Member State and EU Citizenships Should be Strengthened Rather than Disentangled

Willem Maas   2019-01-29T12:26:13

Since the origins of European integration Member States may no longer discriminate, in areas of EU competence, between their own citizens and those of other EU Member States; starting in the 1950s with free movement provisions for coal and steel workers, citizens of the Member States have gradually acquired wide-ranging rights throughout EU territory.[1] Willem Maas, *Creating European Citizens* (Lanham: Rowman & Littlefield, 2007). Since those earliest days, access to most EU rights has depended on Member State citizenship. But Dora Kostakopoulou now proposes to "disentangle" EU from Member State citizenship. By "escaping state management and the imposed link with state nationality," EU citizenship "would be reclaimed as the cornerstone of European integration"; this "would not interfere with national legislation [but] would simply mean that the member states would no longer have the exclusive privilege of granting" EU citizenship. This is not a new proposal. In 1943 the Italian Movimento Federalista Europeo promoted a European "continental" citizenship alongside national citizenship, entailing direct political and legal relationships with a European federation, the legal equality of citizens of all European states, and the "option to take out European citizenship in addition to national citizenship," while the Dutch 'European Action' group called more modestly for European citizenship to supplement national citizenship.[2] Willem Maas, "The Genesis of European Rights," *Journal of Common Market Studies* 43, no. 5 (2005): 1012. More recently, some early drafts of the 2003 constitutional treaty specified that each EU citizen "enjoys dual citizenship, national citizenship and European citizenship; and is free to use either, as he or she chooses; with the rights and duties attaching to each," but this was dropped in subsequent drafts because of objections from some member states.[3] Maas, *Creating European Citizens*, 85. For a more developed argument, see Espen D. H. Olsen, *Transnational Citizenship in the European Union: Past, Present, and Future* (London: Continuum, 2012).

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

While perhaps appealing as a gesture towards addressing problems such the anticipated deprivation of rights following Brexit, statelessness, or wide variation in Member State naturalization and denaturalization policies, these proposals are impracticable in the absence of international recognition of EU citizenship (which

would normally require recognizing the EU as a state, which in turn should normally mean that the Member States cede competence over citizenship), challenge deeply rooted national stories of peoplehood with an emerging story of European peoplehood, and risk undermining fragile public support for EU rights. Better alternatives include increased conversations about best practices in naturalization and denaturalization policies in an effort to encourage Member States to engage in gradual policy harmonization, continuing to promote the ongoing emergence of a European peoplehood, and strengthening the rights that Europeans already have rather than introducing a new category of semi-citizens.

Citizenship as a Monopoly of States

The dominant idea that only sovereign states can grant citizenship means that jurisdictions such as cities, provinces, stateless or indigenous nations, or supranational entities like the EU cannot bestow citizenship, at least not in a form that receives widespread international recognition. The artificiality and arbitrariness of the sovereign state monopoly on conferring citizenship becomes clear from the fact that alternative jurisdictions such as the EU *do* constitute important sources of rights and status.[4] Willem Maas, "Varieties of Multilevel Citizenship," in *Multilevel Citizenship*, ed. Willem Maas (Philadelphia: University of Pennsylvania Press, 2013), 1–21; Willem Maas, "Multilevel Citizenship," in *The Oxford Handbook of Citizenship*, ed. Ayelet Shachar et al. (Oxford: Oxford University Press, 2017). Yet wishing away the state monopoly on citizenship will not make it so.

As a scholar of EU law, Dora correctly identifies the *Micheletti* judgment that Member States can establish conditions for acquiring or losing nationality only with "due regard to Community law" as granting European institutions a role. Indeed, during the Maastricht negotiations, the European Parliament resolved that the "Union may establish certain uniform conditions governing the acquisition or loss of the citizenship of the Member States, by virtue of the procedures laid down for the revision of the Treaty" – but at the Edinburgh Summit following Maastricht the Member States declared that "the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the nationality law of the Member State concerned".[5] Willem Maas, "European Union Citizenship in Retrospect and Prospect," in *Routledge Handbook of Global Citizenship Studies*, ed. Engin Isin and Peter Nyers (London: Routledge, 2014), 415. Dora also correctly notes the importance of the *Rottman* judgment that Member State decisions about naturalization and denaturalization are "amenable to judicial review carried out in the light of European Union law", and I have argued elsewhere that EU citizenship's rise profoundly alters the nature of Europe and its meaning for citizens, which forces even notionally sovereign EU Member States to coordinate their citizenship policies.[6] Willem Maas, "European Governance of Citizenship and Nationality," *Journal of Contemporary European Research* 12, no. 1 (2016): 542.

But the international state system continues to constrain the scope for EU action. The 1930 Hague Convention specifies that it "is for each State to determine under its own law who are its nationals," and Member States have always defended

their monopoly on defining who is a citizen for the purposes of EU law, from West Germany's declaration in the Paris and Rome Treaties that individuals in East Germany should be considered German for the purposes of European law to the United Kingdom's declaration specifying which British citizens and subjects qualify as UK citizens for the purposes of European law.[7)]Ibid, 535. EU Member States have continued to make such determinations despite the European Parliament's resolutions that there should be "closer coordination and a more structured exchange of best practices between Member States with respect to their citizenship laws in order to ensure fundamental rights and particularly legal certainty for citizens", and that there should be "comprehensive common guidelines clarifying the relation between national and European citizenship". While the Hague Convention is an invention less than a century old, the EU cannot overturn it unilaterally; an autonomous EU citizenship would require Member States to agree that their citizenship policies are subsets of the overarching international status of European citizenship.

To take a practical example, there exist only a few thousand EU laissez-passer documents (compared with some 40,000 United Nations laissez-passer documents) held by EU officials and some members of their families, but these do not enjoy the same level of recognition as diplomatic passports – or the hundreds of millions of Member State passports. Which authority would issue EU passports for the twenty million long-term resident third-country nationals (many of whom might disavow their other nationality once their European rights are secure, and thus would require EU passports), plus stateless individuals, *jus soli* children born in Europe, and the several other categories that Dora's proposals are intended to assist? Dora cannot dismiss debates about a federal future for the EU or how her proposals would affect Member State competence, because under international law only states can grant a citizenship that is recognized by other states. The Commission has insufficient resources to issue passports on the scale and scope required by an autonomous EU citizenship, even if it somehow acquires the personnel to fulfil Dora's dream of EU authorities being able to "make an independent determination of the EU's citizenry."

That last quote underscores what Jelena Dzankic calls a "core contradiction": the proposal for an autonomous EU citizenship depends on a status that is shaped and conditioned by the Member States, which remain the only authorities which bestow status. Perhaps over time EU central authorities could develop the capacity to conduct independent determinations of status (e.g. birth certificates issued or validated by EU authorities, independent verification of whether individuals meet EU-wide standard residence conditions, etc), but such capacity exists at EU level only in embryonic form. Jelena is right to flag the wide variation in status determination that now exists for third-country nationals and other categories. Such inequalities might even be exacerbated: a Member State with an Orbán or Salvini government might be less likely to bestow status than one more friendly to minorities or migrants. Eva Ersbøll agrees on the necessity of harmonizing laws on acquisition and loss of citizenship but argues that disentangling EU from Member State citizenship and granting EU citizenship after five years of residency would be opposed by many Member States, such as Denmark. Rainer Bauböck is right to worry that an autonomous EU citizenship would weaken the EU's leverage to

encourage reforms of Member State citizenship policies, as nationalistic Member State governments could argue that they should not be responsible for "rootless" EU citizens; narrow nationalists might be all too happy to offload responsibility for stateless individuals or "undesirable" minorities to the EU – Jules Lepoutre's invocation of Roma deportations and Dora's own invocation of suboptimal policies pursued by Estonia, Latvia, Romania, and Slovenia (additional examples are possible) suggest that Rainer's solution is better: Member States should reform their citizenship laws to bring them in line with liberal and democratic standards.

In a series of judgments, the CJEU has ruled that "Union citizenship is destined to be the fundamental status of citizens of the Member States" – which sounds wonderful, except to those who prefer national patriotism and national destiny. In ways that find echo in Dora's proposals, I have argued that EU citizenship provides rights that are autonomous from and supplementary to those of member state citizenship – that despite EU citizenship's derivative status it also confers its own independent entitlements and responsibilities.[8] Willem Maas, "Unrespected, Unequal, Hollow?: Contingent Citizenship and Reversible Rights in the European Union," *Columbia Journal of European Law* 15, no. 2 (2009): 265–80. Yet that article warns against EU citizenship remaining unrespected, unequal, and hollow: comparative examples of citizenship's development demonstrate that debates about citizenship are central to politics and that respect for citizenship rights is uneven and subject to political contestation, which should make us skeptical about claims that an autonomous EU citizenship can be insulated from political pressures. Along similar lines, Rainer's reminder that rights must be generated through democratic institutions that are seen as legitimate finds echo in Daniel Thym's invocation of the hollow hope, wondering how much courts can effectuate social change. Daniel is right to recall that the normative imaginary of the term "citizenship" was an important motivation for many heads of state or government at Maastricht (indeed my book *Creating European Citizens* traces this motivation from the 1940s to the present), but like any story of peoplehood (and like the decisions examined in *The Hollow Hope*) the narrative of EU citizenship provoked counter-narratives, including the Brexit narrative of taking back control.

The Tragedy of Brexit

Hardline Brexiteers portray EU citizenship and free movement as an unalloyed negative: "We must break free of the EU and take back control of our borders" declared a poster unveiled by UKIP leader Nigel Farage during the 2016 referendum campaign, and Farage subsequently emphasized that "the main reason above all that we voted to leave the European Union is we wanted to get back control of our lives and, in particular, control of our borders because unrestricted free flow of unskilled labour had driven down wages, had made it tough to get a [medical] appointment, to get our kids into the right school".[9] https://www.express.co.uk/news/uk/770912/Nigel-Farage-David-Davis-Brexit-EU-borders-migrants Blaming EU free movement (rather than successive UK governments implementing austerity measures) for cuts to healthcare and education budgets misrepresented reality, as did the Leave campaign's infamous bus emblazoned with the promise that leaving

the EU would mean £350,000 per week extra spent on the National Health Service, a promise from which Brexiteers quickly backtracked after the vote.

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

Dora is right to want to minimize hardship and unnecessary human suffering, but rather than introducing a new category of EU citizens (or enfranchising long-term resident third-country nationals for European Parliament elections, as Dimitris Christopoulos suggests; a suggestion that similarly skirts debates about status and recognition discussed above), a better solution is to increase the content and use of EU citizenship, to encourage what Jules calls "federal solidarity" to continue evolving and progressing. Jules calls full free movement for every European citizen "rather unlikely" – but it is precisely here that EU institutions should focus their energies. To counter Euroscepticism and myths promoted by resurgent nationalist movements that promise border controls will restore national sovereignty, Europe's political leaders must work to reinvigorate the European idea by undergirding the legal rights of EU citizenship with concrete social assistance for those who move between member states, and perhaps for non-movers too. Worries about social dumping and welfare tourism are exaggerated but introducing pan-European social entitlements such as a European unemployment insurance program financed by EU rather than destination-state funds would reassure publics skittish about the imagined dangers of intra-EU migration.[10] Willem Maas, "Boundaries of Political Community in Europe, the US, and Canada," *Journal of European Integration* 39, no. 5 (2017).

Brexit has uncovered and stimulated increased attachment to the EU and the European project more generally, both in the UK (where the likelihood of a second referendum reversing the result of the first continues to grow) and in the rest of the EU. With Jean-Thomas Arrighi I agree that it is too soon to attempt to upend the existing hierarchy by making Member State nationality derivative of EU citizenship and based on residence: as Jean-Thomas notes, comparative examples of centralization of citizenship usually followed dramatic events, such as the civil war in the United States. EU citizenship's future depends on *longue durée* sociological processes rather than a top-down legal imposition that would lack legitimacy. The Schuman Declaration famously spoke of "common foundations for economic development as a first step in the federation of Europe," but Jean Monnet and others realized the need for a sense of shared destiny and shared prosperity. Support for integration was driven by the idea that it would lead to monetary stability, economic expansion, social protection, a higher standard of living and quality of life, economic

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

References

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