# *Reassessing the Uncertain Prospects of Free Movement of Persons: A Third Way between the "Economic' and the "Constitutional' Model*

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## Introduction

The marriage between European citizenship and right to free movement is navigating troubled waters. Nationalist ferments in several parts of the EU threaten the promise of supranational citizenship. Whilst the urge to re-close borders, curtailing free movement rights and 'regaining control' has been a leit-motive in the context of Brexit. The Court of Justice of the European Union (CJEU) over the last few years has scaled back on some of its milestones in the protection of the rights of migrant European citizens.[1] However at the same time, free movement remains, from the perspective of the European citizens, one of the most prized achievements of the process of European integration.[2]

This inconsistent picture prompts to reconsider the relationship that has long sustained hopes for a 'People's Europe'.[3] The relation between European citizenship and free movement has been told in different versions. A constitutional and a market paradigm respectively offer different views of the relative role of citizenship and free movement in the relation. According to the former it is citizenship that has injected a constitutional narrative into previously economic focused free movement rights. According to the latter, it is rather the market rationale underpinning European free movement that has corrupted citizenship in the EU context.

Neither paradigm - this article argues - captures all the nuances of the relationship. And each fails to fully account for the apparent zeniths and nadirs of that relation. The article recuperates a third paradigm that has gone largely unnoticed. It argues that the CJEU, in interpreting the relation between citizenship and free movement, has worked on a pre-existing international law paradigm and has imported from this into EU law an asymmetry between right to leave and right to enter. In doing this on the one hand, it has appropriated to EU free movement the long intellectual pedigree of the right in political philosophy and history. On the other hand, by shoring up the free movement narrative through both market logics and constitutional categories, it has challenged in new ways the tension between individual freedom and sovereignty that underpins the international law right. The result is an enhanced international law paradigm of free movement. This sets both the constitutional and the market models in a new light.

Methodologically, the article relies on a doctrinal journey throughout the asymmetry between right to leave and right to enter to trace elements of the different legal frames informing free movement of EU citizens. Identifying and distinguishing these legal frames yields two sets of implications. A first set concerns the scope and roots of some key notions in EU free movement

[1] Case Dano.
[2] Standard Eurobarometer 86, Autumn 2016.
[3] See Report of the Committee on a People's Europe, 1985.

law. In particular the article analysis sheds light, in this sense, on the prospects of transnational solidarity in the EU, and on the resilience capability of supranational citizenship rights in the context of withdrawal of a Member State. From this perspective the article contributes to, and advances the debate in the literature on European citizenship, particularly its social citizenship strand.[4] A second set of implications concerns the theory of the right to transnational free movement beyond the specific European context. In particular, understanding the legal frames that contribute to govern the right to free movement allows reassessing the distributive consequences of the right. This in turn offers new perspective to communitarian, libertarian and neoliberal understandings of the right. From this second perspective, the article contributes to the international law literature on free movement,[5] by making added conceptual room for the rationales elaborated in that literature. It also contributes to the burgeoning literature on comparative free movement and regional integration.[6] As a reflection, the analysis, whilst focusing on legal frames, ultimately also contributes to set the stage on which political and policy debates on the future of the EU can be articulated.[7]

Whilst some of the rules and tests that the article analyzes are shared between free movement intended as a right of economic actors, and free movement intended as a right of citizens, it is with the latter that this article is centrally concerned. Hence any references to free movement of persons in this article are to be intended, unless otherwise specified, as references to free movement as a right of European citizens. This is because it is when conceived as a general right of citizens, rather than as a right for distinct categories of economic actors, that free movement prompts reflections on the market or constitutional fabric of supranational citizenship. And it is in conjunction with the latter that, by pushing for the framing of comprehensive transnational rights, it poses the strongest challenge to existing balances between individual freedom and sovereignty.

Part I introduces the constitutional and market paradigm of EU free movement of citizens and considers the reading keys they offer for recent turns in the jurisprudence of European citizenship. Part II considers the right to free movement under international law. It traces an asymmetry between right to leave and right to enter in EU law and delineates the EU enhanced international law paradigm of free movement. Part III considers the implications of this novel paradigm for transnational solidarity, for the future of supranational citizenship after Brexit, and for the right to free movement.

## Part I Free Movement of EU Citizens between Market and Constitutional Models. Deranged Citizenship or Failed Promise?

[4] D. Kostakopoulou, D. Kochenov, E. Spaventa, J. Shaw, D. Thym etc.
[5] Nafziger, Chetail, Juss, Aleinikoff, Liss, Goodwin-Gill etc.
[6] Caribbean Integration Law. Oxford Handbook of Citizenship.
[7] See Commission White Paper on the Future of the EU, March 2017.

European citizenship, with its advent in 1992, has changed the scope and the nature of free movement.[8] This has taken place in large part through the work of the Court of Justice of the European Union (CJEU) on this concept. Hindsight on a quarter century of doctrine developed around the notion of European citizenship shows, from one viewpoint, that relevant CJEU case law has traced a descending parabola. For about two decades, the court has relied on European citizenship to expand the right to free movement in several directions - the ascending side of the parabola -. In recent years, however, it has apparently begun, with a few exceptions, to retreat from some of its interpretive achievements, precipitating the sorts of European citizens' free movement rights down a descending curve.

Two main paradigms can be traced in the literature on Union citizenship and free movement, offering different explanations of the relevant relation and its evolution. The first is a constitutional paradigm, according to which the relation is citizenship-led, and it is citizenship that has, or should have, vested European free movement of persons in constitutional garb. The second is a market paradigm, according to which it is rather free movement that has injected its economic rationale into citizenship. Each paradigm tenders different reading keys for the parabola in the citizenship case law. What is the triumph of a deranged citizenship in the market paradigm, is the failure of a momentous promise in the constitutional paradigm.

*The constitutional paradigm*

The constitutional paradigm swings between analytical and normative angles. From an analytical perspective, it finds its origin in the opinions of a number of Advocate Generals. From the famous words of Advocate General Jacobs in Konstantinidis, reminding that 'a Community national who goes to another Member State as a worker or self-employed is not just entitled to pursue his trade or profession, and to enjoy the same living and working conditions, but is entitled to say 'Civis Europaeus sum'';[9] to Advocate General Jarabo Colomer in Petersen who sets the relation between free movement and citizenship in stone by suggesting that with the advent of Union citizenship, 'the free movement of persons becomes the movement of free citizens'.[10] As Jarabo Colomer himself remarks,[11] the change in perspective is of no small consequence. Union citizenship reshapes free movement of persons, sealing a long-standing trend towards the recognition in Europe of a right to free movement for all.[12] At the same time, citizenship

[8] See E Spaventa, 'Seeing the Wood Despite the Trees. On the Scope of Union Citizenship and its Constitutional Effect', CMLR 2008. Also see F Strumia 'Citizenship and Free Movement: European and American Features of a Judicial Formula for Increased Comity', CJEL (2006).

[9] Case C-168/91 Konstantinidis, EU:C:1992:504. Par 46 of Jacobs opinion.

[10] Par 28 of opinion of AG Colomer in Petersen C-228/07. See also AG Cosmas in Wijsenbeek C-378/97; AG Colomer in Baldinger C-386/02. Also see F. De Cecco, 'Fundamental Freedoms, Fundamental Rights and the Scope of Free Movement Law' GLJ (2014), p. 387-88.

[11] Opinion of AG Colomer in Petersen C-228/07.

[12] Thym, The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens, CMLR (2015) at 19-20: citizenship continues an established trend towards a free movement for all persons, that has always transcended purely economic rationales. De Cecco, supra n 10 at 396 and 386-88 (for the

represents a novel tool in the hands of the Court, legitimating heightened judicial scrutiny of both EU institutions actions, and Member States' action, when it comes to free movement.[13]

As Niamh Nic Shuibne forcefully explains, albeit born as a market tool, Union citizenship offers vast uncharted conceptual space.[14] Part of this space has been occupied by scholarly arguments and aspirations. On the one hand, Union citizenship, with its opening to the rights of not economically active migrants, has been seen as the harbinger of transnational solidarity and as a burgeoning supranational social citizenship.[15] While the promise of equality that it enshrines has been described as just Victorian,[16] Union citizenship has grounded much expectation in this sense.

Free movement for non-economically active people was indeed one of the first achievements to which the interpretation of European citizenship on the part of the Court lent itself.[17] Truth to be said this conquer was not a wholly judicial enterprise. European legislation had already expanded the categories of persons entitled to free movement beyond economic actors with three 1990 directives.[18] It was the court however that, from the late 1990s, injected in its case law an urge to strengthen the social character of free movement. Case after case it turned it from the right 'of workers and their families' to improve their living and working conditions and promoting their social advancement,[19] into a transnational guarantee of equal citizenship.[20] The combination of guarantee of non-discrimination on the basis of nationality and provisions on citizenship was central to the court's effort in this sense.[21] In 1998, the Court found for instance that Spanish Maria Martínez Sala was entitled to the same child raising allowance in her country of residence, Germany, to which a German national would have been entitled in her position, regardless of her lack of a formal title of residence in Germany.[22] In Grzelczyck, in 2001, the Court recognized, on a non-discrimination basis, the entitlement of a French student to a Belgian minimum subsistence benefit to help him fend off temporary economic difficulties while studying in Belgium.[23] Also on grounds of non-discrimination on the basis of nationality, the Court found in 2004 that a minimum subsistence allowance could not be denied to Mr. Trojani, French national enrolled in

argument that free movement of persons has been entirely reshaped and has become a fundamental right due to European citizenship).

13 M Dougan, 'The Constitutional Dimension to the Case Law on Union Citizenship' EL rev (2006) at 622 (Union citizenship gives the court a legitimate tool for stricter judicial review of the regulatory choices of the institutions, for instance through application of the principle of proportionality)

14 N. Nic Shuibne, 'The Resilience of EU Market Citizenship' CMLR (2010).

15 S Giubboni ELJ (2007), 368-370. S O'Leary, Solidarity and Citizenship Rights in the Charter of Fundamental Rights of the European Union, in G De Burca ed. EU Law and the Welfare State (2005); G. De Burca 'Towards European Welfare?' in ibid.

16 Dougan 2006 P 622 (as it does not really extend a promise of social equality).

17 See K Hailbronner, 'Union Citizenship and Access to Social Benefits' CMLR (2005).

18 Strumia CJEL 2006. Directive 90/364; Directive 93/96; Directive 90/365.

19 Case 28/83 Forcheri.

20 Strumia (2006) at 717.

21 Ibid.

22 Case C-85/96 Martinez Sala.

23 Case C-184/99 Grzelczyck

a Salvation Army reintegration program in Belgium.[24] At this point, it seemed clear that free movement rights were not intended just for workers and other economic actors. Distinguishing its previous jurisprudence, the Court also clarified that in the wake of European citizenship, both jobseekers and students, albeit arguably at the margins of the class of economically active migrants, were entitled to maintenance support.[25] The building blocks of transnational social citizenship had been laid, in the insignia of the 'degree of financial solidarity' that – as the Court affirmed in Grzelczyck- nationals of the Member States owe one another.

Transnational social citizenship is not the sole conquer of the Court. In a different sense, the Court gradually loosened the relation between citizenship rights and exercise of free movement, through an extensive interpretation of what qualifies as a cross-border situation. As a result, it extended the jurisdiction of Union citizenship to a range of situations that looked more internal than cross-border.[26] Up to the Rottmann ruling in 2010, in which the Court recognized the need to protect citizens from deprivation of European citizens' rights;[27] and the Ruiz Zambrano case in 2011, in which the Court began to scrutinize Member States' legislation interfering with the genuine enjoyment, even on the part of a static national, of the substance of Union citizenship.[28]

This trend has lent support to another strand of the constitutional paradigm, according to which Union citizenship could and should be a vehicle for the protection of fundamental rights. Eleanor Spaventa has argued early that Union citizenship should ground protection from discrimination even in internal situations.[29] Von Bogdandy, for instance, has suggested that the free movement link that traverses unacknowledged the case law on citizenship should be made explicit.[30] And Kochenov has argued for a new role of Union citizenship as a jurisdictional tool, grounding rights protection regardless of cross-border links.[31] The Rottmann and Ruiz Zambrano doctrines have blown force into all these arguments.

The constitutional paradigm faces both conceptual and political critiques. With regard to the former, any constitutionalized vision of supranational citizenship, as well as its effect on free movement, potentially conflicts with the intended nature of the European integration project.[32] The EU is not a federal state, any vagaries of federalism have foundered together with the 2003 constitutional treaty. What survives of that project is at best a judicial coup on the part of the

[24] Case C-456/02 Trojani.
[25] Respectively case C-138/02 Collins and case C-209/03 Bidar. Albeit subject to a genuine attachment test.
[26] See e.g. case C-60/00 Carpenter.
[27] Case C-135/08 Rottmann
[28] Case C-34/09 Ruiz Zambrano.
[29] Spaventa CMLR (2008) n 7.
[30] A. Von Bogdandy, M. Kottmann, C. Antpöhler, J. Dickschen, S. Hentrei, M. Smrkolj, 'Reverse Solange-Protecting the Essence of EU Fundamental Rights against EU Member States', CMLR (2012) 489.
[31] D Kochenov, 'The Citizenship Paradigm' (2013) 15 CYELS 196.
[32] Nicolaidis, The Idea of European Demoicracy.

CJEU.[33] In respect of the latter, a constitutionalized vision of citizenship and free movement exalts welfare tourism preoccupations, as well as nationalist resistances.

*The market paradigm*

The latter critique resonates with some of the concerns exposed through the market paradigm of EU citizens' free movement. The market paradigm is both analytical and evaluative. It considers that the traditional rationale of free movement of persons, a right addressed to economic actors looking for an improvement of their living and working conditions, bears existentially on the prospects of Union citizenship.

Embracers of this paradigm take as an answer what Advocate General Sharpston posed as a question in Ruiz Zambrano: 'Union citizenship is merely the non-economic version of the same generic kind of free movement rights as have long existed for the economically active and for persons of independent means'.[34]

The market paradigm emphasizes the market link even in the case law in which the Court has elaborated a dimension of transnational solidarity.[35] The social side of Union citizenship is grounded in the exercise of market rights, and not in any consciously embraced notion of supranational equality. On the other hand, even whilst lending some support to the non economically active, the main court achievements in the field of citizens' free movement come through the claims of wealthy migrant citizens who do not truly raise questions of solidarity. The case in which the Court recognized direct effect to the right of residence of European citizens prescribed in the Treaties concerned a well-off former migrant worker.[36] Similarly, the case in which the court derived rights of residence for third country national parents from the need to protect European citizen children' rights to free movement concerned a wealthy family of Chinese business owners.[37] The result is a deranged citizenship, bent on free movement imperatives and functional to market strengthening objectives.[38]

Market citizenship lends itself to conceptual and political critiques. Conceptually, any albeit thin notion of transnational solidarity that market citizenship brings about comes at the expense of traditional citizenship and of the ability of the Member States to discharge their social functions.[39] Indeed, citizenship from this perspective results into a push towards the opening of

[33] Hailbronner CMLR 2005.
[34] Case C-34/09 Ruiz Zambrano, Opinion of AG Sharpston.
[35] D Kochenov, A Real European Citizenship.
[36] Baumbast.
[37] Zhu and Chen.
[38] Kochenov, 15-19 in Citizenship Paradigm: market that has become an end in itself. M Everson, GLJ (2014): p.966: at the core of EU citizenship is the economically oriented right to free movement. 967: emphasis is on material circumstances of free movement. p. 968: 'packaging of functional market rights as European citizenship'. Also Everson, 'Legacy of the Market Citizen'.
[39] Scharpf, Economic integration, democracy and the welfare state in 4/1 Journal of European Public Policy (1996) 18, p. 27; Ferrera to some extent; Everson: p. 967: EU citizenship undermines the 'socially cohesive achievements

the national welfare state that risks compromising its very premises.[40] Politically, the interests of transnational market citizens are pitted against those of potentially displaced local workers, whose wages and employment opportunities, as well as traditional protective structures, potentially suffer from novel competition pressures.[41]

*Recent Doctrinal Developments and the Two Paradigms Take*

Recent developments in Union citizenship doctrine feed from one perspective the discontents of the market paradigm, whilst frustrating the expectations of the constitutional one.

The court's engagement with European citizenship has partly gone down a descending curve. With regard to social benefits, the descending curve began with the Brey judgment in 2010. The court was accommodating here, at first sight, towards a German pensioner's claim for a pension supplement in Austria. The court ruled that rejection of a migrant citizen's social assistance claim cannot precede an assessment of the claimant's individual situation and aggregate impact on the host State's welfare system. However, in a dictum, the court opened the door to forthcoming upheavals: nothing prevents a Member State – it suggested – from making grants of benefits subject to a legal residence test. A substantial line of cases built on this dictum in subsequent years. In Dano, the court explicitly outlawed welfare tourism in the EU. It found that two Romanian nationals did not meet the Citizenship Directive requirements for a right to reside in Germany, given that they had never worked and always claimed benefits during their residence there. In Alimanovic and Garcia Nieto, the court qualified its Brey ruling. It found that social assistance claims raised, respectively, by jobseekers and by migrant citizens in the first three months of residence in a host Member State, can be denied even without an individual assessment. What is in the eyes of many a dismantling of European social citizenship reached its zenith with the June 2016 Commission v. UK judgment.[42] The court here endorsed the UK's legal residence test for the grant of social benefits to migrant Union citizens. It held unequivocally that both social assistance and social security claims can be subjected to legal residence requirements, thereby de facto subordinating the provisions of the EU regulation on coordination of social security systems to the requirements of the Citizenship Directive. It thus hardened the conditional character of Union citizens' rights to move and reside, belittling the degree of financial solidarity that it had itself announced years earlier and inflicting a crucial wound to the architecture of supranational social citizenship.

From the market paradigm perspective, recent turns in the case law may signal that deranged citizenship has reached its outer limit. The Court, perhaps under pressure of contemporary political discourses, may have surrendered to the idea that it is time to rebound the nation state and protect its welfare system from the corrosive forces of the market; whilst recognizing that

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of traditional citizenship'. Also quotes to herself in 'A very cosmopolitan citizenship but who pays the price'? in Empowerment and Disempowerment of the European Citizen

[40] Ferrera.

[41] Viking. Brexit debate.

[42] C O'Brien, CMLR; Case C-308/14 Commission v UK.

all we have is an economic free movement right. Not only, an elitist one.[43] From the constitutional paradigm viewpoint, recent turns rather mark the failure of a momentous promise: whilst citizenship enters its 'reactionary phase',[44] free movement rights are left hanging in a moral vacuum.[45] Not to mention that the prospect of bitter withdrawal of the first Member State ever from the EU threatens the entire architecture of supranational citizenship with collapse.[46] Ultimately it is confirmed that Union citizenship is but a misnomer,[47] whether because it is an unfulfilled promise, or whether because it was a deranged project in the first place.

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Neither account of the parabola of European citizens' free movement is entirely satisfactory however. On the one hand neither the market nor the constitutional model fully account for the Court's intermittent deference to Member States' (apparent) interests in its case law. Concerns for Member States interests have gained momentum not only in the case law on social benefits but also in other strands of European citizenship case law. In recent cases concerning derivative rights for family members of migrant citizens, the court has been reluctant to expand the definition of family member and has re-emphasized Member States' discretion in this respect.[48] Similarly, in cases on the composition of names decided from 2010 onwards, the Court has begun to pay closer attention to Member States' justifications for not recognizing names composed according to the rules of other Member States. In relevant cases, it has articulated careful arguments on the need to protect Member States' national identities and their constitutional traditions.[49]

On the other hand, supranational citizenship interests have scored their own wins in the recent revival of the Ruiz Zambrano doctrine. As well as in the recognition, in a recent criminal law judgment, of protection from extradition for European citizens residing in a Member State other than their own.[50] If the recent twist and turns mark the ultimate demise of a deranged citizenship, what explains these apparent outlier cases?

The insufficient explanatory power of existing paradigms of the relation between citizenship and free movement prompts to look further for interpretive keys to that relationship. One such key is offered by international law, under which the EU, after all, constitutes a novel and peculiar legal order.[51] Under international law, the right to move across borders has a long pedigree. As well as a troubled and multi-faceted relation with national citizenship.

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[43] O'Brien.
[44] Spaventa.
[45] O'Brien.
[46] Strumia, Brexiting European Citizenship through the Voice of Others, GLJ 2016.
[47] Menendez, a misnomer that has betrayed its role of upgrading the national socio-democratic state.
[48] Hadj Ahmed; Rahman.
[49] Sayn Wittgenstein; Bogendorff.
[50] Petruhhin.
[51] Van Gend en Loos.

## Part II Free Movement and International Law

### *The Right to Free Movement under International Law*

The human freedom to move across borders has entertained philosophers, political and legal theorists long before the European Union devised for its citizens one of the most sophisticated regimes of free movement in the world.[52] Considered one of the strongest guarantees of human liberty and equality of opportunity, intellectually, the right to free movement has the longest and most varied pedigree.[53] It was hailed as a natural individual liberty by the international law theorists of the 16th and 17th century. And across the centuries its roots have been claimed in the common law, in freedom of expression, and in democratic principles.[54] Legally, as a matter of international law, it has been codified in the 1948 Universal Declaration of Human Rights. Article 13 of the Declaration proclaims that 'everyone has the right to leave any country and to return to his own country'. The UDHR formula has subsequently echoed into a number of regional human rights instruments, as well as in sector-specific conventions.[55]

For the best part of the remaining decades of the 20th century, however, the right to free movement has remained mostly 'in the books'. The United Nations, influenced in part by the Soviet Union, have focused on other classes of rights.[56] And interpretation of the provisions included in the UDHR, the ICCPR and other conventions has long been left to academics and jurists, with no real engagement on the part of governments.[57]

The trend has sensibly changed with the work of the UN Human Rights Committee and in particular in the wake of the Committee's 1999 General Comment 27 on Freedom of Movement. The General Comment has provided a first authoritative interpretation of the right, spelling out its content.

As it emerges clearly from the General Comment, the right to free movement, in its international dimension,[58] is the composition of two halves. It entails a broader right of everyone, regardless of nationality, to leave any country. As well as a narrower right to enter a country, right that is however recognized only to citizens and to persons who can prove some qualified connection to the relevant country.[59]

The right to leave encompasses the right to exit a country for international travel as well as the right to permanently emigrate.[60] It mirrors, on the part of states, into both negative obligations – not to impede the relevant right- and positive ones – to enable its exercise through, for

[52] Jane McAdam.
[53] McAdam, Juss, Nafziger; Kochenov.
[54] Jane McAdam
[55] ECHR Protocol 4. For an overview, Kochenov, Connecticut LJ.
[56] Kochenov
[57] Uppsala and Strasbourg declarations.
[58] The General Comment, as article 12, also refers to freedom of movement within a country.
[59] General Comment. Also formulation of UDHR, ICCPR, Protocol 4.
[60] General Comment 27

instance, the grant of relevant travel documents.[61] The Human Rights Committee has listed state practices that infringe the right to leave in General Comment 27. These include the denial of a passport, restrictions to family members travelling together, or the requirement of an invitation from the state of destination.[62] In the jurisprudence of the Committee based on individual communications, most cases of infringement revolve around direct impediments to the right to leave. The Committee has found, for instance, that the Libyan government had violated article 12(2) of the ICCPR in withholding from the wife and children of a Libyan national in asylum in Switzerland the necessary documents to join him.[63] Similarly Uzbekistan incurred in an infringement when it arrested and detained a national who had travelled to Turkmenistan on business without what the government considered a valid exit visa.[64] The European Court of Human Rights, on its part, has found violations of the corresponding provision of Protocol 4 to the European Convention on Human Rights in cases of blanket denial of a passport to a father failing to make maintenance payments to a former wife;[65] as well as in the case of Bulgaria imposing a ban on foreign travel on a national having been expelled back to Bulgaria from the United States.[66] Beyond the direct impediments that international case law is concerned with, intellectual arguments have targeted the efforts of rich states to prompt poor states governments into cooperation to restrain illegal immigration. Relevant efforts are not easy to square with right to leave considerations.[67] Whilst on the other hand preoccupations for brain drain from developing countries have grounded arguments for containing or conditioning the right to leave.[68] The right is in any case not an absolute one. Both the ICCPR and the ECHR recognize that the right to leave admits of limitations for reasons, among others, of national security and public order. However in both cases, relevant restrictions must be provided by law and necessary in a democratic society to protect the relevant purposes. Hence both the Committee and the European Court apply both a test of legality and a test of proportionality in assessing limitations and exceptions.[69]

The other half of the international law freedom of movement is the right to enter. This is an articulated right that embraces the right to remain in a country, the right to return to a country, as well as the right to enter for the first time a country where one has qualified ties.[70] Despite its several facets, it is a right narrower in scope than the right to leave. Whilst international law entitles every person to leave any country, it does not give them a right to enter a country of their choice. For every person there is possibly only one country, or a few at best, where a right

[61] Chetail, Kochenov.
[62] General Comment 27 par 17.
[63] El Dernawi.
[64] Zoolfia.
[65] Battista. Also mentioning other hypotheses.
[66] Stamose.
[67] Dauvergne, Kochenov.
[68] Strasbourg declaration. But Dimitry.
[69] General Comment par. 11; ECHR in Battista
[70] General Comment 27.

to enter can be claimed. Beyond the country of nationality, these are the countries that a person can call 'one's own'.[71] The Human Rights Committee has held that 'one's own country' is a broader concept than country of nationality. It includes countries in which an individual, due to special ties or claims, 'cannot be considered a mere alien'.[72] The nature of the special ties that qualify a country as one's own has evolved in the jurisprudence of the Committee. In an earlier phase, the Committee would have looked for ties alternative to nationality only as a means to protect individuals whose nationality had been subject to undue manipulations. These could be for instance persons deprived of nationality in violation of international law or in the context of incorporation of their country into another one.[73] In its more recent jurisprudence, the Committee has begun to more convincingly recognize an individual's social membership in a country: regardless of the vagaries of nationality, residence, family ties, intention to remain, and absence of ties to other countries all contribute to qualify a country as one's own.[74] So for instance effective social membership in a country may protect a non-national from deportation even when he accrues a substantial criminal record.[75] Whilst the right is narrower than the right to leave, it also tolerates in fact fewer exceptions: according to the Human Rights Committee 'there are few if any circumstances in which deprivation of the right to enter one's own country would be reasonable'.[76]

If the Human Rights Committee has thus adopted a somewhat expansive approach to the right to enter, under the European Convention of Human Rights the relevant right has a much more marginal place. Textually, Protocol 4 to the Convention only recognizes the right to enter one's own country of nationality. The European Court of Human Rights has considered arguments that the relevant right was being infringed in both a case regarding a first time entry, as well as a case pertaining to the right to remain. The former concerned the descendant of the last Italian kings who was constitutionally prevented from entering Italy;[77] the latter concerned the alleged forced expulsion of Turkish Cypriots from the Republic of Cyprus.[78] The Court has however eventually solved the relevant cases on grounds other than the right to entry and has never found a violation of the relevant right.

The different scope of, respectively, right to leave and right to enter, as well as the way the two rights have been treated in international case law suggest that the two halves do not match. Hence zooming back out and looking at the right to free movement as a whole, it appears that this is a crippled right in international law. It encompasses a broad freedom to exit the borders of any country, but finds a serious limit in the absence of a co-terminus right to cross the borders

[71] UDHR, ICCPR. But Protocol 4.
[72] General Comment par 20.
[73] General Comment par 20, Stewart v Canada.
[74] Warsame; Nystrom; Lyss, Belonging (on general trend towards recognition of social membership in IL).
[75] Warsame v Canada; Nystrom v Australia.
[76] Nystrom, par. 7.4-7.6.
[77] Victor Emmanuel de Savoie
[78] Denizci v Cyprus.

of another country other than the one that can be narrowly defined as one's own.[79] The right is plagued, in other words, by an asymmetry between its two faces.

This asymmetry reflects the troubled relation between free movement and national sovereignty. The freedom to move across borders directly challenges sovereignty that is premised on the control of people and territory. Such control entails states' discretion in deciding on admission and exclusion of foreigners. Whilst sovereignty can be reconciled with the individual freedom to leave a country, the right to enter is on a collision course with it.[80] Hence international law can accommodate a broadly defined right to leave, however despite compelling moral and legal arguments,[81] it leaves only the narrowest place to the right to entry. The latter can only trump sovereignty in a discrete set of circumstances: when a person is knocking on the door of his own country, of a country where he has family relations, or of a country where he needs refuge.[82]

The asymmetry between entry and exit, as well as the sovereigntist concerns that it expresses, are echoed also, albeit with some adaptations, in the EU model of free movement. This asymmetry, and these concerns help trace the contours of a different paradigm in the EU relation between citizenship and free movement, beyond the constitutional, and the market one.

***The Asymmetry in EU Free Movement Law***

EU free movement law explicitly protects both rights to entry and rights to exit.[83] However, the Court of Justice of the European Union has weaved a more complex doctrine around the right to exit; and a more cautious one around the right to entry, thereby tracking to some extent the international law asymmetry.

Right to exit and right to entry, in their bare meaning, are codified in articles 4 and 5, respectively, of the Citizenship Directive.[84] But their content is spelled out more fully in other provisions of the directive, as well as in the case law, where both have surfaced in several different guises. The right to exit is the right of a Union national to leave the Member State of origin. It is a right with several facets. Some of these, such as the right not to be directly prevented from leaving the territory of a Member State of origin, track directly the international law right to leave. [85] Others, such as the right not to be discouraged from leaving, or not to be treated less favorably than static nationals upon return, are distinctive features of the EU law right. The right to enter, by contrast, is the right of a Union national to move to, and reside in, another Member State. It entails admission in the host Member State; equal treatment with nationals in respect to a range

[79] Kochenov, Chetail, Harvey Barnidge.
[80] (Aleinikoff, protocol 15, Nafziger, Juss).
[81] Nafziger
[82] Lyss
[83] See Spaventa. Seeing the Wood despite the trees. 22-23 Distinguishes right to move and right to reside from a slightly different perspective.
[84] Article 4 and 5.
[85] A direct representation in Jipa.

of opportunities and benefits; as well as absence, in the host Member State, of obstacles of other nature that may make the prospect of settling there less appealing for a Union national.

The asymmetry between the two components begins from the very wording of the Citizenship Directive. Article 4 thereof, introducing the right to exit, refers to the 'right' of Union citizens in this sense. Whilst article 5, in respect of entry, speaks of the requirement that Member States shall 'grant Union citizens leave to enter', without venturing into the language of rights. Further to this linguistic distinction, also the conditionality that characterizes free movement of persons bears on the two components in different ways. The financial self-sufficiency conditions to which the freedom under discussion is subject has been commonly read as a condition to be legally resident in a host Member State, rather than as a condition to legally leave the Member State of origin.[86]

Beyond legislation, it is in the case law that exit and entry have increasingly received a different treatment. The initial focus of the case law on sanctioning discrimination on the basis of nationality may indicate a balance tilted towards rights to entry.[87] However the Bosman judgment in 1995, introducing a restriction-based test for infringements of free movement of persons, altered that balance. In the aftermath of Bosman, rules and practices of Member States of origin that deter or hamper movement have come under scrutiny, thereby giving a boost to the right to exit. Whilst Bosman concerned free movement of workers, its legacy has resonated particularly loudly in the case law on free movement of citizens.[88] In a string of citizenship cases beginning with D'Hoop, the Court emphasized that

'National legislation which places some of its nationals at a disadvantage simply because they have exercised their freedom to move and to reside in another Member State gives rise to inequality of treatment, contrary to the principles which underpin the status of citizen of the Union, that is, the guarantee of the same treatment in law in the exercise of the citizen's freedom to move.'[89]

The Court has since arguably embraced protection of European citizens' rights to exit more light-heartedly than protection of rights to entry. Over the years it has grown bolder in finding home Member States obligations in respect of the former, whilst becoming increasingly cautious in enforcing the latter against unwilling host Member States.[90]

[86] Art. 7 Citizenship Directive. Also, Dano.

[87] See e.g. case Hoeckx C-249/83, cited in Grzelczyck.

[88] A similar trend of different intensity can however be found also in the case law on free movement of economically active people. The 2006 Belgian Communities case, restating the overall test for breaches of free movement, points to 'any rule having the effect of rendering less attractive the exercise of a fundamental freedom such as free movement'. These can be rules preventing exit as for instance in S&G and Surinder Singh. Or rules affecting entry and non-discrimination.

[89] D'Hoop, Pusa, Turpeinen.

[90] See Kochenov, Mevrouw de Jong – European citizenship entails first of all a right to leave.

In particular, the Court has forced on home Member States obligations to continue providing social and other benefits to their nationals residing in other Member States. The principle of exportability of benefits, at least for what pertains to social security, is codified in the regulation on coordination of Member States' social security systems.[91] Even beyond the principles set forth in the regulation, exportability of benefits has become in the case law one of the pillars of the right of a Union national to leave the Member State of origin. In Lucy Stewart, the court found that the United Kingdom, in subjecting a national's entitlement to an incapacity in youth allowance to a requirement of past, ordinary and present residence in the United Kingdom, was discouraging the relevant national's freedom to move. As discouraging was – the court found respectively in Tas-Hagen and Nerkowska – the decision of the Netherlands and Poland to withdraw civilian war victim benefits from nationals who had moved to a different Member State. Not only the withdrawal of benefits but also the denial of tax deductions to leaving citizens offends the right to exit. In this sense, the court has outlawed tax schemes that disadvantage movement: Union citizens cannot be denied a tax deduction in the home State, for instance, for the costs of education sustained in a different Member State.[92]

One could counter argue that the Court has imposed equally extensive obligations to provide benefits on host Member States in right to entry cases. In fact the Court seemingly set the right to entry and to equal treatment of European citizens on firm grounds in its earliest case law on European citizenship. In the above mentioned Martínez Sala, Trojani and Grzelczyck cases, the court through the combination of citizenship and non-discrimination provisions weaved a robust doctrine protecting the right of not economically active migrant citizens to enter and claim benefits. Yet, when considering the relevant judgments more closely, one comes to realize that in none of these cases the court really protected a right to entry by imposing a duty to admit on the host Member State. At best it closed its eyes on the possibility that the relevant claimants may not, or may no longer, qualify for a right to reside under EU law. In the first two cases, the court focused the EU law analysis on discrimination with regard to access to social benefits, strong of the fact that Ms. Martinez Sala and Mr. Trojani were legally resident in their host Member States as a matter of domestic law.[93] Grzelczyck's right to reside in Belgium as a migrant student, by contrast, was based in an EU law directive.[94] However the Court once again eschewed the question of the continuing legality of Mr. Grzelczyck's residence. Mr. Grzelczyck had initially been admitted to residence in Belgium as he had met the relevant requirements.[95] Hence the

[91] Reg 883/2004

[92] Schwartz; Zanotti.

[93] Martinez Sala par 47 (the court proceeds on the 'assumption' that the claimant had been authorized to reside in Germany); Trojani, par. 36-37 (the court actually denies that Mr Trojani would have a proper right to entry under EU law - it specifies that Mr Trojani would not enjoy a directly effective right of residence a la Baumbast under Community law as he would not meet the resources requirement; however, he has a residence permit granted by the Belgian authority and at this point, he is covered by non-discrimination).

[94] Directive 93/96.

[95] Par. 40-45 of Grzelczyck. (a student's declaration as to his resources is only to be assessed at the time it is made – his financial circumstances may well change over time par. 45).

question was rather what degree of solidarity Belgium owed him at this point. It is one thing to demand that Member States treat their legal residents, whether national or not, on equal terms. It is another thing to demand that Member States admit not economically active migrants to residence. It turns out that in its most daring 'right to entry' cases in respect of migrant citizens, the Court was not dealing with the right to enter at all.[96]

In the recent cases in which the Court has gone back to the issue of free movement of not economically active citizens, revisiting in part its earlier positions, the assessment of rights to entry had a much more central place. The Danos and the Alimanovic did not have domestic law residence rights in Germany.[97] They could not, as in the aftermath of Baumbast, and with the coming into force of the Citizenship Directive, domestic residence permits for EU nationals in EU Member States have become a thing of the past. This has brought to the ECJ docket a more troubling sort of free movement questions regarding not only the right for migrant citizens to receive social benefits on equal terms with nationals, but their very right to enter and reside in a host Member State in the absence of adequate resources. Confronted with the prospect of forcing a migrant's right to entry on a host Member State, the Court has retreated towards the letter of the Treaties and of secondary legislation: in Dano, it re-emphasized that rights to enter a host Member State are conditional on the availability of sufficient resources, and migrants who fail the resources test do not have a right to enter and reside in the first place.[98] In Commission v UK, it went one step further, recognizing the autonomy and discretion of Member States in administering their own tests of legality of residence, before recognizing a migrant's 'leave to enter', and to stay.

This different treatment of, respectively, rights to entry and rights to exit prompts a reflection on financial burdens: the court has become as reluctant to burden host Member States financial systems with the costs of entering EU nationals as it is ready to burden home Member States with the costs of their exiting nationals. This allocation of financial burdens perspective could explain the court's ease in recognizing rights to entry where aspiring entrants are not likely to raise claims on the resources of the host State. This was the case for instance, in Baumbast, where the court went as far as recognizing that Union citizens' rights to residence – and hence to enter a host State – are directly effective; and in Zhu and Chen, where it protected a wealthy Chinese mother, and her Irish-born EU national daughter, in their 'right to enter', and reside in, the United Kingdom.

This same perspective could help explain the case law on free movement of students and study finance, which portrays the distinction between Union citizens' rights to entry and rights to exit at its strongest. Relevant case law, tracking secondary legislation, has recognized that students

[96] Possibly substantiating the view that the two rights have to be read as separate – Spaventa, Seeing the Wood.
[97] Dano par. 73-74; Alimanovic par. 52.
[98] Dano, par. 73-74 and 80-82; in Alimanovic the Court found that the Alimanovic may have a right to reside under art. 14.4.b of the Citizenship Directive, however this did not entitle them to equal treatment with regard to social assistance benefits. Par 57

cannot claim study finance, in the form of maintenance aid, in a host Member State, before having resided there for five years. A five-year residence requirement is considered an appropriate indicator of genuine integration of the claimant student in the society of the host Member State, regardless of individual circumstances. By contrast, prior residence requirements for students' eligibility to export study finance from a home Member State to a host Member State do not pass the ECJ test.[99] If not allowing for case by case consideration of other factors potentially corroborating the link between the student and the funding Member State, even residence requirements of just one year in the prior three infringe free movement. Hence, the striking asymmetry between the right of a Union citizen student to 'exit with funds', which is strongly affirmed, and the right of a Union citizen student to 'enter with funds', which attracts no protection.[100] Regardless of the fact that in both types of scenario, to stick to the court's test, free movement per se is similarly deterred.

Yet the asymmetry between rights to entry and exit for Union citizens is not just about allocating financial obligations between host and home Member States. The distinction cuts beyond immediate financial considerations. In the domain of corollary rights for TCN family members of citizens, for instance, the court, when faced with the prospect of forcing admission obligations on host Member States, has retreated into a rather narrow reading of the provisions of the Citizenship Directive. As a result, in Kuldip Singh it has read the Citizenship Directive provision so as to defeat the right of a TCN to continue to stay in a host Member State when dissolution of marriage from a sponsor Union citizen spouse – which under the Directive does not threaten the TCN's right to reside- is preceded by the spouse's departure from the host Member State. By contrast, when called to impose obligations on home Member States, the court has promptly sought support in the Treaty provisions on citizenship where secondary legislation did not provide the necessary solution. In this sense, in O&B it has protected the right of a TCN spouse to return with the sponsor Union national to a home Member State. The rationale in this latter case being that otherwise the right of exit of the migrant Union citizen would have been chilled in the first place.

Albeit from a different perspective, the asymmetry can be traced also in the case law on the spelling of names. Relevant cases are essentially cases about a right to exit. Either the Member State of residence has to recognize name spelling rules of the Member State of nationality of a Union citizen;[101] or the Member State of nationality has to recognize names as registered in the Member State of residence.[102] In the former case, the obligation of the Member State of residence corresponds to the right of a Union citizen to exercise free movement and exit a Member State of nationality without leaving behind the part of his or her identity that is attached to the spelling of a name. In the latter case, the obligation of the Member State of nationality is

[99] Refer to Thym CMLR that sees this as a sign of uncertain direction in the case law, p. 46-47

[100] For a broader analysis of real links beyond student cases, see Charlotte O'Brien on real links. Also see Thym CMLR p. 44-47.

[101] Garcia Avello.

[102] Grunkin Paul.

to duly recognize a national's enduring belonging, despite 'exit' to another Member State. Adapting a name as required in the very documents that define a citizen's identity is part of that recognition.[103] The court protects this right to exit up until it risks turning into a version of a right to entry. That is, a right to take on, through a name, an element of identity of a host Member State, and force it back on the Member State of nationality. This explains the Court's rulings in Sayn Wittgenstein and Bogendorff: the right to have the experience of exit reflected into the composition of one's own name does not go as far as to compromise constitutional traditions of the Member State of nationality.

Arguably one strand of case law on Union citizenship is out of sync with this dichotomy between protection of rights to entry and protection of rights to exit: this is the Ruiz Zambrano doctrine on the genuine substance of Union citizenship, which has recently been re-emphasized in NA and Rendón Marín. The genuine substance doctrine forces obligations of admission on the Member States in respect of third country national family members of Union citizens. In this sense, it protects the right to entry of persons who are not even Union nationals. However the doctrine is exceptional in character. It does not involve free movement. And it responds to rationales distinct and independent from the ones underpinning free movement. Hence it does not necessarily contradict the asymmetry between entry and exit rationales that the case law otherwise portrays. On the contrary, it may be the exception confirming that the asymmetry is grounded in a peculiar vision of citizens' free movement, one that intersects, but does not blend with the constitutional/economic, and market/social divides. It rather fits another paradigm better, an enhanced international law paradigm.

***The Enhanced International Law Paradigm of EU Free Movement Law***

Whilst the asymmetry between right to entry and right to exit, in international law, is one in scope, the asymmetry in EU free movement law is one in intensity of protection.[104] The right to leave a home Member State, and the right to enter a host Member State are co-extensive in their definition. Both rights belong to all Union citizens. Yet they are protected to a different degree.

In comparison to its international law version, the right to leave under EU law is complexified. Not only it requires the removal of any immediate impediments, such as travel bans or denial of documents on the part of a Member State.[105] But it encompasses a broader guarantee that migrant citizens will in no way be disadvantaged in respect to static citizens.[106] As a result the spectrum of Member State actions that potentially infringe a citizen's right to leave is much broader than under international law. It includes any rule or practice that may have the effect of making the prospect of free movement less appealing on the part of the citizen.[107] On the other

[103] Recognition that is ultimately aimed at not deterring Union citizens' rights to free movement. Grunkin Paul.
[104] Spaventa, Seeing the Wood, 39-41. Difference in the assessment of proportionality.
[105] Jipa
[106] Belgian Communities case; Pusa.
[107] Spaventa, Seeing the Wood 22-25 (obligations on home Member States extend the scope ratione materiae of European citizenship).

hand, from a personal scope perspective, the right to free movement is defined more narrowly: it is not a universal right for everyone within the borders of a Member State.[108] It is a right of citizens. It transforms expatriation, from an exit experience, into the exercise of a citizen's right, thereby stretching national citizens' freedom towards the jurisdictional space of any other Member State.[109]

When it comes to the jurisdictional space of these other Member States, however, the same sovereign concerns that shadow the right to free movement under international law mitigate the freedom of European citizens. Hence the right to entry is shyer than the right to leave. The right to entry entails the right to be admitted for residence in a host Member State. And the right to receive a certain treatment in law whilst residing. Whilst both aspects are codified in EU law,[110] the latter aspect has been more convincingly developed by the CJEU.[111] Migrant European citizens benefit from a broad guarantee of equal treatment in host Member States, that the CJEU has traditionally interpreted boldly. But the equal treatment face of the right to entry rests on a fuzzy approach to the residence face of the same right. The Treaties and secondary law state that the right to reside is conditional. And the CJEU, as evidenced in the previous section, has come up at best with contingent stratagems to work around this sovereign constraint. Its approach has mostly been to interpret equal treatment guarantees broadly in situations in which the right to residence was not at stake,[112] or not problematic.[113] Hence the court has construed the right to entry as a right after entry. Nonetheless, the CJEU, in construing a strong right to leave, has made conceptual room for further theorization of the right to entry as a corollary of the right to leave. Effective protection of a freedom that enhances national citizenship through a 'guarantee of the same treatment in law in the exercise of free movement' and the sanction of rules and practices that place intra-EU migrants at a disadvantage,[114] ultimately calls for a stronger articulation of the right to entry in comparison to international law. Despite its multi-facet and courageous jurisprudence on European citizenship, the CJEU is however yet to answer that call.

The EU law right to entry otherwise tracks the international law one. Rights after entry increase in intensity over time. The court has elaborated a 'genuine link' test for the award of benefits to migrant EU students and jobseekers that allows for durational residency and other requirements pointing to a degree of attachment between the migrant and the Member State where he or she is claiming a benefit. On the other hand the accrual of residence time in a host Member State weakens the conditionality of the right to reside,[115] up until the point of silencing it with the achievement of permanent residency after five years.[116] Some comments have relied on these

[108] Mobile citizens, immobile aliens.
[109] But Gareth Davies, Any Place; EU Citizenship and Federalism chapter.
[110] Art. 21 TFEU. Directive 2004/38.
[111] Art. 24 of the Citizenship Directive is boldly defined.
[112] Trojani
[113] Baumbast
[114] Quote relevant cases.
[115] Protection against expulsion art. 28 Citizenship Directive.
[116] Right to permanent residency.

features to describe the European model of free movement as an integration one.[117] Beyond this, the model also resonates with the social membership rationale that has gained momentum for purposes of the right to entry under international law.[118]

Also, under EU law as under international law, the sovereignty considerations that constrain the right to entry give way in exceptional circumstances that require heightened consideration of individual rights. Humanitarian and family interests drive the recognition of rights to admission under international law.[119] Similar interests have made for exceptional niches of European citizenship protection in the CJEU jurisprudence, where rights to entry have been affirmed with no deference to Member States' sovereignty. In Zhu and Chen,[120] for instance, the court, albeit reasoning in terms of free movement, gave weight to the family unity rights of a newborn European citizen and recognized her third country national parent caretaker derived right to be admitted in the UK. In Ruiz Zambrano,[121] and in the doctrine descending from it and recently revived,[122] the Court similarly ruled in favor of the 'right to entry' of a third country national. The explicit rationale in the judgment was protection of the substance of the rights of the European citizen children that formed the claimant's family. Humanitarian considerations animated however the backstage to the case.[123]

The EU version of the asymmetry between right to leave and right to enter ultimately points to an enhanced international law paradigm of free movement of citizens. The right to leave, emboldened by a comprehensive vocabulary of citizen freedom, is far-reaching and admits of few compromises. The right to entry, inhibited by sovereign concerns, is rather treated as a timid right, at least at the border. However it grows stronger with accrual of residence time. And it ripens into a firmer citizenship right after the border, protecting the condition of migrant citizens within the jurisdictional space of a host Member State through a wide-ranging guarantee of equal treatment.

In this sense the EU paradigm is enhanced in comparison to the international law one: the base layer of the right to free movement for EU citizens is the same as the international law one. The right is articulated along the spectrum between sovereignty and individual freedom. However, its components are strengthened by supporting the discourse of freedom through resort to market logics, and by mitigating the discourse of sovereignty through resort to the categories of citizenship, non-discrimination, solidarity, fundamental rights. Hence the enhanced international law paradigm does not deny the market and constitutional ones, but rather intersects them providing perspective to the tenets of both.

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[117] Thym, CMLR
[118] ICCPR, Lyss.
[119] Thym, Juss or Lyss.
[120] Zhu and Chen
[121] Ruiz Zambrano
[122] NA, Rendon Marin.
[123] Chapter EU law stories.

In terms of the nature of supranational citizenship, the paradigm suggests that this is, first of all, a metamorphosis of national citizenship. Through the entrenchment of supranational free movement rights, national citizenship acquires an extra-territorial reach that stretches its content and opens up its scope. The recent Petruhhin judgment, in the domain of criminal law, forcefully illustrates this extra-territorial feature. The CJEU rules in Petruhhin that Latvia, before executing a third country extradition request in respect of a national of Estonia resident in Latvia, had to give the Estonian government an opportunity to decide whether to prosecute its national in Estonia. Free movement of the relevant Union citizen would otherwise have been chilled as by leaving the Member State of origin, the citizen in question would have lost the protection from extradition that Member States grant to their own nationals. The judgment stands for a key principle that characterizes European citizenship, the free movement rights it brings about, and their relation to national citizenship. The exercise of those free movement rights on the part of a European citizen is an exercise of citizen freedom. Hence it cannot result into a diminution of the protections that national citizenship ensures. Rather it will result into the extra-territorial extension of those very protections. Estonia's jurisdiction to protect its citizen in the exercise of free movement stretches to reach Latvia's jurisdictional space, so that Latvia has an obligation to alert Estonia and involve it, before surrendering one of Estonia's citizens to the jurisdiction of a third country.

This extra-territorial extension of national citizenship is grounded in mutual recognition, among the Member States, of their national citizens' right to leave.[124] Mutual recognition of this citizens' freedom dictates reciprocal concessions in terms of sovereignty. Rights to entry, to residence, to non-discrimination, to long-term settlement are a corollary of this recognition of freedom, and of the corresponding sovereignty concessions. Yet the enhanced international law paradigm also indicates that European supranational citizenship, and the right to free movement to which it is married, remain sovereigntist at their core. Hence the recent case law in which the CJEU has apparently shifted away from its classical stance on the rights of non-economically active migrants, and bowed to Member States' interests, is not anti-systemic. It is a confirmation of the international law nature of EU free movement rights, that exist in a legal space mediated between sovereignty and freedom. Relatedly recent judicial twists and turns do not necessarily confirm that European citizenship is a deranged version of national citizenship. Nor that it is a failed promise. They rather reiterate that supranational citizenship is ultimately a reconfiguration of national one. Its transnational reach and capability ultimately depend on what is sustainable from a national citizenship perspective, in democratic, solidarity and identity terms.

## Part III Free Movement, Solidarity and Citizenship under the International Law Lens

Focusing on the enhanced international law character of EU free movement of citizens has important implications from at least three perspectives. First, from the perspective of the

[124] Strumia ELJ 2016.

regulation of free movement in regional organizations, in a comparative direction, and in terms of the legal frames that free movement engages. Second, from the point of view of transnational solidarity. And lastly in terms of the resilience of supranational citizenship, and of its prospects in the context of withdrawal of a Member State from the European Union.

### *Transnational Solidarity*

The enhanced international law paradigm of EU citizens' free movement offers a peculiar angle to interpret the roots and scope of transnational solidarity in the EU. Solidarity as a value informing the society of European peoples, figures among the objectives of European integration[125]. As a principle of cooperation among the Member States, it informs several of the Union policies. The common foreign and security policy, for instance, is premised on 'mutual political solidarity' among the Member States.[126] Cohesion policy, the common immigration policy, and policies on energy, among others, are also premised on a principle of solidarity among the Member States.[127] As is the clause that brings the very name of solidarity in the Treaty on the Functioning of the European Union.[128]

In this sense, when the CJEU first referred to that 'certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States' that secondary legislation on free movement of citizens accepts,[129] it built on a rich repertoire of Treaty provisions and commitments. It seemed to directly implement the Member States' wish expressed in the preamble to the Treaty on European Union to 'deepen the solidarity between their peoples'.[130]

In the context of the newly established institution of European citizenship, and of its application in the domain of free movement of non economically active European citizens, the Court's reference charged however transnational solidarity with novel expectations. The obligation of the Member States to mutually provide for each other's nationals was being impliedly grounded in the assumption that European citizens owed one another across borders. And that a bond of communal belonging comparable to the one justifying the welfare state could sustain the edifice of European citizenship.

In this communitarian, identity-oriented version, transnational solidarity has repeatedly proven a failure in the EU. Looking at free movement of European citizens from an enhanced international law perspective offers a reading key for such failure.

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125 Articles 2-3 TEU. Also preamble to TEU.
126 Art 24 TEU
127 Art. 194 TFEU, art. 3 TEU and 174 TFEU, art. 80 TFEU.
128 Art. 222 TFEU.
129 Grzelczyck, par 44.
130 Preamble, TEU.

From this perspective transnational solidarity is not the result of an assumed or expected burgeoning collective identity of the European peoples, but is rather the corollary of an individual freedom. It is the individual freedom to move across borders, and leave any Member State to resettle in another one, that requires a measure of transnational solidarity. And it is protection of this individual freedom that grounds the Member States' obligation of mutual responsibility for the welfare of one another's nationals.

Up to this point, there is – it may seem – nothing new. It has already been observed that European citizens are but 'accidental cosmopolitans', whose transnational rights promote enhanced individual autonomy rather than broader collective engagement.[131] And the finger has been already pointed against the tendency of European integration to turn transnational citizens into 'self-centered individuals'.[132]

The above observations focus on the perspective of citizens' identity and engagement that, at first sight, remain unaffected, if not diminished, by the evolution of transnational free movement rights. The enhanced international law paradigm helps move one step further and recuperates the perspective of the Member States and their obligations of mutual responsibility. In particular, the paradigm helps articulate the conceptual frame for those obligations, and relatedly offers a way to reassess the prospects of citizens' transnational identity and engagement.

If transnational solidarity is a corollary of the individual citizen's freedom to leave the Member State of origin, then Member States, in protecting rights to entry and extending their welfare protections to nationals of other Member States, are protecting first of all the freedoms of their own nationals. This realization provides a powerful corrective to many discourses that have put the prospects of free movement, and of transnational solidarity, in jeopardy: the idea that free movement opens the welfare state and threatens the ability of the state to discharge its functions; that it forces solidarity towards strangers; that it allows for welfare tourism. There is a kernel of potential truth to all of these discourses, however their conclusions can be rebalanced through appreciating, and emphasizing, that a Member State in accommodating free movement protects first of all its own nationals. In this sense, the view from the enhanced international law paradigm also allows confronting nationalist and populist rhetoric with novel tools.

A possible counter-argument is that the opportunity to leave a Member State has a different value for nationals of different Member States. Not every British national will have an interest in exercising his freedom to move to Bulgaria. Hence relatedly, accommodation of incoming free movement on the part of the UK government does not protect UK citizens' freedom to the same extent that accommodation of incoming free movement on the part of the Bulgarian government protects Bulgarian citizens' freedom. Yet, such argument is premised on the market and economic motives for the concrete exercise of free movement, rather than on the intrinsic value of the freedom that it entails. Whilst the enhanced international law paradigm points to the value

[131] Somek.
[132] Weiler, Van Gend en Loos revisited.

of freedom from the constraints of sovereignty, regardless of the material motives that may prompt its concrete exercise. Further, even if one embraces the economic and market perspective on the motives of free movement, even the nationals of wealthier Member States enjoy the freedom that European citizenship entails. The significant cohort of British national retirees residing in Spain provides an example in this sense.

A further counter-argument is that the obligations of mutual solidarity that free movement imposes on the Member States are in any case unequal, given the de facto direction and intensity of the free movement flux. This argument is tempered on the one hand by considering the overall size of the cohort of migrant citizens in the EU. And by considering that available empirical studies suggest that the majority of that cohort is economically active, and a net contributor to the finances of host Member States, rather than a drain on the same. On the other hand, this argument points to the direction in which institutional reforms of free movement should move. In order to make free movement, and the related solidarity obligations, sustainable, reforms are needed to equalize the Member States' commitment in this sense. Considering concrete options in this sense is beyond the scope of this paper. However, for exemplification's sake, relevant options could include a solidarity fund to which the Member States could resort to offset the costs of free movement contingencies, possibly funded through a tax on the 'sale' of EU passports to wealthy third country investors.[133] As well as the tailoring of a strand of EU cohesion policy to strengthen protection of 'negative' rights to free movement.[134]

Finally, it may appear that the enhanced international law paradigm defeats any hope of fostering a sense of common belonging among the peoples of Europe and grounding that deeper solidarity that the Treaties hint to. It does not. Only, it shows the direction from which that solidarity may come. It suggests that transnational solidarity, in the EU, has to come from freedom rather than from identity. In this sense, the enhanced international law paradigm proposes a transnational notion of the liberal social contract. Should the citizens of the Member States eventually embrace that contract with further conviction, what they would effectively do, is pooling their nationally bound resources, and nationally drawn circles of solidarity, to consolidate and protect one another's freedoms, and give those freedoms a transnational reach.

***Resilience of Supranational Citizenship***

*[To be added]*

***Free Movement***

*[To be added]*

[133] Strumia & Fumero.
[134] Strumia ELJ 2011.

## Conclusion

*[To be added]*