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A citizenship without social rights?
EU freedom of movement and changing access to welfare rights

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ABSTRACT

Despite not being grounded in the classic nation-building dynamic of citizenship identified by T.H.Marshall, EU citizenship offers social rights and welfare protection to non-nationals on a principle of non-discrimination. We narrate a creeping process of retrenchment by which European member states have used policy strategies to undermine this principle, by transforming the unique idea of free movement of persons in the EU to just another form of 'immigration' which can be subject to selectivity and exclusion. As Europe's multiple recent crises have unfolded, political resources were found to effect this transformation tangibly via reshaping access to welfare for EU citizens. Focusing on the cases of UK and Germany, we discuss how despite their distinctive welfare regimes and labour market systems, these two countries have led the way toward a dismantling of non-discrimination for EU citizens and effectively the end of the anomalous 'post-national' dimension of European citizenship.

KEYWORDS

intra-European migration, social rights, welfare, citizenship, EU.

INTRODUCTION

European citizenship – specifically the 'freedom of movement of persons' for nationals within the EU, and the non-discrimination by nationality it entails – was never a fully fledged form of citizenship on the national welfarist model (Marshall 1950).[1] Yet it has long stood as the most legally developed form of 'post-national membership' (Soysal, 1994) in the world. This is the 'fourth freedom' – of capital, goods, services *and* persons – on which the cosmopolitan normative claims of the European Union arguably rest (Favell, 2014). Legally, the notion of European citizenship has entailed the non-discrimination of EU nationals resident in other member states on a wide range of rights and entitlements – including many social and welfare benefits usually available only to citizens of the country. As the EU has moved through the sequence of crises brought on by the rejection of the Constitution (2005), the global economic crash and sovereign debt crisis in Europe (2008-14), the Mediterranean refugee crisis (2014-16), and the British referendum on exiting the EU (2016), we argue that 'freedom of movement of persons' has increasingly been seen politically as problematic, and most likely unsustainable; it has been reduced to just another form of 'immigration' like others, that must be subject to the same kinds of sovereign control, restriction and selectivity imposed on conventional forms of international migration from outside the EU.

The drivers for this changing access to rights are not difficult to surmise. The new migrations and cross-border mobilities associated with freedom of movement have increasingly been seen by national electorates as a cause of the growing, hostile 'populist' reaction to the EU (de Vries, 2018). Not least, this is because this ambiguous migration is seen to fundamentally clash with the privileges enshrined in the idea of the European welfare state for national citizens as part of the post-war European social compact (Manow et al., 2018). Our aim in this paper is not to repeat these general explanations, but rather to fill in the narrative details of *how* this change has occured, while pointing to a surprising convergence in policies among leading member states, despite their well known 'varieties' of welfare state and labour market institutions. We focus on changes that have taken place in the two member states which have seen the largest populations of free moving EU nationals, the UK and Germany, but which also represent clearly distinct welfare state and labour market contexts. Their leadership in these matters is pulling the rest of Europe towards a restriction on free movement rights that will largely terminate the cosmopolitan claims of EU freedom of movement rights. A rump

form of EU citizenship – for the more privileged – may be saved at the expense of an idea of non-discrimination for all Europeans.

For sure, EU citizenship was always an ideal that has failed to fully live up to its normative potentiality (Shaw 2015). Its normative claims have rested more on the facilitation of everyday and participatory practices beyond legal and technical borders (Wiener 1998; Isin and Saward 2013). Focusing on technical analysis of law, policy and implementation, social policy scholarship on EU citizenship in recent years, as we document, has largely concentrated on critiquing the unjust economic stratification of non-discrimination rights, on their increasing conditionality and precarisation, and on legal challenges and roll-back (Pennings and Seeleib-Kaiser, 2018; Bruzelius, 2018). At the same time, it has stressed divergence in application of welfare rights, generally upholding a view in which coordinated welfare state economies have offered better protection (Carmel et al, 2011; Römer 2017). In this context, a strongly social democratic voice among some scholars has emerged in political economy – notably Wolfgang Streeck – arguing against the "neo-liberal" consequences of open borders and for the maintenance of highly regulated national economies (Streeck, 2014). We challenge this mainstream, left-leaning literature on two grounds. Firstly, we point to ways in which it was the putatively 'neo-liberal' British model which in fact best fulfilled the normative post-national promise of EU freedom of movement, through the effectiveness of non-discrimination as a norm in employment and organisational practices and its positive selection dynamics. And secondly, we stress the convergence in restriction across all types of welfare state economies in Europe, which question assumptions about the inherent deviance of the British 'Brexit' from EU laws and ideals still supposedly supported better elsewhere.

After a brief survey of the debate on post-national membership rights and recent analyses of EU citizenship by social policy scholars, we lay out the specific legal and policy developments that have effected changes to welfare rights for EU citizens in the UK and Germany. These developments have made possible a convergence of European practices around the kinds of restrictions of rights of EU citizens, ironically, very much in line with those negotiated by British Prime Minister David Cameron to salvage British membership of the EU. He failed, and Britain has opted out of EU law. Britain Brexiting, however, will not be enough to save the 'fourth freedom' in Europe.

EUROPEAN CITIZENSHIP AND WELFARE RIGHTS

Critical social policy analysts are of course right that EU 'citizenship' is not *really* citizenship – by any normative standard of full national citizenship. In a classic understanding, such as T.H.Marshall (1949[1965]), social rights are the last evolutionary development of citizenship after civil and political rights. All such dimensions are necessary to ensure equal membership for all citizens. This theory of social citizenship referred to national citizens only (Janoski 1998). How and why such rights might have been extended to immigrants in postwar European welfare states thus became a key question. Following in Marshall's steps, Soysal (1994) identified an emergent conception of 'post-national' membership, anchored in human rights and individualist (global) 'personhood'. Moreover, the sequencing of rights' accession was different: migrant workers in postwar Europe accrued social rights relatively quickly but encountered great difficulties in acquiring political rights. Elaborating on this, Guiraudon (1998) showed how these advances typically occured 'behind gilded doors': in the offices of lawyers and bureaucrats following procedures and norms rather than listening to angry electorates.

The unprecedented extension of immigrants' rights across Europe during the postwar period thus received much attention (i.e., Bauböck, 1994; Hansen and Hager, 2010), not least because of its suggestiveness in terms of a normative cosmopolitanism. Controversy continued over the source of these rights: whether grounded in national political and legal dynamics of inclusion (Hammar, 1985; Joppke, 2001), or pulled by 'post-national' forces of individualisation and international institutional isomorphism, as suggested by the altered sequence in the post-war period (Jacobson, 1996; Bosniak, 1998). Rights for *immigrants* however tend to assume the need for naturalisation and full national 'integration'. EU migrants are anomalous in this view: their claim to rights must somehow therefore be 'post-national'. In line with this, the parallels with human rights remain an important reference for the normative power of EU citizenship rights (Soysal 2012). Yet these clearly derive in formal terms more from a market building logic: of building a single economic space for the four factors of economic production, that would extraordinarily include the free movement of persons *alongside* the freedom of movement of capital, goods and services (Favell, 2014)..

Because of these complexities, the literature on international migration has generally not done a good job in distinguishing such 'freedom of movement of persons' from other, more conventional types of 'immigration', that tend to be at the centre of most discussion. This

follows the simple (nationalist) tendency in national political and media debates to see all foreigners resident in the territory as 'immigrants' subject to national sovereign political control. There is a dangerously regressive slippage at work here. Whereas once EU migration would have been understood as novel form of spatial mobility unique to the European regional project – i.e., a fundamental freedom linked to the expansive building of an economic and political community (Recchi, 2015) – it has been increasingly reframed as just another form of 'immigration' to be absorbed by overloaded nation-states – adding to hostility already surrounding asylum seekers, irregular migration and existing ethnic and racial minorities. The implication of 'non-discrimination by nationality' on migrant rights – whether political, social or economy – is however that EU free movers are *not* legally or normatively 'immigrants' *at all*, but rather EU nationals simply living or working in another part of Europe – that *Europe* is their primary 'homeland' or (even) 'society', as it were. This is the particular normative source of the cosmopolitan claim of EU citizenship (Kostakopolou 2008).

The testing ground of this claim and its *de facto* limits have been seen in recent debates among critical social policy and legal scholars, on the problematic recognition and implementation of welfare rights for EU citizens across borders. As freedom of movement has expanded quantitatively – with the accession of East and Central European member states from 2004 (Favell, 2008a), and then new youth and labour migrations after the economic crisis in the South (Barbulescu, 2017; Lafleur and Stanek, 2017) – legal and political framings of these migrations have indeed changed. Scholarship is of course adamant that there is little evidence to substantiate one of the clear symptoms of this shift: the accusations rife in populist media and, increasingly, among mainstream politicians, about abusive 'welfare tourism' and 'poverty migration' by mobile EU citizens (Dustman et al., 2010; Giuletti et al., 2011; Ehata and Seeleib-Kaiser, 2017; Vargas-Silva, 2017). Yet it has also charted a clear trend across Europe towards new modes of restriction, differentiation of 'wanted' and 'unwanted' migrants, and sovereign state control over migration selection dynamics. The expansive 'supra-national' tendencies of an earlier European Court of Justice have in recent years reversed and sustained popular suspicion against the legitimacy of non-national welfare claims (Menendez 2014). The literature has always emphasised areas in which EU citizenship rights failed to fulfill participatory norms of citizenship (Meehan, 1993; Shaw, 2015), or have been stratified according to socio-economic status (i.e., excluding the non-economically active), or unequal due to country of origin and destination differences

(Roos, 2016; Bruzelius et al, 2017). Conditionality – for example, rules of residence – have been used to impose further restrictions (Bruzelius et al, 2015; Dwyer et al, 2018). Social policy analysts have highlighted the creative ways that welfare states or national courts have devised new modes of implementing EU directives, quarantining EU citizens away from certain benefits (Blauberger and Schmidt 2014; Kramer et al, 2018; Martinsen and Werner, 2019; Heindlmeier and Blauberger 2017). O'Brien (2015) construes the eviction of EU citizens from the welfare state as a means to achieve immigration targets. Geddes and Hadj-Abdou (2016: 236) note these changes as an effective strategy to limit the power of populist parties: to simulanously signal 'commitment[s] to forms of social protection associated with the national welfare state [because they] face certain electoral punishment if they back too overtly away from these'. Finally, there has been evidence advanced on how restrictiveness and categorisation of non-economically viable EU foreigners can be used to further cement welfare retrenchment against similarly unwanted welfare claims of marginal and vulnerable national citizens (Anderson, 2013; Shutes, 2016).

At the same time, the social policy literature is still deeply embedded in comparative views of welfare states and 'varieties of capitalism' that continue to stress likely differences in outcomes across different regime types (in the classic line of Esping-Anderson, 1999; Hall and Soskice, 2001). The broadest frameworks conjoining immigration, welfare and political economy predict different outcomes, while not clearly differentiating theoretically freedom of movement (ie. in the EU legal context) from other forms of labour movement (Sainsbury 2012; Afonso and Devitt, 2016). Applied work thus still finds differences concerning, for example, the so-called 'neo-liberal' British case, for example, compared to Scandinavian or continental models: either in terms of public attitudes towards social citizenship driving political outcomes (Bruzelius et al, 2014) or the fact that more coordinated welfare state economies will be more generous (Römer, 2017).

Brexit would seem to confirm this hypothesis – at least as regards commitment to normative European principles on the continent. Ruhs' widely read work on the basic negative trade off between open immigration and extensive welfare rights (Ruhs 2013), reprising Milton Friedman via Freeman (1986), leads to the conclusion that the British combination of open accession for EU migrants and universal basic welfare provision was (politically) unsustainable (Ruhs 2015); by implication, it confirms the view that continental welfare states, such as Germany – which are also apparently drifting in a neo-liberal direction – will

need to shore up the rights of national workers *against* foreign migrant workers, if they are to retain any credible welfare state protection for their 'own' citizens.

Yet the virtue of EU freedom of movement of persons – when it worked economically and socially to build a more integrated, cross-border Europe – was precisely that it defied these conclusions. Effectively, the new migration system created by the 'fourth freedom' set up a different equation in which all kinds of temporary, pendular, transnational, and non-linear forms of mobility *short* of permanent settlement and re-naturalisation (i.e. classic 'immigration') were made possible as viable economic modes of living within the EU, protected by a substantial transnational welfare net underpinning an effectively 'flexisecure' cross-border labour market across the EU. The point then missing in nearly all conventional analyses, is that it was the UK – the most popular destination of internal European free movement – which in fact best embodied the EU's 'win-win-win' ideal theory of freedom of movement (Borjas 1999). The booming UK economy of the late 1990s and 2000s paired positively selected, open bordered migration with a basic (largely unused) welfare net. This had positive results for the EU citizens themselves, for the receiving country (where economic demand was high), but also sending countries – which received benefits from transnational flows and further embedded European economic integration (Favell, 2008b; Gordon et al, 2007; Portes, 2016). This story has been lost in the academic panic over nationalist democratic 'revolt' against the EU. Put another way, the 'progressive dilemma' highlighted by the roll-back to national social democracy so vehemently proselytised by Streeck (Parker, 2017), has meant that left leaning scholarship everywhere has concluded that in order to stop populism it is only right that the 'left behind' national working classes have to be protected from the 'post-national' claims of foreign 'immigrant' workers pouring into the country under EU freedom of movement clauses (Kriesi et al, 2008; Guilley, 2015; de Vries, 2018; Manow et al, 2018; Goodhart, 2017; Eatwell and Goodwin, 2018).

Post-crisis Europe is indeed choosing this path, sacrificing the 'fourth freedom' for national populist political expediency by brutally dismantling the 'post-national' implications of EU citizenship rights – as social policy analysts have ably documented. A key moment came when the Netherlands, Austria, Germany and the UK jointly sent a letter to the Irish Presidency of the EU in 2013, requesting the *ample revision and retraction* of welfare rights for certain categories of EU migrants. Invoking a strain on public services and social security, they asked it to introduce provisions to enhance their capacity to restrict access when needed

(Guild, 2017). Yet Europe has moved this way not by converging on a so-called 'neo-liberal' model (as nearly all the mainstream commentary claims), but rather by converging on a frankly *nationalist* (as well as false) view of the sustainability of workers' rights and welfare protection. For this to happen, 'free movers' had to become 'immigrants' again, a trend as deeply anchored in the (thereby) *methodologically nationalist* underpinning of much current academic scholarship, as it is in overtly nationalist politics and nationalist media. What we turn to now, is how the European trends have been led by the UK and Germany, and effected along parallel lines – despite their very different welfare states and labour markets – and why Brexit only confirms a European trend rather than British exceptionalism. Our data builds on primary research of official policy documents, guidelines and reports which were collected through archival research and the MISSOC data base.[2]

UK:
RETRACTION AND DELAY OF WELFARE RIGHTS FOR EU CITIZENS

In the cold light of the Brexit referendum outcome, much has been made of the momentous decision of the then Labour Government in the UK to 'open the doors' to what is often misleadingly referred to as 'EU immigration', by not imposing accession delays on the new Central and East European (CEE) member states in 2004 (Ford and Goodwin, 2017; Evans, 2016). At the same time, there is little doubt that Britain in the 1990s and through the 2000s – that is well before the CEE accessions, as well as after the economic crisis of 2008 – was by far the most attractive and successful economy in Europe in terms of non-discriminatory work opportunities and 'fairplay' organisational practices for intra-EU migrants, and the subsequent selection effects for the economy (Vargas-Silva, 2017). It consistently attracted the brightest and the best, the youngest and most successful, and on into the larger-scale CEE migrations, it continued to attract the most entrepreneurial and (financially) least vulnerable of intra-EU migrants. For example, in 2015, (male) employment rates for A8 residents stood at 91% whereas for A2 residents it was a slightly lower 89% per cent; a solid +17% and +15% higher than for British-born males respectively (Rienzo, 2016: 4). Similarly, employment rates for women were higher for A8 and EU14 than for those born in UK. As we will see, Germany has done less well in bringing EU citizens into the labour market.

The full story of how and why freedom of movement was twisted into 'EU immigration' – thereby becoming the main driver of the anti-EU vote in Britain – is a political story, not one

that has any economic foundation (a story we tell elsewhere: see Favell and Barbulescu, 2018). What we focus on here, rather, are the precise legal and policy moves Britain and Germany have made to untie the knot between freedom of movement and access to welfare for EU nationals.

It is a timeline not explained by a simple chronology of European crises, nor easy assumptions about left-wing vs right-wing governmental preferences. The retrenchment can in fact be traced back to 1994, during the Conservative government of John Major, as well as key points during the New Labour boom years (1997-2010). As a result, on the face of it, the UK's 'neo-liberal' welfare state and the unrestricted access of EU citizens to benefits could not be further apart. Because of its reliance on means-tested benefits and low rates of replacement pay unattractive for workers, as well as a preference for private welfare solutions, the UK seemed primed as the European country to least fear abuses. A peculiar culture of compliance – following EU rules quasi-religiously, while constantly chafing in political terms at the regulation – cemented a context in which an 'ideal' highly Europeanised labour market was possible.

Looking back it is surprising how efficiently the UK developed strategies to further curb welfare for EU citizens. In particular, these centre on a series of four interlinked 'tests' to which all EU migrants are subject (although clearly targeting CEE migrants): the Habitual Residence Test (first introduced in 1994); the Right to Reside Test (introduced in May 2004); the Genuine Prospect of Work Test; and the Minimum Earnings Threshold Test (both introduced in March 2014). Welfare tests are efficient measures of reducing access as they depend on claimants meeting additional requirements and, crucially, involve an element of discretion, open to hostile interpretation in a given political environment (Guma, 2018). If passed, these tests give access to different components of the benefits system. For example, the right to reside is associated with most types of welfare provision: income support, income-based jobseeker allowance, pension credit, housing benefit, council tax reduction, child benefit, child tax credit, universal credit (discontinued), and housing assistance from local authorities. In turn, the Habitual Residence Test gives access to means-tested benefits such as disability benefits and carer's benefit (attendance allowance, disability living allowance, personal independence payment and carer's allowance). The Genuine Prospect of Work Test gives access to housing benefit tax credits and child benefit while the Minimum Earnings Threshold Test opens up to income-based job seeker allowance (JSA IB), income

support (IS), income-related employment and support allowance (ESA IR) and state pension credit (SPC).

The move towards restricting access to welfare thus started as long ago as 1994 when the Conservative government introduced the so called Habitual Residence Test (HRT) which required EU citizens (and returning British citizens) to have lived for a period of time before qualifying for welfare provisions. While residence requirements are not unusual there was no statutory definition of HRT, which introduced uncertainty and arbitrariness. It was the agency administrating the test, the JobCentre, and in particular a public servant with decision-making powers – known (ominously) as the 'Decision Maker' – who was the authority who could finally attest whether a person passed the test and qualified for the benefits (formally enjoyed by all legal residents regardless of nationality). In a later version of the test, the Decision Maker was asked to 'determine the main centre of interest of a person's life'.

From 1994, the Habitual Residence Test has become a permanent feature of welfare provision for EU citizens. In a sense, it was an early attempt to align their supposedly 'privileged' status with the well-known 'hostile environment' that has long existed for non-European migrants. The HRT was revised and made stricter on several occasions, which tended to coincide with any opening of the labour market to EU citizens from CEE countries: first in May 2004 under the Labour Government, which had otherwise lifted restrictions on work and residence, and again in December 2013, under the Coalition Government. Upon introducing the 'new, more robust' version of the test, the Department for Work and Pensions (DWP) proudly stated that: '[F]or the first time, citizens will be quizzed about what efforts they have made to find work before coming to the UK and whether their English language skills will be a barrier to them finding employment" (Kennedy, 2015).

The new version of the HRT came into force on 1 January 2014, the very day that restrictions for workers from Romania and Bulgaria were lifted. The role of the Right to Reside Test (2004), meanwhile, is to define the EU citizens who can stay in the country after the first three months. It was introduced by the Labour Government as a necessary pre-condition to pass the Habitual Residence Test *in anticipation* of the arrival of A8 citizens to Britain in May 2004. Until this, HRT was the only test being applied.

The Coalition Government undoubtedly ratcheted up the rhetoric of restrictive 'immigration' policies symbolically (and misleadingly applied) against EU legislation. The Genuine Prospect of Work Test (GPoW) and the Minimum Earnings Threshold Test (METT) corresponded thereby to a second generation of welfare tests. Initially, the GPoW was to be applied only to those EU citizens arriving after 1 January 2014. However, the DWP later revoked its decision and started applying it retrospectively to *all* EU citizens who were *already* receiving benefits, but who under the new regulation would now not have qualified (DWP 2015). The purpose for revisiting these rules and extending it to other categories of EU citizens was for the authorities – in this case the JobCentre – to be able to decide whether they still qualified to remain in the UK under EU law. The basic Right to Reside becomes supplemented by further tests, ostensibly designed to check for capability to find work, but which can be used to undermine the basic test. In order to satisfy the GPoW test, beginning May 2015, jobseekers from EU countries who had stayed in the country and received income-related JSA had to provide compelling evidence of scheduled interviews or contracts. If they passed this test, the JSA could be extended for only an additional two months.

Some of this will seem familiar to anyone who has seen the Ken Loach film (2016) *I, Daniel Blake*, about an English worker serially humiliated in his quest for welfare support by the tests and barriers he is forced to pass through to claim his rights. What is distinctive is that the familiar British bureaucratic apparatus was being applied to actively remove *any* incentive to stay from *anyone* who did not have viable access to the labour market. Even this battery was not enough. EU citizens also had to prove that their employment was not marginal or ancillary to gain access to welfare entitlements, in line with CJEU judgements.[3]

To thus evaluate what might constitute 'genuine and effective work', the UK unilaterally introduced a fourth test: the "Minimum Earnings Threshold Test" (METT). METT was used to restrict the meaning of a being a 'worker' or 'self-employed' under British and EU law. In effect, it introduced a strict financial and temporal definition for what might be considered 'genuine and effective work': an income of minimum £663 gross per month (or £153 per week), as well as a period of time (minimum three months) before any benefit might be claimed in case of loss of work. The threshold was set at £663/month (the equivalent of 24 hours per week at the rate of national minimum wage), because this is the level at which employees start to pay National Insurance.

METT is nonetheless problematic because indirectly it gave British authorities control over who could be considered a genuine 'worker'. It therefore introduced differentiation in the face of EU law according to the type of work one has. This was clearly a move in the direction of seizing back state control vis-à-vis the European market over lower-end, possible less "wanted" workers; normally the definition of a 'worker' would be the competence of EU free movement legislation. In addition, equally problematic was the fact that the threshold *de facto* excluded part-time workers – again in conflict with EU law, a clear departure from EU principles (O'Brien, 2015).

Squeezed between an intensely rewards-driven open labour market for those who could succeed, and a welfare system that had already shut down many of the entitlements to non-discrimination, well in advance of Brexit and all that, the UK had ironically hit upon the ideal highly selective, off-shore model for freedom of movement. What was not under control, though, were the political consequences of sustaining a false public image of the 'EU immigration' this attracted. David Cameron, seeking only to resolve the question of EU membership for his wayward party, bought into an ever harder line of rhetoric against the 'welfare tourists' of the EU, who had abused Britain's open doors. His gambit was that a deal with the EU on toughening even more the restrictions to welfare benefits would deliver a referendum result to stay with unpopular but economically vital EU membership, while doing little to alter selective, labour demand driven flows. His EU partners were not particularly reticent in agreeing; as we will see, the rest of the EU has been looking for ways to slide away from the principle of non-discrimination on social rights. Echoing the May 2015 Conservative Manifesto, Cameron's proposal was to (1) remove child benefits and child tax credit for children living outside UK; (2) introduce a four-year waiting period in which EU citizens would only contribute to National Insurance, but have no access in-work benefits; and (3) cut taxpayer support for job-seekers. The final agreement largely confirmed British PM's demands with the exception of indexing rather than removing benefits for children residing abroad. It also limited the exclusion from in-work benefits to newly arriving Europeans for a period of seven years, eight less than what Cameron requested. It was a 'deal', as EU negotiator Donald Tusk famously tweeted. Freedom of movement rights were being undone on all sides. But the real damage was done already. Why would a population convinced by its leading politicians that the scare stories and lies about welfare abuse and hurt to British workers perpetrated by EU nationals in the UK were true, be suddenly assuaged and happy to accept their continued residency, with a series of propositions that

only debarred social rights abuse to those who were not (significantly) engaged in it? All British voters could see were high numbers of so-called 'EU immigrants' that were not going down. So they accepted what UKIP leading voice Nigel Farage (as well as several influential scholars) had been saying all along: that these mobile populations were in fact the type of unwanted 'immigrants' that Britain could only block from its shores by leaving the EU.

GERMANY:
WELFARE RETRENCHMENT IN THE ABSENCE OF ECONOMIC CRISIS

Germany was one of the few countries in the world with positive growth during the global economic crisis, and its commitment to the principles of EU membership cannot be questioned. Yet it has in recent years set off on its own unilaterial retrenchment on welfare benefits for EU citizens. Like the UK, Germany has also welcomed a large number EU citizens who are a young, skill-endowed population that do well in the German labour market. In 2003 it was the destination for 2.7 million EU-born citizens; by 2017 it had reached 4.7 million, with large increases among Poles, Italians, Romanians, Greeks and Bulgarians (Statistischesamt, 2018). However, other statistical indicators are decidedly less rosy than in the UK. In 2016, 4.9% of EU27 citizens were unemployed, compared to 3.4% for natives. While reliance on social assistance in households where no-one works is almost identical (around 7.5%), 10.6% of EU27 citizens are at risk of poverty, compared to 6.2% of Germans. The selection profile of EU migrant workers in Germany is different, tailored to more lower-end work under dual labour market conditions, with high skilled professions in many sectors much more restrictive to non-nationals than the UK (Statistischesamt, 2017: 62-69, 81); welfare access, meanwhile, is inherently stratified by its contributory conditionality (Römer).

What is striking, is that despite the later start, Germany has rapidly – in just two years from 2014 to 2016 – designed and implemented its own mechanisms of further selectively restricting welfare entitlements for unemployed EU citizens and their families. Much of this has been in the form of symbolically visible concessions to some sections of the Conservative Party (CSU) particularly in the Southern Länder; and the Eurosceptical populists from the *Alternative fuer Deutschland* (AfD), at a time of huge controversy over other immigration issues, notably the Mediterranean migration crisis. As in the UK, assimilating distinct types of migration has facilitated more sovereign control.

As is often the case in Germany, the conservative current began in the South. In 2014, Horst Seehofer, Bavarian Governor and regional leader of the Conservative Party, argued that the authorities had to take stricter measures to ensure freedom of movement rights were not used to gain rights to German social protection. The German association of cities and towns (*Städtetag*) had already raised the issue in 2013 and early 2014 but did not have the political clout to push it further. Seehofer called for an amendment to the EU directive on freedom of movement (Directive 38/2004) to tighten conditions for permanent residence for EU citizens and to have legal clarification on the limits of the anti-discrimination principle in EU law. These statements followed alarming reportage from the German tabloids foreseeing a new wave of arrivals in the coming year, as 2014 marked the end of restrictions for workers from Romania and Bulgaria.

Only a few years earlier the same tabloids had raised the alarm about the arrival of Southern Europeans, young Italians, Greeks, Portuguese and Spaniards escaping the severe economic crisis at home. While absolute numbers were not spectacular, the news about the revival of the South-North migratory routes once used by guest-workers, had elements of triggering a new moral panic about 'immigrants' (Lafleur and Stanek, 2017). The 2014 elections for the European Parliament brought surprises and electoral rewards for far-right populist parties across Europe. In Britain, UKIP had its largest success with 26.6%, but the far right in Germany got even more international press when the AfD won 7.1% of the vote in the very first election in which it had participated. Facing a new challenger on the right, the CSU thus began to extend its anti-immigration stance, to demand more restrictions on freedom of movement rights and on access to welfare for EU citizens. The same year, the newly elected Government responded to CSU's demands, appointing a special committee whose mission was to investigate levels of welfare use and abuse of EU citizens. On 26 March 2014, the report was released. It showed that there was in fact little evidence of welfare abuse, yet it did underline how some cities and localities in Germany were in particular need of assistance, given the unequal distribution of EU migrants to certain cities (Ministry of Interior and Minister of Labour, 2014). The German authorities' response was multifold.

First, the federal government increased central funding to the most affected municipalities where there had been a rapid increase in demand for social protection from EU citizens. In total, circa €200 million were directed to these localities as a form of relief, followed by an

additional €25 million for housing and heating costs – despite these being local responsibilities. There was also money for professional training, schools and nurseries, and vaccination campaigns (Ministry of Interior and Minister of Labour, 2014). These were in effect 'integration' policies: assuming EU citizens to be 'immigrants' who were settling.

Second, Germany stepped up its practice of referring cases on the welfare rights of EU citizens to the Court of Justice of the European Union (CJEU). In the past, the Court has been known as a source of progressive interpretations, but it too in recent years has been swayed by the mood of politics in Europe, delivering a number of important cases that have retracted social rights (Menendez 2014). In the German narrative, two cases, Dano and Alimanovic, have been vital steps.[4] In the Dano case, the CJEU ruled that EU citizens would lose the right to access to certain social protection packages if after the first three months they did not fall under the categories protected by the Citizenship Directive: i.e., workers (whether dependent or self-employed), former workers, or jobseekers. Elisabeta Dano was a Romanian Roma and single mother in charge of a 5-year-old with whom she resided in Germany since 2011. She was already receiving child benefit and single-parent benefit, and applied for additional non-contributory cash. The Court instead decided that she was not entitled claim benefits because she was neither a worker, a former worker or a jobseeker. In the second case, Alimanovic, the Court confirmed that member states can refuse jobseeker support to EU citizens. The family had settled in Germany in the early 1990s as refugees, but moved to Sweden in 1999 where they also naturalised. They then returned as EU migrants to Germany in 2010. The Court ruled that Germany could stop payments to the family as they were not in work and had been in unemployment for longer than a year.

With this legal foundation, Germany could then develop a third strategy, building on the CJEU jurisprudence: to reshape welfare entitlements by removing the welfare rights of EU jobseekers. In December 2016, the Bundesrat voted to redefine eligibility criteria to withdraw both the jobseeker allowance and social assistance for EU jobseekers and their families. They would only have access to welfare if they had lived and worked for five years in Germany and become permanent residents. Unlike two years earlier when it was the CSU, CDU and AfD promoting stricter rules for EU citizens, in 2016 it was now the Social Democratic Party of Germany (SPD) which championed and indeed vouched for the 'need and merits' for retrenchment of welfare rights. The new criteria were to be applied not only to incoming jobseekers from other EU countries but also to existing EU recipients. The latter would have

four weeks emergency pay to cover basic expenses such as food and health care, but would lose the right to stay in Germany. At the end of the period, they would be entitled to a loan from the German State to finance the return to their home country.

In a short period of time, and perhaps under cover of the disastrous scenario that had evolved in the UK with the referendum vote, Germany was in effect putting into a practice set of propositions as tough if not tougher than those David Cameron had negotiated earlier that year.

DISCUSSION

In open defiance of European Union principles, two of the most prominent EU member states, the UK and Germany, have been able pursue independent courses of retrenchment on EU migrant rights, using their political and policy resources to hand. Under cover of the Brexit crisis, European negotiators have also converged on a new 'deal' on rights of EU migrants close to David Cameron's. The influence of these two migrant economies on a convergence within the EU on more restriction and selectivity would seem paramount. They have made it easier for politicians to call for emergency brakes, as in Spain, or sanction talk of state-imposed 'quotas' after the Swiss referendum on EU migration and the Brexit vote. The trends have also normalised the kind of state-controlled legal exceptions on free movement and migrant rights pioneered in Denmark (Adler-Nissen 2014; Greve, 2014). There have been moves to curb vagrant and economically inactive populations in Sweden and the Netherlands (Scholten and van Ostaijen, 2018). The example of Britain negotiating a 'less free' free mobility in the EU with all the members states and having to vote such restrictions in the European Council, had the perverse effect of normalizing the removal of welfare rights, indeed outing the eagerness of other members to buy into Cameron's rhetoric. Everywhere, it has become easier to assimilate unwanted 'low end' EU migration to unwanted or unsustainable 'EU immigration'.

With the troublesome UK now opting out of EU law, the other member states may indeed have hit upon a remarkable solution to preserving a denuded notion of 'EU citizenship' without the social rights intended to protect the most economically vulnerable. The UK and Germany have demonstrated how to barbwire access to social assistance for mobile Europeans, while increasing (or at least not reducing) incentives to the high skilled and

highly employable. In line with this, remarkably, actual intra-EU mobility continues at similar rates as before the start of the multiple crises (Eurostat, 2018), and the everyday transnational practices of mobile upper but also many middle class Europeans and their families remain an engine for societal Europeanisation (Recchi, Favell et al, 2019). The resilience of the European citizenship in this sense is not miraculous: it has come at the cost of sacrificing access to social rights for those mobile Europeans most in need.

This is clearly a defeat for the normative, egalitarian, post-national and cosmopolitan notion of membership implied by the 'fourth freedom'. But there may be further consequences of this roll-back on the idea of national citizenship itself in the Marshallian tradition. As the examples of the UK and Germany suggest, once 'anomalous' EU migrants have been absorbed back into the frame of 'normal' immigration and integration policies, the exclusion from social rights of certain 'unwanted' EU nationals provides legal and policy mechanisms likely to enable states to also single out and exclude other categories of national citizens whose 'non-discriminatory' rights to welfare protection can similarly be questioned (Anderson, 2013). The anomalous post-national implication of EU free movement rights may therefore turn out to have been a temporary challenge that has only sharpened the capacity of national bureaucracies and national political systems to put the famous expansive, evolutionary Marshallian triptych of civic, political and social protection further in reverse – in societies already characterized by growing basic inequalities and ever stronger discriminatory differentiations.

REFERENCES

Adler-Nissen, R. 2014. *Opting Out of the European Union: Diplomacy, Sovereignty and European Integration*. Cambridge University Press, Cambridge.

Anderson, B. 2013. *Us and Them? The Dangerous Politics of Immigration Control*. Oxford University Press, Oxford.

Barbulescu, R. 2017. "From international migration to freedom of movement and back? Southern Europeans moving North in the era of retrenchment of freedom of movement rights", in Lafleur, J-M. and Stanek M. (eds) *South-North Intra-European Mobility in Times of Crisis*, Springer, Amsterdam, 15-31.

Bauböck, R. 1994. *Transnational Citizenship: Membership and Rights in International Migration.* Edward Elgar, Cheltenham.

Blauberger, M and Schmidt, S. 2014. "Welfare migration? Free movement of EU citizens and access to social benefits", *Research and Politics*, 1(3): 1-7.

Borjas, G. 1999. *The Economic Determinants of International Migration: Lessons for the European Union*. World Bank, Washington DC.

Bosniak, L. 2006. *The Citizen and the Alien: Dilemmas of Contemporary Membership*. Princeton University Press, Princeton.

Bruzelius, C. 2018. "Freedom of movement, social rights and residence-based conditionality in the European Union". *Journal of European Social Policy*, 29(1): 70-83.

Bruzelius, C., Chase, E., Hueser, C. and Seeleib-Kaiser, M., 2014. "The social construction of European citizenship and associated social rights". Barnett Papers in Social Research, Working Paper 14(1).

Bruzelius, C., Chase, E. and Seeleib-Kaiser, M. 2015. "Social rights of EU migrant citizens Britain and Germany compared".*Social Policy and Society*, 15(3): 403-416.

Bruzelius, C., Reinprecht, C. and Seeleib-Kaiser, M. 2017. "Stratified social rights limiting EU citizenship". *Journal of Common Market Studies*, 55(6): 1239-1253.

Carmel, E., Cerami, A. and (eds.) 2012. *Migration and Welfare in the New Europe: Social Protection and the Challenges of Integration*. Policy Press, Bristol.

De Vries, C., 2018. *Euroscepticism and the Future of European Integration*. Oxford University Press, Oxford.

Dustmann, C., Frattini, T. and Halls, C. 2010. "Assessing the fiscal costs and benefits of A8 migration to the UK". *Fiscal Studies,* 31(1):1-41.

DWP. 2015. *Extending GPoW Assessment to Stock EEA Nationals*. Report. 9 February.

Dwyer, P., Scullion L, Jones K. and Stewart A. 2018. "The impact of conditionality on the welfare rights of EU migrants in UK". *Policy & Politics*, 47(1): 133-150.

Eatwell, R. and Goodwin, M. 2018. *National Populism: The Revolt against Liberal Democracy*. Penguin, London.

Ehata, R. and Seeleib-Kaiser, M. 2017. "Benefit tourism and EU migrant citizens: real-world experiences". *Social Policy Review,* 29: 181-197.

Esping-Andersen, G. 1999. *Social Foundations of Postindustrial Economies*. Oxford University Press, Oxford.

European Commission. 2013. "Social security benefits: Commission refers UK to Court for incorrect application of EU social Security safeguards". Press release. 30 May.

Evans, G. 2016. "The British people are perceptive: immigration and the EU", in Cowley, P. and Ford, R. *More Sex, Lies and the Ballot Box*. Biteback, London.

Favell, A. 2008a. "The new face of East-West migration in Europe", *Journal of Ethnic and Migration Studies*, 34(5): 701-16.

Favell, A. 2008b. *Eurostars and Eurocities: Free Movement and Mobility in an Integrating Europe*. Blackwell, Oxford.

Favell, A. 2014. "The fourth freedom: theories of migration and mobilities in 'neo-liberal' Europe", *European Journal of Social Theory*, 17(3): 275-289.

Favell, A. and Barbulescu, R. 2018. "Brexit, 'immigration' and anti-discrimination", in Diamond, P. et al (eds). *The Routledge Handbook of the Politics of Brexit*, Routledge, London, 118-133.

Ford, R., and Goodwin, M. 2017. "A nation divided." *Journal of Democracy,* 28(1): 17-30.

Freeman, G. 1986. "Migration and the political economy of the welfare state". *The Annals of the American Academy of Political and Social Science*, 485: 51-63.

Geddes, A. and Hadj-Abdou, L. 2016. 12 "An unstable equilibrium: freedom of movement and the welfare state in the European Union," in Freeman, G.P. and Mirilovic, N. (eds), *Handbook on Migration and Social Policy*. Edward Elgar, Cheltenham, 222-238.

Giulietti, C., Guzi, M, Kahanec, M. and Zimmermann, K. 2011. "Unemployment Benefits and Immigration: Evidence from the EU". IZA Discussion Paper 6075.

Goodhart, D. 2017. *The Road to Somewhere: The Populist Revolt and the Future of Politics*. Hurst, London.

Gordon, I, Travers, T. and Whitehead, C. 2007. *The Impact of Recent Immigration on the London Economy*. LSE/City of London. Report. July.

Greve, B. 2014. “Free movement as a threat to universal welfare states”. *European Review,* 22(3): 388-402.

Guild, E. 2017. *Brexit and its Consequences for EU Citizenship or Monstrous Citizenship*. Brill, Leiden.

Guilley, C. 2015. *La France périphérique: comment on a sacrifié les classes populaires*. Flammarion, Paris.

Guiraudon, V. 1998. “Citizenship rights for non-citizens: France, Germany and the Netherlands 1974-1994,” in Joppke, C. (ed) *Challenge to the Nation State: Immigration in Western Europe and the United States*. Oxford University Press, Oxford, 272-309.

Guma, T. 2018. “Exploring potentialities of (health)care in Glasgow and beyond: negotiations of social security among Czech- and Slovak-speaking migrants”. *Central and Eastern European Migration Review* 7(1): 73-90.

Hall, P. and Soskice, D. 2001. *Varieties of Capitalism*. Oxford University Press, Oxford.

Hammar, T. (ed). 1985. *European Immigration Policy: A Comparative Study*. Cambridge University Press, Cambridge.

Hansen, P. and Hager, S.B. 2010. *The Politics of European Citizenship. Deepening Contradictions in Social Rights and Migration Policy*. Berghahn, New York.

Heindlmeier, A. and Blaumberger, M. 2017. “Enter at your own risk: free movement of EU citizens in practice”. *West European Politics,* 40(6): 1198-1217.

Isin, E. and Saward, M. 2013. *Enacting European Citizenship*. Cambridge University Press, Cambridge.

Jacobson, D. 1996. *Rights across Borders: Immigration and the Decline of Citizenship*. Johns Hopkins University Press, Baltimore MD.

Janoski, T. 1998. *Citizenship and Civil Society*. Cambridge University Press, Cambridge.

Joppke, C. 2001. “The evolution of alien rights in the United States, Germany and the European Union,” in Aleinikoff, A.T. and Klusmeyer, D. (eds) *Citizenship Today. Global Perspectives and Practices*. Carnegie Endowment for International Peace, Washington DC, 36-62.

Kennedy, S.. 2015. “Measures to limit migrants” access to benefits”. House of Commons Library. Briefing Paper 06889, 17 June .

Kostakopoulou, D. 2008. *The Future Governance of Citizenship*. Cambridge University Press, Cambridge.

Kramer, D., Sampson Thierry, J. and Van Hooren, F. 2018. “Responding to free movement: quarantining mobile union citizens in European welfare states”. *Journal of European Public Policy*, 25(10):1501-1521.

Kriesi, H-P. et al. 2008. *West European Politics in the Age of Globalization*. Cambridge University Press, Cambridge.

Lafleur, J.M. and Stanek, M. (eds). 2017a. *South-North Migration of EU Citizens in Times of Crisis.* Springer, Amsterdam.

Manow, P., Palier, B, and Schwander. H. (eds.) 2018. *Welfare Democracies and Party Politics: Explaining Electoral Dynamics in Times of Changing Welfare Capitalism.* Oxford University Press, Oxford.

Marshall, T. H. 1950. *Citizenship and Social Class*. Cambridge University Press, Cambridge.

Martinsen, D.S. and Werner, B. 2018. "No welfare magnets–free movement and cross-border welfare in Germany and Denmark compared". *Journal of European Public Policy*: 26(5): 637-655.

Menendez, A.J. 2014. "Which citizenship? Whose Europe?—The many paradoxes of European citizenship". *German Law Journal* 15(5): 907-933.

Ministry of Interior and Minister of Labour (DE). 2014. *Rechtsfragen und Herausforderungen bei der Inanspruchnahme des sozialen Sicherungssysteme durch Angehoerige der Eu-Mitgliedstaaten*. Final Report. 27 August 2014.

O'Brien, C., 2015. "The pillory, the precipice and the slippery slope: the profound effects of the UK's legal reform programme targeting EU migrants". *Journal of Social Welfare and Family Law*, 37(1): 111-136.

Parker, O., 2017. "Critical political economy, free movement and Brexit: Beyond the progressive"s dilemma". *The British Journal of Politics and International Relations*, 19(3): 479-496.

Pennings, F. and M. Seeleib-Kaiser (eds.) 2018. *EU Citizenship and Social Rights. Entitlements and Impediments to Accessing Welfare*. Edward Elgar, Cheltenham.

Portes, J. 2016. "Immigration, free movemanr and the EU referendum", *National Institute Economic Review*, no.236: 14-22.

Recchi, E., 2015. *Mobile Europe: The Theory and Practice of Free Movement in the EU.* Palgrave, Basingtoke.

Recchi, E., Favell, A. et al. 2019. *Everyday Europe: Social Transnationalism in an Unsettled Continent*. Policy Press, Bristol.

Rienzo, C. 2016. "Characteristics and outcomes of migrants in the UK labour market". Migration Observatory Briefing. COMPAS, University of Oxford.

Römer, F. 2017. "Generous to all or "insiders only": The relationship between welfare state generosity and immigrant welfare rights", *Journal of European Social Policy*, 27(2): 173-196.

Roos, C. 2016. "Freedom of movement in the EU and welfare state closure: welfare regime type, benefit restrictions and their implications for social mobility" in Wulfgramm, M., Bieber, T. and Leibfried, S. (eds.) *Welfare State Transformations and Inequality in OECD Countries*. Palgrave, London, 267-289.

Ruhs, M. 2013. *The Price of Rights: Regulating International Labour Migration*. Princeton University Press, Princeton.

Ruhs, M. 2015. "Is Unrestricted Immigration Compatible with Inclusive Welfare States? The (Un)sustainability of EU Exceptionalism". WP-15-125. Oxford: COMPAS.

Sainsbury, D. 2012. *Welfare States and Immigrant Rights: The Politics of Inclusion and Exclusion*. Oxford University Press, Oxford

Scholten, P. and van Ostaijen (eds) 2018. *Between Mobility and Migration: The Multi-Level Governance of Intra-European Movement*. Springer, Amsterdam.

Shaw, Jo. 2015. *The Transformation of Citizenship in the European Union*. Cambridge University Press, Cambridge.

Shutes, I., 2016. "Work-related conditionality and the access to social benefits of national citizens, EU and Non-EU citizens. *Journal of Social Policy*, 45(4): 691-707.

Soysal, Y. 1994. *Limits of Citizenship: Migrants and Postnational Membership in Europe*. University of Chicago Press, Chicago.

Soysal, Y. 2012. "Citizenship, immigration, and the European social project: rights and obligations of individuality", *British Journal of Sociology,* 63(1): 1-21.

Statistisches Bundesamt. 2017. *Migration und integration. Integrationsindikatoren 2005-2016*. Berlin.

Statistisches Bundesamt. 2018. "Foreigners by age, gender, year and citizenship group". Berlin, Genesis online datebase, ref. 12521.

Streeck, W. 2014. *Buying Time: The Delayed Crisis of Democratic Capitalism*. Verso, London.

Vargas-Silva, C., 2017. "The fiscal impact of immigration in the UK". Migration Observatory Briefing. COMPAS, University of Oxford.

Wiener, A. 1998. *European Citizenship Practice: Building Institutions of a Non-State*. Routledge, New York.

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[2] MISSOC - Mutual Information System on Social Protection: http://www.missoc.org

[3] ECJ *Case C75/63 Hoekstra (née Uger) v Bestuur der Bedrijfsverening voor Detailhandel en Ambachten*.
[4] Case Elisabeta Dano and Florin Dano *v* Sozialgeright Leipzig (Germany), C-333/13; Case Alimanovic et al *v* Jobcenter Berlin Neukoeln (Germany) C-67/14.