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## **Perspectives on Social Citizenship in the EU: From Status Positivus to Status Socialis Activus via Two Forms of Transnational Solidarity**

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# Perspectives on Social Citizenship in the EU: From *Status Positivus* to *Status Socialis Activus* via Two Forms of Transnational Solidarity

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## I Introduction

Ever since the inauguration of EU citizenship, elements of social citizenship have been on the agenda of European integration. European-level social benefits were proposed early on,<sup>1</sup> and demands for collective labour rights have followed.<sup>2</sup> This chapter uses the theoretical umbrella of transnational social citizenship to link transnational access to social benefits and collective labour rights. It promotes transnational rights as the best way to conceptualise EU social citizenship as an institution enabling the enjoyment of EU integration without being forced to forego social rights at other levels. Such a perspective sits well in a collection on EU citizenship and federalism, since it simultaneously challenges the calls for the renationalisation of social rights in the EU and the reduction of EU-level citizenship rights to a merely liberal dimension. Social

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\* This chapter was submitted in spring 2015. In November 2016, only ten days were offered for updating. I was unable to update the chapter in this short time. Since the editors asked me to maintain my contribution nevertheless, I use this footnote as a disclaimer. I do know that new case law on both forms of solidarity has been issued in the time of more than a year which has passed now. Also, deliberations spurred by the results of the UK referendum on withdrawal from the EU would have merited to be integrated, had a reasonable time frame been offered.

<sup>1</sup> Schmitter and Bauer, 'A (Modest) Proposal for Expanding Social Citizenship in the EU' (2001) 11 *Journal of European Social Policy* 55.

<sup>2</sup> Bercusson, *European Labour Law* (Cambridge University Press, 2009), 263–65.

citizenship as advocated here requires an interactive conceptualisation of regulatory and judicial powers at different levels of government, as typical of federal systems.

In linking citizenship with human rights, the chapter highlights the different statuses of citizens. It argues that the rights constituted by social citizenship derive from a *status positivus* and a *status socialis activus*, expanding the time-honoured Jellinek categories.<sup>3</sup> This concept is developed further by linking the notions of receptive solidarity to the *status positivus* and the notion of participatory solidarity to the *status socialis activus*. In relation to European Union citizenship, it promotes a sustainable transnational social citizenship catering for receptive and participatory solidarity.

These ideas contrast with most current discourses on EU citizenship. The stress on social citizenship takes issue with a retreat<sup>4</sup> to mere liberalist notions of EU-level citizenship, and the stress on rights takes issue with conceptualising EU citizenship as a community bond with obligations,<sup>5</sup> downplaying the empowering potential of rights. The difficulty of conceptualising transnational social citizenship is to avoid, on the one

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<sup>3</sup> Jellinek, *System der subjektiven öffentlichen Rechte* (Mohr, 1892); Schiek, 'Fundamental Rights Jurisprudence Between Member States' Prerogatives and Citizens' Autonomy', in Micklitz and de Witte (eds.), *The European Court of Justice and the Autonomy of Member States* (Intersentia, 2012), 221–22.

<sup>4</sup> This retreat is a relatively recent phenomenon: in the 1990s and until the 2000s, social citizenship was widely debated (see for example Magnusson and Stråth (eds.), *A European Social Citizenship?* (Peter Lang, 2004); Faist, 'Social Citizenship in the European Union' (2001) 39 *JCMS* 37; and Shaw 'The Interpretation of European Union Citizenship' (1998) 61 *MLR* 293, 301–02. The retreat is also not ubiquitous, since adding social strands to EU citizenship is still defended. See, e.g., Kostakopoulou, *Co-Creating European Union Citizenship* (European Commission, 2013), 47.

<sup>5</sup> Some sociological approaches focus on this, e.g., Hurrelmann, 'Democratic Citizenship in Europe – an Impossible Ideal?' (2015) 22 *Journal of European Public Policy* 19, stressing the requirements that citizens must fulfil to live up to the ideal of EU citizenship.

hand, taking up the tune of populist discourses imagining those moving beyond state borders as a threat to national social citizenship and, on the other hand, rejecting the legitimate fears of those remaining at home of creating rupture in the social fabric of Europe's society. By promoting transnational social citizenship rights based on receptive and participatory solidarity, this chapter aims to contribute to avoiding these pitfalls.

The chapter will proceed in two parts. The first will discuss the potential of transnational social citizenship. Linking Marshall's concept of social citizenship for the (British) nation-state to concepts of welfare rights in constitutional social states, the guarantee of social rights – as opposed to voluntary handouts or toleration of participation – emerges as the main progress connected with social citizenship in nation-states. Social, as opposed to liberal or civic citizenship, consists in the guarantee of rights for the many instead of the few, on the basis of both receptive and participatory solidarity. If citizenship is defined as being connected by a shared fate of equals, it is possible to imagine transnational citizenship as a multiplicity of citizenships in overlapping and interlinking spaces. The question addressed is how a rights-based approach to social citizenship must change to provide transnational social citizenship in line with the two modes of solidarity-based rights. In order to illustrate its complexity, populist discourses challenging the factual emanations of transnational citizenship in the EU will be used. The first part concludes that while receptive solidarity is more difficult to adapt to transnational citizenship than participatory solidarity, finding a comprehensive new mode of social citizenship rights for the transnational age is possible in principle.

The second part of the chapter explores the European Union as a laboratory for transnational social citizenship rights, assessing how far its practice contributes to or hinders new modes of transnational solidarity. While EU citizenship – a legal construct severely limited by the direct reference to nationality – is certainly important here, transnational citizenship as a factual situation precedes positive law on EU citizenship. In particular, free movement rights – linked to economic freedoms as well as to EU citizenship – have engendered transnational social spaces as sites of EU social citizenship. In order to assess how far EU law contributes or restrains transnational social citizenship in practice, ECJ case-law will be analysed, using one case study for each of the two types of solidarity. As regards the *status positivus* or receptive solidarity, the recent *Dano* case will be used as a starting point for a critical investigation into the degree to which the positive potential of the non-discrimination dimension of free movement rights is realised. As regards the *status socialis activus*, or participatory solidarity, the analysis focuses on the judicial assessment of manifestations of transnational solidarity, as illustrated by the *Laval* and *Viking* case law. The chapter will conclude that the ECJ has a long way to go to find responsible answers to the challenges of transnational social citizenship.

## II Towards Transnational Social Citizenship

### A The Social Citizenship Metaphor

The notion of social citizenship is usually traced back to T. H. Marshall, who developed citizenship as a sociological category against the background of British politics.<sup>6</sup> He

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<sup>6</sup> Marshall, *Citizenship and Social Class* (Cambridge University Press, 1950).

defined citizenship as membership in a community based on equal rights, which developed alongside the rise of capitalism, a socioeconomic order based on inequality.<sup>7</sup> Wondering how these two could coexist, Marshall suggested that citizenship rights developed through a number of phases: the equal civil rights of the eighteenth century could easily coexist with unequal economic rights, which led to unequal political rights. However, once equal political rights had been established, some form of social citizenship had to develop in order to integrate the dispossessed classes. Accordingly, the rights to education, healthcare, housing and to some monetary benefits replaced the factual social membership in villages and communities. While Marshall's model of a logically staged development from initially civil (liberal) then political (democratic) and then social rights, was not ubiquitous in the industrialised societies of the nineteenth century,<sup>8</sup> and though written from the perspective of a non-federal national state,<sup>9</sup> it remains relevant to establishing the distinctive elements of social citizenship as ideal types in any entity.

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<sup>7</sup> Ibid., 29.

<sup>8</sup> Bellamy, 'Historical Development of Citizenship', in Wright (ed.), *International Encyclopaedia of Social and Behavioural Sciences* (Elsevier, 2014). For example, in Bismarck's Germany benefit rights were granted to appease workers while anti-socialist legislation prohibiting trade-union-related rights to association were maintained: Schiek, 'Artikel 20 Abs. 1–3 V: Sozialstaat', in Stein et al. (eds.), *Alternativkommentar zum Grundgesetz* (Luchterhand, 2001), marginal number 6. Marshall conceded that the Poor Laws of Elizabethan Britain by incorporating steps towards a just wage were early emanations of social citizenship, conflicting with new civil rights supporting a competitive economy (ibid., 22).

<sup>9</sup> Accordingly, his approach requires adaptation to theorise citizenship in a transnational federal entity such as the EU (for a critical approach to Marshall's ideas in relation to the EU, see de Búrca, 'Report on the Further Development of Citizenship in the European Union' (2001) 39 *Zeitschrift für schweizerisches Recht* 50.

## B Rights in Constitutional Social States

Without using the metaphor of social citizenship, constitutionalised welfare states provide a similar answer to the need to afford full membership in capitalist societies through state-led endeavours aimed at social inclusion,<sup>10</sup> offering payments in times of need on the one hand, and attachment to social institutions such as social insurance or the educational systems on the other. The difference between constitutionalised welfare states and social citizenship as metaphors is that the former is focused on social structures and the latter on the individual – though this is a matter of degree.<sup>11</sup> More important, the constitutional welfare state stresses that benefits are not gracious hand-outs which may at times further social inclusion, but rather rights to which a citizen has a constitutional claim, alongside claims to access social institutions.<sup>12</sup>

## C Rights and Social Citizenship

As a sociological concept, citizenship can be defined by a combination of three elements: belonging to a community, endowment with rights and being subjected to the corresponding obligations.<sup>13</sup> These have recently been summarised as a shared fate of equals.<sup>14</sup> This kind of citizenship emerges anywhere where humans live, since humans

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<sup>10</sup> See for example, Taylor-Gooby, *Reframing Social Citizenship* (Oxford University Press, 2008).

<sup>11</sup> Marshall also related to the institutions needed to guarantee social citizenship. See Marshall (n.6), 52–59.

<sup>12</sup> See Katrougalos, 'The (Dim) Perspectives of the European Social Citizenship' (2007) *Jean Monnet Working Paper* 05/07.

<sup>13</sup> Bellamy (n.8).

<sup>14</sup> Somers, *Genealogies of Citizenship: Markets, Statelessness, and the Right to Have Rights* (Cambridge University Press, 2008).

are social animals and prone to interacting and building communities and societies. When discussing EU citizenship, it is less useful to consider these timeless elements – the EU is certainly built on modernity in a particular regional variety. Here, the ascent of citizenship coincided with the ascent of the nation-state, which again coincided with the demise of absolute rule by monarchs and the rise of capitalism.<sup>15</sup> Accordingly, the community to which the new citizens belonged was the nation-state. However, the more fundamental distinction between the citizen and the subject lies in the fact that she is regarded as an individual endowed with rights, liberating the citizen from ties deriving from inherited status.<sup>16</sup> Accordingly, citizenship and individual rights not only emerged at the same time, but are also co-genital.

Arendt coined the phrase that citizenship consists of the right to have rights<sup>17</sup> in order to underline that guaranteeing rights without a frame of reference for their enforcement and participatory creation<sup>18</sup> is useless. While Arendt's phrase does not answer the question of which rights define citizenship,<sup>19</sup> it highlights that rights are a relational category, thus reminding us of their dialectical character.<sup>20</sup> Rights presuppose interaction with fellow humans for their creation as well as for their enforcement –

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<sup>15</sup> For a brief narrative on the birth of constitutional rights in Europe with further references, see Schiek, *Economic and Social Integration* (Edward Elgar, 2012), 54–59.

<sup>16</sup> See on this, Bellamy (n.8).

<sup>17</sup> Arendt, 'Es gibt nur ein einziges Menschenrecht' (1949) 4 *Die Wandlung* 754. This is the original German version of the article translated as 'The Rights of Man: What Are They?'

<sup>18</sup> Bellamy, "Right to Have Rights", in Bellamy and Warleigh (eds.), *Citizenship and Governance in the European Union* (Continuum, 2001).

<sup>19</sup> This is alluded to by Kochenov, 'The Right to Have *What* Rights?' (2013) 19 *ELJ* 502.

<sup>20</sup> Balibar, *Strangers as Enemies*, Globalization Working Paper 06/4 (McMaster University, 2006), 13.



insofar as they presuppose society, whether in the form of a constituted political community or not. Societies do not have to coincide with nation-states – they could even encompass the world. All this demonstrates the centrality of rights to the concept of citizenship. Any contrast between rights and citizenship<sup>21</sup> is less than convincing if we realise that no human being can be an isolated bearer of natural rights.<sup>22</sup> Rights only make sense in interaction with others.

Social citizenship, thus understood as a specific category of rights, is appropriate to conceptualise the concern which the constitutional social state sought to pursue: to include not only the *citoyen* of capitalist societies of the penultimate century, but also a wider and more diverse population, encompassing non-possessing classes and international migrants. Social citizenship ensures that persons, though formally right-bearing, do not become socially excluded, internally right-less and thus factually, if not legally stateless.<sup>23</sup> It provides the factual preconditions for the enjoyment of formally endowed rights. Social citizenship is thus inalienable from social rights.

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<sup>21</sup> As drawn by Mundlak, 'Industrial Citizenship, Social Citizenship, Corporate Citizenship' (2007) 8 *Theoretical Inquiries in Law* 719, contrasting industrial citizenship with labour rights.

<sup>22</sup> Somers (n.14), 7–8, makes a similar argument, and the same argument can be based on the necessary embeddedness of individuals in a web of relationships, as stressed by feminist legal theory: Moller Okin, 'Equal Citizenship' (2004) 72 *Fordham Law Review* 1537. Another way of expressing this is by reference to autonomy: see, for example, Möller, 'Two Conceptions of Positive Liberty' (2009) 29 *OJLS* 757.

<sup>23</sup> This stark terminology alludes to Somers (n.14), 24–36.

## D Rights for the Many instead of the Few: Of Statuses and Two Kinds Of Solidarity

This leads to the next step in defining social citizenship rights. Social citizenship aims to guarantee rights for the many instead of the few. This task requires bridging the tension between enabling individuals to self-govern their lives and the need to do justice to the dependence of human beings on each other as well as on the wider animate and inanimate world. Accordingly, rights need to move beyond the liberal paradigm.

The liberal paradigm in a nutshell, relied on the notion of a formal autonomy of the citizen, who was fully capable of governing his own life relying on his (inherited) wealth and the labour of his dependants. His autonomy was only contested by a usurping state, against which liberal citizenship rights were wielded to challenge any 'intervention'. Jellinek, analysing Prussian administrative law, referred to this as the *status negativus*.<sup>24</sup> With the inclusion of more and more people into the citizenry, the liberal notion of formal autonomy was perceived as unrealistic: because the formally autonomous bourgeois actually depends on the services of his family and workers, his autonomy needs to be balanced with theirs if they, too, are granted citizenship rights. Social citizenship chimes with Jellinek's *status positivus*: new groups of citizens – the poor, the workers, the women – cannot factually enjoy citizenship rights in a merely defensive mode. They depend on positive rights, as associated with state benefits as regards the provision of housing, education and healthcare, as well as monetary income supplements or minimum wages in order to guarantee subsistence. However, the *status positivus* is also a *status passivus*, inevitably entailing some paternalism. By giving those citizens who lack the property-based autonomy characterising the ideal bourgeois

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<sup>24</sup> Jellinek (n.3); Schiek (n.3), 221, and references therein.

citizen state-funded benefits to guarantee their capacity to provide for themselves, the difference between bourgeois and the non-possessing classes is entrenched rather than overcome.

Beyond the *status positivus*, in which citizens are dependent on states, the notion of substantive autonomy requires the expansion of citizenship rights. What if citizens did not have to rely on state hand-outs in order to factually enjoy their status as full citizens? What if they were empowered to fend for themselves? This is the essence of the *status socialis activus*.<sup>25</sup> citizens should not only have the right to engage in state-centred public democracy via Jellinek's *status activus*, but also the right to engage actively in any other sphere where they interact with others. Such spheres will frequently be circumscribed by markets: the housing market, the employment market, the market for bank accounts or the market for education, to name but a few. However, the spheres of citizens' interaction can also be non-market spheres: the space where the inhabitants of a neighbourhood interact, the public education system or the public health service, in which pupils or patients interact with teachers and medical staff.

Traditionally, a *status socialis activus* is realised in the field of labour relations, frequently referred to as industrial citizenship.<sup>26</sup> The notion refers to the right of workers to form a distinct group united not only by a common fate but also through a purposeful association. 'Combining' is the classical term used for this kind of organisation, typically in trade unions, which allows workers to threaten collective

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<sup>25</sup> Schiek (n.3), 219–58.

<sup>26</sup> Marshall (n.6); Fudge, 'After Industrial Citizenship' (2005) 60 *Relations Industrielles / Industrial Relations* 631; Mundlak (n.21); Bagguley, 'Industrial Citizenship' (2013) 33 *International Journal of Sociology and Social Policy* 265; Zhang and Lillie, 'Industrial Citizenship, Cosmopolitanism and European Integration' (2014) 17 *European Journal of Social Theory* 1.

action in order to engage their employers in collective bargaining, which again offers them the opportunity to achieve a fair deal on the labour markets.<sup>27</sup> In Marshall's conception, industrial citizenship appeared as an afterthought,<sup>28</sup> since he considered the state-funded generation of income independent of the recipients' 'market value' as conceptually superior to establishing better terms on markets.<sup>29</sup> As the central element of industrial citizenship, collective bargaining aims to increase the workers' market value through the credible threat of collective action. More recent conceptions of the constitutional social state guarantees stress the inherent value of self-determined social participation. From this perspective, industrial citizenship is a mode for realising self-determination in the marketplace under conditions of structural inequality.<sup>30</sup>

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<sup>27</sup> It should be stressed that the assumption that labour markets in particular suffer from an asymmetry is not necessarily based on any Marxist theory. It has famously been explained by the so-called fallacy of labour theory, which was developed by economists who favoured the market economy as a point of principle. According to this theory, the labour market suffers from an imbalance because most workers do not have any alternative to earning their main income through employed work. Accordingly, if wages fall below a certain level, workers will not withdraw their labour but rather expand its supply. For example, they may take on a second job, or encourage their children to work. This is the basis for an orthodox justification of collective bargaining. While these ideas have been around for a long time, see Stützel, *Marktpreis und Menschenwürde* (Bonn Aktuell, 1982), 75–76.

<sup>28</sup> Bagguley (n.26); Fudge (n.26).

<sup>29</sup> Marshall (n.6), 42–46, see also 68. There is a link to the more recent concept of the de-commodification effect of the welfare state: see Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Polity Press, 1990).

<sup>30</sup> Kittner and Schiek, 'Artikel 9 Abs. 3 GG (Koalitionsfreiheit)', in Stein et al. (eds.), *Kommentar zum Grundgesetz – Reihe Alternativkommentare* (Luchterhand, 2001), marginal numbers 89–92, for a critique of more limited views.

In the practice of European welfare states,<sup>31</sup> social citizenship is frequently realised through a mix of benefits and participation. For example, the public social insurance budgets are based on contributions and frequently administered democratically. Contribution-based benefits on this basis constitute a step towards self-organised social citizenship, harking back to the origins of some branches of social insurance in employee self-organisation through trade unions, which survived until recently in some unemployment insurance systems.<sup>32</sup> Social insurance thus combines self-organisation typical of the *status socialis activus* with state benefits typical of the *status positivus*.

The concept of statuses may seem fairly static if used in isolation. Social citizenship in both statuses depends on some emanation of solidarity. However, two different kinds of solidarity underlie the *status positivus* and the *status socialis activus*. Overall, it is interaction between human beings and the participation in human society which creates and reactivates solidarity.<sup>33</sup> If social citizenship is the means for achieving

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<sup>31</sup> For an overview of European welfare state models involving social insurance see chs. 40–43 in Castles et al. (eds.), *The Oxford Handbook of the Welfare State* (Oxford University Press, 2010).

<sup>32</sup> Under the so-called Ghent system, unemployment benefits are linked to insurance provided by trade unions, as workers' mutual societies were the forerunners of trade unions in many European countries in the 20th century. On the history of the system and its longest surviving Scandinavian variety, see Clasen and Viebrock, 'Voluntary Unemployment Insurance and Trade Union Membership' (2008) 37 *Journal of Social Policy* 433; for more recent developments, see Høgedahl, 'The Ghent Effect for Whom?' (2014) 45 *Industrial Relations Journal* 469.

<sup>33</sup> This is a Durkheimian concept of solidarity, which constructs solidarity as a type of social relationship. For a short introduction to competing concepts of solidarity in EU integration discourses, see Ross, 'Solidarity – a New Constitutional Paradigm for the EU?', in Ross and Borgmann-Prebil (eds.), *Promoting Solidarity in the European Union* (Oxford University Press, 2010), 26–28, with references to classical expositions of the theme.

the inclusion of large sections of the population into engagement with their polity, social citizenship also aims at increasing interactions and thus solidarity.

Social citizenship, if based on the distribution of payments, also creates interaction between different factions of the citizenry: those who contribute larger parts of the tax base interact with those who receive benefits through the medium of the social state. However, this interaction is merely indirect and mediated through the political process. As indicated above, the benefactor (even if it is the state) is the one active here, and the passive status of the recipients is not without its problems. They receive benefits (preceded by medieval alms)<sup>34</sup> and are often portrayed as not giving back. Accordingly, it seems appropriate to term this kind of solidarity as 'receptive solidarity'.

The *status socialis activus* involves more direct engagement of different factions of the citizenry with each other. Beyond relieving citizens from constant worry about their mere existence, the *status socialis activus* empowers citizens to take political engagement from the narrow realm of the public sphere to the wider realms of the and beyond that into civil society. Instead of remaining passive recipients, citizens gain the right to improve their position in the markets by direct action – making the benefits potentially superfluous. This leads of necessity to the interaction of those citizens with each other, and of their collective with those multinational corporations or other individuals holding private power. Such 'participatory solidarity' could even be regarded as being closer to the meaning of solidarity as interaction. It also expands the realm of the political, thus questioning the neutrality of market forces.

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<sup>34</sup> See Andersen, 'Precarious Pasts, Precarious Futures', in Costello and Freedland, *Migrants at Work* (Oxford University Press, 2014).

## E Transnational Social Citizenship

If citizenship is conceptualised as a bond between equals joined by 'a shared fate',<sup>35</sup> it is no longer a state-focused notion. People can share a link to the same multinational corporation as their employer, the same housing estate as their landlord or the same higher education sector as their employer or education provider. These entities can extend beyond national borders or encompass only a fraction of a territory. The society of equals whose fate the citizens share could just as well encompass the whole world.

'Transnational citizenship'<sup>36</sup> is a term best suited to capturing this complex reality. Using the notion of 'transnational'<sup>37</sup> we take into account the continuing relevance of nation-states and the fact that nation-states are increasingly 'relativised'<sup>38</sup> by transnational interactions. These interactions complete those at national and subnational level. Transnational spaces are multilayered by definition. The dynamic concept of citizenship<sup>39</sup> offers attractive options here to assess the emergence of new

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<sup>35</sup> Somers (n.14).

<sup>36</sup> The debate on EU citizenship as a transnational citizenship is too voluminous to be referenced in full here. The debate on transnational citizenship began in political sociology in the 1990s, e.g., Bauböck, *Transnational Citizenship* (Edward Elgar, 1994), expanding to EU critical perspectives around the turn of the century, e.g., Balibar, *We, the People of Europe?* (Princeton University Press, 2004). More recently, legal scholarship has also taken up the theme, e.g., Iliopoulou Penot, 'The Transnational Character of Union Citizenship', in Dougan et al. (eds.), *Empowerment and Disempowerment of the European Citizen* (Hart, 2012); Bellamy et al., *Making European Citizens* (Palgrave Macmillan, 2006); Olsen, *Transnational Citizenship in the European Union* (Bloomsbury, 2012); Lacroix, 'Is Transnational Citizenship (Still) Enough?', in Kochenov et al. (eds.), *Europe's Justice Deficit?* (Hart, 2015).

<sup>37</sup> See also DeBardleben and Hurrelmann, *Transnational Europe* (Palgrave Macmillan, 2013).

<sup>38</sup> Balibar (n.20), 10.

<sup>39</sup> Fudge (n.26), 634.

fate communities as overlapping and pluralist entities. While citizenship is continuously associated with specific ties which bind,<sup>40</sup> individuals can be bound by different ties into different polities, societies and communities.

Just as social citizenship rights – which used to be rooted in village, town or guild – were transferred to the nation-state when industrial capitalism emerged,<sup>41</sup> social citizenship rights can be transferred to transnational entities to make them viable for transnational citizenship sites, such as multinational corporations, a supranational community of states or a regional university. Just as sites of social citizenship within nation-states developed in contradictory and diverse forms, sites of social citizenship in transnational entities will evolve in haphazard and possibly even more contradictory ways. Analysing all this is fortunately not necessary for a chapter focused on the rights discourse.<sup>42</sup> Instead, we can limit our ambition to considering how rights guarantees can negotiate potential tensions between the different levels at which social citizenship is enacted and leads to rights.

Intuitively, we would assume that there are differences between rights based on receptive and participatory solidarity. This is confirmed by current populist discourse on the extension of benefits beyond national borders as well as on migrants at work.

Relating to the former, restrictions on the poor to move into the catchment area of territorial benefit regimes is much older than the modern welfare state: there were already restrictions to the movement of the poor as well as the distribution of alms (the

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<sup>40</sup> Wright and Reeskens, 'Of What Cloth Are the Ties That Bind?' (2013) 20 *Journal of European Public Policy* 1443.

<sup>41</sup> Marshall (n.6), 13.

<sup>42</sup> Nor is a single book sufficient space to exhaust the theme, see Balibar (n.36).



precursor of benefits) in the late Middle Ages.<sup>43</sup> Today, the mass media condemn Romanians moving to northern states where they can claim benefits<sup>44</sup> and some governments berate foreigners who partake of national social institutions.<sup>45</sup> In nested<sup>46</sup> or semi-sovereign<sup>47</sup> welfare states, it is alleged that the ties between persons<sup>48</sup> distant from each other may be too long to bind reliably.<sup>49</sup> If there is no 'sufficient link',<sup>50</sup> the payment of benefits to a stranger is perceived as no longer underpinned by feelings of solidarity. If payments to the poor are bound to smaller territorial entities, the actual

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<sup>43</sup> From historical perspectives, Andersen exposes how criminalising vagrancy and prohibiting the distribution of alms were used to prevent the poor from moving about: Andersen (n.34), 69.

<sup>44</sup> For example, the German weekly magazine Focus of 11 November 2014 commented on the Court's Dano ruling (see below) that Germany's generous welfare system would attract some migrants who would only be entering Germany to claim benefits: 'in Deutschland (greift) das Sozialsystem ... Hilfsbedürftigen finanziell unter die Arme ... Das macht die Bundesrepublik auch im Ausland attraktiv: ... Manche kommen aber auch nur, um Sozialleistungen vom Staat zu kassieren'. See 'Deutsche und Zuwanderer betroffen: Diese Menschen haben keinen Hartz-IV-Anspruch', available at [http://www.focus.de/finanzen/news/arbeitsmarkt/arbeitslosigkeit/harte-regeln-diese-menschen-haben-keinen-anspruch-auf-hartz-iv\\_id\\_4266041.html](http://www.focus.de/finanzen/news/arbeitsmarkt/arbeitslosigkeit/harte-regeln-diese-menschen-haben-keinen-anspruch-auf-hartz-iv_id_4266041.html).

<sup>45</sup> The Prime Minister of the UK coined the slogan that the National Health Service should not become an International Health Service in response to EU citizenship rights afforded to non-UK citizens. A video is still available on the *Daily Telegraph* web page: <http://www.telegraph.co.uk/news/uknews/immigration/9953448/David-Camersons-benefit-tourism-pledges-unravel.html>.

<sup>46</sup> Ferrera, 'Liberal Neo-Welfarism' (2013) *Observatoire social européen*, Opinion Paper 14; Ferrera, *The Boundaries of Welfare* (Oxford University Press, 2005).

<sup>47</sup> Bruzelius et al., *Semi-Sovereign Welfare States, Social Rights of EU Migrant Citizens and the Need For Strong State Capacities* (Oxford Institute of Social Policy, 2014).

<sup>48</sup> Wright and Reeskens (n.40).

<sup>49</sup> Lamping, 'Mission Impossible?', in Ross and Borgmann-Prebil (eds.), *Promoting Solidarity in the European Union* (Oxford University Press, 2010).

<sup>50</sup> On this aspect of EU citizenship case law, see Pennings, 'EU Citizenship' (2012) 28 *International Journal of Comparative Labour Law and Industrial Relations* 307.

opportunities for the use of any free movement rights will be limited. As a result, free movement will be portrayed as the privilege of the better-off,<sup>51</sup> which again could fuel social envy. All this indicates that a principle of equal treatment for free movers in the receiving society may well be a precondition to making free movement an option for all, but it could also cause resentment in regions with higher levels of welfare state protection, especially if the media and politicians link cuts in welfare levels to immigration and free movement.

As regards migrant workers, employers may prefer strangers who accept employment for less attractive conditions than the local population, which again stirs up xenophobia and rejection of these migrants and their employers.<sup>52</sup> The strategy of offering very low wages for low qualified and physically demanding work to migrant workers instead of negotiating for locally acceptable wages and conditions confirms the labour market paradox referred to earlier: employers have a greater incentive to expand the pool of workers and to create profit margins from low wages than to increase the quality of production and to create profit margins from higher turnover.<sup>53</sup>

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<sup>51</sup> Bellamy, 'The Liberty of the Postmoderns?' (2009) *LSE Working Paper* 61; Everson, 'A Very Cosmopolitan Citizenship', in Dougan et al. (eds.) (n.36); Giubboni, 'European Citizenship and Social Rights in Times of Crisis' (2014) 15 *GLJ* 935, 944–45; Menéndez, 'Which Citizenship? Whose Europe?' (2014) 15 *GLJ* 907.

<sup>52</sup> To quote but one contemporary example: a convenience food production chain, after receiving state aid for creating employment opportunities, offered only monotonous and dangerous work instead of more humane conditions to which the local workforce was used. The employer claimed that it had to hire from other EU Member States for these low-paid posts. See 'Sandwich maker goes ahead with Hungary hire drive', available at <http://www.theguardian.com/business/2014/nov/10/sandwich-firm-fill-vacancies-factory-east-european-workers>.

<sup>53</sup> See from an orthodox perspective, Ruhs, 'Immigration and Labour Market Protectionism', in Costello and Freedland (eds.), *Migrants at Work* (Oxford University Press, 2014), 104–05.

Transnational movement of labour helps employers compete through lowering wages, especially in sectors such as the food industry where repetitive and low-qualified work can still reap profits. What does this imply for transnational social citizenship?

The fact that migrants are more easily exploited than domestic workers is partly a result of unfamiliarity with local conditions and the expectation of lower wages at home,<sup>54</sup> and partly a function of limited migration rights: migrants who depend on their employer as a sponsor for residency have limited options to turn positive market effects to their own advantage. Equally, if migrants have neither equal rights to social benefits nor to remuneration, the labour market fallacy mentioned earlier works more markedly in the employers' favour.<sup>55</sup> There is thus an economic argument for awarding migrant workers strong rights to equal treatment in the field of social benefits and to protection from their employers.

These latter equal treatment rights will only be of use if workers can also enforce them adequately, which again presupposes effective trade union representation for migrants. Transnational labour markets thus demand expanding participatory social citizenship: labour market imbalance calls for a counterweight to the employers' advantage. Normatively, it would appear more attractive to create this counterweight through participatory solidarity rather than receptive solidarity. However, developing such participatory solidarity at transnational levels is fraught with difficulties. The populist argument seems to warrant the exclusion of foreign workers, as guild-type trade unions did in the early twentieth century. While the objective situation of low-skilled workers may call for international solidarity, there are severe factual barriers to

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<sup>54</sup> O'Leary, 'Free Movement of Persons and Services', in Craig and de Búrca (eds.), *The Evolution of EU Law* (Oxford University Press, 2011), 506–07.

<sup>55</sup> See for a short discussion with ample references Ruhs (n.53), 105–07.

such solidarity: for example, in the area of language capacity. With respect to a legal framework for transnational social citizenship, all this seems to imply that the law should not create more barriers to the development of transnational participatory solidarity than exist already.

This cursory discussion of the practical barriers to transnational social citizenship has mainly highlighted its difficulties, but has also indicated that finding a framework within which factual transnational solidarity could develop is possible in principle. Equal treatment rights are likely to play an important part in this respect, as will the establishment of a constructive interrelation between different sites of social citizenship. Since a full exploration of all this is beyond the scope of any single chapter, the remainder of this one will explore two aspects of EU case law on citizenship in order to illuminate the difficulties further.

### **III The EU as a Case Study for Transnational Social Citizenship**

The EU is considered here as a practical laboratory of transnational (social) citizenship, which is created through a number of mechanisms of this unique polity. While formal EU citizenship plays a role in this endeavour, transnational social spaces as sites of social citizenship emerge from the EU's wider aspirations to create an entity without internal borders. This entity not only engenders interaction between the citizens of the EU Member States, but also encompasses immigrants from beyond the EU. In line with this volume's ambition, the subsequent discussion focuses on EU Member State citizens, while highlighting how limited this nationality-focused approach is in reality. The case study is further limited by using the lens of positive law as interpreted by ECJ case law.

While the frictions of this case law with social reality are highlighted, this is not the place to explore them fully.

## A EU Citizenship, Other Bases of Free Movement and Equal Treatment

While the EU is exceptional in formally establishing citizenship beyond states,<sup>56</sup> its positive legal concept of citizenship is also limited. Since EU citizenship is only granted to the nationals of its Member States (Article 9 TEU, Article 20 TFEU), it is shackled to the nation-state.<sup>57</sup>

Such limitations do not necessarily impact on social citizenship. After all, the EU as a transnational space precedes the formal acknowledgement of EU citizenship. This is partly a consequence of the EU's overall concept of integration: in expanding a market beyond states, the EU has also endeavoured to expand society itself beyond states.<sup>58</sup> Citizen interaction is definitely not restricted to some public sphere which could still be controlled by states or the EU as their conglomerate. It mainly occurs in markets. Is citizen interaction thus necessarily mainly economically or market-biased in nature? It is unlikely that this is the case. Even insofar as exchanges originate in the markets, it is fair to say that this does not compromise the societal nature of such exchanges. At the very least, market-based exchanges lead to more contact between citizens than required

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<sup>56</sup> Kivisto and Faist, *Citizenship* (Blackwell, 2007), 5, 12, 122.

<sup>57</sup> See on this, among others, Kochenov, 'Ius Tractum of Many Faces' (2009) 15 *CJEL* 169; Szpunar and Blas López, in this volume.

<sup>58</sup> This is the main assumption of classical neo-functionalism: for a summary of its approaches, see Saurugger, *Theoretical Approaches to European Integration* (Palgrave Macmillan, 2014), 34–53.

for purely economic reasons, making it a good starting point for transnational social spaces.<sup>59</sup>

Economic free movement rights, particularly the free movement of workers, have required rights to receive benefits on the basis of equal treatment in other Member States from early on.<sup>60</sup> The EU's specific model of regional economic integration thus complies with the conditions identified above as crucial for transnational social citizenship to survive. Guaranteeing equal treatment prevents downward pressure on wages and social benefits from being initiated by migration, which again would create a hotbed for xenophobia, potentially plunging the EU into the abyss from which it was meant to rescue its Member States at the time of its foundation. This explains the inextricable link between the free movement of persons and equal treatment in the host state: since persons are not considered as a commodity traded across borders, they enjoy the right to equal treatment in their host state. This contrasts with the country-of-origin principle applied to free movement of products (goods and services) as true commodities, which could well trigger competition between legal orders and result in a downward spiral of standards.<sup>61</sup>

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<sup>59</sup> The work of Thomas Risse and Neil Fligstein offers some support for the thesis that citizens who do not interact beyond borders develop a limited European identity. Risse, *A Community of Europeans?* (Cornell, 2012); Fligstein, *Euroclash* (Oxford University Press, 2008); see also Risse's chapters in Moro (ed.), *The Single Currency and European Citizenship* (Bloomsbury, 2013).

<sup>60</sup> This is now regulated by Regulation (EU) 492/2011 on freedom of movement for workers within the Union, OJ 2011 L141/1; and Regulation (EC) 883/2004 on the coordination of social security systems, OJ 2004 L166/1; which also cover people who are self-employed or unemployed. Both are complemented by Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, OJ 2014 L128/8. See also Tryfonidou in this volume.

<sup>61</sup> For a short introduction which continues to be instructive, see Davies, 'Posted Workers' (1997) 24 *CMLRev.* 571, 585–91.

In contrast, some authors have demanded that immigrant workers compete against the local population with lower wages.<sup>62</sup> This cynical proposition conforms to orthodox macroeconomic approaches to global trade and development, which is challenged by heterodox macroeconomic theory.<sup>63</sup> This chapter does not offer the space to resolve this dispute but it must be pointed out that off-hand claims about the need for workers to undercut the wages demanded by unionised workers is economically ill informed. Such strategies may well lead to a general decline in wages, with a resulting contraction of the European economy.

Over time, the EU has developed a contradictory course to the equal treatment of its citizens. Economically active EU citizens enjoy equal treatment in any state to which they move, while equal treatment rights of economically inactive EU citizens are more limited. Free movement of EU citizens is, according to Article 20 TFEU, subject to conditions established by secondary EU law. Secondary EU law has limited equal treatment rights specifically, which suggests that EU citizenship is but an empty shell. However, the Court of Justice has developed more stringent requirements for Member States to afford the equal treatment rights which are so important to transnational

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<sup>62</sup> Magnette famously stated, 'To equalise the salaries and the social rights of all workers meant depriving migrant workers from their main economic advantage, their lower cost', referring to granting free movement rights to Italian workers in 1958 as a way to allow Italy 'to export its surplus labour': Magnette, 'How Can One Be European?' (2007) 13 *ELJ* 664, 672.

<sup>63</sup> It is not possible to provide a complete treatment of the macroeconomic theories here. An orthodox view of the global labour market is presented by Flanagan, *Globalization and Labor Conditions* (Oxford University Press, 2006); while Vercherand, *Labour* (Palgrave Macmillan, 2014) develops a heterodox analysis.

social citizenship, aligning EU citizenship rights with social constitutionalism.<sup>64</sup> The haphazard and contradictory way in which this case law has developed is part of the case study developed more specifically below.

EU law also withholds equal treatment rights from workers through another mechanism. Ever since the EU's Southern Enlargement in the 1980s, existing Member States have temporarily restricted free movement of workers of new Member States, based on the fear that labour markets might become imbalanced. Posting of workers has developed into an alternative route for migration. In the 1990s, the Court established the principle that those workers, typically posted to a building site abroad, could not rely on free movement of workers.<sup>65</sup> Instead, their posting is framed as an expression of their employers' freedom to provide services. Any limitations on moving these workers from the employer's country of establishment to the place where their work is needed have been qualified as restrictions of the freedom to provide services.<sup>66</sup> The ECJ first addressed the requirements of immigration control.<sup>67</sup> However, soon it transpired that the equal treatment of workers on the same building site would also be conceived as a restriction of their employer's freedom to provide services. The Court frequently accepted justifications for such restrictions with reference to protection of workers' rights.<sup>68</sup> However, the fact remains that workers moving as posted workers

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<sup>64</sup> On the different layers of EU constitutionalism, see Tuori, 'The Many Constitutions of Europe', in Tuori and Sankari (eds.), *The Many Constitutions of Europe* (Ashgate, 2010); Schiek (n.15), 308.

<sup>65</sup> C-43/93, *Vander Elst*, EU:C:1994:310, paras. 21–22.

<sup>66</sup> C-113/89, *Rush Portuguesa*, EU:C:1990:142, para. 15.

<sup>67</sup> *Ibid.*, para. 15.

<sup>68</sup> The requirement to pay a statutory minimum wage was accepted (C-369/96 and C-376/96, *Leloup*, EU:C:1999:575; and C-164/99, *Portuguaia Construções*, EU:C:2002:40), and to provide social security payments for wage continuation during work stoppage due to winter weather (C-272/94, *Michel Guiot and Climatec*,



cannot claim equal treatment individually by relying on their Treaty rights. Rather, the host state may impose on their employer an obligation to grant certain employment rights. While workers formally have a choice whether to move independently or approach an employer who will post them, in practice this choice is conditioned by labour market constraints. There are indications that the long periods during which workers could not rely on individual free movement after successive enlargement rounds has entrenched posting as the only way to move into Western labour markets.<sup>69</sup> In fact, the EU withdraws the equal treatment guarantee – so decisive for social citizenship – both in relation to economically inactive citizens and to posted workers. EU citizenship rights can thus be of practical use only for the *beati possidentes*.

## **B Two Case Studies from the ECJ case Law**

Since EU citizenship was developed by the EU judiciary, the case law of the Court of Justice conditions the scope of social citizenship – at times extending it and at times restricting it. While judicial governance<sup>70</sup> is not sufficient to engender EU social citizenship, the Court remains the final arbiter of contestations and conflict over social citizenship. Accordingly, the remainder of this chapter focuses on two strands of case law and how social citizenship – whether based on receptive or participatory/interactive solidarity – fares before the bar of the EU’s highest court.

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EU:C:1996:147) or to secure annual holiday pay (C-490/04, *Commission v. Germany*, EU:C:2007:430) and the requirement to provide surety for workers’ wages (C-60/03, *Wolff & Müller*, EU:C:2004:610).

<sup>69</sup> Bertelsmann Stiftung, *Harnessing European Labour Mobility: Scenario Analysis and Policy Recommendations* (Bertelsmann Stiftung, 2014), 59, 74.

<sup>70</sup> On this idea, see Schiek (n.15), 217–18, 235–37.

## C. The ECJ and the *Status Positivus* – Receptive Solidarity

If there is a field of law in which the ECJ is viewed as a force in favour of the social, it is in its citizenship case law. The story of how the ECJ developed the relatively meagre provisions on Union citizenship in the Treaty of Maastricht into the basic law of multilevel solidarity has been told so often<sup>71</sup> that only a brief reminder will suffice here. Five years after EU citizenship had found its way into the Treaties, the Court derived a claim for citizens to equal treatment based on moving to another Member State from what then were Articles 12 and 18 EC (now Articles 18 and 20 TFEU),<sup>72</sup> and only three years later it first referred to EU citizenship as a fundamental status. While this phrase came to be relevant in cases concerning residence and work permits,<sup>73</sup> it is useful to recall that the phrase was first used in 2001 in order to require the Member States to extend a certain level of solidarity to student migrants from other Member States.<sup>74</sup> Another four years later, the Court confirmed that this ‘certain level’ was limited indeed,

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<sup>71</sup> The research report by Kostakopoulou (n.4), offers a very good overview of this debate.

<sup>72</sup> C-85/96, *Martínez Sala*, EU:C:1998:217, confirmed by C-456/02, *Trojani*, EU:C:2004:488.

<sup>73</sup> The much-discussed *Ruiz Zambrano* case, C-34/09, *Ruiz Zambrano*, EU:C:2011:124, did not concern access to social benefits (receptive solidarity) or inclusion into labour unions (participatory solidarity), but merely residence rights. Residence and free movement were also at stake in the *McCarthy* cases: one was brought on behalf of an EU citizen and mother caring for disabled children and desiring that her non-EU husband be able to continue to maintain her family on the basis of a residence permit (C-434/09, *McCarthy*, EU:C:2011:277; the family background is recalled by Nic Shuibhne, ‘(Some of) the Kids Are All Right’ (2012) 49 *CMLRev.* 349, and on the other hand on behalf of a comparatively privileged family suffering inconvenience from excessive UK border controls while travelling between their properties in different Member States (C-220/12, *Thiele Meneses*, EU:C:2013:683).

<sup>74</sup> C-184/99, *Grzelczyk*, EU:C:2001:458.

and that Member States could require a certain degree of integration into the host society before a student could claim equal treatment with respect to benefits designed to facilitate the maintenance of studies.<sup>75</sup> This case law subsequently informed Directive 2004/38/EC. Article 24 of the Directive is the decisive codification of the extent to which 'receptive solidarity' is extended to freely moving EU citizens and their families. It repeats the principle that EU citizens have a right to equal treatment in relation to social benefits (para. 1), but establishes exceptions from that principle: according to its second paragraph, social benefits can be withheld in the first three months of residence, or during such time as the residence of a non-worker is extended for periods of serious job-seeking. In addition, any student benefit can be withheld until the person in question acquires permanent residence. The Court has since elaborated this in case law. The *Förster* case<sup>76</sup> established that students can still derive equal treatment rights directly from the Treaty, but that Member States may impose a generalised minimum period of legal residence as proof of sufficient integration. This case law was specific to students, however.

Social rights for citizens less privileged than students constitute a greater concern for national budgeteers. In this regard, the Court had held in *Trojani*<sup>77</sup> that Member States may terminate the legal residence of a citizen who has become an unreasonable burden on the social assistance system. However, it also confirmed that as long as the residence had not been terminated, the right to equal treatment in relation

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<sup>75</sup> C-209/03, *Bidar*, EU:C:2005:169, decided without direct reference to the Directive.

<sup>76</sup> C-158/07, *Förster*, EU:C:2008:630.

<sup>77</sup> C-456/02, *Trojani* (decided on the basis of Council Directive 90/364/EEC on the right of residence, OJ 1990 L180/26).

to social benefits remains intact.<sup>78</sup> This case law considerably expanded the relevance of EU legal citizenship for promoting transnational movement (and the resulting transnational social space). It clashed with the Member States' traditional sovereignty over immigration and attracted corresponding criticism.<sup>79</sup> In these situations, the Court tends to rein in its more courageous case law sallies and call a partial retreat.<sup>80</sup> Accordingly, subsequent case law has seemed to confirm that Member States may withhold equal treatment in some instances.<sup>81</sup> Accepting such an exception from the principle of free movement on the basis of equal treatment would have quite dire consequences indeed. The Member States, instead of complying with the cumbersome procedures of ending the lawful residence of an EU citizen, could just withhold social benefits. They would thus create a social underclass of legally resident EU citizens who are nevertheless excluded from receptive solidarity as part of their social citizenship. These members of an EU *Lumpenproletariat* would have a strong incentive to sell their (employed or self-employed) labour at any price initially, thus potentially devaluing the social compromise achieved by society in their host state, which materializes in granting of minimal subsistence to all citizens. A relatively recent AG's opinion was thus very much to be welcomed. In the *Brey* case,<sup>82</sup> Advocate General Wahl summarised:

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<sup>78</sup> C-456/02, *Trojani*, paras. 42–43.

<sup>79</sup> See n.73.

<sup>80</sup> See Nic Shuibhne in this volume. For an early exploration of this point see Kostakopoulou, 'Ideas, Norms and European Citizenship' (2005) 68 *MLR* 23.

<sup>81</sup> Lenaerts, 'European Union Citizenship, National Welfare Systems and Social Solidarity' (2011) 18 *Jurisprudencija* 397, referring to cases such as C-158/07, *Förster*; C-162/09, *Lassal*, EU:C:2010:592; C-434/09, *McCarthy*, and C-325/09, *Dias*, EU:2011:498.

<sup>82</sup> C-140/12, *Brey*, EU:C:2013:565.

To resume until a Member State has put an end to the lawful residence of a Union citizen by a decision that complies with the procedural guarantees enshrined notably in articles 15, 30 and 31 of the Directive ... a citizen ... may invoke EU law for the duration of his lawful stay. Such a decision must be taken independently from the question whether the Union citizen fulfils the requirement of sufficient resources.<sup>83</sup>

If this statement is confirmed in later case law, we could say that the EU has indeed matured into a territory where the minimum requirements of receptive solidarity had acquired a second, transnational level: as long as citizens are legally resident abroad, they can claim the social minimum agreed in their host state. The Court seemed to follow Advocate General Wahl in *Brey*, though its reasoning was less clear.

The recent *Dano* ruling<sup>84</sup> however, constitutes one of those instances where the Court beats a retreat. The facts of the case played on every fear to torture the fevered imaginings across the spectrum of the European press: Ms Dano, a Romanian citizen, belonging to the Roma ethnic minority, moved from Romania to join her sister in Germany while a pregnant teenager, and bore a child before her sixteenth birthday. She had never worked and would find it difficult to access the German employment market due to her lack of formal education and ability to write in German. The German authorities nevertheless granted her and her son unlimited right to abode in Germany. However, they rejected her application for a specific form of social assistance on the grounds that she was not a worker and that they were entitled to refuse to treat her equally with Germans for that reason. On humanitarian grounds, they granted her childcare benefits and a lower level of subsistence allowance, though.

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<sup>83</sup> C-140/12, *Brey*, Opinion of AG Wahl, EU:C:2013:337, para. 96.

<sup>84</sup> C-333/13, *Dano*, EU:C:2014:2358.

In this case, the Court did not stress that Member States were allowed to end the lawful residence of a Union citizen on the grounds that its social assistance system would otherwise be overburdened. Neither did the Court reinforce the right of legally resident EU citizens to be treated equally with respect to social benefits in the host state, a principle from which exceptions are only allowed as far as specified by secondary law. Guided by Advocate General Wathelet, the Court stressed the dilemmas of the Member State instead: Member States would find it difficult to fulfil all the requirements of the rule of law when ending the lawful residence of an EU citizen who becomes an undue burden on the public purse.<sup>85</sup> Accordingly, it allowed Germany to withhold equal access to social assistance without ending Ms Dano's lawful residence. No reference was made to the principle that exceptions to the right to equal treatment enshrined in primary EU Law must be narrowly construed. As mentioned, Article 24 Directive 2004/38 allows the withholding of equal treatment for finite groups of EU migrants: those who are not economically active within their first three months, those who are students throughout their studies and those who are job seekers before they are actually employed. Furthermore, equal treatment can also be denied to those who abuse free movement rights.<sup>86</sup> All other citizens who are unable to rely on the economic freedoms, and who do not have sufficient means to sustain themselves, can be expelled once they become an unreasonable burden on the social system of the host state. After *Dano*, Member States may withhold equal treatment from any category of citizen making use of the free movement rights, instead of taking the thorny path of expelling EU citizens who becomes a burden on their social system.

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<sup>85</sup> *Ibid.*, paras. 77–80.

<sup>86</sup> Art. 35 Directive 2004/38/EC on the right of citizens of the Union, OJ 2004 L158/77.

Politically, this means that the Court has created a social underclass of EU citizens who are unable to rely on the solidarity extended to the other citizens in the host state. This also erodes social citizenship based on receptive solidarity for those citizens. As Marshall found in the previous century, social citizenship allocates income independently of a person's market value – this is the de-commodification function of the welfare state highlighted by Esping Anderson.<sup>87</sup> Social citizenship also establishes a level of income below which no citizen can be compelled to accept waged or other labour. Introducing an underclass destroys this function of social citizenship also for the host state nationals.

The Court has not maintained its stance as a bulwark against nationalist preoccupation with reserving welfare rights to citizens. Sadly, the defence of national welfare budgets has even been raised by authors who fiercely defend other aspects of European social citizenship, such as industrial citizenship.<sup>88</sup> It is thus confirmed again that receptive solidarity may be the most difficult to expand to EU levels.

## **D The ECJ and the *Status Activus* – Participatory Solidarity**

Does EU-level industrial citizenship fare any better before the ECJ as an instance of participatory solidarity? It is well known that the Court of Justice has decided a line of cases which is widely viewed as compromising industrial relations at national levels. The rulings in *Laval*<sup>89</sup> and *Viking*,<sup>90</sup> so widely debated that it is barely possible to refer

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<sup>87</sup> Esping-Andersen (n.29).

<sup>88</sup> Giubboni (n.51), 942.

<sup>89</sup> C-341/05, *Laval un Partneri*, EU:C:2007:809.

<sup>90</sup> C-438/05, *Viking Line*, EU:C:2007:772.

to the whole discussion,<sup>91</sup> constitute the core of the second case study. The two cases could not have been more different, and shed some light on the difficulties presented by transnational social citizenship based on participatory solidarity.

## i Laval: A National Labour Market Segregated by Transnational Posting

In the real-life scenario underlying the *Laval* case, a Swedish trade union engaged in collective action aimed at forcing a Latvian employer to conclude a collective agreement with them to give Latvian workers higher wages than the employer would ordinarily have been prepared to pay. It is worth explaining the background to this, since it is not frequently presented in full. Laval, a Latvian company, had won a bid to build a school in northern Sweden through their subsidiary Baltic Bygg, a Swedish company.<sup>92</sup> While it would seem natural for a Swedish company with Latvian roots to hire Latvian workers, the company could have opted to allow Latvian workers to benefit from the free movement of workers. After all, Sweden was one of only three countries to have opened their labour markets to Eastern European citizens as early as 2004. Baltic Bygg chose a different route: it hired workers from their parent company in Latvia.<sup>93</sup> According to EU

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<sup>91</sup> See for example, Barnard and Deakin, 'European Labour Law after *Laval*', in Moreau (ed.), *Before and after the Economic Crisis* (Edward Elgar, 2011); Bercusson, 'Implementing and Monitoring of Cross-Border Agreements', in Papadakis (ed.), *Cross-Border Social Dialogue and Agreements* (International Institute for Labour Studies, 2008); Malmberg, 'Posting Post *Laval*', *Uppsala Center for Labor Studies Working Paper* 2010:5; Rönnmar, '*Laval* Returns to Sweden' (2010) 39 *Industrial Law Journal* 280; Supiot, 'Under Eastern Eyes' (2013) 73 *New Left Review* 29.

<sup>92</sup> C-341/05, *Laval un Partneri*, para. 27.

<sup>93</sup> *Ibid.*, para. 29.



legislation on posted workers,<sup>94</sup> workers hired out from another employer become posted workers, without any right to equal treatment with workers in the host state. Thus, Laval endorsed unequal treatment of Latvian and Swedish workers.

The work on the school started in May 2004, and negotiations with the local trade union on the level of wages to be paid commenced in June. The negotiations collapsed on 15 September 2004,<sup>95</sup> one day after the Latvian employer concluded collective agreements with a trade union representing its workers. It has been stated that ‘the timing of this agreement suggests an attempt to indulge in a form of “pre-emptive recognition”’.<sup>96</sup> Furthermore, the Latvian workers were not actually members of the trade union which had negotiated for their wages. Contemporary reports detail a media war between the Swedish trade unions trying to attract Latvian workers and the Latvian employers threatening that Latvian workers would not find employment in Latvia after joining a Swedish trade union.<sup>97</sup> As a result, the trade unions fought for non-members, and relations between the Latvian and Swedish trade unions were soured for a long time after this spectacular case.<sup>98</sup>

The Court focused on the position of the employer, and mainly held that the industrial action went over and above what was necessary to secure adequate employment conditions because the employers could not know before negotiating a

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<sup>94</sup> Art. 1(3) Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, OJ 1997 L18/1.

<sup>95</sup> See Davesne, ‘The Laval Case and the Future of Labour Relations in Sweden’ (2009) 5 *Les Cahiers européens de Sciences* 6, with ample references to contemporary newspaper reports.

<sup>96</sup> Woolfson and Sommers, ‘European Mobility in Construction’ (2006) 12 *European Journal of Industrial Relations* 54.

<sup>97</sup> Ibid., 55.

<sup>98</sup> Lovén-Seldén, ‘Laval and Trade Union Cooperation’ (2014) 30 *International Journal of Comparative Labour Law and Industrial Relations* 87.

collective agreement what actual 'tariff' they would be expected to pay their workers.<sup>99</sup> This position is open to criticism as an expression of ignorance of any bargaining process: it is the nature of contractual negotiations that neither party knows in advance what the result will be. By deriving the right to a known tariff for posted workers from the freedom to provide services, the Court also established the freedom from serious collective bargaining for employers who engage transnationally.

The academic debate inspired by *Laval* criticises the decision for overlooking the interests of Latvian employers and their workers.<sup>100</sup> However, I would suggest that the Latvian workers and the Latvian employers were little more than extras on the stage in a play enacted by the Swedish employers' associations and their counterparts, the rather traditional 'Byggnads' builders' union. While Laval had been active on the Swedish construction market since 2002,<sup>101</sup> the Swedish employers' association seized this opportunity to challenge the national collective bargaining system creating a high-wage economy. Accordingly, they continued to fund the litigation even after the claimant had been wound up due to bankruptcy.<sup>102</sup> It will never be known whether the Latvian employer gained any advantages from this cooperation. Interestingly, the case

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<sup>99</sup> C-341/05, *Laval un Partneri*, para. 110.

<sup>100</sup> Kukovec, 'Law and the Periphery' (2015) 21 *ELJ* 406. This is not quite accurate, since there is a body of literature based on empirical work in Latvia and Sweden, e.g., Davesne (n.95); Woolfson and Sommers (n.96); Woolfson et al., 'The Swedish Model and the Future of Labour Standards After *Laval*' (2010) 41 *Industrial Relations Journal* 333.

<sup>101</sup> Woolfson and Sommers (n.96), 54.

<sup>102</sup> Woolfson et al. (n.100), 341; see also Davesne (n.95). It is sometimes suggested that Laval became insolvent as a result of this collective action. However, since Baltic Bygg did not become insolvent, we could also infer that it allowed its subsidiary Laval to become insolvent as it was no longer needed to challenge an industrial relation system which Baltic Bygg did not support.

may have also started trade union cooperation in the Baltic region – similarly driven by activity on the Swedish side.<sup>103</sup> Thus, it contributed to creating a transnational social space for industrial relations.

## ii *Viking* – EU Law used to Destabilise an Agreement for International Industrial Relations

The *Viking* case was fundamentally different in that the trade unions representing seafarers had concluded an international agreement to govern their relations with each other. If an employer tried to use an employment regime other than the one in the country where it held its main assets, the trade unions pledged not to start negotiations with that employer, thus ensuring that collective labour agreements would continue to apply after such a virtual move. This would allow the trade unions to exert pressure to maintain their recognition by that employer, and to continue bargaining with him. They would not have to fear being presented with a collective labour agreement concluded with another trade union, which would render such pressure as illegal collective action under a number of national legal regimes. Crucially, the Court found that such an agreement could never be justified, because it had a territorial element.<sup>104</sup> If this reasoning is maintained in future cases, trade unions would be prevented from exercising one of their core functions – exerting pressure to deter employers from circumventing collective agreements to which they are party by means of the EU economic freedoms. There is much less industrial relations research into the *Viking*

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<sup>103</sup> Lovén-Seldén (n.98).

<sup>104</sup> C-438/05, *Viking Line*, para. 85.

case, which may have something to do with the fact that the case was settled in a secret agreement,<sup>105</sup> and never had any legislative consequences in Finland.<sup>106</sup>

### iii Commonality of the Cases and Relevance for EU-Level Industrial Citizenship

For all their differences, both cases have some issues in common. In both instances, trade unions took action against labour market segmentation. In the *Laval* case, the legal framework for this segmentation had been created by the long line of case law on posting,<sup>107</sup> which established the posted worker as not being entitled to equal treatment. In the *Viking* case, the segmentation of labour aboard a vessel relied on the traditional consequences of 'out-flagging', which is just one instance of the employer practice of moving its corporate domicile into a jurisdiction perceived as more favourable without moving its economic activity.<sup>108</sup> A logical counter-strategy for trade unions would be to shield collective bargaining processes from these segmentation exercises. The facts of *Laval* and *Viking* illustrate such territorially based strategies, with

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<sup>105</sup> Nic Shuibhne, 'Settling Dust?' (2010) 21 *European Business Law Review* 681, 684.

<sup>106</sup> Bruun et al., 'Consequences and Policy Responses in the Nordic Countries as a Result of Certain Decisions of the Court of Justice of the EU', in Bücken and Warnecke (eds.), *Reconciling Fundamental Rights and Economic Freedoms after Laval, Viking and Rüffert* (Nomos, 2011), 19, 22.

<sup>107</sup> See above text following n.64.

<sup>108</sup> A long line of cases has dealt with the moving of corporate domiciles for tax purposes to the Netherlands (e.g., C-167/01, *Inspire Art*, EU:C:2003:512) or Ireland (e.g., C-196/04, *Cadbury Schweppes*, EU:C:2006:544), and have accepted in principle the right of businesses to choose the cheapest legal environment, irrespective of from where their activity was actually conducted.

the Court holding in both cases that trade union actions to prevent segmentation of labour markets unjustifiably violated EU internal market law.

Reality has progressed beyond *Laval* and *Viking*. Sweden has adapted its legislation to satisfy the Court's demands for uniformity (instead of flexibility) in collective agreements.<sup>109</sup> Trade unions have also developed more sophisticated internationalisation strategies,<sup>110</sup> and the European Trade Union Congress has even recently succeeded in convincing its counterpart to conclude an EU-level agreement for a sector with notoriously low unionisation levels.<sup>111</sup> The facts of the recently decided *Sähköalojen ammattiliitto*<sup>112</sup> case demonstrate the development: a Finnish trade union convinced Polish posted workers to join it. This enabled the Polish workers to pass on their claims for payment for posted work to the Finnish trade union, which was in an economic position to actually pursue those claims. While Advocate General Wahl remained uncomfortable at the fact that Finnish collective agreements would apply to posted workers, he conceded that the pursuit of workers' wage claims by their trade union would not constitute a restriction of the freedom to provide services.<sup>113</sup> The Court ruled accordingly, relying also on Article 47 of the EU Charter of Fundamental Rights

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<sup>109</sup> Rönömar, 'Laval Returns to Sweden' (2010) 39 *Industrial Law Journal* 280.

<sup>110</sup> Greer et al., 'The European Migrant Workers Union and the Barriers to Transnational Industrial Citizenship' (2013) 19 *European Journal of Industrial Relations* 5.

<sup>111</sup> Bändas, 'A Framework Agreement in the Hairdressing Sector' (2014) *Transfer: European Review of Labour and Research* OnlineFirst.

<sup>112</sup> C-396/13, *Sähköalojen ammattiliitto ryv. Elektrobudowa Spółka Akcyjna*, EU:C:2015:86.

<sup>113</sup> C-396/13, *Sähköalojen ammattiliitto ryv. Elektrobudowa Spółka Akcyjna*, Opinion of AG Wahl, EU:C:2014:2236, paras. 63–66 on the validity of the Finnish collective bargaining system, paras. 40–57, on the question of whether the Finnish trade union may represent its Polish members.

(CFR). While a comprehensive analysis of this case is beyond the scope of this chapter, it is worth highlighting the potential of including migrant workers – whether posted or not – into trade unions in the country where they work. This could be considered an incipient form of European industrial citizenship. Further development can be envisaged. For example, trade unions could create framework agreements which pledge cooperation in establishing networks of collective wage agreements. Framework agreements could also establish arrangements on the factual representation of employees with varying or dual places of work. There is no reason why trade union members who are working as posted workers should not be represented by a trade union in the host state, as even the Court of Justice has acknowledged. While EU law has at times viewed posted workers as unfree labour, not entitled to equal treatment, this line of reasoning returns some subject status to posted workers. The related opportunity to offer collective representation at the place of work could be used as a starting point for developing a multi-level trade union network capable of countering the disenfranchisement of posted workers in other areas.

The question is, however, whether the frequently demanded respect for national industrial relations models<sup>114</sup> is sufficient to develop the participatory dimension of EU social citizenship. National industrial relations could only be sufficient if collective solidarity, the base of participatory social citizenship, could only derive from reciprocity bonds within national borders.<sup>115</sup> However, the solidaristic bond underlying collective labour relations is based on a different principle, in that it derives from the position in

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<sup>114</sup> See for example Barnard and Deakin (n.91).

<sup>115</sup> This would appear to be implied by Giubboni (n.51), 951, 959, where he states that the ‘maintenance of bounded worlds of social justice based on some criterion of territorial belonging’ is necessary to maintain any form of social citizenship.

the market-based production of goods and services. Irrespective of territoriality, employees can combine in solidarity to overcome employer dominance. The challenge for trade unions is immense, since transnational solidarity in practice demands so much more than language competence – and even this is no small feat. Seriously respecting the access of migrants to labour markets is the higher hurdle for developing the common interests of citizens from the EU's diverse regions.

It has been pointed out that the *Laval* quartet was issued before the Charter of Fundamental Rights for the European Union became legally binding and that subsequent case law<sup>116</sup> demonstrates a more acute awareness of the constitutional protection of labour rights. The case law of the European Court of Human Rights on the right to collective bargaining is unlikely to have no impact on the EU's highest Court.<sup>117</sup> The Court would not have to make radical changes to its case law to accept industrial citizenship. It would be completely sufficient to view industrial relations and the occasional occurrence of collective industrial action<sup>118</sup> as a normal aspect of conducting business in the European Union. Employers should therefore expect to engage in collective bargaining, and experiencing strikes and boycotts would not thus amount to an anomaly which would in itself qualify as a restriction of economic freedoms. The court could still intervene if trade union activity emerged which was driven by

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<sup>116</sup> C-271/08, *Commission v. Germany*, EU:C:2010:426; see case note by Syrpis, 'Reconciling Economic Freedoms and Social Rights' (2011) 40 *Industrial Law Journal* 222.

<sup>117</sup> Veldman, 'The Protection of the Fundamental Right to Strike within the Context of the European Internal Market' (2013) 9 *Utrecht Law Review* 104.

<sup>118</sup> On the role of industrial action in securing the effectiveness of EU-level collective labour agreements, see Bercusson (n.91); and Hepple, 'The European Right to Strike Revisited' (2013) 140 *Giornale di diritto del lavoro e di relazioni industriali* 575.

xenophobic motives.<sup>119</sup> The Court would thereby cease to constitute an obstacle to the development of industrial social citizenship from below.

## IV Conclusion

Transforming social citizenship to adapt to the reality of life in overlapping and multi-layered transnational social spaces is not an easy task. Social citizenship has been read here as a bundle of rights based on two different types of solidarity: receptive solidarity is extended to those who cannot fend for themselves, and participatory solidarity allows those who can fend for themselves collectively to structure markets which are characterised by paradoxical imbalances more efficiently but also more justly. The archetypical form of social citizenship based on receptive solidarity consists of benefits from the public purse; the archetypical form of social citizenship based on participatory solidarity is the combination of workers in trade unions.

As a transnational concept, social citizenship based on receptive solidarity acquires a dual function. On the one hand, the transnational free mover is in need of protection against being discriminated by the social provider in the host region. Enforcing equal treatment will prevent migrants from resorting to undercutting local minimum standards. Equal treatment thus again avoids a merciless competition between locals and migrants, which is very unlikely to lead to any race to the top. This also protects the position of the resident population. In the absence of equal treatment, migrants (including EU migrants) are excluded from the social minimum accepted in the host society, and will be ready to accept any occupation at any price. Nevertheless, receptive social solidarity will meet budgetary limits in some circumstances, which

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<sup>119</sup> For greater detail see Schiek (n.15), 240–43.



creates support for residual supranational social benefits,<sup>120</sup> or at least for compensation fund arrangements to counteract sustained burden imbalances.

Social citizenship based on participatory solidarity is more open to adaptation to transnational spaces because it relies on factual interaction in transnational settings such as markets or other social fields. A person's actual opportunities to combine with those in a similar position to improve their collective fates is the key to this type of social citizenship. However, participatory solidarity depends on actual interaction. If and when language barriers can be overcome, the divergence of micro-interests within categories such as workers (whether employed or self-employed) increases with dimensions of transnationality. Finding a common interest sufficiently compelling to bring individuals together as a group can be difficult, and solidarity relationships take time to develop. In this situation, multi-level legal orders and their courts, must ensure that the emergence of transnational solidarity is not hindered by the legal system.

Despite all its uniqueness in providing for formal citizenship beyond nation-states, it is not surprising that the EU does not yet provide an adequate frame for transnational social citizenship. Politically, it is hindered by current trends within Member States to reclaim national social policy competences. Constitutionally, its greatest strength lies in the numerous guarantees of equal treatment for free moving citizens. However, these constitutional guarantees are not consistent. Economically inactive citizens and posted workers are deprived of their equal treatment rights. The EU judiciary has also played a contradictory role. In the field of social benefits, it has at

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<sup>120</sup> For the social citizenship models on the other side of the Atlantic, which rely on US or Canadian federal budgets for considerable proportions of 'redistributive' welfare payments, see Lenaerts (n.81), 400–02; and Verdun and Wood, 'Governing the Social Dimension in Canadian Federalism and European Integration' (2013) 56 *Canadian Public Administration* 173.

times promoted equal treatment rights over restrictive secondary law. However, this case law was never consistent, and the recent *Dano* ruling indicates that the Court accepts the Member State competence to exclude citizens from the community of equals on their territories. With respect to participatory solidarity through trade unions, the Court has prioritised the free movement rights of employers in its *Laval* and *Viking* judgements, without considering the complex situation of free moving workers, whether posted or employed in a mobile trade such as transport. Ironically, the Court's case law has engendered transnational cooperation not only among employers' associations, but also among trade unions. It may thus have helped overcome demands that industrial citizenship should remain national. However, the Court has a long way to go to find sustainable answers to the challenges of transnational social citizenship.