

The Future of European Migration Rights

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Abstract: This is part of my Ph.D. dissertation, entitled “Creating European Citizens,” which explains the development and implications of European Union citizenship. EU citizenship grants nationals of EU member states a set of rights (including mobility and voting rights) throughout the territory of the Union; these are rights enforceable by individuals against states of which they are not necessarily citizens. In this paper, I consider some scenarios for the future of EU migration rights. I advance two main sets of arguments: first, the current Treaty rights enjoy widespread support and are unlikely to be reversed, although contestation continues to occur over their interpretation and implementation. Second, although a number of phenomena – here I consider enlargement and the push for greater harmonization between different national legal systems, touching also on potential socio-economic shocks and political opposition – pose risks for their future development, EU migration rights will likely be consolidated and even expanded over the coming decades. The dynamics by which this probable consolidation and expansion of rights occurs deserve close attention.

The Future of European Migration Rights¹

Transnational migration rights in Europe originated half a century ago for certain categories of coal and steel workers and developed fully with EU citizenship in 1992.² Over the course of the past decade, citizens of European Union states have enjoyed full rights of movement and of residence across the entire territory of the EU. The European Commission and the European Parliament, supported by expansive rulings from the European Court of Justice, have been active guardians of these rights. Indeed, the Commission continues its efforts to extend the scope of mobility rights, both for EU citizens and third-country nationals. But can this effort succeed given the current transformations in the European political climate towards migration issues? Indeed, when politicians and even some governing parties call for limiting the rights of soon-to-be EU citizens from the candidate accession states (Austria, Germany), for erecting more stringent barriers to migration (France, Denmark, Italy), and even for dropping out of Schengen entirely (Pim Fortuyn), can we continue to speak of a developing European migration regime? The purpose of this paper is to sketch some potential future developments in European mobility rights and to discuss their implications.

I. The Established Rights

Although it was introduced with the Maastricht Treaty in 1992, many Europeans are not yet aware of the existence of EU citizenship. An October 2002 “Flash Eurobarometer” survey found that about one-third of EU citizens know what Union citizenship means, one-third has heard about it but is not sure about its meaning, and one-third has never heard the term Union citizenship. Union citizenship is most familiar in Portugal, Finland, Denmark, Luxembourg, and Ireland, where about 80% is familiar with the term. The Luxembourgers know the exact meaning best with 55%. Union citizenship is the least known in Belgium, Sweden, Greece and UK, where more than 40% of people interviewed had never heard about it. In these member states, the proportion of those who knew the exact meaning was only about 20%. Thus, in many member states the term Union citizenship is seen as a vague and abstract concept. Perhaps somewhat surprisingly, the rights conferred by Union citizenship are more known than the EU citizenship itself. The majority, 70% of those interviewed, replied correctly to 7 of 11 statements concerning the rights of Union citizens. The most familiar right was that of Union citizens to work in any Member State, with 89% of correct replies. However, the majority of citizens, 57%, believe that a work permit is needed, even if this is not the case. Next comes the right to take up residence throughout the Union, with 84% of correct replies.³ It is telling that the rights are better known than the legal instrument which introduces them, EU citizenship. How are these rights being accessed?

¹ Earlier versions were presented at the Yale World Politics Workshop and the International Studies Association conference. I thank participants for their comments.

² For the historical account, see my “The Genesis of European Rights,” currently being revised for *Journal of Common Market Studies*.

³ “European citizenship opinion poll - The majority of Europeans think that they are not well or not at all informed about their rights as citizens,” accessed 23 February 2003.

Recent Evolution of European Migration

Early free movement rights within the European Community were focused on economic actors: first certain categories of workers, then most categories of workers, then family members of workers, and so on. The internal market initiative of the mid-1980s led to the extension of mobility rights to students, retired people, and other non-economic actors. Finally, the introduction of EU citizenship in the Maastricht Treaty consolidated free movement rights for all EU citizens. Following the extension of mobility rights to the non-economically active in the early 1990s, there was initially not much change in the numbers of people choosing to reside in another member state. Since then, however, the number of EU citizens permanently resident in another member state has started to increase, to a total for the entire EU now over 6 million. The impact has differed between member states, with some states witnessing a large increase. For example, Spain witnessed an increase in the number of permanent residents from the other fourteen member states from 179,248 in 1987 to 312,203 in 2000.⁴ Denmark witnessed a jump from 36,535 in 1986 to 53,195 in 1999. The increase in Portugal was even more spectacular in proportional terms: from 17,468 in 1986 to 52,429 in 2000.

In other member states, the increase was less spectacular. Thus, the number of EU citizens permanently resident in the United Kingdom grew modestly from 697,000 in 1985 to 859,138 in 1999 while, in Germany, the numbers went from 1.55 million to 1.85 million between 1986 and 2000. It is likely that, in all states, the numbers do not reveal the full extent of the increase in citizens from other EU member states, as some of the migrants naturalize to the citizenship of the host state and thus disappear from the statistics. Thus, in the Netherlands, the number of EU foreigners rose only modestly from 165,465 in 1986 to 195,886 in 2000 and the number of resident EU-foreigners even shows a decline in the mid-1990s after a change in citizenship policy made it easier to naturalize. Yet between 1980 and 2000, some 75 thousand citizens of the fourteen other current EU states were granted Dutch citizenship; if their number were added to the overall figure, the increase in the Netherlands would be considerably higher. There is likely a similar phenomenon at play in France, where the number of permanently resident EU citizens actually dropped from 1.32 million in 1990 to 1.20 million in 1999, and Sweden, where the number has steadily declined from 218,486 in 1985 to 177,430 in 2000.

Naturalization helps explain the fact that, in 2000, there were 18.5 thousand persons born in France or its overseas territories resident in the Netherlands, but only 12.5 thousand French citizens; similarly, there were 45 thousand persons born in Belgium, but only 25 thousand Belgian citizens resident in the Netherlands.⁵ To take another example: in the United Kingdom in 1999, there were 105 thousand people born in Italy, but only 94 thousand Italian citizens; 40 thousand people born in the Netherlands, but only 32 thousand Dutch citizens; 56 thousand people born in Spain, but only 47 thousand Spanish citizens, and so forth. The point is that the figure of 6 million EU citizens resident in a

⁴ All numbers refer to the fifteen current member states of the EU, even though Sweden, Finland, and Austria did not join until 1995; numbers of Swedish, Finnish, and Austrian citizens are included in data.

⁵ Numbers are similar for other nationalities: there were 124,237 persons born in Germany resident in the Netherlands in 2000, but only 54,272 German citizens. Citizens of some states appear less likely to naturalize: thus, there were 43,626 persons born in the United Kingdom resident in the Netherlands in 2000, but fully 39,466 British citizens.

state other than that of their nationality obscures the fact that many additional individuals have disappeared from the statistics because of naturalization.

The picture of northern Europeans heading south to retire may need some revision. The latest figures for Spain show that only 51 thousand of the 295 thousand non-Spanish EU citizens permanently resident in Spain in 1999 were over the age of 65, a proportion (17%) almost exactly equal to the proportion of Spanish citizens over the age of 65. There are national differences – for example, fully 26% of the 12 thousand Belgian citizens, 25% of the 75 thousand British citizens, and 21% of the 16 thousand Dutch citizens permanently resident in Spain are over the age of 65, but only 15% of the 40 thousand French citizens and 14% of the 58 thousand Germans, to say nothing of the very low proportions of Italian (11% of the 27 thousand resident in Spain) and Portuguese (8% of the 12 thousand) citizens over the age of 65 – but the overall picture is that the proportion of citizens of other member states resident in Spain matches that of Spanish citizens.

Another picture emerges from the numbers for Germany, where it seems non-Germans do not go to retire, only to work or to study. For example, only 5.5% of the 619 thousand Italian citizens, 6.7% of the 115 thousand UK citizens, and 6.8% of the 365 thousand Greek citizens resident in Germany in 2001 were over the age of 65, compared with 18% of German citizens. Conversely, fully 30% of the Italian citizens resident in Germany in 2001 were under the age of 25, compared with 26% of German citizens. We can surmise that a large number of Italian students and families with children under the age of 25 make their homes in Germany.

The German numbers may reflect the phenomenon of return migration on the part of those who had left to find work abroad.⁶ Of course, many of these migrations are simply international versions of forms of migration familiar in national settings, such as the movement of rural workers to urban jobs and their subsequent return to the village for holidays or for retirement. This is likely the case for large numbers of Spanish citizens in Germany, Portuguese citizens in France, Irish citizens in the United Kingdom, and so on. The overall point is that migration within the European Union, while still nowhere near the level of inter-state or inter-provincial mobility in federal states such as the United States or Canada, does show signs of a modest and gradual increase.

Migration and social entitlements

In the age of the welfare state, a key impediment to migration has been the risk of being cut off from social support in one's country of origin while not being admitted to social support in the destination country. Social rights are key to full citizenship, and the design of social programs impacts their realization. By virtue of social citizenship rights, individuals are entitled to equal or equitable access to a range of primary goods, such as education, health, welfare, and education. Separate social systems in the member states can be "linked together to form a 'national' system by virtue of introducing principles such as portability of benefits, prohibition of residence requirements for program access,

⁶ Carminda Cavaco, "A Place in the Sun: Return Migration and Rural Change in Portugal," in *Mass Migrations in Europe: The Legacy and the Future*, ed. Russell King (London: Belhaven Press, 1993).

mutual recognition of occupational qualifications,” and so on.⁷ Only by ensuring that social entitlements can be enjoyed regardless of the particular jurisdiction in which one resides does intra-European migration become viable. In order to safeguard the content of EU citizenship, supranational institutions such as the Commission and the Court press on principles such as portability of benefits, prohibition of residence requirements for program access, mutual recognition of occupational qualifications, and so forth.

To give one example, following the decision of the European Council of Barcelona of March 2002 to create a European Health Insurance Card which would replace all the current paper forms needed, in the framework of the co-ordination of the national social security schemes under Regulation 1408/71 for health treatment during a temporary stay in another country, the Commission adopted on 17 February 2003 a communication in which it sets out a detailed roadmap for a progressive replacement of the current paper forms by a European Health Insurance Card.⁸ Although the current paper forms represent precisely the same rights to health care that the new health card will if it is adopted, the symbolism of a European card is not accidental; the European Health Insurance Card is intended to reinforce the portability of benefits throughout the territory of the Union. Of greater importance for migrants than access to health care during a temporary stay elsewhere in the EU, however, is access to the full range of social rights during an extended stay.

Let me provide two examples of recent court decisions reinforcing the social rights of EU citizens: *Martínez Sala* and *Grzelczyk*. Mrs Martínez Sala, a Spanish citizen who had lived in Germany since 1968 applied in 1993 to Freistaat Bayern for a child-raising allowance. Freistaat Bayern rejected her application on the ground that she did not have German nationality, a residence entitlement or a residence permit. When she also lost an appeal to the Sozialgericht Nürnberg, Mrs Martínez Sala appealed to the Bayerisches Landessozialgericht, which asked the European Court of Justice for a preliminary ruling. In response, the ECJ ruled that “Community law precludes a Member State from requiring nationals of other Member States authorised to reside in its territory to produce a formal residence permit issued by the national authorities in order to receive a child-raising allowance, when the Member State’s own nationals are only required to be permanently or ordinarily resident in that Member State.”⁹ Since Mrs Martínez Sala met the same requirements as German citizens, she was entitled to the allowance.

A related case is *Grzelczyk*.¹⁰ In 1995 Mr Grzelczyk, a French citizen, began a course of university studies in physical education at the Catholic University of Louvain-la-Neuve and for that purpose took up residence in Belgium. During the first three years of his studies, he defrayed his own costs of maintenance, accommodation and studies. At the beginning of his fourth and final year of study, he applied to the Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve (CPAS) for payment of the minimex. CPAS observed that Mr Grzelczyk had worked hard to finance his studies but that his final academic year, involving the writing of a dissertation and the completion of a qualifying

⁷ Thomas J. Courchene, “Federalism and the New Economic Order: A Citizen and Process Perspective” (paper presented at the Forum of the Federations Conference on Federalism in the Mercosur, Porto Alegre, Brazil, 2002).

⁸ COM (2003) 73. See also “EU-commissaris wil identieke zorgpas,” *Radio Nederland Wereldomroep* bulletin, 21 February 2003

⁹ Case C-85/96 of 12 May 1998

¹⁰ Case C-184/99 of 20 September 2001

period of practical training, would be more demanding than the previous years. Thus, the CPAS granted Mr Grzelczyk the *minimex* and applied to the Belgian state authorities for reimbursement. The competent federal minister, however, refused to reimburse the CPAS on the ground that the legal requirements for the grant of the *minimex*, in particular the nationality requirement, had not been satisfied, whereupon the CPAS withdrew its funding. Mr Grzelczyk challenged that decision before the Labour Tribunal, Nivelles, which observed that Mr Grzelczyk did not satisfy all the requirements for claiming the *minimex* since his student status prevented him from being regarded as a worker and his residence in Belgium was not attributable to operation of the principle of free movement of workers. The Labour Tribunal also referred to the judgment of the Court of Justice in Case C-85/96 *Martínez Sala* and queried whether the principles of European citizenship and non-discrimination precluded application of the national legislation at issue.

The case drew much attention and a long list of interveners before the ECJ. CPAS argued that it would be wrong to regard all EU citizens as being entitled to claim non-contributory social benefits, such as the *minimex*. Indeed, it argued, Directives 90/364, 90/365 and 93/96 subject the exercise of freedom of movement to a requirement to demonstrate that the person concerned possesses sufficient resources and social security cover. The Belgian and Danish governments concurred, submitting that citizenship of the Union does not mean that Union citizens obtain rights that are new and more extensive than those already deriving from the EC Treaty and secondary legislation. The principle of citizenship of the Union has no autonomous content, they argued, but is merely linked to the other provisions of the Treaty. The Belgian Government added that the *minimex* is an instrument of social policy with no particular link with vocational training and that it is not within Community competence. The French Government submitted that the idea that the principle of equal treatment in the matter of social advantages should be extended to all citizens of the Union when at present it applies only to workers and members of their families would amount to establishing total equality between citizens of the Union established in a Member State and nationals of that State, which would be difficult to reconcile with rights attaching to nationality. The Portuguese Government argued that, since the entry into force of the Treaty on European Union, nationals of the Member States are no longer regarded in Community law as being primarily economic factors in an essentially economic community. One consequence of Union citizenship is that the limits and conditions which Community law imposes on the exercise of the right to freedom of movement and residence within the territory of the Member States should no longer be construed as envisaging a purely economic right arising from the EC Treaty but as being concerned only with those exceptions that are based on reasons of public policy, public security or public health. Furthermore, if from the time when the Treaty on European Union entered into force, nationals of the Member States acquired the status of citizen of the Union and ceased to be regarded as purely economic agents, it follows that the application of Regulation 1612/68 ought also to be extended to all citizens of the Union, whether or not they are workers within the meaning of that regulation. The United Kingdom government countered that, although Mr Grzelczyk suffered discrimination on the grounds of his nationality, Article 6 of the EC Treaty does not apply to his situation because any discrimination against him falls outside the scope of the Treaty; article 6 cannot have the effect of striking down limitations upon the scope of Regulation 1612/68, whether read alone or together with Article 8. By contrast, the Commission argued that

Articles 6 and 8 grant every citizen of the Union the right not to suffer discrimination by a member state on grounds of nationality, provided that the EU citizen's situation has some relevant connection with the member state concerned.

In its ruling the ECJ stated that Articles 6 and 8 (now, after amendment, Articles 12 EC and 17 EC) 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 1612/68 when no such condition applies to nationals of the host Member State. The *Grzelczyk* “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.”¹¹ In both *Martínez Sala* and *Grzelczyk*, the European Court upheld the access to social benefits on the basis of EU citizenship. Are there any limits to these rights?

A New Directive?

In order to address, within the context of EU citizenship, the problem of sometimes lengthy administrative procedures and ambiguity about the rights of family members, the European Commission presented in May 2001 a proposal for a directive on the right of the EU citizens and their family members to move and reside freely within the territory of the Union.¹² If adopted, the proposed directive would lengthen from three to six months the period in which EU citizens and their families may reside without conditions and with no formality in a member state other than that of their nationality. After six months, the current residence card would be replaced by an optional system of registration. For people in work, whether in paid employment or self-employed, the only condition on the right of residence is to engage in gainful activity, which is proved by a simple declaration. For people not in work and students, the right of residence will, for the first four years of residence in the host Member State, continue to be subject to the individual having sufficient resources and sickness insurance. However, evidence that the two conditions are met is likewise replaced by a simple declaration. Finally, after four years of continuous residence, EU citizens would automatically acquire the right of permanent residence, without conditions and with full access to social welfare and immunity from expulsion.

In addition to these changes, the proposed directive also broadens the definition of ‘family member’ and strengthens the rights to which family members are entitled. In particular, the proposal recommends including within the category of ‘family member’ unmarried partners if national legislation recognizes them, and ascendants and descendants whether or not they are dependent or minor. Family members who are

¹¹ The Court repeated this reasoning in Case C-224/98 *D’Hoop* of 11 July 2002

¹² Commission of the European Communities, COM (2001) 257. *Proposal for a European Parliament and Council directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States* (2001).

nationals of third countries would also enjoy greater legal protection, for example in the event of death of the EU citizen on whom they depend, or the dissolution of the marriage under certain circumstances. Finally, the proposed directive clarifies the limitations to the right of residence on grounds of public policy, public security and public health. The impact of the proposed directive would thus be significant.

The proposed directive was approved with amendments by the European Parliament at its sitting of 11 February 2003.¹³ The next question is whether or not the proposed directive will be adopted by Council. As a result of the Nice Treaty, this particular proposed directive no longer requires unanimous approval in Council, but only a qualified majority vote, as the Commission recently informed the Parliament and Council.¹⁴ In this process, the Commission can be expected to stick to its strong proposal. Indeed, European civil servants, who constitute a “small but powerful body of Europeans, who are themselves migrants,”¹⁵ are likely to be quite concerned with the rights and freedoms which attach to the status of Community migrant. Nevertheless, the future development of European mobility rights faces a number of challenges.

II. Challenges

Speculation about the future is a dangerous enterprise. Nevertheless, considering some challenges to European migration rights is a valuable exercise in terms of mapping out some potential avenues for the future development of European citizenship more generally. Here, I consider harmonization in Justice and Home Affairs, enlargement, and potential conflicts between national and EU citizenship.

Harmonization in Justice and Home Affairs

Increasingly, social scientists are joining lawyers in the analysis of the harmonization of laws across the European Union. At first, most harmonization occurred in the domains of law related to the economy. But other legal domains are also being transformed. One such area is family law, which has historically been the subject of seemingly interminable legal conundrums in cases where members of the family reside in or hold the nationality of different member states. Because cases crossed jurisdictions, competing judgments often caused chaos. Consider the example of the dissolution of marriage: the Brussels II convention, which entered into force on 1 March 2001, specifies that a single court is competent to approve a divorce: that of the ordinary place of residence of the couple before their separation. With the exception of Denmark, every divorce recognized by the competent court within the EU member states is henceforth automatically recognized in the other member states, thereby putting a stop to difficult and expensive parallel divorce proceedings launched in two different jurisdictions.¹⁶

But divorce is only perhaps the simplest of many areas of potential cross-jurisdictional confusion. The Lancelin-Tiemann affair, named after the parents of Caroline and Matthias, kidnapped by their French mother and then retaken by their German father in the spring of 1998, helped give a political push to the move to

¹³ See A5-0009/2003 of 23 January 2003.

¹⁴ See COM(2003)61 of 6 February 2003.

¹⁵ Siofra O’Leary, “The Free Movement of Persons and Services,” in *The Evolution of EU Law*, ed. Paul Craig and Gráinne De Búrca (Oxford: Oxford University Press, 1999), 380.

¹⁶ “Bruxelles simplifie le divorce entre Européens,” *Le Figaro*, 15 March 2001.

harmonize European rights under family law. Ms Lancelin's actions were fully supported by French judiciary, while the German judiciary supported Mr Tiemann's reaction; parents of different nationalities involved in custody battles were similarly tempted to pit one legal system against another. The Brussels II convention should help clarify the rights of parents and children by specifying that a single court has jurisdiction in child custody battles between citizens of different member states: that of the couple's residence before separation.¹⁷ While the temptation to kidnap children to the more sympathetic of the two legal systems may thus be eliminated, issues relating to visitation rights are not resolved by the Brussels II convention, relegating the further elaboration of the exact legal status of the European 'right to family life' to future negotiations.¹⁸

In general, the implications for migration of efforts to harmonize further in the field of Justice and Home Affairs reflect the fact that harmonization provides citizens with legal certainty about their rights. Thus further harmonization can be expected to lead to greater certainty about free movement rights. The challenge consists of the observation that legal harmonization will likely proceed at a slower pace than actual migration. It may be worth placing European legal harmonization in comparative context to see how it impacts and is impacted by movement between jurisdictions. For example, what effect if any does movement between different states in the U.S. exert on the development of a national legal space? The fact that significant differences continue to exist between various states in the U.S. – to take a stark example: in some states, being convicted of certain crimes can lead one to be put to death while, in other states, that would not occur – underlines the point that complete legal harmonization in Europe will and perhaps should never be realized. But the challenge is how to achieve enough standardization to remove impediments to free movement.

Enlargement

For individual citizens in the candidate accession countries, freedom of movement is without a doubt a key symbol of the 'return to Europe' that EU accession represents. Yet there is a disjuncture between the rhetoric of EU citizenship and the reality of negotiations, in particular the transition arrangements being considered in order to render enlargement more politically palatable. The current enlargement negotiations provide those who see European integration in terms of a gradual move away from a focus on economics towards greater and greater emphasis on individual rights with a sobering reality check. Because of (largely unfounded) fears of mass migration from candidate countries to current member states, the extension of full freedom of movement is likely to proceed gradually.¹⁹

To what extent does enlargement pose a threat to the future of European migration rights? My view is that the current enlargement round will not result in a significant political backlash in the current member states against migration rights for citizens of applicant states. Once they join, the applicant states will likely be highly

¹⁷ "Des contentieux franco-allemands à régler," *Le Figaro*, 15 March 2001.

¹⁸ There is movement on this front as well: the European Parliament has reacted favorably to a French proposal which would oblige courts to honor cross-border visitation rights while simultaneously guaranteeing the return of the child to the parent who has been awarded custody

¹⁹ See my "Free Movement and the 'Return to Europe'," presented at the Society for Comparative Research graduate retreat, Central European University, Budapest, 8-10 May 2002

supportive of maintaining or expanding free movement rights. Indeed, this is precisely the path followed by Spain and Portugal, which continue to be two of the staunchest supporters of EU mobility rights.

Nevertheless, there are some scenarios which could well cause increased political opposition. The most obvious is that of large influx of citizens from the candidate accession states into current member states. The worry that this might happen explains the transition periods by which full free movement rights will be extended to citizens of candidate accession states after they join. The felt political need for these transition periods is curious. The vast majority of studies predict only small levels of migration, yet free movement rights are to be phased in over a number of years rather than extended immediately upon accession.²⁰ Despite the existence of EU citizenship and its guarantees of full freedom of movement for all EU citizens, short-term economic self-interest and domestic political concerns continue to trump European rights.

The Europe Agreements do not extend any rights for candidate country nationals to access to employment in the EU, although the member states are encouraged to maintain or to introduce bilaterally more favorable conditions.²¹ Many of the candidate countries have concluded with existing member states bilateral arrangements concerning the migration of workers—and quite often these arrangements are not fully utilized.²² In other words, there is more room now for workers from candidate states to move to existing member states to take up jobs than there are workers from the respective candidate states willing to move. The chance of that pattern changing with accession seems illogical.

Proponents of transitional arrangements—primarily the governments of Germany and Austria—point to historical precedents in order to justify them now. While it is true that the accession of Greece in 1981 and of Spain and Portugal in 1986 also featured transitional arrangements, there has been no such arrangement since the introduction of EU citizenship a decade ago. Unlike the current process, the accessions of Austria, Sweden, and Finland in 1995 were not subject to evolutionary clauses; citizens of those states became EU citizens upon accession and immediately enjoyed the full range of rights of EU citizenship. In fact, they had previously enjoyed free movement rights under EEA agreements.

A further reason why the focus on transitional arrangements is curious relates to the fact that it affects only labor employment and covers only two of the five categories of employed persons: migrant workers and (sometimes) frontier workers. Anyone who is not seeking employment will enjoy a right of residence upon accession. This fits with precedent. Even in the accession of Spain and Portugal, the provision of services and the right of establishment of self-employed persons was not subject to transition periods. The question then becomes how to explain the transition periods.

The proposals on transitional periods can be characterized as an argument between certain member states (most notably Germany and Austria, in the case of the

²⁰ Some even predict virtually no migration from candidate countries to the existing member states. See Caroline De la Porte, “De inzet van de sociale dimensie van de uitbreiding en de toekomstverwachtingen,” *Belgisch Tijdschrift voor Sociale Zekerheid* 43 (2001): 11.

²¹ Commission of the European Communities, *The Free Movement of Workers in the Context of Enlargement* (2001) 5.

²² De la Porte, “De inzet van de sociale dimensie van de uitbreiding en de toekomstverwachtingen,” 11.

desire to limit the access of workers from candidate accession states to the domestic labor market) and European institutions. Indeed, the Commission generally appears to favor reducing or eliminating transition periods. In response to fears that citizens of candidate countries would make use of their rights of EU citizenship to travel, live and seek work in other member states, Internal Market Commissioner Frits Bolkestein argued “that in a healthy economy it is better to prepare for competition than to erect new barriers. After all, the freedom of people to move is a central pillar of the single market.”²³

In order to explain the position of those member states which oppose granting full free movement rights immediately upon accession it is necessary to refer to domestic politics. The case of Austria provides an example of a state in which anti-immigration rhetoric has increased in recent years, and where it is invoked explicitly by Eurosceptics and others in order to argue against EU enlargement. Similar dynamics—raising the specter of hordes of economically disadvantaged easterners flooding over (aqueous metaphors are common) the eastern borders once they are lowered—are evident in other member states as well.²⁴ Migration is a significant issue in recent and upcoming elections in a range of EU member states.

A further component of domestic politics, which plays into the positions taken by specific member states, relates to specific economic sectors. For example, some businesses and unions in Germany are opposed to easing restrictions on workers from candidate accession states because they fear competition from lower wage laborers. This is reportedly the case for construction firms in Berlin, although it would seem more logical for German firms to demand transition periods for Polish firms (right of establishment) which might compete with them rather than workers (freedom of movement) that they could hire for lower wages than their current workforce.

The key exception to freedom of movement for individuals consists of those who need to make use of public assistance. The fact that social welfare arrangements differ in the candidate accession states as well as in the existing member states leads some to revive the worry that the introduction of free movement between the existing member states and the candidate accession states will lead to ‘social dumping.’ But an erosion of standards of welfare provision in the more established EU member states is highly unlikely; indeed the Europe Agreements signed with the candidate accession states appear to be leading to a ‘race to the top’ rather than a ‘race to the bottom’ in terms of the benefits provided under national social services regimes.²⁵

A final consideration relating to freedom of movement of workers concerns cross-border commuters. If the right to seek employment were extended immediately upon accession, some worry about large numbers of workers commuting internationally daily: the European Parliament urged “special cross-border flanking measures such as possible transitional periods be considered in regions where workers are likely to commute across borders, with a view to anticipating the labour market consequences of the free movement of workers and services”. These transitional periods would help “secure an

²³ Frits Bolkestein, “De uitbreiding en het effect ervan op de vrijheden van de interne markt” (paper presented at the Beraad voor de bouw conference, The Hague, 10 October 2000).

²⁴ For example, in the 2001 elections, the Danish People’s Party (Dansk Folkeparti), a populist party with an anti-immigration platform took out full-page newspaper advertisements with a caption reading ‘do you really want to open our borders to 40 million Poles?’ I am indebted to Mette Bastholm for this example.

²⁵ De la Porte, “De inzet van de sociale dimensie van de uitbreiding en de toekomstverwachtingen,” 10.

urgently needed socially sustainable integration process.”²⁶ The issue of borders is one of the most sensitive ones in the accession negotiations. “One of the difficulties of defending enlargement is that in Germany and Austria it is sold with the understanding that the eastern borders will remain closed for some time after accession,”²⁷ while in the candidate countries enlargement is sold as a means of achieving open borders with the existing EU states.

National versus European citizenship?

Unless and until the constitutional convention’s proposals to institute a dual citizenship – European and national, with a separate legal status for each rather than EU citizenship being derivative of national citizenship, as is currently the case – are enacted in a future treaty, the question of who is a European citizen flows from the prior question of who is a citizen of a member state. One potential arena of concern thus rests in the question of who is granted national citizenship. Indeed, the Treaty clearly provides that member states remain the final arbiters over the question of citizenship, and the ECJ has protected the attribution of citizenship as the domain of exclusive member state authority.²⁸ Some member states may be concerned that other states are too lax in their attribution of citizenship, because attributing member state citizenship to an individual now automatically entitles that individual to rights throughout the Union. Thus, the concern that Ireland’s policy of granting Irish citizenship to anyone with even a single Irish grandparent – which affected mostly Americans – was frowned upon by some of the other member states.²⁹ Likewise, one potential explanation for the change in Germany’s citizenship laws to make it more difficult for ethnic Germans – primarily from eastern Europe and the former Soviet Union – to automatically claim German citizenship derives not from its impact within Germany but its potential impact elsewhere in the Union.

In this context, we may well observe more explicit pressure being exercised on member state governments by other member states to ensure that the attribution of citizenship does not occur in ways significantly out of alignment with the policies of other EU member states. To take a purely hypothetical example, if a member state decided to attempt to raise funds by selling citizenship – following the example of some Caribbean states, where non-citizens can buy citizenship for certain amounts of money or investments – there would surely be a response from other member states.

The selling of citizenship in Europe will likely never occur. But questions do remain about who should be entitled to citizenship, and there may be incentives in many cases for other member states to intercede in what remains officially a purely national matter. This affects not only the formal attribution of citizenship, but also the substantive effect of citizenship. Consider the case of minority rights. A cynic might say that one of the reasons why there has been so much insistence on the importance of protecting minority rights within the candidate states before those states are allowed to join is in order to diminish the chance of an exodus of minority populations once mobility rights are extended to them. One need only think of the attempts by Roma residing in the Czech

²⁶ European Parliament, *European Parliament resolution on the enlargement of the European Union B5-0538/2001* (2001), at point 35.

²⁷ Commission of the European Communities, Enlargement DG website.

²⁸ See, e.g., Case C-192/99 *Kaur* of 20 February 2001

²⁹ I need to find a reference for this; can anyone help?

Republic to emigrate for a pertinent example of what might worry existing member states. In response to the migration of Slovak Roma into EU countries, the member states re-introduced a visa requirement for citizens of Slovakia. Until the visa requirement was lifted in 2001, this move increased tension between the majority population, who generally perceived Roma emigration as economically motivated, and the Roma, who pointed to discrimination as a key factor for their desire to emigrate.³⁰ What precisely constitutes discrimination by a member state of the EU and when, if ever, are other member states entitled to intervene to put a stop to it? These are explosive questions, but ones which would certainly come to the fore if significant numbers of members of a minority group from one member state decided to exercise their migration rights.

A related example would be the case of a member state granting special privileges to third-country nationals. What if any impact can be expected from Hungary's Status Law – which grants a set of entitlements, including entitlements to temporary residence and work permits in Hungary, to ethnic Hungarians outside Hungary, primarily in Romania? As long as those affected by the Status Law do not make claims on other member states, there is likely to be no impact. But what if significant numbers of individuals were to attempt to use the provision to acquire Hungarian citizenship and subsequently move to another EU member state? Analogies to the example might be the German and Irish cases discussed above, although we can imagine other cases as well. The point is that the precise relationship between citizenship of a member state and citizenship of the Union remains vague, and vagueness may lead to contention.

Conclusion

In this paper, I considered some scenarios for the future of EU migration rights. I advance two main sets of arguments: first, the current Treaty rights enjoy widespread support and are unlikely to be reversed, although contestation continues to occur over their interpretation and implementation. Second, although a number of phenomena – here I consider enlargement and the push for greater harmonization between different national legal systems, touching also on potential socio-economic shocks and political opposition – pose risks for their future development, EU migration rights will likely be consolidated and even expanded over the coming decades. The dynamics by which this probable consolidation and expansion of rights occurs deserve close attention.

³⁰ Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement. Michal Vašečka, *Country Report on Minority Rights in Pre-EU Accession Slovakia* (Bratislava: Institute for Public Affairs, 2001) 21.