertised, such as France's removal of Roma populations, Germany's ban on "social tourism," or Belgium's deportation of Spanish citizens. Below the surface, data shows that thousands of European citizens are quietly expelled by host Member States on economic or public policy grounds every year.⁴ It seems relatively easy to consider a European citizen as an

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¹ *New York v. Miln*, 36 U.S. 102 (1837), at 142.

² *Edwards v. California*, 314 U.S. 160 (1941), at. 174 (Justice Byrne quotes Cardozo).

³ Septième rapport du Conseil fédéral sur les mesures propres à assurer la sécurité du pays, BOAF, 1943. II. 164.

⁴ Directorate-General for Internal Policies (2016), *Obstacles to the right of free movement and residence for EU citizens and their families*, PE 571. 375.

ordinary ‘foreigner’ rather than a ‘fellow-citizen’. Hence, a legislative move toward absolute freedom of movement seems rather unlikely.

The second (practicable) option: a “rescue residence” linked to Eurozenship

The second option to make Eurozenship functional is to create a “rescue residence” to determine a Member State responsibility for receiving a European citizen without (European) nationality who would have been expelled by a host Member State. This path is well known to young or weak federations with limited freedom of movement. In the United States, freedom of movement used to operate within a framework set up by ‘settlement laws’. The model came from Elizabethan England and its notorious ‘poor laws’. Citizens were able to claim a right of settlement in a certain state after a given period without using social assistance (the length varied across states, from one to five years).⁵ Once the settlement was established in a given state, the latter would normally be chosen as a return destination in case of deportation by another state. Likewise, the Confederal and then Imperial Germany recognised a similar principle. The Law of 6 June 1870 provided a two-year delay to acquire a “rescue residence” (*Unterstützungswohnsitz*) in a local community in charge of social assistance and repatriation.⁶

Could a similar disposition be built into Dora Kostakopoulou’s proposed scheme? Indeed, it could. It is possible to link the autonomous acquisition of European citizenship to the acquisition of a first rescue residence. In other words, residence in a specific state would not only allow individuals to get European citizenship, but also to establish a “rescue residence” in that state. Accordingly, every Member State welcoming foreigners long enough to enable them to obtain European citizenship would be, at the same time, responsible for them – should another Member State want to deport them on economic or public policy grounds. Practically, this would only require amending Directive 2004/38EC by specifying that European citizens who do not hold the nationality of a Member State could be deported in the State of rescue residence.

To conclude: no (more) reason to oppose an autonomous Eurozenship

The critical question would remain whether to adopt this new kind of European citizenship disentangled from Member State nationalities. Then, this “rescue residence” not only fixes the Eurozenship and the question of free movement, but it helps to take a stand. First, this new category of European citizens would not be some sort of “weightless” citizens; on the contrary, they would have a strong link with an identified Member State through their rescue residence. Hence, this would be one way to eliminate the risk of “the erosion of solidarity within states” that Richard Bellamy rightly raises to oppose Dora Kostakopoulou’s proposal. Second, I consider residency the most appropriate proxy for establishing a person’s belonging. Therefore, I see no reason to oppose Dora Kostakopoulou’s idea that residence or domicile should be “the main criterion for the acquisition of EU citizenship” – even if I would rather choose the ten-year delay of the European Convention on Nationality (art. 6, 3.).

What is next? The federal debate cannot be avoided. Yet, it is no longer taboo to state that the EU is *already* a Federation.⁷ The adoption of this new kind of citizenship would only lead EU’s federal attributions to deepen, and certainly not to change its very nature. One should also remember that in 1913, the German Empire implemented a new “direct” imperial citizenship (*“unmittelbare Reichsangehörigkeit”*), to be granted by the Chancellor of the Empire, alongside with the old way of

⁵ Mandelker, D. R. (1955), ‘Settlement Requirement in General Assistance’, *Washington University Law Quarterly* 41 (4): 355–377.

⁶ Gesetz über den Unterstützungswohnsitz, BGBl. S. 360 (6 June 1870).

⁷ Here I rely on Beaud, O. (2007), *Théorie de la Fédération*. Paris: Presses Universitaires de France.

access through the federal states' citizenship ("*Staatsangehörigkeit in einem Bundesstaat*")⁸. In fact, the broad picture suggests that the terms of this debate are hardly unique in history. The United States, Germany and Switzerland cases (at least) show that sooner or later, the EU will face both the question of autonomous federal citizenship and free movement of citizens. Dora Kostakopoulou's proposal, packed with a 'rescue residence' system, is, I believe, a good compromise. The next move is political, and it would be left to the sovereign discretion of the European people and their representatives – probably not tomorrow, "but it is worth giving a try."⁹

⁸ Reichs- und Staatsangehörigkeitsgesetz, RGBl. S. 583 (22 July 1913).

⁹ See Dimitris Christopoulos' contribution.

On the Risk of Trying to Kill ‘Seven at a Blow’

Jean-Thomas Arrighi*

Starting from the assumption that the existing framework regulating the acquisition and loss of European Union (EU) citizenship produces legal incoherencies that ultimately translate into “unnecessary human suffering,” Dora Kostakopoulou proposes a two-step reform. First, the status should be made inalienable to prevent its involuntary loss resulting from the withdrawal of a Member State nationality, or the withdrawal of a Member State from the EU. Second, there should be a parallel path to “Eurozenship” based on birth and long-term residence in the EU, irrespective of whether or not the person holds a Member State nationality. At first glance, her plea appears rather cunning, for it promises, like the brave little tailor in the Grimm Brothers’ fairytale, to kill “seven at a blow.” Indeed, in Dora’s account, breaking Member States’ definitional monopoly over EU citizenship could solve at once a variety of issues, ranging from: the consequences of statelessness, the collective deprivation of EU citizenship resulting from a Member State’s withdrawal from the Union, the loss of Member State nationality due to long term residence abroad, and the lack of uniformity in the application of EU law or precarious status of third-country nationals owing to different or exclusive naturalisation requirements across Member States.

I agree with Dora that political theorists should not be afraid of radicalism, as long as the proposed reform effectively achieves clearly defined and desirable goals (the utilitarian test) and is consistent with fundamental norms (the principled approach). Richard Bellamy already pointed to the potentially negative consequences of what he describes as a form of “mushroom reasoning” on some of the core principles underlying the European project, such as that of reciprocity. While I broadly share Richard’s conclusion, my main concern here is that Dora’s proposal may not entirely satisfy the utilitarian test requirements. In other words, instead of killing seven flies at a blow, it may end up killing none. In what follows, I will briefly explain why, and conclude that the multitude of distinctive issues produced by the existing regulatory framework rather call for a series of targeted and more modest reforms than an overarching solution.

A utilitarian test is like a doctor’s consultation. It must start from a precise and objective diagnosis of what is wrong under present conditions, and then evaluate whether the proposed remedy provides a suitable cure or at least alleviates the symptoms without creating new and potentially more debilitating ones. In the social world, the truth is often in the eye of the beholder, for the diagnosis itself essentially depends upon the practitioner’s normative inclinations. Dora is primarily concerned with cases of what we may call ‘under-inclusion’, whereby a person has a *legitimate* claim to EU citizenship status, but does not have it because of *illegitimate* state practices. She mentions several groups of individuals arguably falling under this category, such as those Russian-speakers long settled in Latvia who became stateless in the aftermath of the disintegration of the USSR; third-country nationals born or residing in a Member State that has no *jus soli* provisions for birthright citizenship or no appropriate path to ordinary naturalisation; and former European citizens whose Member State nationality either lapsed or was stripped away because they acquired it on fraudulent grounds or allegedly constitute a threat to the vital interests of the state. Assuming that all such persons have a legitimate claim for inclusion, offering them a Eurozenship that is not buttressed in a Member State nationality is unlikely to improve their lot in any significant way. The main reason for it is that EU citizenship is meant to complement – but not to substitute itself to – state nationality. This normative premise is embedded in the very institutional design of the EU’s multilevel citizenship architecture and has practical implications. Having a qualified right to move, not to be discriminated against, and to vote in local elections in a country where one was once considered a foreigner is a valuable addition to the rights derived from Member State nationality. It does not, however, constitute a credible alternative to it. Instead of a *second path* to a Eurozenship of free

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and equal citizens, we may well end up creating a *second-class* citizenship that would not satisfy the aspirations of those who are unduly kept out of a Member State's national community, be they stateless or third-country nationals. Besides, creating a compensatory route to a European citizenship emptied of its national core provides reluctant Member States with a convenient excuse for not putting an end to their exclusion.

Member States' citizenship regimes are under-inclusive towards certain groups. They are also over-inclusive towards others. Co-ethnic policies targeting populations without an actual link to the political community other than a faded family bond with a long-deceased national can be found in several Member States. In a similar vein, so-called "Golden Passport" programmes targeting foreign investors eager to buy their way into European citizenship have been widely seen as over-inclusive, especially when they are not tied to a residence requirement. In theory, over-inclusive state practices pose a more immediate challenge to Eurozenship, for they may breed conflict among Member States suspecting each other of undermining their immigration control policy. But Dora's proposal, which deliberately refrains from encroaching upon Member States' sovereignty in matters of nationality, would not help solve this issue.

Would it be more effective in addressing the consequences of BREXIT, as Dora suggests? Consecrating the inalienability of European citizenship status would indeed benefit all sixty six million British citizens by allowing them to *remain* European citizens, even if their country actually *leaves* the EU. On the other hand, it would not help preserving the rights of EU citizens residing outside the Union's territorial jurisdiction, should the UK become a third-country. One could even argue, with the blend of cynicism and realism that have permeated BREXIT negotiations thus far, that taking off the bargaining table the perspective of a reciprocal agreement mutually protecting migrant populations on both sides of the Channel may further undermine the status of current and future EU citizens residing in the UK. The principle of reciprocity may well not only be the cornerstone of European integration, but also of European dis-integration.

In sum, an autonomous Eurozenship may only marginally mitigate the problems arising from over- and under- inclusive state practices, partially limit the downgrading of rights engendered by the decision of the British people to exit the European Union, and further entrench illegitimate state practices. What are, then, the alternatives?

One radical solution would be to turn the normative hierarchy upside down, by making Member State nationality derivative of European citizenship and based upon residence instead of the other way around. The rules of acquisition and loss of European citizenship would thus be determined at EU level and uniformly applied across its jurisdiction, Member States essentially surrendering one of the last bastions of their sovereignty. The European Union would then walk in the footsteps of several historical federations, such as the US, Germany, and to a lesser extent, Switzerland. I see at least two reasons why such bold move should be taken cautiously. First, the centralisation of citizenship powers often came in the wake of dramatic events. After all, the introduction of the 14th amendment in the American constitution costed no less than a civil war, and the European *demos* are unlikely to support a similar reform in the absence of a major systemic shock. Second, it would not necessarily translate into a more inclusive citizenship regime. Even in the unlikely scenario that Member States agree to adopt the most inclusive national dispositions currently in force across the Union as the basis of a putative Eurozenship regime, it would still fall short of unconditional *jus soli* at birth or naturalisation strictly based on residence. The experience of Switzerland, which combines a birthright regime almost exclusively based on *jus sanguinis* with thick communal, cantonal and federal naturalisation criteria that must be met cumulatively, provides a sobering counter-example. Under present conditions, pushing for such reform would amount to taking a sledgehammer to kill flies: A disproportionate, unreasonable, dangerous and ultimately ill-suited tool for our purposes.

Ultimately, the solution may not lie in one architectonic change, but in a series of more modest and targeted reforms addressing one problem at a time. The inspiration for it would not come from a fairytale

character, but from the experienced hunter, who knows that in reality, killing two birds with the same stone is next to impossible.

The metaphor invites us to act in a way that is consistent with two principles. First, just like killing flies and birds is inherently wrong unless it is absolutely necessary, a complete overhaul of a system that enjoys considerable legitimacy among Member States and citizens alike is inappropriate unless there is compelling evidence that the negative consequences it produces cannot be addressed through other, less radical means. Second and relatedly, problems that are different “in kind” rather call for different solutions than an overarching one. In practice, the multiple pitfalls of European citizenship should be addressed separately. I see at least two desirable changes. First, disentangling local citizenship from state citizenship, by expanding the municipal franchise to all residents, irrespective of their nationality. Local voting rights for third-country nationals already exist in twelve Member States, and reluctant ones should be urged to put an end to the arbitrary discrimination between European and non-European local citizens. Second, limiting Member States’ room for manoeuvre in nationality law by setting EU-wide maximum and minimum standards on citizenship acquisition and loss that are consistent with democratic norms. While Eurozenship would still be formally derivative of Member State nationality, Member States could no longer super- or down-size the European citizenry in ways that flagrantly violate the EU’s fundamental principles.

In the current political climate, any progressive reform, however modest, may well be infeasible. However, Dora’s ambitious proposal shows that we should not, at the very least, stop thinking about it altogether.

Eurozenship: Always a Bridesmaid?

Jelena Džankić*

Since the early 1980s, my citizenship has changed four times due to multiple disintegrations of the former Yugoslav states. Over the past twenty years, I have lived as a third-country national (TCN) in five European Union (EU) Member States. Hence, as a person whose life has been a rollercoaster ride through different experiences of citizenship and residence, I would be most happy if Dora Kostakopoulou's vision of an autonomous EU citizenship came into being. However, there are two key normative and practical pitfalls of her proposal. First, the decoupling of statuses that she proposes poses the risk of 'free riding' on EU citizenship rights for those who had, at some point enjoyed, and then lost, this status. Second, having in mind the different definitions of residence across the Member States, linking the acquisition of EU citizenship to this status is like putting a roof on a house with uneven walls.

The risk of the free-riding exes

Taking note of the evolving practice of the Court of Justice in the domain of nationality and citizenship, Kostakopoulou maintains that the bond between EU citizens and the EU is a direct one. EU citizens enjoy rights that derive directly from the Treaties and are not contingent on the approval of other Member States. They would also not vanish in the absence of an EU nationality.

Perhaps my scepticism is rooted in my personal experience of what happens to citizenship rights when states fall apart, but Kostakopoulou seems to somewhat neglect that rights cannot exist in and of themselves. They are premised on membership in a collective of some kind. From the more universal human rights norms, to the specific ones enjoyed by groups or individuals – the claim to rights is inextricable from belonging to a category that shares some common characteristics or patterns of behaviour. Those characteristics are stipulated in legislation and serve to attribute status and delineate the relationship between the holders of that status and rights that it bestows upon them.

Decoupling the two so that the loss of "*a Member State nationality would not automatically result in the forfeiture of Union citizenship*" is problematic as it would delegitimise the very existence of the EU as a voluntary association of states. There are different ways in which the loss of EU citizenship can happen, but for the sake of the argument let's just focus on the withdrawal of the country from the Union. In a scenario in which seven, eight, or more Member States decided to leave the EU, the nature of the political community that is the source of rights would be substantially altered. This could potentially result in 'free-riding' on rights of EU citizenship by the exiting states. In the absence of some sort of an alternative political membership (which she does not propose), there would be a risk of further fragmentation.

Commensurability of existing statuses

There are major differences between those who have at some point had EU citizenship and those who had never enjoyed this status. In proposing modification to Article 20 TFEU that would be applicable to TCNs, Kostakopoulou deliberately leaves the definition of "every person ... declared as an EU citizen" vague. However, she implies that this may mean an individual domiciled in the EU territory or a long-term resident. The acquisition of EU citizenship would not be subject to any conditions bar residence (of five years) in a Member State and a clean criminal record. There is a core contradiction in this approach. As much as Kostakopoulou advocates for an independent EU citizenship, she still makes it conditional upon *status* (of a resident) in an EU Member State.

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Definitions of residence, domicile and the related rights, as well as the conditions for the acquisition of the long-term resident status, vary significantly across countries and types of permits. Having this in mind, Kostakopoulou's argument remains unclear as to her understanding of 'five year periods' of lawful and uninterrupted residence. The latter means different things for students, workers, refugees, diplomatic personnel, or investors.

To give you an example – I have held the national residence permit (study) in Bulgaria for 4 years, in the Netherlands for 6 months, a Tier 4 (student) visa in the UK for four years and a Tier 2 (work permit) in this country for further 18 months. Since 2011, as an employee at the EUI (international organisation), I hold an ID card issued by the Italian Foreign Ministry, which is incompatible with national residence. The latter means that even though I have been uninterruptedly and lawfully present in the state for almost eight years, I am unable to access the status of a long-term resident since the kind of permit that I have is excluded under article 3(2)f of the 2003/109/EC Directive.

This means that 'five year periods' have different meanings for different categories of permit holders within and across Member States. For instance, to maintain his or her resident status, an investor in Portugal needs to provide evidence of stay in the country for 7 days in the first year and 14 days in the subsequent two-year periods. To be able to do the same, a work permit holder must not be absent for more than six consecutive months within a year. By contrast, an investor in France may retain residence in that country while living abroad only if he or she exercises a private or public professional activity on behalf of the French state.

Further to this, we should bear in mind that acquiring permanent residence or domicile, proposed by Kostakopoulou as potential access points to EU citizenship for TCNs is commonly accompanied by civic integration tests, language, financial or other conditions. Each of these conditions (when applied) is defined by national authorities. This reflects the plethora of approaches to statuses and rights across the EU. And perhaps before putting the roof on the house and thinking about EU citizenship, we should check that the walls we are putting it on are commensurable. Otherwise, it won't hold.

Coda: keep on dreaming

Given my personal circumstances, I cannot but wholeheartedly support the desire to one day see a Europe of citizens, an egalitarian society, a community in which Union-wide rights would not be determined by a necessary association to one of its Member States. However, Kostakopoulou's argument for Eurozens is not yet sufficiently developed for me to be able to endorse it as a feasible scenario. This does not mean that we should simply dismiss it. Even the EU in its current form was unthinkable back in 1951 or even in 1979. So, let's keep on dreaming and see what the future has in store for the tale of Eurozenship.

More Suffocating Bonds?! Conceptual and Legal Flaws of the Unnecessary Proposal

Dimitry Kochenov*

In this brief contribution I turn to Kostakopoulou's text and briefly show that her proposal: 1) ignores the core aspects of EU citizenship's added value; 2) is entirely unnecessary; 3) is not legally neat; and 4) is dangerous for the very nature of EU citizenship today as it essentially pleads for the recreation of the 'suffocating bonds' the EU was created to ease, only at a scale much more scary than Greece, Ireland or France, when taken one by one. Besides, it ignores every single outstanding problem actually posed by EU citizenship law as it stands.

Ignoring the main value of EU citizenship

Kostakopoulou's proposal strikes me as empty: unnecessary, not worked out, and potentially harmful. I thus join the majority of other commentators in feeling obliged to dismiss it. Its underlying aim, even if not directly stated, emerges as the replication of the suffocating bonds at the supranational level in a Union that was created with one core idea in mind: to tone down liberal nationalisms and make the individual emerge as a beneficiary of rights deriving directly from EU law, more than a hostage of the polities distributing the statuses of belonging.¹ The core aspect of EU citizenship is that it is the *natural enemy number one* of the nationalities of the Member States, in that it simply switches them off within the scope of application of EU law as a result of the application of non-discrimination on the basis of nationality. It turns Member States' aspirations to control the composition of their populations – a right any other sovereign state claims to enjoy around the world – into an even bigger fiction, since free movement across the Union borders is a directly enforceable right. Even more, although derivative from the Member States' nationalities, EU citizenship, in fact, has significant implications for the distribution and functioning of the national-level statuses: *Boukhalfa* prohibits discrimination on the basis of the grounds of acquisition of a nationality, *Micheletti* prohibits the testing of the suffocating bonds with other states, and *Rottmann* outlaws arbitrariness in the removal of nationality (at least EU-law-significant arbitrariness). The circle is rounded up: the supranational status already necessarily affects core approaches to the essence of nationality in the Member States.² Unlike any status of tying a person to the imaginary 'society' through 'residence' (even if a Bangladeshi naturalises in a Bangladeshi ghetto in an EU capital) EU citizenship, instead, *decouples*. Indeed, it is the only citizenship in the world with the core directly enforceable right to leave the state that claims you as a national.³ It is citizenship that liberates you from the obligation to conform to the linguistic, cultural, and other clichés and is based, essentially, on *difference*, elevated to a sacred right.

This is only possible due to the fundamental decoupling of the competence to distribute the status, which guarantees both EU citizenship's fascinating nature of an empowering 'anti-citizenship' of sorts – a protector of the claims to belong based on the denial of the very rationale behind the *need* to belong – and, secondly, the most ironical legal pluralism of access to the status, only possible through essentially false claims of the Member States of being in control, as I have demonstrated with

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¹ Kymlicka, W. (2006), 'Liberal Nationalism and Cosmopolitan Justice', in Benhabib, S. (ed.), *Another Cosmopolitanism*, 134. Oxford: Oxford University Press.

² Kochenov, D. (2010), 'Rounding up the Circle: The Mutation of Member States' Nationalities under Pressure from EU Citizenship', *EUI Working Paper RSCAS* 2010/23.

³ Łazowski, A. (2015), '“Darling You Are Going Nowhere”: The Right to Exit in EU Law', *European Law Review* 40 (6): 877.

Lindeboom.⁴ Both these aspects are fundamentally precious and both are overlooked and potentially undermined by Kostakopoulou's suggestions. Once able to confer its own status, the EU will be bound to make the clichés of EU citizenship explicit – and Kostakopoulou already suggests 'residence' – damaging the status and depriving it of the core added value.

Offering to solve no problem

Kostakopoulou mentions several potential vulnerable groups to benefit from a direct conferral of EU citizenship, some of them real, but the majority imaginary, and fails to explain why the decoupling of EU citizenship and Member State nationality would at all be necessary. Fighting statelessness is not an argument, since the EU is not a state and anyone with an EU citizenship will remain stateless. Ensuring that children of EU citizens exercising free movement do not end up without a nationality is not an argument either, since EU law will have to step in – *à la Rottmann* – prohibiting Member States from punishing the children of those who exercise their main citizenship right, an example Gerard-René de Groot and many other colleagues discussed in detail since the times of Maastricht.⁵ Brexit is a wrong pretext too: tying British people to the EU ignoring the sovereign decision of their Member State taken democratically smells like tyranny, as I explain with van den Brink in detail in a forthcoming *JCMS* article.⁶

Lastly, the third-country nationals who reside in the EU for long enough a time could objectively benefit from a significant improvement of their status. In disagreement with Acosta Arcarazo, I submit that the relevant Directive failed to establish a status similar in any way to EU citizenship.⁷ It is not this failure, however, which is a problem – after all, not so much depends on this legal status *per se*, as Thym rightly underlines in his contribution – but the fact that unlike any other constitutional system in the world, the EU does not even pretend to offer its law and the opportunities of the internal market to the majority of third-country nationals, who are confined to individual states.⁸ Solving the problem of opening up the internal market to third-country nationals is a matter of amending the Directive, however – no complete reshuffling of the Treaties will be needed for this. The proposal uses an impossible sledgehammer to crack a microscopic nut. As we have seen, the absolute majority of the problems it purports to solve are imaginary, while the last remaining one does not require, *per se*, a separate supranational citizenship solution. Thinking about Europe's future, one could be inspired by Paul-Henri Spaak in charting the paths for change: idealistic reforms leading nowhere, however well-intentioned, can – and shall – harm the cause of European integration. Solution to no problem, Kostakopoulou's submission is in this category.

Failing to rely on the law as it stands

It is very good that Kostakopoulou does not explain how to put the unnecessary proposal in practice, since the answer, quite obviously, is that it is impossible without amending the Treaties. Sarmiento has most recently explained in great detail why the EU is not empowered to regulate the main bulk of

⁴ Kochenov, D. & Lindeboom, J. (2018), 'Pluralism through Its Denial: The Success of EU Citizenship', in Avbelj, M. & Davies, G. (eds), *Handbook on Legal Pluralism in the EU*. Cheltenham: Edward Elgar.

⁵ De Groot, G.-R. (2004), 'Towards European Nationality Law', *Electronic Journal of Comparative Law* 8 (3).

⁶ Van den Brink, M. & Kochenov, D. (2019, forthcoming), 'Against Associate EU Citizenship', *Journal of Common Market Studies* 57. Draft available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3175318.

⁷ Acosta Arcarazo, D. (2015), 'Civic Citizenship Reintroduced?', *European Law Journal* 21 (2): 200.

⁸ Kochenov, D. & van den Brink, M. (2015), 'Pretending There Is No Union: Non-Derivative Quasi-Citizenship Rights of Third-Country Nationals in the EU', in Thym, D. & Zoetewij Turhan, M. (eds), *Degrees of Free Movement and Citizenship*, 66. Leiden: Martinus Nijhoff.

nationality-related matters, including the introduction of the status.⁹ In essence, given that the need for the proposed change is not explained to us and the mechanisms are left out in the open, it would be difficult to agree, at the bottom line, that there is a proposal at all. Nothing legally doable is proposed for no reason at all. The picture is a bit more complicated than that, however, as the ‘proposal’ is bound to contradict the Treaties quite a bit even beyond the main *ius tractum* rationale of the independent supranational status.¹⁰ This is due to the fact that an independent supranational status is inescapably but the first step to an *outright replacement* of the Member States’ nationalities: spill-over logic ensures that if the Union can bite off a finger, it will. Put otherwise, what is suggested – in the medium-term run – is the abolition of the Member States and, thus depriving the project of EU integration of added value – there is no interest in benefitting from free movement if what you find on the other side of the border is the same as at home. And without citizenship not much is left of states of course.

Ignoring the federal bargain, analysed by Nic Shuibhne so well, is deeply problematic.¹¹ The ‘proposal’ is not merely insensitive to the current division of competences in the citizenship field. It is entirely silent on all the law at play. Silence is not a wise approach, with respect, should the crowd targeted by preaching not be composed uniquely of those already converted.

At issue, ultimately, is the Member States’ ability to regulate, full stop. I am not a proponent of the wholly internal situations as currently construed.¹² They are, however, the law of the land as it stands. Consequently, the implications of the separation between the nationalities of the Member States and EU citizenship for this aspect of EU law have to be considered. This is important, in particular, since only the nationalities of the Member States in combination with no cross-border element can result in a situation where national law, rather than EU law available on the issue, applies. I have claimed that this is one of the core legally-significant aspects of Member State nationalities in the current EU: they allow states to lawfully mistreat (treating better would be prohibited by EU law) huge chunks of people.¹³ The absence of local nationality means, presumably, the absence of wholly internal situations for that person, which automatically shifts the main bulk of the law applicable to the situation of ‘pure’ EU citizens to the supranational register, turning national law into a redundancy. One might be happy about this, but cannot be happy silently: visceral opposition of the Masters of the Treaties is to be expected. More supranational regulation is not a problem *per se*, besides the fact that when the difference in regulation is lost, some Europeans will feel that their state, which is already prohibited from treating them better than EU foreigners in many vital aspects of life – represents them even less.

The EU lacking its own territory properly speaking (going beyond the sum of the territories of the Member States as per Article 52 TEU) will be obliged to *assign* the ‘pure Europeans’ to particular state anyway, should they enjoy any right of residence. Given that an absolute right to reside does not exist and free movement is subject to legal limitations that have to be respected,¹⁴ what is likely to emerge is a *quasi*-nationality of a Member State anyway. Given that the Member States will not accept that their own nationals are subjected to more limitations in the EU than the nationals of no Member State as per the ‘proposal’, ‘pure Europeans’ will either never emerge in practice, or be treated as markedly second rate inhabitants of the EU. Even worse, of course, is that they will be stateless in the eyes of the rest of the world, unless Kostakopoulou has a plan to negotiate the acceptance of this status by Putin and Trump

⁹ Sarmiento, D. (2019), ‘EU Competence and the Attribution of Nationality in the Member States’, *Investment Migration Research Papers* 2019/2.

¹⁰ Kochenov, D. (2009), ‘Ius Tractum of Many Faces’, *Columbia Journal of European Law* 15 (2): 169.

¹¹ Nic Shuibhne, N. (2017), ‘Recasting EU Citizenship as Federal Citizenship’, in Kochenov, D. (ed.), *EU Citizenship and Federalism*, 147. Cambridge: Cambridge University Press.

¹² Tryfonidou, A. (2009), *Reverse Discrimination in EC Law*. Alphen aan den Rijn: Kluwer Law International.

¹³ Kochenov, ‘Rounding up’, *op. cit.*

¹⁴ Carter, D. & Jesse, M. (2018), ‘“The *Dano* Evolution’: Assessing Legal Integration and Access to Social Benefits for EU Citizens’, *European Papers* 3 (3): 1179–1208.

administrations (among almost 200 others), giving necessary concessions for the requested gestures of good will.

Ignoring all real problems

What is a pity, is that the ‘proposal’ does not engage with the core problems of EU citizenship, some of which have been outlined by Kostakopoulou in her earlier work. It *is* a problem that EU citizens can become unwelcome, when they belong to minorities and are destitute, like Miss Dano;¹⁵ it *is* a problem when EU citizens become *de facto* foreigners when they commit a crime, however non-dangerous for the society;¹⁶ it *is* a problem that the rules of the delimitation of the scopes of the law are based on personal histories of employment and cross-border movement and are thus purely personalised and neo-Mediaeval, instead of being rooted in the equality before the law based on the status of EU citizenship as such;¹⁷ it *is* a problem that fundamental rights seem to be not part of the EU citizenship package in all cases; it *is*, finally, a problem that the EU emerges as a powerful actor of injustice in the eyes of thousands of those who are let down by its law.¹⁸ The arcane legalistic explanations why the law is what it is do not save the situation. It is a problem that some of the core assumptions underlying Union law are not based on any ethical or moral imperative – that EU law is “the law of taking a bus,”¹⁹ where your employability or willingness to travel activates the protection of rights, not a fundamental legal status as such. All these core issues are not touched upon either by Bellamy or Kostakopoulou when discussing the possible innovations so huge, that they are virtually impossible. The whole conversation emerges as sterile in that it does not mention a single significant socio-legal problem that the EU and its citizenship happen to be facing.

A ‘proposal’ coming down to an aesthetically-displeasing word?

All in all, the ‘proposal’ tells us that EU citizenship separated from the nationalities is something new, while potentially replicating precisely what the EU was needed to liberate the Member States’ citizens from. It is about ‘suffocating bonds’: more of those and now in scale. It is thus good news that these are both unnecessary, since they will not solve any problems, as we have seen – and pretty much impossible, legally speaking, while steering clear of all the core problems of EU citizenship law. In essence, what has been proposed comes down to an unutterable word, which I will not replicate here. Much more could be expected of ‘courageous proposals’: we clearly do not need this word.

¹⁵ Schiek, D. (2017), ‘Perspectives on Social Citizenship in the EU’, in Kochenov, D. (ed.), *EU Citizenship and Federalism*, 341. Cambridge: Cambridge University Press.

¹⁶ Kostakopoulou, D. (2014), ‘When EU Citizens Become Foreigners’, *European Law Journal* 20 (4): 447.

¹⁷ Kochenov, D. (2016), ‘Neo-Mediaeval Permutations of Personhood in the European Union’, in Azoulai, L., Barbou des Places, S. & Pataut, E. (eds), *Constructing the Person: Rights, Roles, Identities in EU Law*. Oxford: Hart.

¹⁸ O’Brien, C. (2017), *Unity in Adversity*. Oxford: Hart.

¹⁹ Kochenov, D. (2017), ‘On Tiles and Pillars: EU Citizenship as a Federal Denominator in Europe’, in Kochenov, D. (ed.), *EU Citizenship and Federalism*. Cambridge: Cambridge University Press.

EU Citizenship as an Autonomous Status of Constituent Power

Oliver Garner*

I agree with Dora Kostakopoulou that the reconstruction of EU citizenship as an autonomous status could provide a new cornerstone for European integration. Richard Bellamy's argument that such a move would "erode civicity and solidarity" in Europe reifies the nation-state as the only legitimate arena for the exercise of self-determination in pursuit of the collective good. This precludes the possibility of the establishment of new duties to complement existing rights at the European level. I would argue, however, that Kostakopoulou's argument for a "co-determined Eurozenship" would not go far enough in realising the potential of the status. This post develops this argument first by grounding the normative appeal of autonomous EU citizenship in the context of Member State withdrawal. Next, it is suggested that the co-determination of the status by Member States and the EU institutions would be incompatible with the current legitimacy foundation of the EU. The post concludes by considering the more radical alternative of EU citizenship being made autonomous so that individuals can exercise constituent power to re-establish these foundations of the European Union constitutional order.

The limitations of a 'co-determined Eurozenship'

I am sympathetic towards the arguments forwarded by Rainer Bauböck that the creation of an autonomous EU citizenship would not address the inequities of nationality law at the micro-level of individual cases. Therefore, I would agree with Bellamy's diagnosis that Brexit provides the dominant driver and the most compelling justification for Kostakopoulou's proposal. The voluntary decision of a Member State to withdraw from the EU explodes the tension between nationality and EU citizenship as domains for the self-determination of EU citizens. As Jürgen Habermas has explicated, the present basis of legitimacy within the European Union is the sharing of constituent power between individuals in their role as nationals of a Member State and individuals in their role as citizens of the EU.¹ The direct derivation of EU citizenship from the nationality of a Member State mandated by Article 20 TFEU, in conjunction with the possibility for a polity to revoke its membership through Article 50 TEU, means that nationality remains the 'master status' for the dual-constituent balance in the European constitutional order. This is also reflected in the accession rules in Article 49 TEU. Member statehood – and thus EU citizenship for the nationals of that state – can only be conferred through a unanimous international agreement with the pre-existing Member States.

Kostakopoulou's proposal for partially disconnecting these rules for the conferral of EU citizenship and enabling them to be 'co-determined' with the EU institutions would disturb the balance whereby the conferral of EU citizenship rests with the decisions of individuals as Member State nationals. It is unclear from the proposal what the incentives would be for the nationals of the Member States to direct their representatives in the amendment of the Treaties to create such a generalised competence for the EU institutions to determine who may hold EU citizenship. The only incentive would seem to be a form of solidarity with long-term residents Third Country Nationals (TCNs) who are presently barred from naturalising as EU citizens. Bellamy correctly observes that the "most valuable rights are, for the most part, not rights that are offered by EU institutions...but rights that are upheld by the constituent states." This suggests that political efforts to ensure secure residence for TCNs would be better directed towards attempts to liberalise the regime for enabling naturalisation at the national level. Bellamy does concede, however, that the exceptional added value of EU citizenship is the right to vote in European Parliament elections. Enabling the European institutions to bestow EU citizenship on resident TCNs would

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¹ Habermas, J. (2012), 'The Crisis of the European Union in the Light of a Constitutionalization of International Law', *European Journal of International Law* 23 (2): 335–348.

therefore provide them with a means of exercising political subjecthood in the creation of EU law norms through the direct election of European legislators.

Crucially, however, the dual-legitimacy basis of European legislation means that individuals who hold EU citizenship without nationality of a Member State would be subjected to legislation of which they have only had a partial opportunity to approve. The ordinary legislative procedure mandated in Article 289 and Article 294 TFEU means that the European Parliament functions only as a co-legislator with the Council of the EU. Conferring EU citizenship upon TCNs would only guarantee their voice in the European Parliament; they would have no representation in the Council which is indirectly legitimated by ministers appointed on the basis of national elections. Therefore, within the current construction of the European supranational constitutional order, enabling the European institutions to determine EU citizens independently of Member State nationals would not contribute to the full exercise of self-determination of these individuals. It may be argued that such partial representation is better than no representation. As a counter-argument, the disconnection of EU citizenship from Member State nationality would be a revolutionary step. In such a context it may be expedient to eschew incrementalism and instead embrace a holistic reform of the status.

The creation of an autonomous constituent status as a reaction to disintegration

The ‘co-determination’ of EU citizenship with the European institutions would not serve to substantiate the status as one of true self-determination. The only situation which would warrant the disconnection of EU citizenship from Member State nationality would be for the status to become a means of exercising constituent power. This would serve as a reconstruction of the foundation of the European Union. This is currently based upon the mixed constituent power of individuals as nationals and individuals as EU citizens. In its place, a singular European constituent power would be created through individuals being given the choice to be EU citizens. This would provide the basis for the creation of a new constitutional settlement within the European Union.

Such a revolutionary disruption could be envisaged as a reaction to the hypothetical progression of a domino effect from Brexit cascading into disintegration of the European Union. A constitutional decision to withdraw from the European Union represents the end of the consensus on ‘levelling up’ constituent power to the supranational level.² A fissure is opened between those nationals who do regard their EU citizenship as a means for self-determination and those who do not. This majority and minority dynamic towards European integration lurks under the surface of all Member States who have not held a referendum on membership. Although unlikely, the remote possibility remains of multiple Member States withdrawing from the EU. On the basis of national democratic majorities, this would extinguish the EU citizenship of all, including those who regard it as integral to their social and political identity.

In the face of such a fault-line amongst the population of Europe towards integration, one could formulate an argument for the choice being given to those entitled to EU citizenship on whether they wish to hold the status or not.³ Those who choose to be European citizens would then form the nucleus for the formation of a constitutional convention to determine the design of a future European constitutional polity. Clearly such a constitutional moment would go far beyond the ambit of the current Treaty structure of the European Union.

The repatriation of constituent power by domestic electorates could provide the impetus for a counter-movement establishing constituent power at the European level. This would serve to preserve the achievements of integration for those who regard their European identity as a means of self-

² Patberg, M. (2017), ‘The Levelling Up of Constituent Power in the European Union’, *Journal of Common Market Studies* 55 (2): 203–212.

³ Garner, O. (2018), ‘The Existential Crisis of Citizenship of the European Union: The Argument for an Autonomous Status’, *Cambridge Yearbook of European Legal Studies* 20: 116–146.

determination. If we accept the argument that the original sin of European integration was a lack of popular legitimacy, it may be argued that such a leap of faith is a necessary step to either validate or invalidate the European project in the current climate of stagnation.⁴ In conclusion, therefore, I agree with Dora Kostakopoulou that autonomous EU citizenship could provide a way forward for the troubled status of European integration. In accordance with Richard Bellamy's argument, however, I believe that such an autonomous status will only help resolve rather than exacerbate Europe's problems if it functions as a means of true political self-determination.

⁴ Walker, N. (2016), 'The EU's Constitutional Overabundance?', *Edinburgh School of Law Research Paper* 2016/14.

Member State and EU Citizenships Should be Strengthened Rather than Disentangled

Willem Maas*

Since the origins of European integration Member States may no longer discriminate, in areas of EU competence, between their own citizens and those of other EU Member States; starting in the 1950s with free movement provisions for coal and steel workers, citizens of the Member States have gradually acquired wide-ranging rights throughout EU territory.¹ Since those earliest days, access to most EU rights has depended on Member State citizenship. But Dora Kostakopoulou now proposes to “disentangle” EU from Member State citizenship. By “escaping state management and the imposed link with state nationality,” EU citizenship “would be reclaimed as the cornerstone of European integration”; this “would not interfere with national legislation [but] would simply mean that the Member States would no longer have the exclusive privilege of granting” EU citizenship. This is not a new proposal. In 1943 the Italian Movimento Federalista Europeo promoted a European “continental” citizenship alongside national citizenship, entailing direct political and legal relationships with a European federation, the legal equality of citizens of all European states, and the “option to take out European citizenship in addition to national citizenship,” while the Dutch ‘European Action’ group called more modestly for European citizenship to supplement national citizenship.² More recently, some early drafts of the 2003 constitutional treaty specified that each EU citizen “enjoys dual citizenship, national citizenship and European citizenship; and is free to use either, as he or she chooses; with the rights and duties attaching to each,” but this was dropped in subsequent drafts because of objections from some Member States.³

Dora proposes that this autonomous EU citizenship decoupled from Member State citizenship be extended to long-term resident third-country nationals and stateless individuals who can prove five years of residence within EU territory, a *jus soli* right for children born in the EU to gain autonomous EU citizenship even if they do not qualify for Member State citizenship, and a right of EU citizens to maintain their autonomous EU citizenship in cases of loss or absence of Member State nationality.

While perhaps appealing as a gesture towards addressing problems such as the anticipated deprivation of rights following Brexit, statelessness, or wide variation in Member State naturalisation and denaturalisation policies, these proposals are impracticable in the absence of international recognition of EU citizenship (which would normally require recognizing the EU as a state, which in turn should normally mean that the Member States cede competence over citizenship), challenge deeply rooted national stories of peoplehood with an emerging story of European peoplehood, and risk undermining fragile public support for EU rights. Better alternatives include increased conversations about best practices in naturalisation and denaturalisation policies in an effort to encourage Member States to engage in gradual policy harmonisation, continuing to promote the ongoing emergence of a European peoplehood, and strengthening the rights that Europeans already have rather than introducing a new category of semi-citizens.

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¹ Maas, W. (2007), *Creating European Citizens*. Lanham: Rowman & Littlefield.

² Maas, W. (2005), ‘The Genesis of European Rights’, *Journal of Common Market Studies* 43 (5): 1012.

³ Maas, *Creating European Citizens*, op. cit., 85. For a more developed argument, see Olsen, E. D. H. (2012), *Transnational Citizenship in the European Union: Past, Present, and Future*. London: Continuum.

Citizenship as a Monopoly of States

The dominant idea that only sovereign states can grant citizenship means that jurisdictions such as cities, provinces, stateless or indigenous nations, or supranational entities like the EU cannot bestow citizenship, at least not in a form that receives widespread international recognition. The artificiality and arbitrariness of the sovereign state monopoly on conferring citizenship becomes clear from the fact that alternative jurisdictions such as the EU *do* constitute important sources of rights and status.⁴ Yet wishing away the state monopoly on citizenship will not make it so.

As a scholar of EU law, Dora correctly identifies the *Micheletti* judgment that Member States can establish conditions for acquiring or losing nationality only with “due regard to Community law” as granting European institutions a role. Indeed, during the Maastricht negotiations, the European Parliament resolved that the “Union may establish certain uniform conditions governing the acquisition or loss of the citizenship of the Member States, by virtue of the procedures laid down for the revision of the Treaty” – but at the Edinburgh Summit following Maastricht the Member States declared that “the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the nationality law of the Member State concerned.”⁵ Dora also correctly notes the importance of the *Rottman* judgment that Member State decisions about naturalisation and denaturalisation are “amenable to judicial review carried out in the light of European Union law,” and I have argued elsewhere that EU citizenship’s rise profoundly alters the nature of Europe and its meaning for citizens, which forces even notionally sovereign EU Member States to coordinate their citizenship policies.⁶

But the international state system continues to constrain the scope for EU action. The 1930 Hague Convention specifies that it “is for each State to determine under its own law who are its nationals,” and Member States have always defended their monopoly on defining who is a citizen for the purposes of EU law, from West Germany’s declaration in the Paris and Rome Treaties that individuals in East Germany should be considered German for the purposes of European law to the United Kingdom’s declaration specifying which British citizens and subjects qualify as UK citizens for the purposes of European law.⁷ EU Member States have continued to make such determinations despite the European Parliament’s resolutions that there should be “closer coordination and a more structured exchange of best practices between Member States with respect to their citizenship laws in order to ensure fundamental rights and particularly legal certainty for citizens;” and that there should be “comprehensive common guidelines clarifying the relation between national and European citizenship.” While the Hague Convention is an invention less than a century old, the EU cannot overturn it unilaterally; an autonomous EU citizenship would require Member States to agree that their citizenship policies are subsets of the overarching international status of European citizenship.

To take a practical example, there exist only a few thousand EU laissez-passer documents (compared with some 40,000 United Nations laissez-passer documents) held by EU officials and some members of their families, but these do not enjoy the same level of recognition as diplomatic passports – or the hundreds of millions of Member State passports. Which authority would issue EU passports for the twenty million long-term resident third-country nationals (many of whom might disavow their other nationality once their European rights are secure, and thus would require EU passports), plus stateless

⁴ Maas, W. (2013), ‘Varieties of Multilevel Citizenship’, in Maas, W. (ed.), *Multilevel Citizenship*, 1–21. Philadelphia: University of Pennsylvania Press; Maas, W. (2017), ‘Multilevel Citizenship’, in Ayelet Shachar et al. (eds.), *The Oxford Handbook of Citizenship*. Oxford: Oxford University Press.

⁵ Maas, W. (2014), ‘European Union Citizenship in Retrospect and Prospect’, in Isin, E. & Nyers, P. (eds.), *Routledge Handbook of Global Citizenship Studies*, 415. London: Routledge.

⁶ Maas, W. (2016), ‘European Governance of Citizenship and Nationality’, *Journal of Contemporary European Research* 12 (1): 542.

⁷ Ibid, 535.

individuals, *jus soli* children born in Europe, and the several other categories that Dora's proposals are intended to assist? Dora cannot dismiss debates about a federal future for the EU or how her proposals would affect Member State competence, because under international law only states can grant a citizenship that is recognised by other states. The Commission has insufficient resources to issue passports on the scale and scope required by an autonomous EU citizenship, even if it somehow acquires the personnel to fulfil Dora's dream of EU authorities being able to "make an independent determination of the EU's citizenry."

That last quote underscores what Jelena Dzankic calls a "core contradiction": the proposal for an autonomous EU citizenship depends on a status that is shaped and conditioned by the Member States, which remain the only authorities which bestow status. Perhaps over time EU central authorities could develop the capacity to conduct independent determinations of status (e.g. birth certificates issued or validated by EU authorities, independent verification of whether individuals meet EU-wide standard residence conditions, etc), but such capacity exists at EU level only in embryonic form. Jelena is right to flag the wide variation in status determination that now exists for third-country nationals and other categories. Such inequalities might even be exacerbated: a Member State with an Orbán or Salvini government might be less likely to bestow status than one more friendly to minorities or migrants. Eva Ersbøll agrees on the necessity of harmonising laws on acquisition and loss of citizenship but argues that disentangling EU from Member State citizenship and granting EU citizenship after five years of residency would be opposed by many Member States, such as Denmark. Rainer Bauböck is right to worry that an autonomous EU citizenship would weaken the EU's leverage to encourage reforms of Member State citizenship policies, as nationalistic Member State governments could argue that they should not be responsible for "rootless" EU citizens; narrow nationalists might be all too happy to offload responsibility for stateless individuals or "undesirable" minorities to the EU – Jules Lepoutre's invocation of Roma deportations and Dora's own invocation of suboptimal policies pursued by Estonia, Latvia, Romania, and Slovenia (additional examples are possible) suggest that Rainer's solution is better: Member States should reform their citizenship laws to bring them in line with liberal and democratic standards.

In a series of judgments, the CJEU has ruled that "Union citizenship is destined to be the fundamental status of citizens of the Member States" – which sounds wonderful, except to those who prefer national patriotism and national destiny. In ways that find echo in Dora's proposals, I have argued that EU citizenship provides rights that are autonomous from and supplementary to those of Member State citizenship – that despite EU citizenship's derivative status it also confers its own independent entitlements and responsibilities.⁸ Yet that article warns against EU citizenship remaining unrespected, unequal, and hollow: comparative examples of citizenship's development demonstrate that debates about citizenship are central to politics and that respect for citizenship rights is uneven and subject to political contestation, which should make us sceptical about claims that an autonomous EU citizenship can be insulated from political pressures. Along similar lines, Rainer's reminder that rights must be generated through democratic institutions that are seen as legitimate finds echo in Daniel Thym's invocation of the hollow hope, wondering how much courts can effectuate social change. Daniel is right to recall that the normative imaginary of the term "citizenship" was an important motivation for many heads of state or government at Maastricht (indeed my book *Creating European Citizens* traces this motivation from the 1940s to the present), but like any story of peoplehood (and like the decisions examined in *The Hollow Hope*) the narrative of EU citizenship provoked counter-narratives, including the Brexit narrative of taking back control.⁹

⁸ Maas, W. (2009), 'Unrespected, Unequal, Hollow?: Contingent Citizenship and Reversible Rights in the European Union', *Columbia Journal of European Law* 15 (2): 265–280.

⁹ Smith, R. M. (2003), *Stories of Peoplehood. The Politics and Morals of Political Membership*. Cambridge: Cambridge University Press.

The Tragedy of Brexit

Hardline Brexiteers portray EU citizenship and free movement as an unalloyed negative: “We must break free of the EU and take back control of our borders” declared a poster unveiled by UKIP leader Nigel Farage during the 2016 referendum campaign, and Farage subsequently emphasised that “the main reason above all that we voted to leave the European Union is we wanted to get back control of our lives and, in particular, control of our borders because unrestricted free flow of unskilled labour had driven down wages, had made it tough to get a [medical] appointment, to get our kids into the right school.”¹⁰ Blaming EU free movement (rather than successive UK governments implementing austerity measures) for cuts to healthcare and education budgets misrepresented reality, as did the Leave campaign’s infamous bus emblazoned with the promise that leaving the EU would mean £350,000 per week extra spent on the National Health Service, a promise from which Brexiteers quickly backtracked after the vote.

Richard Bellamy suspects that Dora’s proposals are driven by Brexit and the anticipated removal of EU citizenship from British citizens – and indeed she notes that Brexit and the likelihood of a mass deprivation of EU citizenship rights “highlight the need for a reform”: over “one million UK nationals who have activated their fundamental right to freedom of movement and residence will be deprived of their EU rights without their consent.” Although negotiators stress that transitional arrangements should minimise disruption, unfortunately here it is not possible to have one’s cake and eat it too: mass deprivation of EU citizenship following Brexit can be assuaged but not avoided. Otherwise, why not grant full EU citizenship (rather than simply some rights, such as reciprocal free movement) to citizens of Norway and Switzerland, or even states further from the EU?

Dora is right to want to minimise hardship and unnecessary human suffering, but rather than introducing a new category of EU citizens (or enfranchising long-term resident third-country nationals for European Parliament elections, as Dimitris Christopoulos suggests; a suggestion that similarly skirts debates about status and recognition discussed above), a better solution is to increase the content and use of EU citizenship, to encourage what Jules calls “federal solidarity” to continue evolving and progressing. Jules calls full free movement for every European citizen “rather unlikely” – but it is precisely here that EU institutions should focus their energies. To counter Euroscepticism and myths promoted by resurgent nationalist movements that promise border controls will restore national sovereignty, Europe’s political leaders must work to reinvigorate the European idea by undergirding the legal rights of EU citizenship with concrete social assistance for those who move between Member States, and perhaps for non-movers too. Worries about social dumping and welfare tourism are exaggerated, but introducing pan-European social entitlements such as a European unemployment insurance program financed by EU rather than destination-state funds would reassure publics skittish about the imagined dangers of intra-EU migration.¹¹

Brexit has uncovered and stimulated increased attachment to the EU and the European project more generally, both in the UK (where the likelihood of a second referendum reversing the result of the first continues to grow) and in the rest of the EU. With Jean-Thomas Arrighi I agree that it is too soon to attempt to upend the existing hierarchy by making Member State nationality derivative of EU citizenship and based on residence: as Jean-Thomas notes, comparative examples of centralisation of citizenship usually followed dramatic events, such as the civil war in the United States. EU citizenship’s future depends on *longue durée* sociological processes rather than a top-down legal imposition that would lack legitimacy. The Schuman Declaration famously spoke of “common foundations for economic development as a first step in the federation of Europe,” but Jean Monnet and others realised the need

¹⁰ ‘Nigel Farage feels betrayed by David Davis over open borders to EU migrants after Brexit’, Express, 23 February 2017. Available: <https://www.express.co.uk/news/uk/770912/Nigel-Farage-David-Davis-Brexit-EU-borders-migrants>

¹¹ Maas, W. (2017), ‘Boundaries of Political Community in Europe, the US, and Canada’, *Journal of European Integration* 39 (5): 1–16.

for a sense of shared destiny and shared prosperity. Support for integration was driven by the idea that it would lead to monetary stability, economic expansion, social protection, a higher standard of living and quality of life, economic and social cohesion, and solidarity among the Member States (these were the conclusions of the Spaak committee). Over more than six decades, European integration has indeed made advances on many of these goals. But rather than resting on laurels (or simply reminding Europeans of how bad things used to be), European leaders should strive to revitalise those aims. Inequality, economic instability, insufficient social protection, and other challenges demand attention – and it appears that a strong majority of Europeans favour harmonising social welfare systems, with younger Europeans more in favour of harmonisation than older ones; such public support should lead to strengthened cooperation, such as the European Pillar of Social Rights proclaimed in 2017. Richard is right that the most valued rights are, for the most part, not offered at EU level. But this can be remedied: rather than seeking to disentangle EU citizenship from Member State citizenship, the link should be reinforced by simultaneously strengthening citizenship at both levels.

A Citizenship Maze: How to Cure a Chronic Disease?

Liav Orgad*

European Union (EU) citizenship is in crisis. If the Eurozenship debate, composed of experts on EU citizenship, is analogised to a doctor's diagnosis, the outcome is more extensively polarised than initially thought – a chronic disease, not just a temporary disorder. As I follow the debate, it is no longer clear what the problem is – there seem to be too many, real and imaginary – or how to heal it. Some issues seem to be “genetic,” part of the EU's DNA, yet others resemble a concrete illness that may be cured, so the argument goes, by a “doctor's prescription,” which in law means a legal design.

Dora Kostakopoulou's diagnosis indicates four problems: statelessness, lack of citizenship for children born in a Member State with no *jus soli* rule, third-country nationals who have no due path to ordinary naturalisation, and a mass loss of citizenship as in the case of Brexit. Her concern is with what Jean-Thomas Arrighi calls under-inclusive rules, “whereby a person has a *legitimate* claim to EU citizenship status, but does not have it because of *illegitimate* state practices.” Other authors have added a long list of additional problems. Jean-Thomas Arrighi also reminds us of the other side of the coin – over-inclusive rules whereby persons, who have a less legitimate claim to EU citizenship, still receive it, such as co-ethnics living outside Europe and foreign investors. Jelena Dzankic brings her story – people trapped in a system of different definitions and categories in Member States – and Dimitry Kochenov blames Dora for largely focusing on “imaginary” issues, rather than what he sees as “real” problems.

Having a complex diagnosis, no wonder the reader is lost in a maze even before trying to understand the “solution.” Dora's prescription contains the idea of an autonomous EU citizenship, disentangled from Member States' nationality, to be gained by a “domicile for a period of five years in the territory of the Union.” Her proposed reform has provoked a fierce debate and strong objections on different grounds: theoretical, conceptual, historical, legal, and political. Every author, it seems, has a different prescription – from a reform of nationality laws (Rainer Bauböck), through a full freedom of movement for EU citizens or a “rescue residence” option (Jules Lepoutre), to an individual exercise of constituent power (Oliver Garner), to name just a few examples. The only agreement seems to be that Dora's proposal is somehow “wrong.” All the rest is disputed – twelve experts have fifteen opinions (often radically different). Luckily, Europe is not a patient. Unluckily, this is not merely an academic exercise.

Instrumentalism, Federalisation, Solidarity

Following the same pattern, I want to add – or perhaps reframe – three additional problems to those identified by Dora (and others): instrumentalism, federalisation, and (lack of) solidarity. As for the first, EU citizenship is an *instrumental* status, to the point that one wonders whether it can be considered “citizenship” at all. It has very few rights associated with the status, mainly free mobility rights, no duties, and almost no shared identity (i.e., European demos) or participation for the common good. Christian Joppke rightly observes that Union citizenship has instrumentalism “written on its forehead.”¹ He finds that it resembles a Roman conception of citizenship in which “a citizen is a legal, not political being”; such a conception is a “rights-based and more interest-focused citizenship.” EU citizenship is “the avant-garde of ‘citizenship lite’, exclusively about rights with no complementary duties whatsoever, decoupled from even the thinnest of identities.” While this may be an advantage – it

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¹ Joppke, C. (2018, forthcoming), ‘The instrumental turn of citizenship’, *Journal of Ethnic and Migration Studies*. Available: <https://doi.org/10.1080/1369183X.2018.1440484>.

emancipates citizenship from its “sacred” meaning – it undermines solidarity and leads to some of the problems identified in this debate. Member States simply treat Union citizenship for what it is – an instrument for promoting their interests (e.g., selling citizenship or granting it for co-ethnics abroad).

The second problem is *federalisation*. With the establishment of Union citizenship by the TEU in 1992, most people saw EU citizenship as a “purely decorative and symbolic institution,”² as Dora mentioned in her ELJ article, an instrument to facilitate labour mobility and promote economic interests; in spite of these assumptions, EU citizenship has grown to be a different institution. First, the EU has adopted several directives that have turned national citizenship to a weaker concept. In particular, the Directive concerning the status of third-country nationals who are long-term residents (2003/109/EC, 2003) has created a status similar to citizenship and made the distinction between Union citizens and long-term residents thin. It means that “citizenship” rights are mostly granted to long-term residents and primarily governed by EU law. Second, European courts have narrowed Member States' power on nationality issues. The ECJ has ruled that admission to citizenship and citizenship deprivation are subject to European law; e.g., measures of integration can only be lawful if they are proportional and suitable to facilitate integration, not as a means to filter out people.³ The submission of nationality rules for the approval of justices in Luxembourg was not originally foreseen.

Precisely because EU citizenship derives from national citizenship, one could expect that Member States would exercise sovereign powers according to *mutual solidarity*. The political reality, however, is quite the opposite. First, naturalisation policies in Member States are based on national interests and by and large do not consider the interests of other Member States or a “European interest,” although such decisions affect all Member States and Europe as a whole. States use naturalisation policies as a means to overcome economic crisis (Malta, Cyprus) and prioritise ethnic diaspora outside Europe (Italy, Greece, Hungary, Romania, Spain). The dissimilarity between Member States' policies also means that a person wishing to become European can be naturalised in a more permissive state, for instance Sweden, and then resettle in a state with a stricter regime, for instance Denmark. Second, although admission policies are separate from citizenship decisions, they are likely to affect other Member States since the regulation of territorial admission pre-selects those who later may become citizens, and there is a link between the two (especially in countries that apply the principle of *jus soli*).

These “problems” are quite different than the ones identified in the debate in the sense that they are not merely about individual human rights violations, caused by EU citizenship regimes, but rather bring the points of view of Member States. Searching for a solution, I believe, is not only about human rights and ethics but also about the political interests of states. A solution is thus a political necessity.

Toward EU Citizenship Directive?

While I do not claim to have solutions, I want to offer another idea, which, in spite of its low political feasibility (e.g., it requires a Treaty amendment), is worth considering – an *EU Directive on Citizenship*. It can set up three issues: Member States may agree on common rules, regulating areas that will either be a shared core European policy or be left to the sovereign powers (do's and don'ts). For instance, they may agree that selling citizenship is impossible without genuine links to a Member State, or that the means for evaluating integration can vary among states. In other words, states can agree on certain issues, as a minimum; agree to disagree on other issues; and agree on procedures that must follow on some issues so that a substantive outcome will be respected even without agreement if certain procedures are taken. To be clear, a directive on citizenship does not mean a uniform EU policy but merely a partial harmonisation (“a more uniform legislation on acquisition and loss of their citizenship,” to use Eva Ersbøll's words). At the same time, it may clarify legal boundaries, as the current situation leaves states

² Kostakopoulou, D. (2007), ‘European Union Citizenship: Writing the Future’, *European Law Journal* 13 (5): 623–646.

³ Case C-578/08, *Rhimou Chakroun v Minister van Buitenlandse Zaken* [2010] ECR I-01839, paras 42–60.

with no clear rules of how to regulate citizenship without being condemned for human rights violation, and creates a legal lacuna that is filled out by European courts.

An intermediate solution, given the difficulty to reach an agreement among Member States, can be multilateral agreements among (some) Member States in light of the attempt of the Nordic states to harmonise citizenship rules in the 1940s, as Eva explains. Take residency requirements, for example. If Germany requires eight years' residence for ordinary naturalisation, a multilateral agreement between Germany and other Member States (say, Austria, Italy, and The Netherlands) can recognise the fulfilment of the residency requirement inasmuch the applicant has lived eight years in these states, even if not eight years entirely in Germany. Such an idea can solve part of the problem – e.g., Jelena's story – and, in the long run, may politically incentivise other Member States to join the agreement for their benefit. This approach would enable noncitizens to get access to citizenship by demonstrating “genuine links” to different Member States, which, although they may not be sufficient for national citizenship in one state, can grant access to citizenship by showing sufficient genuine links as a whole. Such a direction will not harmonise EU citizenship law at once but (possibly) in stages.

Dora's kickoff should be welcomed as a reflection on how to correct the deficits of EU citizenship law. Her analysis is motivated by Brexit. It's a “good cause,” as Dimitris Christopoulos recognises, yet full of particular characteristics that make it a wrong paradigmatic case to reform EU citizenship, as Daniel Thym and Richard Bellamy rightly indicate. Brexit is just a symptom of a much deeper illness. Instead of reforming EU citizenship law to solve Brexit, the effort should be on the root problems that led to Brexit. Paradoxically, Brexit can be Europe's constitutional moment to reform its citizenship regimes.

EU Citizenship Enigma Variations, Mushrooming Historical Time and Emancipation

Dora Kostakopoulou*

The Eurozenship debate has generated a wealth of ideas and interesting proposals. Both Willem and Liav have summarised them wonderfully and thus there is little to be gained from reiterating the contributors' various positions here. What I would like to do in this brief rejoinder is to consider, and reflect on, four main themes that have emerged in the critiques of my Eurozenship proposal.

Mushroom reasoning or mushrooming historico-political time?

I read the contributions to the debate during a brief trip to Frankfurt (Oder) a couple of weeks ago. Walking along the bridge connecting two cities and two countries (i.e., Germany and Poland), being on the 'border' without being stopped by a border guard and walking leisurely without seeing either a wall or a fence or barbed wire sharpens one's view of historical time. Reinhart Koselleck's once wrote "there is no history which could be constituted independently of the experiences and expectations of active human agents."¹ Who could have expected the human exodus from DDR and the reunification of Germany? Had anyone predicted the collapse of Tito's Yugoslavia – a past mentioned in Jelena's introduction? Had Mr Gove and Mr Johnson, key architects of the British 'Leave the EU' campaign, predicted the outcome of the EU membership referendum of 23 June 2016? The answer to the above questions is a negative one.

The historico-political field is full of 'mushrooms emerging from the earth' unexpectedly. But it is also cultivated and nurtured by the expectations, struggles, ideas for reform and actions of human beings. 'Mushroom reasoning', which Richard is so keen to criticise, necessarily accompanies 'mushrooming politics' and, thus, 'mushrooming history'. At the same time, the latter cannot be divorced from ordinary human beings' convictions that the suffering inflicted on them by arbitrary will, power, wealth, prejudice, dogma or ideology is unnecessary and that their future does not have to resemble the present or the past. The European unification process has solidified this realisation.

Seeing like a state²?

Not everything begins with states. Richard sees the EU "as the creature of the contracting states," a system that "operates through their sovereign systems" and as an order based on reciprocity. I do not share such views. I find it almost impossible to bracket the role of social mobilisation and collective action (e.g., proto-federalist and federalist movements, European unification initiatives, peace movements, anti-fascist mobilisation and so on), non-state actors and of what I call subversive memories of wars, atrocities and destruction of life in the European integration process. Nor do I subscribe to the view that the EU legal order is based on reciprocity, as Richard states, or on pooled sovereignty, as Rainer argues, – the Court of Justice has categorically denied this throughout the decades.

In addition, I do not agree with Richard's contention that "the related and most valued rights [of EU Citizenship] are, for the most part, not rights that are offered by EU institutions – the notable exception being the right to vote in European Parliament elections – but rights that are upheld by the constituent states." EU citizenship rights are upheld by the Member States precisely because they are provided by EU institutions and enforcement proceedings will follow if the Member States breach their obligations

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¹ Koselleck, R. (1983), *Futures, Past*, 256. New York: Columbia University Press.

² I borrowed this from Scott, C. J. (1998), *Seeing Like a State*. New Haven: Yale University Press.

under EU law. Dimitris has eloquently expressed this. He has argued that a republican democratic account would support the grant of voting rights at EP elections to all members of ‘the public’, irrespective of their nationality. Oliver fully shares this point of view and has provided good justifications for this. Democracy is closer to a republican Europe of peoples rather than a republican Europe of states.

Rainer argues that this can be achieved by national citizenship reform and greater inclusivity in national arenas. No one would object to this; there is no disagreement among the participants here. Jean-Thomas’s contribution complements this position by being explicit on the desirable national citizenship reforms; namely, expanding municipal franchise to all residents in all Member States and limiting the Member States’ power to “super-or-down size the European citizenry” in violation of EU law. However, the issue at stake is that, given that such reforms at national level have not taken place for years and seem unlikely to take place in the near future, why should we not consider making EU citizenship more inclusive and responsive to the needs of Europe’s residents?

Rainer’s response is that this cannot be done because the “two levels of government are constitutionally intertwined.” But why should this constitutional fact lead us to believe that citizenship at one level must be derived exclusively from citizenship at the other level? After all, we know that such a derivation is not prescribed in a deterministic way; it is a ‘historically preferred’ derivation, that is, it was politically agreed in the 1960s with respect to the beneficiaries of free movement and residence. It has been sedimented in law since then. But political choices are changeable and ‘contingent combinations’ are alterable. Of course, the Member States would object that the proposed disentanglement of citizenships would interfere with their doctrines of national sovereignty and their juridico-political choices, as Daniel and Eva wonderfully show with respect to Denmark and Germany, respectively, and Jelena remarks with respect to divergent definitions of residence. In response, Jules notes the didactic role of history in his conclusion; there is a historical precedent and therefore “it is worth giving an autonomous EU citizenship a try” (Jules Lepoutre) or welcoming “a leap of faith” (Oliver Garner).

Either national citizenship or Eurozenship?

My argument for Eurozenship did not, and could not, map out all possible reforms which could be taken at national or EU levels. Nor was my intention to argue that a reconstruction of EU citizenship along the lines I proposed would solve all problems. The contributors to this debate outlined a number of reforms, while Willem makes a convincing case for the simultaneous strengthening of citizenship at both levels. I fully agree with Willem and have consistently defended reforms in the material scope of EU citizenship and a social citizenship in the EU for more than two decades. In this forum I only reflected on one question: ‘who should be a citizen of the European Union?’. I did not focus on the rights EU citizens ought to have or how national citizenship could become less restrictive. I agree with both Willem and Liav that a reconstruction of EU citizenship would be inherently productive if it gained support from a wide range of actors, gave expression to real ties of social solidarity and changed power imbalances and ideological interests. EU citizenship reform is not a matter of ‘either/or’ in the same way that one cannot make a convincing case about democratic deficits in the EU without addressing democratic deficits in the Member States and their role in generating democratic deficits in the EU.

On institutional change, Brexit and emancipation

It is true that the character, pace and direction of institutional change in this domain will not be determined by our contributions to this debate. Such an expectation would not be realistic. And although the intellectual temper of the present era counsels against radicalism and our life and mind are saturated with the Brexit discourse and politics, we should not forget that democracy at all levels is essentially about the quality of human experience and the richness of associated life. Brexit has lessened the quality

of both and thus it can hardly function as a compass for future reforms. Unlike Liav, I am rather hesitant to conclude that it can serve 'Europe's constitutional moment to reform its citizenship regimes.' Brexit has highlighted the mistakes in constructing an equivalence among demagoguery, demography (that is, the aggregation of votes) and democracy and in dividing deeply communities and societies at all levels of governance. The spirit of emancipated, internationalist democracy and human solidarity is steady blowing and must be galvanised for it is this spirit that turns walls of all sorts, which narrow morality and human empathy, into bridges, like the bridge I walked on a couple of weeks ago in Frankfurt (Oder).

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