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## Free movement and the emergence of European social citizenship

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Keywords: social citizenship, freedom of movement, European Court of Justice, European citizenship

Can we observe the emergence of an independent European social citizenship, or does (still) the economic logic of EU integration prevail as well as the national anchorage of the concept? This article offers a well-founded empirical investigation into this topical issue. It characterizes personal free movement as central to EU citizenship and analyzes the complete jurisdiction of the EU on Freedom of Movement of social assistance, carving out firstly to what extent social citizenship elements are dissolved from their national basis and redeployed at EU-level, and secondly whether social citizenship elements are detached of the economic basis rooted in the founding treaties of EU integration. It argues that, in the individual dimension of social citizenship partial denationalizing effects are observable that do not give way, however, to a clear post-national construction of a true social citizenship and which come at the cost of the collective dimension of social citizenship.

### Personenfreizügigkeit und die Herausbildung europäischer sozialer Bürgerschaft

Schlüsselwörter: soziale Bürgerschaft, Personenfreizügigkeit, Europäischer Gerichtshof, europäische Bürgerschaft

Können wir die Herausbildung einer unabhängigen Europäischen sozialen Bürgerschaft beobachten, oder überwiegt (noch immer) die ökonomische Logik der Europäischen Integration und die nationale Verankerung des Konzeptes? Dieser Beitrag liefert eine fundierte empirische Untersuchung zu diesem Themenkomplex. Er charakterisiert Personenfreizügigkeit als zentral für Europäische Staatsbürgerschaft und analysiert die komplette Rechtsprechung der EU betreffend Personenfreizügigkeit und Sozialhilfe. Dabei wird erstens herausgearbeitet, in welchem Ausmaß Elemente sozialer Bürgerschaft losgelöst von der auf die Gründungsverträge zurückgehenden ökonomischen Basis der EU-Integration existieren. Es wird argumentiert, dass in der individuellen Dimension sozialer Bürgerschaft denationalisierende Effekte beobachtbar sind. Diese eröffnen jedoch nicht den Raum für eine klare postnationale Konstruktion von umfassender sozialer Bürgerschaft, sondern materialisieren sich zulasten der kollektiven Dimension sozialer Bürgerschaft.

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## 1. EU citizenship and its contested consequences for the EU's social dimension<sup>1</sup>

Citizenship is a concept that refers to the relationship between a person and the political system in whose realm of authority the person lives. It consists of at least four dimensions, namely membership, participation, identity and rights (Olsen 2008; Sassen 2009) and should be understood as a dynamic concept that describes a “social practice” (Benhabib 1999, 720ff.) instead of being restricted, rather statically, to formal assignment of membership rights. During the 20<sup>th</sup> century, we have become accustomed to the unique historical situation in which these dimensions were bundled together in a close package that we are used to call *national citizenship*. Yet, this coincidental, only seemingly stable package has become under pressure, not least in the remarkable changing context of the European Union (EU).

The fluidity of the citizenship concept has become most visible through the inclusion of the concept of *European citizenship* into the Maastricht Treaty (1993), ever since the literature on European citizenship exploded (Bauböck 2007; Shaw 1997; Weale 2005; Maas 2007; Wiener 1998). Although European citizenship is contingent upon national citizenship in one of the member states, it is a status that is not grounded in a prior belonging to a particular state, if it is an EU member state. This changing context has led observers conclude that European integration has unbundled citizenship to such a degree that we can detect a partial “disaggregation of citizenship rights” (Benhabib 2007, 457), or even “a redeployment of specific components of citizenship” (Sassen 2009, 5), but the intensity and the direction of this unbundling remains contested and needs further specification.

The area of social citizenship rights has been a particularly crucial battle ground and can therefore be used to better understand the processes of the dynamic citizenship contours in the EU. Social citizenship rights comprises both, individual welfare entitlements (e.g. education, employment, pensions), and collective rights (e.g. to form trade unions, to make collective agreements) and are to be found in all European welfare states, though in different configurations (Koopmans et al. 2005), hereby establishing a basis of what is called the European Social Model (Lenaerts/Heremans 2006). In the last years, one can observe a rise of (above all legal) scholarship on European social citizenship (Carlier/Guild 2006; Conant 2006; de Búrca/de Witte 2005; Hailbronner 2006), a discussion which was stimulated by the substantial deepening of European integration in the wake of the internal market programme (Giubboni 2006; Joerges/Rödl 2008), but which, as we demonstrate here, has roots that date back to the early years of European integration.

However, although it seems undisputed that much is going on with social citizenship, there remain contestations about the nature of the changes. These contestations, which are usually based on selected cases of the European Court of Justice (ECJ) on the personal right to freedom of movement, have found new momentum through the intervention of Caporaso and Tarrow on ‘Polanyi in Brussels’ (Caporaso/Tarrow 2008, 2009). In the light of increasing free movement, they argue that “the lines between market and social policy [...] are increasingly blurred” (Caporaso/Tarrow 2008, 19) and that it is particularly the most vulnerable members of society who profit from this development. Hereby, one could gain the impression that the EU was finally ready to tackle one of the key structural deficiencies of the European integration process, namely the de-coupling of economic integration from social integration (Scharpf 2002, 646). For others, however, the EU seems to remain a “market without states” (Joerges 1991) because citizenship rights continue to be rather a sub-means of the EU's economic logic and thus establish merely “equal opportunities for commodification” (Streeck 2000, 253) instead of

issuing a citizenship status for individuals vis-à-vis the market. Menéndez for instance claims that the expansion of freedom of movement rights in “a ‘cosmopolitan’ direction” (Menéndez 2009, 31) have come at the cost of solidarity norms of the European welfare states by favouring the mobile, better offs to the disadvantage of the worst offs of European societies. Therefore, in an interesting discussion of Caporaso and Tarrow, Höppner and Schäfer suggest that the alleged expansion of social citizenship rights might at least as likely trigger welfare state-retrenchment rather than being a “nucleus of an emerging European welfare state” (Höppner/Schäfer 2010, 23).

In this article, we want to contribute to clarifying this dispute by adding new empirical details to it. Hence, we empirically analyse the central citizenship practice of European people, namely their *free movement across borders*. Besides voting members of the European Parliament, it is particularly the freedom of movement (FoM) through which European people act as European citizens, and through which they actively engage in re-shaping the dimensions of citizenship. By making use of FoM, however, European people are often caught in norm collisions of different national and European policy legislation, what explains that there is a significant body of case law from the ECJ on FoM. Therefore, in this article, we understand *litigation* as another important element of a European citizenship practice so that, by analysing the complete jurisdiction on FoM, we gain an empirically nuanced picture about the development and the nature of social citizenship rights in the EU.

## 2. Free movement of persons and European citizenship

The inclusion of European citizenship in the Maastricht Treaty marks a significant hallmark in making European citizenship explicit. However, the gradual development of citizenship elements date back to the beginning of the integration process, without having necessarily been explicitly associated to the citizenship concept (similar Olsen 2008; Maas 2005). The founding treaties, which addressed individuals merely as workers and not as citizens, left the door open for a personal dimension of European integration by offering the European people space for citizenship practices. People tried to expand their status as workers from being treated as mere economic production factors in a European-wide labour market towards full personhood with, in particular, social citizenship rights, hereby initiating an, arguably unintended, dynamic process. Thus, citizenship elements were inscribed into the grammar of European integration from the very beginning, so that European integration included from the outset an element of socialisation that transcends marketization.

In this context, the FoM of persons is the most important provision of the Treaty of Rome that refers to individuals (as *persons* in Art. 3 and as *workers* in Art. 48 seq.), aiming at abolishing obstacles to move across member states for the purpose of employment. Certainly, one can assume that the founding member states restricted the scope of the free movement provision by conceptualising labour mobility as a productive economic factor. Such a perspective maintains that the “labour force only strives for selling their labour at the highest possible price” (Boni 1976, 144), while disregarding other aspects of human life and needs, such as health and family life. However, as was observed almost forty years ago, it was underestimated that FoM bears the potential to become a “fundamental freedom of a self-determined choice of the spatial living and working conditions” (von der Groeben/Mestmäcker 1972, 32, translation by the authors). Consequently, FoM is more than a mere economic activity but should more broadly be understood

as citizenship practice, which, eventually, collided with the relatively restrictive economic fences set up by member states of the founding treaties. Often, these collisions were legally solved through the jurisprudence of the ECJ.

Thus, the nature of the citizenship practices, as applied in this article, is twofold: the usage of the peoples' market right of free movement, and the usage of courts' jurisdiction. People that migrate to another country do not move only in the function as workers, but as full persons with all their social and cultural needs. To the extent that these needs transcend the boundary of the economic sphere, insufficient or lacking regulation became apparent. This is where litigation at the ECJ steps in and why it can be conceptualised as a citizenship practice by understanding it as "a form of individual political participation in supranational venues" (Conant 2006, 77).<sup>2</sup> In trying to define their own set of rights with all legal means, including the judicial path, people were actively engaging in both a gradual decoupling of citizenship rights from the nation-state and a re-arrangement of citizenship components at EU-level. This means that by making use of their economic rights to work in other European countries, European people have been trying to expand their citizenship rights into issue areas beyond the economic logic.

### 3. The jurisdiction on free movement of persons as data source for empirical analysis

In order to better understand the nature and scope of the redeployment of social citizenship components through the citizenship practice of FoM in the EU, we focus our analysis on a hard case, that of social assistance. Social assistance is a consumptive right, based on need, which belongs to the core of any national social welfare system. Therefore, social assistance is a testing case for the development of European social citizenship components, because eligibility to social assistance benefits usually are apart from the economic sphere, whereas social security benefits are directly linked to the employment status. Moreover, given the lacking legal competences for the EU on social assistance, the sheer existence of such case law is in itself interesting.

Our research approach deviates both from the dominating legal and political science scholarship on social citizenship in the EU. The former focuses on some selected (though crucial) cases only (Carlier/Guild 2006; Conant 2006; de Búrca/de Witte 2005; Hailbronner 2006), without justifying their case selection, whereas the latter tend to underestimate the importance of ECJ case law, but rather focus on political legislative developments (Olsen 2008; Maas 2005). Instead, we established a database of the complete jurisdiction of the ECJ on FoM from 1964 to December 31, 2007, that covers both the Court's judgements (= 417) and the opinions of the Advocate Generals (= 367) in order to gain more empirical authority. We analysed these data with a computer-programme for qualitative textual analysis and could, in due course, establish the most important thematical intersections that pointed us to the crucial topics that have been discussed and, thus, guided us to the most important cases. In 27% of all FoM cases, social policy issues were the main concern – and within that domain, 17% of all cases deal with social assistance issues, a proportion that decreased in the post-Maastricht years from about 28% to 13%.

The actual analysis consists of two different steps, a quantitative and a qualitative. In the first step we identified pattern over time in the distribution of cases alongside different variables, such as the *policy area* concerned or the *type of claimant* (individual person, firm or NGO/As-

sociation, out of a EU country, associated third country or non-associated third country) etc. In the second step we conducted a computer-based qualitative textual analysis of the data. By establishing inductively a differentiated coding scheme, 3922 codings, i.e. text passages linked to at least one code, were applied, including frequent use of multiple coding. Using for instance the codes “nationalistic framings” (comprising expressions such as “residence time” or “social integration”), “economic framings” (e.g. “economic necessity”) or “human rights framings” (e.g. “family reunification”) we try to identify how the ECJ frame its reasoning and whether the reasons change over time.

This means that we did not follow a theory-driven approach but rather ‘asked’ the data to guide the coding process. Unlike legal scholars’ focus on certain crucial cases, we were interested in reconstructing the process of how citizenship components were, or were not, evolving through the complete ECJ’s case law on FoM. Nevertheless, for reasons of readability, we will present the data by focusing on characteristic quotes from important cases in order to illustrate the development of the case law.

In the following, a brief historical overview about the FoM legislation is given, before then key results of the qualitative analysis are presented.

#### **4. Legislation on Freedom of Movement**

In the early days of European integration three differentiated European Communities existed, whose provisions concerning FoM were not identical. Art. 69 of the European Coal and Steel Community concerned the abolishment of all hindrances to mobility that are based on nationality for workers in these industries only. The provision of Euratom’s Art. 96 were similar. Art. 48 of the European Economic Community (EEC), however, reached further by obliging the member states to abolish all unequal treatment of any worker of other member states based on nationality, until the end of a transition period (1 July, 1968).

In the years until the end of the transition period in 1968, a number of implementing legal acts were decided (Dahlberg 1968). Interestingly, as soon as legislation started to implement FoM, the treaty’s narrow focus on the worker only was immediately expanded. It was realised that labour mobility, if it is not confined to short-term contracts, also touches upon policy areas beyond labour regulation. Particular the family members of the mobile worker profited from the new freedoms (see particular Regulation 1612/68). It opened the doors for migrants’ family members to schooling and professional educational systems and aimed at stopping unequal treatment in the job placement services.

In the following years, a number of directives followed which fostered FoM by tackling its social policy flank. To name are the revised regulation 1408/71 that fostered the migrant workers’ and her family’s access to social insurance benefits and five directives between 1975 and the mid-1980’s that covered equal pay, improved equality of work conditions, access to social security schemes for employed and self-employed workers, including women. In the run-up to the Maastricht Treaty, a number of directives were introduced that updated the FoM provisions and extended it beyond the focus of workers, i.a. by including students.<sup>3</sup> Recently, in 2004, as a result of the case law and the introduction of the concept of European citizenship into the Maastricht treaty, a new FoM Directive 2004/38 EC was agreed, replacing many different regulations and directives so to establish a common roof.<sup>4</sup>

## 5. The ECJ's social assistance jurisprudence

Social assistance schemes, as we argued above, belong to the core of a state's solidarity system, because they are entirely dependent on societal solidarity and unlinked to preceding payment of social security contributions or social taxes, as is the case with social security benefits. Instead, social assistance is based on the need of the people, which the social bureaucracy identifies through means-tests. Thus, social assistance covers all benefits awarded due to needs. Consequently, European integration has, so far, largely stopped at the borders of the realm of social assistance because migrant workers, as long as they are in employment, are not expected to need social assistance. Moreover, during employment, they contribute to the respective social security scheme and the issue of social security is clearly covered by Community law (Regulation 1408/71). So, one can wonder about the reasons why social assistance has found entrance into the ECJ's litigation at all. An important part of the answer are the citizenship practices of migrant workers who, as individuals with lives beyond their employment situation, were struggling for extending their social citizenship rights beyond the provisions foreseen in the early legislation.

Thus, the Court was confronted with a number of questions concerning social assistance. As legal base in these cases the ECJ usually used Article 7(2) of Regulation 1612/68 on freedom of workers within the Community, where the principle of equality of treatment as regards tax and *social advantages* is regulated. The cases display, in particular, three battlegrounds: One battleground concerns the *material scope* of social rights, i.e. which types of social benefits fall for what reason under Community law, and the second concerns the *personal scope*, i.e. which person is eligible for social assistance benefits and who is not. Finally in several cases the ECJ had to decide on questions concerning social assistance in the *context of education*.

We argue that the ECJ's jurisprudence in these cases points towards the "social embeddedness" (Caporaso/Tarrow 2009, 608 et seq.) of the worker by granting him/her social rights partially detached from the economic logic.

### 5.1 Disputes about the material scope of social assistance under Community law

Social assistance never had a clear treaty base, unlike social security. Therefore, the Court initially had to clarify why, and, if yes, what kind of social assistance benefits are covered by Community law at all. Due to the meagre legal basis, the ECJ referred to the concept of *social advantage* as laid down in Regulation 1612/68, which it interpreted broadly. Moreover, in its FoM ruling, it used the general principle of non-discrimination (and the right to equal treatment, respectively) as gateway for its jurisprudence on social assistance. After the introduction of the *European citizenship* in the Maastricht Treaty, the ECJ, additionally, referred to this new status in order to foster the establishment of individual social rights.

One of the first cases in our database that directly concerns the question of whether social assistance is covered by Community law at all is *Case C-65/81, Reina*. It was brought forward by an Italian couple which, while residing and working in Germany, applied for an interest-free child-birth loan for families with low income that was voluntarily introduced by the Land Baden-Württemberg. The application was refused and the Land argued that such childbirth loans would fall outside the scope of the concept of social advantage, since it is "a measure adopted in the area of political rights, necessarily linked to nationality [...]" (C-65/81, para 14). The Court,



however, did not accept this justification. On the contrary, in its preliminary ruling of 1982, it broadly interpreted the concept of “social advantages”:

*[A]dvantages which that regulation [1612/68, added by authors] extends to workers who are nationals of other member states are all those which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and the extension of which to workers who are nationals of other member states therefore seems suitable to facilitate their mobility within the community. (C-65/81, para. 12)*

By underlining that residence alone would suffice as eligibility criterion for social advantages, without being linked to a concrete contract of employment, the Court made a first, cautious step in unlocking social rights from an economic framing towards personhood. However, in view of its reference to the aspect of worker mobility, the overall economic logic is only stretched, and not abandoned. Furthermore, the Court expressed its conviction that, in the light of the fundamental rule of non-discrimination, the term “social advantage” not only encompasses benefits accorded by virtue of a right but also benefits granted on a discretionary basis (C-65/81, para. 17).

With its broad interpretation of the concept of social advantage, the ECJ continuously extended the reach of those social benefits which were covered by Community law. Another early example gives further evidence of this tendency, i.e. the case C-122/84, *Scrivner and Cole*, which concerned British nationals who applied for Belgian *minimex* (= minimum means of subsistence). Mr. Scrivner worked in Belgium and, after becoming unemployed, received unemployment benefits. These benefits were, for unknown reasons, interrupted and he therefore, unsuccessfully, applied for *minimex*. The Belgian social services department argued that *minimex* would not fall under Community law, because the entitlement of a *minimex* would be independent of any concept of, or reference to, work and would therefore not fall within the ambit of social security. On the contrary, it would be a social assistance measure outside the scope of primary and secondary law (C-122/84, para 11). In its preliminary ruling, the ECJ however made clear that *minimex* is to be understood as a social advantage in the meaning of Regulation 1612/68 and therefore falls under Community jurisdiction and “may not be denied to a migrant worker who is a national of another member state and is resident within the territory of the state paying the benefit, nor to his family” (C-122/84, para. 24).

In a further Case on *minimex* (C-249/83, *Hoeckx*), the Court referred to the fundamental right to equality of treatment and did not allow for additional requirements in order to receive the social advantage. Regarding the Belgian regulation that nationals of member states are entitled to *minimax*, provided that they have actually resided in Belgium for at least five years immediately preceding the application, the Court stressed:

*The Residence requirement is an additional condition imposed on workers who are nationals of a member state but not national workers. It therefore constitutes a clear case of discrimination on the basis of the nationality of workers. (C-249/83, para. 24)*

Interestingly, the case law that was established by these (and other) rulings seemed to have settled the issue for some time. Not until 2002, the question whether social rights are to be restricted by the condition of a habitual residence in the host state was brought to Court, i.e. well after the

introduction of European citizenship. This case (C-138/02 Collins) concerned the problem of possible social tourism that would potentially occur if any EU citizen was given the right to social entitlements in any EU member state and therefore touches the core of social assistance litigation. Mr. Collins, a person with US and Irish nationality, moved to England in 1998 in order to find work in the social service sector. For the time of job-seeking Mr. Collins applied for a jobseeker's allowance. The British authority refused this grant, arguing that he did not habitually reside in the UK before for some time. In the proceeding, the UK Government, defending the refusal, argued that

*the eligibility criteria adopted for the allowance at issue represent a proportionate and hence permissible method of ensuring that there is a real link between the claimant and the geographic employment market. (C-138/02, para. 47)*

The Court was confronted with the question, whether this refusal was an example of indirect discrimination for reasons of nationality, because UK citizens did not have to prove habitual residence. It reacted in a nuanced way: On the one hand, it stressed that

*[c]itizenship of the Union is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for. (C-138/02, para. 61)*

For this reason, the Court made it clear that a residence requirement is potentially indirectly discriminating for migrant workers because this condition can more easily be met by UK nationals. However, the Court also argues that

*it is legitimate for the national legislature to wish to ensure that there is a genuine link between an applicant for an allowance in the nature of a social advantage within the meaning of Article 7(2) of Regulation No 1612/68 and the geographic employment market in question. (C-138/02, para. 67)*

It thus followed partially the UK Government's position, without, however, supporting it without reservations:

*[W]hile a residence requirement is, in principle, appropriate for the purpose of ensuring such a connection, if it is to be proportionate it cannot go beyond what is necessary in order to attain that objective. More specifically, its application by the national authorities must rest on clear criteria known in advance and provision must be made for the possibility of a means of redress of a judicial nature. (C-138/02, para. 72)*

Yet another case shows how nuanced the ECJ is in granting social assistance rights via Community law, without being disrespectful of national social legislation. In Case C-456/02, *Trojani*, which was decided on September 7, 2004, a French national moved to Belgium and found residence at the Salvation Army in Brussels, for which he worked in return for board and lodging. Mr. Trojani then applied for the Belgium *minimex* which was refused to him because he was no Belgium citizen and because he does not fall under Regulation 1612/68, i.e. that he does not



count as migrant worker, a status which would have entitled him to *minimex*. What the ECJ had to decide in this case was essentially whether *European citizenship* has to be interpreted that extensively as to provide all EU citizens that made use of their right to FoM and residence social rights in the host states. Thus again, the problem of social tourism was at bay. In its ruling, the Court stressed “that the right to reside in the territory of the Member States is conferred directly on every citizen of the Union by Article 18(1) EC” (C-456/02, para. 31).

The ECJ continued, however, that

*Member States can require of the nationals of a Member State who wish to enjoy the right to reside within their territory that they [...] have sufficient resources to avoid becoming a burden on the social assistance system of that State during their period of residence. (C-456/02, para. 33)*

As it happens that Mr. Trojani not only relied on his status as EU citizen, but that he was in possession of a temporal resident permit, he thus gained the status of a legally residing EU citizen and was entitled to benefit from the prohibition of discrimination for reasons of nationality as long as she/he is lawfully resident. The ECJ continued:

*It should be added that it remains open to the host Member State to take the view that a national of another Member State who has recourse to social assistance no longer fulfils the conditions of his right of residence. In such a case the host Member State may, within the limits imposed by Community law, take a measure to remove him. However, recourse to the social assistance system by a citizen of the Union may not automatically entail such a measure. (C-456/02, para. 45)*

The *Trojani-Case* reveals a nuanced argumentation with regard to social assistance and equal treatment, which will certainly cause more subsequent litigation. On the one hand, member states are allowed to apply the condition that sufficient resources are required by a non-national wanting to reside in their respective territory. However, once even a temporary residence permit is issued, an EU citizen gains access to social assistance by application of the principle of non-discrimination. The Court’s position appears reasonable: as long as there is no genuine European social system with comparable standards, a certain link to the host society must remain, hereby delineating the scope of European social citizenship.

## **5.2 Disputes about the personal scope of social assistance under Community law**

Since the right to migrate with the family is undisputed (as stipulated in Regulation 1612/68), it comes as no surprise that several cases in the context of social assistance deal with family members of a migrant worker.

The first case in this group (C-32/75, *Cristini*) concerns an Italian woman with her children, whose husband, who was the migrant worker, had died. Because the family sought unsuccessfully to receive a reduction card issued by the French railway for needy French families, they claimed that they were discriminated by reason of nationality. The French railway federation argued “that the advantages thus prescribed are exclusively those attaching to the status of worker since they are connected with the contract of employment itself” (C-32/75, para. 10).

For that reason, a reduction card could only be issued to the migrant worker directly. But the Court did not accept this argument and clearly states in its ruling that the regulation 1612/68 covers also the family members of a migrant worker, even after he has deceased.<sup>5</sup> The Court applied a teleological method of legal justification by explaining this opinion in the following manner:

*If the widow and infant children of a national of the Member State in question are entitled to such cards provided that the request had been made by the father before his death, the same must apply where the deceased father was a migrant worker and a national of another member state. It would be contrary to the purpose and the spirit of the Community rules on freedom of movement for workers to deprive the survivors of such a benefit following death of the worker whilst granting the same benefit to the survivors of a national. (C-32/75, para. 15 & 16)*

Another case, *C-157/84, Frascogna*, is interesting in that it clarified that also family members in the ascending line fall under Community law, if a child of them possesses the status of a worker in the Community sense. In this case, an Italian widow, who lived at her son's in France, applied for a French old age allowance, which aims at supporting needy pensioners. The application was refused by the responsible French authorities for reasons of insufficient residence time in France. The ECJ, however, characterised this benefit as social advantage and ruled that a requirement for residence time violated the principle of equality of treatment, if such a requirement was not laid down with respect to citizens of that state, too (*C-157/84*, para. 25). It is noteworthy that in this case, hereby reinforcing the ruling of the *Reina-Case*, it becomes overly clear that eligibility for social advantages is given to family members of a migrant worker due to the latter's status as a worker in the Community sense, rather than to the concrete employment situation.

Summing up, family members possess social rights under Community law as long as there is a direct connection to the migrant worker. But the granting of these rights is broad enough as to capture diverse instances of a normal family life from birth to death, and they do not lose validity even after the migrant worker's death.

### **5.3 Social assistance in the context of educational rights**

Our analysis revealed that many important decisions concerning social assistance were decided in cases that concern aspects of study and educational finance.

Educational policy in the ECJ's jurisdiction began to coincide with social assistance with the *Lair-Case C-39/86*. The case concerned a French national, Mrs. Lair, who has been resident in Germany, where she used to work as a bank clerk. After alternate periods of unemployment and retraining, interspersed with brief periods of employment, she started to study languages and literature at the University of Hannover. The University, however, refused to award her a maintenance and training grant for the pursuit of her university studies (*C-39/86*, para. 1 & 2). In its preliminary ruling of 1988, the ECJ pursued its already established strategy of broadly interpreting the concept of social advantages, as laid down in Regulation 1612/68, and specified that grants for educational maintenance were to be understood as social advantage in the sense of that Regulation. It concluded

*that a worker who is a national of another Member State and has exercised his right as such to freedom of movement is entitled in the same way as national workers to all the advantages available to such workers for improving their professional qualifications and promoting their social advancement. (C-39/86, para. 22).*

Using the teleological approach of looking for the spirit and purpose of a rule, instead of interpreting it strictly literally, the ECJ referred to the preamble of Regulation 1612/68, where the fundamental goals of improved living conditions of migrant workers and the promotion of their social advancement had been established. However, although these aspects clearly go beyond a strict economic logic of worker mobility, the Court did not abandon this logic completely and stressed, instead,

*that a student who is a national of another Member State may claim such a grant for university training only in his capacity as a worker within the meaning of Article 48 of the EEC Treaty and Regulation No 1612/68. (C- 39/86, para. 41)*

Moreover, the Court clarified that, in order to be eligible to a benefit awarded for maintenance and training, there must be a relationship between the purpose of the studies and the previous occupational activity of the worker (C-39/86, para. 37).<sup>6</sup> The ECJ made also clear that the *right to financial support for educational maintenance* is only entitled to *migrant workers*, while *Community nationals as such* may only claim *financial support for educational access* (C-39/86, para. 16 et seq.). This basic distinction was upheld by the Court for more than a decade.

Disputes concerning educational support did not only arise with regard to migrant workers, but with regard to their children as well. From a social citizenship rights perspective, the ECJ's rhetorical link of education and access to maintenance grants for the children of migrant workers, by using the sociological argument of *social integration*, is of particular interest, because the Court hereby left the path of economic framing of FoM to a considerable degree. In Case C-389/87, *Echternach and Moritz*, the Court made it explicit that children of migrant workers "must be eligible for study assistance from the State in order to make it possible for them to *achieve integration in the society of the host country*" (C-389/87, para. 35, emphasis added).

This reasoning was reinforced in subsequent rulings, even in instances where the child in question did not pursue her/his study in the parent's host country, e.g. in the *Case C-308/89, DiLeo*, which concerned the daughter of an Italian migrant worker who has been employed for the past 25 years in the Federal Republic of Germany. The daughter received her primary and secondary education in Germany, where she also has her principal residence. In view of the *numerus clausus* applied in German medical faculties, she enrolled to study medicine at the University of Sienna in Italy and was therefore refused the educational grant under the German BAFöG (C-308/89, para. 4). The ECJ stressed that

*[i]t must also be borne in mind that the aim of Regulation No 1612/68, namely freedom of movement for workers, requires, for such freedom to be guaranteed in compliance with the principles of liberty and dignity, the best possible conditions for the integration of the Community worker's family in the society of the host country. If such integration is to be successful, it is essential for the child of a Community worker who resides with his family in the host Member State to have the opportunity to choose a course under the same conditions as a child of a national of that State. (C-308/89, DiLeo, para. 13)*

Interestingly, the Court not only used the concept of social integration in the host society, but also highlighted specific conditions of how freedom of movement has to be realized, namely “in compliance with the principles of liberty and dignity”. These fundamental principles are protected in international and regional human rights treaties, and laid down in the preamble of Regulation 1612/68. This is a clear indication that FoM has not only been interpreted by the ECJ in view of promoting the aim of market integration, but also to embrace other aspects, such as the social rights of workers and their families.

In recent years, the development of education rights, and their characterisation as social rather than economic rights, arguably accelerated due to the ECJ’s linkage of FoM provisions with the concept of *European citizenship*. As a consequence, the long-lasting doctrine, which distinguished between migrant workers and Community nationals as such (introduced in the *Lair Case*, see above), was significantly revised.

The leading case that gives evidence to this departure from the established doctrine is Case C-184/99, *Grzelczyk*, concerning a French national studying in Belgium. Having previously worked in order to finance his studies, he sought financial assistance for his last year of study and applied for *minimex*. His application was denied, because his student status prevented him from being regarded as a worker. In its ruling of 2001, the Court, however, found that it

*is clear [...] that a student of Belgian nationality, though not a worker within the meaning of Regulation No 1612/68, who found himself in exactly the same circumstances as Mr Grzelczyk would satisfy the conditions for obtaining the minimex. The fact that Mr Grzelczyk is not of Belgian nationality is the only bar to its being granted to him. It is not therefore in dispute that the case is one of discrimination solely on the ground of nationality. Within the sphere of application of the Treaty, such discrimination is, in principle, prohibited by Article 6. In the present case, Article 6 must be read in conjunction with the provisions of the Treaty concerning citizenship of the Union in order to determine its sphere of application. Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for. (C-184/99, para. 29 et seq.)*

The judgment was a clear renunciation of the established practice to distinguish between migrant workers and Community nationals as such and was justified by the Court with the introduction of citizenship in the primary Community law (C-184/99, para. 34 & 35). Even though Article 3 of Directive 93/96<sup>7</sup> makes clear that the directive does not establish any right to payment of maintenance grants by the host member state for students who benefit from the right of residence, the ECJ arrived at the conclusion that

*Articles 6 and 8 of the Treaty preclude entitlement to a non-contributory social benefit, such as the minimex, from being made conditional, in the case of nationals of Member States other than the host State where they are legally resident, on their falling within the scope of Regulation No 1612/68 when no such condition applies to nationals of the host Member State. (C-184/99, para. 46)*

The logic of the *Grzelczyk* ruling was confirmed in subsequent decisions by the Court in the field of educational policy (e.g. C-209/03 *Bidar*, C-11/06 *Morgan*).

Summing up, the cases on the intersection of educational policy with social assistance show a development towards social rights which has tremendously accelerated in recent years. It was particularly the rhetoric devise of social integration and the ECJ's linkage of FoM with European citizenship that can be made responsible for the developments. And, as Elspeth Guild observed, "Marshall's argument that social citizenship is closely linked with the development of universal education which is a prerequisite for the extension of the franchise finds an echo here" (Guild 2004, 240).

## 6. Conclusion: the de-nationalization of social citizenship

This article pursued two aims: by reconstructing central aspects of the ECJ's case law on social assistance in the Court's FoM litigation, it was shown that the thin personal dimension of the founding treaties, i.e. as persons as workers, has been sufficiently strong as to become the gate-opener for citizenship practice for European people. Through claiming their rights as persons who move freely, and not only as migrant workers, European citizens contributed to transcend the boundaries of the economic framing of the treaties, testifying a significant degree of socialisation of European integration. Secondly, important components of the formerly purely national social citizenship, such as the increasing eligibility to social assistance and educational participation, have become linked to the person as a European citizen rather than to their nationality.

The empirical evidence has illuminated a gradual de-functionalisation of FoM rights from their economic roots. Almost any person with European citizenship benefit from the rights given by the treaties and secondary law, admittedly within certain limits, as the ECJ tried vigorously to uphold certain possibilities for national restrictions as to protect the financial soundness of national welfare systems against benefit tourism. The results confirm the assumption put forward at the beginning that the inscription of a person-based element into the founding treaties, via FoM provisions, inscribed a social element into the economic grammar of European integration, which was animated by people's rights-claims and furthered by the introduction of European citizenship. FoM rulings indeed socially embed European integration, as claimed by Caporaso and Tarrow (2008). The results do not support Menéndez' claim that the civic turn in the litigation necessarily comes at the cost of the worst-off (Menéndez 2009). Though educational access usually favour a mobile élite, more vulnerable persons (such as unemployed or persons with only temporary residence rights) do profit from access to social assistance schemes as well.

Thus, as is often the case with detailed empirical analysis, the results are differentiated and evade an easy either/or. The emerging transnational social rights establish both "equal opportunities for commodification" (Streeck 2000, 253) as well as for de-commodification by fostering fundamental instead of pure market rights. In doing so, the ECJ encourages social action and contributes to the emergence of a societal basis for a transnational European Welfare Space (Dougan 2009) in which European integration has remained a "market without states" (Joerges 1991), but with citizens that are more than market participants. To some extent, the concept of citizenship has proved to be an institution being inscribed into "the institutions of the welfare state" (Sassen 2009, 8), where citizenship as a formal legal status has increasingly become also a normative project, where equality does not only mean equality of rights but also "substantive equality in social terms" (*ibid.*, 12).

However, there are two important caveats to be made. First of all, it would be over-exaggerating to claim that the ECJ had abandoned economic reasoning for justifying its cases alto-

gether. If it can, it always brings a case back to the EU's economic roots. But incrementally, by making extensive use of the fundamental principle of non-discrimination, the teleological method of interpretation as well as through rhetoric devices such as 'social integration', it gave flesh to the skeletons of European social citizenship. But still, economically active individuals moving across European member states enjoy many of the social advantages in an unrestricted way, whereas for non-economically active citizens it remains harder to benefit from the rights under Community law.

Secondly, the case law on FoM displays a specific rearrangement of social citizenship elements at EU level that focuses on the individual only rather than also taking into consideration of the collective dimension of social citizenship. Indeed, important case law of the ECJ on trade unions and the right to strike (cases Viking C-438/05, Laval C-341/05, Rüffert C-346/06) is severely criticised because the ECJ explicitly underlines the fundamental, quasi-constitutional status of the four (economic) freedoms and, hereby, subordinates the right to collective action to these economic rights (Fischer-Lescano 2010; Joerges/Rödl 2008). This focus on the liberal model of individual social citizenship rights is incomplete in terms of social citizenship; because it merely offers space for liberal citizenship practices rather than for full democratic citizenship practices, which would also require the possibility for collective citizenship practices in order to act as a collective.

Thus, is the cup of European social citizenship rights rather half full or half empty? Citizenship in the EU has not (yet) evolved to a true postnational citizenship (see Wind 2009), meaning that the EU has not (yet) evolved into a key location for citizens' claims for social rights (Sassen 2003, 277 et seq.). The ECJ, although being a central EU organ, does not (and cannot) push forward social legislation and competences. But what it does, through its jurisdiction, is to trigger change in the shape of social citizenship in that it leads to effects of de-nationalization. By this notion, Saskia Sassen refers to "specific transformations inside the national state which directly and indirectly alter specific aspects of the institution of citizenship" (ibid., 278). The case law of the ECJ on FoM is dominated by preliminary rulings, *i.e.* national courts asked for an interpretation of national laws in the light of the EU treaties and re-integrated the ECJ's decision into its national litigation. Hereby, postnational elements are gradually inserted into national citizenship rights, without being streamlined in all EU member states. There has been a continual legal expansion of the status of European citizenship so that it comprises benefits, which in turn may create bonds between individuals and the EU. In this way nationality (belonging) and citizenship (legal status) are gradually becoming dissociated (Nanz 2009, 414 et seq.). The partial de-nationalization of citizenship rights suggests that European and national citizenship are not zero-sum relationships. Instead, through our analysis, a process of boundary-reshaping and a conceptual restructuring of citizenship across Europe has been made visible.

## NOTES

- 1 For helpful comments, we thank particularly Michael Blauberger, Jürgen Neyer and the anonymous referees of the journal.
- 2 This 'bottom-up' conceptualisation of FoM litigation as an expression of citizenship practice does by no means deny the relevance of different approaches on the role of the ECJ in European integration, such as provided *i.a.* by Alter (2009), Conant (2002) or Kelemen (2006). Rather, it offers an alternative to the dominant institutional perspectives.
- 3 Directive 90/364/EEC, Directive 90/365/EEC, and Directive 90/366/EEC.
- 4 European Parliament and Council Directive 2004/38/EC of 29 April, 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation



- (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.
- 5 See also Regulation (EEC) No. 1251/70 of the Commission on the Right of Workers to Remain in the Territory of a Member State after having been employed in that State.
  - 6 See also the following judgements *C-197/86 Brown* and *C-235/87 Matteucci*.
  - 7 Council Directive 93/96/EEC of the Council of 29 October, 1993 on the right of residence for students.

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