The Case Against an Autonomous ‘EU Rump Citizenship’

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In the debate between Dora Kostakopoulou and Richard Bellamy, I agree with most of the propositions put forward by Dora in her introductory paragraphs: that EU citizenship allows former enemies to meet and live in harmony; that nationalistic populism should be rejected; and that the prospect of Brexit remains depressing. Nonetheless, I disagree with her proposal to move towards an autonomous EU citizenship.

To complement the contributions by other authors, my intervention will have an institutional focus by considering questions of positive law, citizenship governance, and legitimacy. It will demonstrate why I regard the proposal as being politically unfeasible, legally unnecessary, and conceptually incomplete. My suggestion would be not to invest our energy in pipe dreams at a time when the EU is in desperate need of (more) realistic reform proposals.

The Constitutional Pitfalls of a Citizenship Directive

Dora remains vague about how her proposal of an autonomous EU citizenship law should be realised. Her comments on ‘Step 2’ speak about EU rules to be adopted. Others have suggested that the proposal should be realised by means of a Directive on Citizenship. It sounds theoretically quite easy: the EU would adopt another directive, like so many others. In practice, however, such a realisation might prove tremendously difficult.

Why? Several actors might disagree. Not least as a result of the subtle changes introduced in the aftermath of the 1992 Danish referendum, in which the Danish population voted against the Maastricht Treaty – the vote led to the well-known formulation in today’s Article 9 TEU that ‘Citizenship of the Union shall be additional to national citizenship and shall not replace it’ – it will be an uphill legal battle to argue that the EU Treaties comprise a supranational legislative competence for harmonising the acquisition and loss of nationality or EU citizenship. The absence of such a competence is one reason why the Court has proceeded carefully when dealing with nationality law. Judgments such as *Micheletti* or *Rottmann* established some limits, but remained cautious nonetheless.

A full-blown Citizenship Directive would require Treaty change or activation of Article 25 TFEU, which would have similar consequences in practice. As we know, Treaty amendments are subject to a completely different set of procedures than the adoption of secondary legislation. There are multiple veto players.

It seems to me that this is more than a practical nuisance, since the centre of attention shifts away from the supranational debate in Brussels to domestic fora. To achieve a Treaty change, one has to politically convince actors and discursive forums at the national levels, which are often side-lined in supranational debates.

Firstly, any expansion of EU citizenship would probably have to survive another Danish referendum, along the lines of the 2015 vote on the new Europol decision, which would have altered slightly the contours of the 1992 Edinburgh compromise and which was rejected by the Danish population.

Secondly, national governments and parliaments might disagree. Hungary is only the most extreme example of a country in which the parliamentary majority might not be happy if it was told that third-country nationals living in Hungary are to be naturalised as Hungarians or EU citizens as a matter of EU law.

Thirdly, you might even encounter the opposition of the German Constitutional Court, which, in its ruling on the Lisbon Treaty, stated somewhat ambiguously that the rules on 'Staatsbürgerschaft' are subject to the constitution's eternity clause (even though we should note that the scope of the caveat is not crystal clear, since it fluctuates semantically between the more formal rules on the acquisition and loss of nationality, called *Staatsangehörigkeit* in German – and the substantive rules governing the status of citizens in the body politic, the *Bürgerschaft* or Citizenship). Common supranational rules might encroach the constitutional identity of the Federal Republic and be blocked by a veto from Karlsruhe.

In short, the politics of citizenship law are against legalistic discourses. Political dynamics would differ markedly from what abstract legal debates about the wording of the Treaties suggests. It will require more than a deal between the Council and the European Parliament or a consensus among a group of pro-European academics. One would have to engage in a pan-European debate about the merits and pitfalls of EU citizenship. The example of the Constitutional Treaty and the Brexit referendum shows that this is easier said than done.

Limited Practical Relevance of Citizenship Law

It seems to me that the debates about EU citizenship are defined by a double exaggeration: on the one hand, academic commentators tend to overstate its practical significance and, on the other hand, some colleagues tend to underestimate the symbolic dimension beyond hard legal developments.

The argument about limited practical effects is primarily about rules on the acquisition and loss of nationality or EU citizenship, which would be relevant primarily for third-country nationals living in Europe. When it comes to third-country nationals, we should be careful not to confuse naturalisation (or the direct conferral of EU citizenship) with basic questions of immigration and asylum laws.

European jurisdictions follow a step-by-step approach when initial admission gradually gives way to more robust statuses. Nationality or EU citizenship is

the last step in this process. Under Directive 2003/109/EC, most immigrants acquire a secure residence status with widespread equal treatment after five years. For such long-term residents, the added value of citizenship is limited from a practical perspective. Studies in Germany show that many migrants with a secure status do not even bother to apply for nationality even though they would fulfil the requirements for naturalisation.

The secure status established under Directive 2003/109/EC is no novelty. It has existed for many years in most jurisdictions and coincided, in countries like Germany, with restrictive *ius sanguinis* rules. As a result, inspecting the naturalisation regime alone can give an incomplete and sometimes false impression of the immigration practice.

The same applies for Brexit: if you are concerned with a pragmatic solution securing the rights of EU citizens in the UK and of British nationals in the EU, there is no need to embark on a politically sensitive, procedurally complicated, and normatively loaded debate about the direct conferral of EU citizenship. From a practical perspective, the EU and the UK resolve 95 % of all problems through advanced rules on immigration statuses in the exit agreement.

To sum up, if academic observers are concerned with immigrant admission, residence security and equal treatment, nationality law often is a secondary side aspect, which needs to be complemented with closer inspection of immigration and asylum regulations. These rules are highly complex and many of us shy away from studying them. But if the concern lies on practical effects, the academic debate cannot evade doing so.

The Symbolic Relevance of Citizenship Law

I do not claim that debates about citizenship and nationality are about practical effects only. Rather, the normative dimension seems to be the primary reason why academics and the broader public love discussing nationality law and EU citizenship. Citizenship law can be a reflection of the collective self-perception of European societies and the European Union at large. It allows to articulate normative visions about the direction to be taken. Dora's kick-off is a perfect example.

My own experience from the German context is that the same applies to domestic debates. Discussions about the *ius soli* and double nationality have limited effects for residence security or equal treatment, which third-country nationals acquire on the basis of long-term residence status anyway, but academics and the broader public embrace these debates nonetheless – and rightly so –since they serve as a projection sphere for how we define membership and identity.

It seems to me that the main added value of most citizenship debates is the symbolic dimension. It guides and reinforces changing self-perceptions of European societies, which welcome third-country nationals as equal members – an effect that technical rules on long-term residence status cannot bring about.

The Limits of Legal and Institutional Change

The symbolic dimension pervades Dora's kick-off and has defined the history of EU citizenship from the beginning. Arguably, the normative imaginary that the very term 'citizenship' conveys in many European languages was an important reason why heads of state or government agreed on the introduction of EU citizenship in Maastricht. Citizenship serves as a projection sphere for political visions of a good life and a just society and it was, in the case of the EU, a symbolic expression of the ambition to move towards some sort of federal Europe.

The Treaty of Maastricht used this normative reservoir despite the absence of widespread legal changes, thereby nurturing the initial criticism among academics that the new rules were just a 'label', an 'empty gesture' or a sort of 'cynical public relations exercise on the part of the High Contracting Parties'.

Along similar lines, the famous dictum by the Court that citizenship was 'destined to be' the fundamental status arguably hinted at the forward-looking potential and, in the beginning, it seemed that Luxembourg might realise the dream of a 'real' European citizenship by means of court judgments.

I have explained in the introductory chapter to the book 'Questioning EU Citizenship', which I edited (Hart Publishing, 2017), that such an instrumental use of supranational law as an engine for social change is not specific to the citizenship regime. It defines much of the integration process, including the single market programme, the Charter of Fundamental Rights or the erstwhile project of a Constitutional Treaty.

While some projects were successful, the Constitutional Treaty and the Brexit referendum remind us that Treaty changes, new legislation and innovative judgments alone cannot bring about an enhanced degree of identity and solidarity. Supranational citizenship law is thus not a self-fulfilling prophecy.

That is not to say that the law or court judgments are irrelevant. They express basic choices of societies and legal developments partake in the constant reconstruction of societal and individual self-perceptions. But the law and court judgments cannot change them single-handedly. To win the argument, innovative court rulings need to be embedded in social structures and political life – in the same way as the success of nation-building in Italy or Germany in the late 19th century was not the result of nationality laws alone.

If legal developments are not embedded in social practices and political life, they can remain a 'hollow hope'. We all know that the context is, unfortunately, not very supportive at the moment. I therefore suggest not to invest too much energy into a project which is politically sensitive, procedurally complicated, and normatively loaded. Let's focus, instead, on more realistic reform proposals which help the EU to overcome the ongoing crises.