

## **Imagine: European Union Social Citizenship and Post-Marshallian Rights and Duties**

*(Contribution to EUDO's Forum Debate on 'Should EU Citizenship be Duty-Free?', EUI, Florence; November 2017)*

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Writing in 1959, Ortega y Gasset [1] noted that 'reality is not closed and reduced to the past and the present, but holds open the frontier of the future in which the real will be something that has yet to come into being.' Ferrera and the other contributors in this forum have opened up a debate on the future of EU citizenship and argued for its 'renovation' in the light of rising Euroscepticism and nationalist centrifugalism in the member states. Ferrera shares Bauböck's diagnosis that EU citizenship has not met its integrative potential. While renovation is not always innovation, Ferrera has laid down the path for innovative thinking about the (future) content of EU citizenship and for the introduction of 'soft' citizenship duties which would strengthen the ties that bind EU citizens. I am in favour of 'soft' as well as 'hard' EU citizenship duties and I argue here that EU citizenship is not, and cannot be, duty free.

My argument is developed in three steps; namely, I discuss a) why EU citizenship is not duty-free, b) why it cannot be duty-free and c) what kinds of explicit duties it could incorporate in the future. I should mention at the outset that I fully share Ferrera's call for a social EU citizenship and the addition of citizenship duties. But, like Joppke, I disagree with the justification provided and with Ferrera's confinement of duties to EU citizens. In addition, it seems to me that we might wish to rethink the functionality and the effectiveness of providing 'instrumental resources (money, benefits, infrastructures and so on) that could make EU citizenship more salient, visible and tangible for wide constituencies' (Ferrera). It might be preferable to draw on normative principles and the values of the EU in order to provide a compelling justification for the development of an EU social citizenship (see

Sangiovanni and Bauböck) and for the addition of EU citizenship duties. The social dimension of EU citizenship must be grounded on values, and not on money. Material benefits and instrumental means create an impression that the EU should be ‘purchasing’ the loyalty of EU citizens, more often than not do not guarantee a long-term identification with ‘Europe’ – this is confirmed by the Pro-Leave votes in Wales in the UK’s ‘Brexit’ Referendum on 23 June 2016 – and cannot be a substitute for the incorporation of durable and meaningful social citizenship rights and duties into the EU citizenship provisions.

### **EU Citizenship is not duty-free**

EU citizenship does not encompass duties for individual citizens, but it is not duty-free. It contains a number of implied duties on the part of the member states (and their authorities) and the EU institutions designed to ensure the implementation of EU citizens’ rights (i.e., mobility rights, political rights, the right to diplomatic and consular protection when travelling abroad and the rights contained in Article 24 TFEU). Article 20 TFEU and the subsequent articles state clearly that ‘citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties’ and that they shall have the rights to move and reside freely, to vote and to stand as candidates in elections to the European Parliament and in municipal elections in the member states of residence, to enjoy diplomatic and consular protection abroad and to non-judicial means of redress, such as those stated in Article 24 TEFU. The word ‘shall’ implies categorical duties on the part of the member states to respect and to realise EU citizens’ rights. In addition, the principles of non-discrimination on the ground of nationality and equality underpin and justify EU citizens’ ‘civil rights’, the right to equal treatment in the member state of residence and political rights. The European Union, on the other hand, has the duty to observe the principle of equality of its citizens in all its activities (Article 9 TEU). EU citizens ‘shall receive equal attention from its institutions, bodies, offices and agencies’ (Article 9 TEU). While all this is true, Ferrera is proposing a different kind of dutiful action and participation. He would like to see: a) the empowerment of stayers through facilitating initiatives and

a partial compensation for the negative externalities produced by free movers; b) an increase in the visibility and salience of EU citizenship by *inter alia* strengthening its social dimension and c) the introduction of EU citizens' voluntary financial contributions for Europe and civic duties. Such reforms would strengthen the integrative function of EU citizenship and sustain bonds of solidarity. I am in favour of both (b) and (c), but, like Joppke and Kuhn, I have several reservations about (a) which are outlined below.

### **Why EU citizenship cannot be duty-free**

One does not have to graft the Marshallian paradigm of civil, political and social rights onto EU citizenship in order to justify the need for a social EU citizenship. Nor does one have to compare national and European citizenships in order to conclude that EU citizenship remains relatively underdeveloped in comparison to its national counterpart. Citizenship rights (and duties) can only be exercised in freedom and dignity and the latter necessarily involves a social welfare dimension. Without it, the free exercise of rights loses its meaning since the abstract, autonomous individual remains unshielded from the contingencies of imposed vulnerability.

The Court of Justice of the European Union (CJEU) has emphasised the need for the protection of vulnerable EU citizens and has justified the extension of the principle of equal treatment to the field of social assistance in the member state of residence on a number of grounds; namely, contribution (for active economic actors), authorised residence, one's sufficient degree of integration or his or her 'real link' with the host society or the employment market and permanent residence. Job-seekers' allowances and other benefits have also been justified on the basis of an anticipated contribution-based solidarity and the need to facilitate a job-seeker's integration into the employment market and his or her active participation in it.[2] More importantly, those who assess whether a mobile Union citizen has a real link to the host society or the domestic employment market are the member states' authorities – not the EU.

True, the politicisation of free movement in the UK and other member states has accentuated concerns about the preservation of national welfare systems which have already been hit by the sovereign debt crisis and years of austerity, but it, nevertheless, remains the case that claims about welfare tourism in the EU in the main are unsubstantiated empirically. Ferrera acknowledges this. But he also draws attention to the war of narratives and discourses in certain member states and the uneasiness about 'the burdens of solidarity' or the 'social impact of mobility' in certain areas. As a remedy, he proposes the creation of an EU fund to ease the impact of mobility and for other measures to empower the stayers (an EU social card and universal transferable vouchers). But such a proposal entails risks. Joppke has accurately articulated them. It would legitimise the 'demonology of European populists' (Joppke, p. 2); it would 'divide the European citizenry into two unequal halves, movers and stayers'; and it would depict 'mobility as harmful and staying as virtuous'. All these are important considerations. To these, I would add that mobility is not cost free for 'free movers' and that 'uprootedness' and settlement in another member state are not easy, straightforward and risk free processes. Everything has its price. The sad predicament and unacceptable experiences of xenophobia and discrimination of EU citizens settled in the United Kingdom following the Brexit referendum of 23 June 2016 confirm this. In addition, the EU citizenship provisions do not reflect the full panoply of rights that 'stayers' derive from EU law. One could briefly mention their access to services of general economic interest, consumer rights, anti-discrimination rights, equal pay as well as to the rights protected by the EU Charter of fundamental rights.

If we wish to make 'Europe' a bit better, we would need to transcend the logic of 'winners' and 'losers'. Whatever one's mobility status, class origin, gender, race, ethnicity, nationality, religion, sexual orientation, ability or disability and age, the kind of trust and solidarity that exist in communities of strangers is based on institutions that promote rights and welfare for all. This form of trust and loyalty expands the potential radius of solidarity and is often more durable because it is not based on narrow perceptions of self-interest or short-term calculations of one's contributions or misperceptions about 'others' (i.e., non-nationals) and their role and contributions to society. In this respect, instead of justifying a stronger social dimension of EU citizenship and social duties on the

basis of a fair (or fairer) mobility agenda, it would be preferable to support the EU social pillar [3] and a social citizenship agenda. This leads me to the final point about what kinds of duties EU citizenship could include.

### **What kinds of EU citizenship duties and who should be the duty-bearers?**

Since the European Union is a multi-layered polity comprising of ‘its peoples’ (Article 3(1) TEU) and the member states (and their authorities), there is no need to confine future citizenship duties to EU citizens. Indeed, one could envisage a ‘variable geometry’ of duties addressed to Union institutions, the member states and to EU citizens. With respect to EU citizen duties, Ferrera’s proposals of introducing some voluntary contribution for ‘Europe’ and a pan-European civil service for young people are meritorious. Kuhn has also mentioned the newly created European Solidarity Corps (operational on 7 December 2016) and Seeleib-Kaiser supports the introduction of a European Minimum Income Scheme. I endorse all of the above. President Juncker has also displayed leadership in commencing a discussion, and an action plan, on the social dimension of Europe. The European Pillar of Social Rights will be proclaimed jointly by the European Parliament, the Council and the Commission at the forthcoming Gothenburg Social Summit on 17 November 2017. Some of the 20 key principles of the Pillar would be an excellent addition to the existing provisions of EU citizenship. These do not differentiate between movers and stayers. Their addition would make EU citizenship an institution relevant to all EU citizens.

Let us imagine an EU citizenship with explicit references to social protection (Principle 12), minimum income to ensure dignified living (Principle 14), access to health care (Principle 16), assistance for the homeless and the combatting of homelessness (Principle 19), protection of health and safety at work (Principle 10) and the right to fair wages and protection from dismissal (Principles 6 and 7). Such social citizenship rights would reflect Bauböck’s suggestion of ‘grabbing both horns of the dilemma’ and ‘risking a rough ride on the back of the bull’. But it would also show that the 21<sup>st</sup> century EU

citizenship, like the early 1990s TEU's version, encompasses vision. It directs our lives with due regard for humane and dignified living, so that in view of it we may live and cooperate with others.

Besides social citizenship rights and duties, one could also envisage the addition of other citizenship duties. For instance, the draft text on Union citizenship included an environmental right and duty: 'citizens should have a right to enjoy a healthy environment coupled with an obligation to preserve and protect it'. Writing in the 1990s, I argued that a clause could be inserted in Part 2 TFEU stating that 'all Union citizens have an obligation to display solidarity with other Union citizens and nationals of third countries. This obligation entails respect for each person's dignity and the rejection of any form of social marginalisation' [4]. More recently, I have argued that 'possible social citizenship duties that might find their way into the TFEU's provisions on EU citizenship in the future are: a) a duty addressed to both the member states and the Union to promote the equal standing of all citizens in the EU by taking all possible measures to promote labour market participation and to fight poverty, homelessness and social exclusion; b) a duty on the part of the member states and the Union to promote inclusive access to the resources, rights and opportunities needed for participation in the democratic life of the Union; and c) an institutional equality duty applying to all levels of policy-making' [5].

The EU would also benefit from the incorporation of the right to good administration which is enshrined in Article 41 of the EU Charter of Fundamental Rights into the EU citizenship provisions, thereby extending the scope of the corresponding duty-bearers to the member states (and all public bodies). According to Article 41(2) of the EU Charter this right includes the right of every person to be heard before any individual measure which would affect him or her adversely is taken, the right of every person to have access to his or her file and the obligation of the administration to give reasons for its decisions. Given that most of the decisions that affect EU citizens (be they movers or stayers) are taken by the authorities of the member states, it is difficult to understand why only EU institutions should have the obligation to observe good and fair administration. Article 41(3) of the Charter also gives every person the right to 'have the Union make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to

the laws of the member states'. Similarly, all public bodies in the member states should be bound by the same obligation. Freedom cannot be separated from dignity and the rule of law and the making of decisions by public bodies in the member states without giving an opportunity to those adversely affected to be heard or without a clear and adequate reasoning epitomises disrespect for citizens and contempt for procedural legality.

## Looking Forward

This interpretation also reveals a post-Marshallian template for EU citizenship. I am certain that scholars, policy-practitioners, civil society representatives as well as the readers of this forum will have more ideas about future EU citizenship rights and duties. Instead of devoting precious time, energies and resources to wasted frictions and unnecessary quarrels, let us welcome the future and reflect on the proposals and the thoughts expressed by Ferrera and all the other contributors in this forum. Free movement and equal treatment (the civil dimension), political participation (the political dimension) and social protection (the social dimension) are important for the development of the self and the flourishing of societies. One cannot promote one dimension and restrict or overlook the others; all are implicated in practice and interact with one another. Similarly, rights cannot exist without duties, be they explicit or implied, perfect or imperfect. An EU citizenship that reflects the values of the EU (Article 2 TEU) and the goals of the European integration project (Article 3 TEU) must have both.

## References

- [1] Jose Ortega y Gasset, *Man and Crisis*, Ruskin House, London: G. Allen and Unwin, 1959, p. 210.
- [2] See, for example, Case C-224/98 *Marie-Nathalie D'Hoop v Office national de l'emploi* [2002] ECR I-6191; C-138/02 *Brian Francis Collins* [2004] ECR I-2703; Joined Cases C-22/08 and C-23/08 *Athanasios Vatsouras v Arbeitsgemeinschaft (ARGE) Nurnberg 900 and Josif Koupatantze v Arbeitsgemeinschaft (ARGE) Nurnberg 900*, Judgement of the Court of 4 June 2009.

[3] European Commission, *The European Pillar of Social Rights*, 24 October 2017, at [https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights\\_en](https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_en).

[4] D. Kostakopoulou, 'Towards a constructive theory of citizenship in the European Union', *Journal of Political Philosophy*, Vol. 4(4), 1996, pp. 337-58.

[5] D. Kostakopoulou, 'European Union citizenship rights and duties: civil, political and social', in E. Isin and P. Nyers (eds.), *Routledge Handbook of Global Citizenship Studies*, London: Routledge, 2014, p. 434.