ACADEMIC SEMINAR: "FREE MOVEMENT RIGHTS IN A PANDEMIC"

19th January 2023 16:00-18:00 (Hybrid event)

Deliverable 2.1 Report of Academic Seminar, author: Romane Lieber (LL.M), Research Assistant. Peer review: Project Operational Team and Co-Investigator

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Executive Summary

Overview

This seminar was organised by the Jean Monnet Centre of Excellence for European Integration and Citizens' Rights (hereafter "JMCE EUICR"). It is the first event of Work Package 2 that explores the connection between citizens of the Union through rights and considers how this fails or succeeds in generating legitimacy. The seminar focused on restrictions on free movement rights during the COVID-19 pandemic and their consequences on EU citizenship. Did these restrictions undermine EU legitimacy? Did they impact EU citizenship? More largely, this seminar asked the question of to what extent EU-derived rights and in particular EU citizenship rights, can be exercised by citizens in times of crisis. This seminar was convened by Dr Stephen Coutts and chaired by Dr Mary C. Murphy while Prof Dagmar Schiek introduced the connection between the seminar and the project overall. The seminar hosted three legal scholars as speakers: Professor Daniel Thym (Konstanz University), Doctor Nathan Cambien (Antwerp University) and Professor Dora Kostakopoulou (KU Leuven University).

Panel contributors

Prof Daniel Thym is the Chair of Public, European and International Law at the University of Konstanz. He has widely published on migration at the European level and questions relating to European citizenship and human rights.

Dr Nathan Cambien is an Associate Professor of EU competition law at the University of Antwerp. He is also a law clerk at the Court of Justice of the European Union. He has widely published on specialized topics of EU law and EU competition law.

Prof Dora Kostakopoulou is the Chair of the Scientific Committee of the Fundamental Rights Agency of the European Union and a professor of European Union Law, European Integration and Public Policy at KU Leuven University. She has published extensively on the free movement of persons and EU Citizenship as well as on questions relating to migration, democracy, and the legitimacy of the EU.

Context and Opening of the Seminar

Introduction of the event - Dr Stephen Coutts

Dr Coutts opened the seminar by recalling the restrictions imposed by Member States of the EU during the COVID-19 pandemic. He stressed that border controls and free movement are two distinct areas which would be considered by the speakers. While restrictions on free movement can be seen to be necessary to fight the pandemic, the seminar related to the way in which Member States of the EU asserted their competence and how EU citizenship seemed to have collapsed. Thus, he emphasised, the seminar would revolve around the nature of EU citizenship and its robustness in the face of crisis and emergency.

Dr Mary C. Murphy highlighted the relevance of EU citizenship for the legitimacy of the EU from a political science perspective on European studies.

Introduction of the JMCE EUICR – Professor Dagmar Schiek

Professor Schiek linked the event to the Jean Monnet Centre of Excellence EU integration and Citizen's Rights (JMCE EUICR), emphasizing the new perspective of EU law and EU integration adopted by JMCE EUICR. The centre investigates the role of rights and how they can be used to enhance EU legitimacy. She observed, that while there is a high volume of research on rights and legitimacy, the JMCE EUICR is original in proposing a new perspective. It departs from the perspective of the institutions to adopt the perspective of the interaction between people.

Professor Schiek stressed that the research of the JMCE EUICR revolves around three central questions. First, it focuses on the nature of rights. The centre departs from the classical perspective of legal scholars that rights are only relevant in litigation and courts. It explores the possibility of rights to also work at a cultural dimension, as an instrument of interaction between people and to a certain extent, defends the sociological dimension of rights. Secondly, the centre focuses on the idea of activation. It defends that it is only with activation that rights can enhance legitimacy. Thus, rights create opportunity structures not only at a political level but also at a sociological level. Professor

Schiek emphasised that the relations between these concepts remain unanswered and that this seminar will focus on answering part of the question. Thirdly, she stressed that the JMCE EUICR covers an original range of geographical areas. The research is built around different work packages, comprising work package 2 on rights for citizens in the Union, work package 3 focusing on the EU neighbourhood with Northern Ireland and Ukraine and work package 4 on the EU's global rights policies. While WP 1 and 2 both analyse rights of citizens to move and anti-discrimination rights, WP 4 considers the role of social rights, human rights and economic rights in the trade agreement and the relationship with China.

Professor Schiek concluded by presenting the core events of the JMCE EUICR.

Panel

Dr Murphy thanked the speakers for their upcoming contribution and the public for participating in the event. She then introduced the first speaker of the event.

Contribution of Professor Daniel Thym

Introduction: "Borders in the Limelight"

Professor Thym started his presentation by stressing how the Schengen area is important for citizens. He gave a personal example, of how by living in Konstanz, close to the Swiss border, he realised the practicality of Schengen during the crisis. Thus, the COVID-19 pandemic is a catalytic way of focusing on what crisis means for Schengen.

Professor Thym argued that when looking at the past fifteen years, Schengen has been a "success story" and seemed to have avoided the crisis. Schengen started with five countries and now has twenty-seven members. Furthermore, it is considered by EU institutions and in particular the Court of Justice of the EU (hereafter 'ECJ') as "one of the proudest achievements of the EU". Professor Thym argued that while Schengen has a practical dimension, for instance not having to show identity papers when crossing the border, it is mainly about symbolism.

Internal borders, he argued, stand for EU unity or national sovereignty if they are controlled. As for external borders, he identified two competitive narratives. One is very popular in political circles and defends the idea of "the Europe that protects" as Jean-Claude Junker, former president of the Commission used to call it. The second narrative is more popular among academic circles and NGOs and defends the idea of common values of human rights. He stressed the difficulty to reconcile both narratives, especially when considering Schengen's history. Indeed, since the very start, external border control lacks consensus.

Internal border controls

Professor Thym started his argument on internal border control by presenting a picture. In the picture, we can see a fence between the Swiss and German border at Konstanz. This border is usually open but was closed during the COVID-19 pandemic. He stressed that the fence had been reinforced with barbed wire as a result of people touching and kissing through it. This image illustrates perfectly what happened during the COVID-19 pandemic. He referred to a "tsunami" of border controls that rapidly evolved to a full closure of borders.

Professor Thym argued that national governments made use of the symbolic value of internal borders to signal protection to their citizens. A sense of uncertainty remained during the COVID-19 pandemic, thus, by re-establishing border controls, national governments signalled to their population that they were taking action. However, in practice, the result was minimal, as closing borders did not prevent the virus to propagate. Therefore, he insisted on the symbolic value of such an action, national governments were simply signalling protection to a worried population.

He then considered the reintroduction of border control from a legal point of view. The Schengen Borders Code (hereafter "SBC"),[1] allow restrictions on free movement rights under certain conditions. During the COVID-19 pandemic, restrictions were taken on the ground of public policy as public health is not listed in the according article. He agreed that the pandemic had political and economic consequences that evidently qualify as public policy risks. Therefore, as restrictions are allowed by the legislature, the reintroduction of border controls and the closure of borders are not problematic per se. However, Professor Thym questioned the legality of such restrictions as regards the proportionality and coherence criterion. Indeed, the ECJ insisted that restrictions on free movement rights, and more specifically, the reintroduction of border control, should be applied coherently. He related again to his personal situation and questioned the coherence of measures that allowed him to travel hundreds of kilometres away inside his country of residence but forbade him to cross the Swiss border five hundred meters away. He stressed the traumatic aspect of such restrictions, as families living on both sides of the borders were split apart. Therefore, he concluded, restrictions were neither proportional nor coherent.

Introducing his next part, Professor Thym argued that a question of relevance for our seminar would be to consider how we got back to normal.

After COVID-19: Returning to "normal"

Professor Thym first considered the perspective of EU lawyers and specialists. For them, he argued, it is the responsibility of the supranational institutions to secure and guarantee the implementation of EU law. However, he analysed a different outcome. While the European Commission (hereafter "the Commission") had been active in publishing papers during the crisis, it was of limited success. In some cases, he argued, they were even counterproductive. Indeed, the careful approach adopted by the Commission in March and April was then utilised by Member States three months later to justify

[1] Regulation 2016/399 of the European Parliament and of the Council of 9 March 2006 on a Union Code on the rules governing the movement of persons across borders, 23 March 2016, OJ L 77/1.

restrictions at a time when the situation on the ground had changed. He insisted on the weight of local political agents such as mayors in border areas, that pressured national governments to sustain border controls. Thus, during the second and third waves, travel restrictions remained, while border closure was lifted. Professor Thym stressed that while EU institutions have an essential role to play in upholding the supranational '*acquis'*, Member States are equally relevant.

He then reflected on the case law of the ECJ regarding the reintroduction of border control. He considered the case relating to Austria's control of the Slovenian border on which the ECJ rendered a decision in April 2022.[2] Austria had been controlling the border with Slovenia for more than seven consecutive years. Essentially, Austria has restricted free movement rights on the ground of article 5 SBC which authorise the reintroduction of border control in the case of a serious threat to safety or public policy. However, article 25(4) SBC imposes a limit of six months on such restrictions.

Professor Thym stressed that the provision has not been respected, by Austria here, and by other Member States in other situations. EU institutions have been aware of this issue since early 2010 and tried to introduce a procedure for the temporary reintroduction of border control. Therefore, during the revision of the SBC in 2013, a complex notification procedure had been introduced. The Commission and the Parliament can voice their opinion on planned internal border control and Member States send a notification letter. However, the content of notification letters had been extremely superficial and does not engage in an earnest assessment of the potential unnecessity to re-establish border controls. Professor Thym concluded that the introduction of procedural supervision has been a failure. He also stressed the inactivity of the Commission under article 258 TFEU, as he is unaware of any infringement proceedings started during, before or after the COVID-19 pandemic.

In the decision relating to Austria's control of the Slovenian border, the ECJ reaffirmed that Article 25(4) should be interpreted strictly. [3] Thus, Member states should not reintroduce border control on the ground of risk to safety or public policy for a period exceeding six months. However, a minor concession should be noted, as in case of a new threat, Member States are entitled to reintroduce border controls for an additional period of six months. Professor Thym concluded that in sight of that decision, Member States restrictions on free movements are not lawful. He stressed that while many Member States have infringed this six-month rule, the Commission stays inactive, testifying of the limited reach of this judgement.

Factual limitations of judicial oversight

Professor Thym referred to his upcoming book,[4] where he produced a statistical analysis of ECJ judgements on migration. He noticed strong discrepancies between Member States and strong thematic discrepancies. He attributes them to the Commission's inactivity under article 258 TFEU and the lack of referral from national courts to the ECJ. He then concluded, that in times of crisis, EU law is not necessarily the most relevant as it presupposes that decisions reach the ECJ. However, border

[2] Joined cases C-368/20 and C-369/20 *NW v Landespolizeidirektion Steiermark* EU:C:2022:298

[3] *Ibid*, para. 78.

[4] Thym Daniel, European Migration Law (forthcoming, 19 May 2023) Oxford University Press

control concerns an area where Member States are making very little referral to the ECJ. He posed the question, if relying on ECJ is not a solution, what is?

Professor Thym referred to the introduction of new and alternative governance mechanisms. The "Schengen council" and "Schengen Forum" were introduced under the French presidency of the council of ministers. He stressed that while these forums have been criticized for their lack of real decisional power, they can prove to be useful in reinvigorating the idea that Member States support the border-free internal area. Thus, he argued, the Schengen council and the Schengen forum might together renew intergovernmental support, which is needed, as the Commission's enforcement mechanisms appear to be insufficient to sustain Schengen.

Professor Thym introduced his next part which focuses on the external aspect of restrictions during the COVID-19 pandemic.

External travel ban

The external travel ban was introduced by the Commission following the "tsunami" of border closures. It was announced on social media and by a press conference. Professor Thym argued that behind the external travel ban, resides the will to undermine Member States' restrictions and to signal protection to EU citizens. Indeed, by closing external borders, extensive control of internal borders may be prevented. While border closure was lifted and did not return during the second and third waves, the external travel ban remained in place until a year ago. He then argued that such a ban was particularly tough on third-country nationals. Indeed, several nationalities were forbidden to enter the Schengen area and the categories for essential travel were very narrowly defined.

Regarding the legality of such a ban, Professor Thym referred to article 6(1)(e) SBC. It relates to entry conditions of third-country nationals which include that "they are not considered to be a threat to public policy, internal security, public health". Thus, if national authorities conclude that they are representing such a threat, their entry can be denied.

Professor Thym considered the institutional aspect of the external travel ban. He argued that while the external travel ban finds its legal basis in article 6 SBC, it was later introduced by means of soft law instruments. Indeed, Member States' behaviour was coordinated by official recommendations, which are not legally binding. However, he argued, EU institutions' coordination was quite successful. He then considered how that model has been utilised in the summer of 2022 to introduce a travel ban on Russian nationals a few months after the invasion of Ukraine. Therefore, Professor Thym concluded on the institutional aspect, that in times of crisis, soft law instruments can be useful. He remarked that it is something relatively new for migration, asylum, and free movement law while it is extensively used in other areas.

On the last point of his contribution, Professor Thym focused on the legal aspect of the external travel ban. He referred to the high volume of ECJ cases on the interpretation of public policy in the context of EU citizenship or free movement. Ten to fifteen judgments have been rendered that consider a similar interpretation of public policy for third-country nationals than for union citizens. Then, in order to decide whether the interpretation shall be the same, the ECJ distinguish according to the context, the wording, and the drafting history of the migration law instrument in question. In several instances,

the ECJ has supported a more generous interpretation of public policy in a migration law context. He concluded by stressing that decisions in the field of union citizenship influence migration, but as well, there are some instances, where migration law influences union citizenship.

Contribution of Dr Nathan Cambien

Introduction

Dr Cambien introduced his presentation entitled "Free movement rights and the COVID-19 crisis: passing the stress test?". He emphasized that it is in times of crisis that we can truly measure the robustness of something. Thus, the COVID-19 pandemic materialised as a "stress test" for EU citizenship. This additional status granted to Member States' nationals, he argued, is the main achievement of the EU. Not only do EU citizens have the right to travel across borders without having their identity papers checked, but EU citizens can live, study and work in other Member States while being subjected to the same conditions as nationals of those Member States. He defended this is an achievement that goes beyond the symbolic value.

Dr Cambien recalled the measures that were taken during the COVID-19 pandemic. He mentioned border closure but also the travel ban. He stressed how these measures were drastic, and how they were accompanied by less drastic measures such as the obligation to present a certificate, be vaccinated, be tested, or even be quarantined. All these measures had an impact on free movement rights and made their exercise more difficult. He then reflected on a personal experience, and how as a Belgian national living in Luxembourg he was suddenly not allowed to enter his country of citizenship. He then reflected on the meaning of these restrictions; does it mean that free movement rights failed the stress test?

He stated that the COVID-19 pandemic is still ongoing. The WHO declaration of 11 March 2020 has not yet been retracted; thus, COVID-19 is still a pandemic. He also stressed that restrictions are not over either. He mentioned for instance the requirement to get vaccinated in many Member States and the recent discussion about travellers from China. More importantly for this seminar, legal issues that arose during the crisis have yet to be resolved.

In the last part of his introduction, Dr Cambien presented the main questions of his contribution. He stated that he would first focus on the compliance of restrictions on free movement rights with EU law and then he would consider which institution safeguards free movement rights.

Whether restrictions on free movement rights were compatible with EU law

Dr Cambien first considered if restrictions on free movement rights were in accordance with the SBC. He emphasised that while article 25 SBC allows for the reintroduction of internal borders, public health is not mentioned. Thus, he argued, the debate has focussed on the possibility to consider the reintroduction of internal borders during the COVID-19 pandemic under the condition of public policy and internal security. He then reflected on the proposition of the Commission to amend the said

provision to include public health; does this mean that it was not included under the ground of public policy or does this amendment clarify what was already there?

He concluded on the SBC, that it is not clear if restrictions were lawful. Indeed, conditions are attached to the reintroduction of border controls. Those need to be a last resort measure, be proportional, not exceed six months,[5] and answer procedural requirements in the form of notifications. Dr Cambien defended that many restrictions on free movement rights were thus, not fully in line with the provisions of SBC.

He then considered the restrictions under the scope of the directive 2004/38.[6] In Chapter VI, article 27 there is an express mention of public health as a ground to limit free movement rights. Dr Cambien stressed that the chapter concerns "restriction of entry". However, many Member States also restricted exit. Furthermore, restrictions need to be proportional and coherent. Thus, he reflected, at a time when the effectiveness of the vaccine was not fully proven, was it proportionate to make it mandatory? He then questioned if these measures were non-discriminatory as the principle of equal treatment is a core component of EU law. He analysed several differences in treatment, between people that were vaccinated and people that could not be or would not want to be vaccinated, between different types of vaccination, and between nationals of Member States and residents of that Member States.

Lastly, Dr Cambien considered article 30 of the said directive that provides "the persons concerned shall be notified in writing of any decisions taken under Article 27(1), in such a way that they are able to comprehend its content and the implications for them". Thus, it is not clear if restriction measures were lawful.

Therefore, Dr Cambien concluded that the text lacks clarity on what is allowed. This is deeply problematic, as even if we understand the conditions, we cannot say with certainty that they were met. He introduced the second point of his presentation and considered that if the rules lack clarity, institutions are here to promote and protect free movement rights.

Whether national or EU institutions had safeguarded free movement rights

Dr Cambien first considered whether national institutions had safeguarded free movement rights during the COVID-19 pandemic. He stressed that many Member States have admitted to acting against EU law and prioritising their citizens during the crisis. While there had been important initiatives of intergovernmental cooperation during the second wave, he argued that the solidarity principle which is the essence of free movement had been overlooked by Member States.

Therefore, Dr Cambien contemplated whether it is the role of national courts to safeguard free movement rights. During the crisis, many national courts had to consider the legality of the measures taken. However, they were focused on constitutional requirements rather than on free movement

[5] Joined Cases C-368/20 and C-369/20 *NW v Landespolizeidirektion Steiermark* EU:C:2022:298

[6] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 concerning the rights of citizens of the Union to move and reside freely within to the territory of EEA member states [2004] OJ L 158/77

rights. Finally, he reflected on the predominant role of scientific experts and expert bodies, such as the European Centre for Disease prevention and control, during the COVID-19 pandemic. He concluded that while these bodies were asked whether restrictions were necessary, they were not relevant in giving decisions relating to free movement rights.

Dr Cambien then considered whether EU institutions had safeguarded free movement rights during the crisis. He argued that the Commission, as "guardian of the treaties", did very little to enforce EU law and supervise Member States. While procedural soft law instruments were put in place, he analysed a lack of coordination, between the Commission and Member States as well as amongst officials. Lastly, he emphasised that the lack of coordination was highlighted by EU bodies as well.[7] He then considered whether the European Parliament was in a better position to safeguard free movement rights. Dr Cambien stressed that legislative action is a long process. Thus, some actions have been taken, but only a year after the start of the crisis, such as Regulation 2021/953 on the EU Digital COVID certificate.[8] He concluded that EU institutions have failed to protect free movement rights in times of crisis. He asked whether it can be the case of the ECJ?

Dr Cambien stressed the key role of the ECJ, which can clarify the legal issues that arose during the crisis. He mentioned the pending case C-128/22 on which the hearing took place on the 10th of January 2023. The case was brought by travel operators that organised travel from Belgium to Sweden. However, Belgium had established a red, orange, and green flag system, and in the summer of 2020, Sweden became a red country. Consequently, the company had to cancel all the trips organised and refund their clients. A damage claim was made against the Belgium State, which then referred to the ECJ. Therefore, he argued, this judgement will give us more guidance on whether restrictions imposed by the Belgium state, here a travel ban on red countries and a requirement of quarantine, are compatible with EU law. Consequently, it will clarify the compatibility of Directive 2004/38 with the exit ban for non-essential travel to red countries, and the legality of entry restrictions for non-Belgian nationals coming from red countries.

Dr Cambien then stressed, that while the ECJ is of primary importance, it also has significant limits. Firstly, the ECJ take time to render decisions, as while the hearing was held in January 2023, the judgement will be given by the end of 2023 at the earliest. Secondly, national courts fail to always refer to the ECJ, not allowing the Court, to clarify a point of EU law. Lastly, the ECJ cannot create new laws to deal with new situations.

On the last point of his contribution, Dr Cambien reflected on the possibility of the General Court of the EU (hereafter "EGC") becoming the EU citizen's court. He stressed that a high volume of applications was received during the COVID-19 pandemic relating mainly to States' aid measures in favour of airlines. He put in doubt the possibility of the body becoming the citizens' court as there are strict admissibility requirements. For instance, several actions were brought against regulation

[7] European Court of Auditors, Special report 13/2022 "Free movement rights during the COVID-19 pandemic" 13 June 2022

[8] Regulation (EU) 2021/953 of the European Parliament and the Council on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test, and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic [2021] OJ L 211/1

2021/953 by citizens as they considered the EU Digital COVID Certificate as an infringement of their fundamental rights. However, while regulation 2021/953 established a framework for the EU Digital COVID Certificate, it does not require Member States to maintain or impose free movement restrictions. Thus, while all the actions were found inadmissible, the EGC stressed the possibility for applicants to challenge national measures before national courts. Dr Cambien then reflected, that even if the EGC would have gone beyond this point, the applicant would have needed to prove a direct and individual concern. Nevertheless, a few cases have been found admissible, such as case T-506/21 on the requirement of transparency,[9] and Case T-710/21 brought by Members of the European Parliament.[10] Both cases are now going to the EGC.

Dr Cambien concluded by emphasising that the central problem is the lack of clarity of the rules. Additionally, it is not clear which institution should safeguard free movement rights. Therefore, there is a need for the legal framework to be clarified and amended. Clarified by the ECJ and the EGC, for instance in the pending cases, and amended by the EU institutional triangle, to clarify what rules and procedures are applicable. He finished by emphasising the primary role of EU institutions in times of crisis.

Contribution of Professor Dora Kostakopoulou

Introduction

Professor Kostakopoulou stressed that her contribution relates to the question "What happens next?". She started her argument by referring to the story of Pandora's Box in Greek mythology. Pandora's curiosity led her to open a jar which released physical and emotional curses upon mankind. However, one force never left the box, the duty to hope. Throughout the COVID-19 pandemic, she argued, we saw these contradictions. On one hand, we saw compassion and care and at the same time, restrictions, domestic abuse, the rising of homophobia, misogyny, and new forms of nationalism.

Indeed, as people were restrained, they were more likely to listen to right-wing messages. She gave the example of the United Kingdom with the narrative "I take back control", and the idea to make decisions based on want irrespective of constitutional provisions and human rights. Therefore, she argued, while we had all these negative developments, we also had a signal of remedy. The remedy is to focus on our values, to focus on principles in order to counteract these negative forces.

The Commission's initiative

Professor Kostakopoulou referred to three documents published by the Commission in 2020. The first document relates to strengthening the application of the charter of fundamental rights.[11] She recalled

[9] Case T-506/21 *Saure v Commission* EU:T:2022:225

[10] Case T-710/21 *Roos and Others v Parliament* (pending)

[11] Communication from the Commission "Strategy to strengthen the application of the Charter of Fundamental Rights in the EU" COM (2020) 711

that the charter of fundamental rights is legally binding since the entry into force of the Lisbon treaty in December 2009. In the document, the Commission emphasised the need to make the charter more effective and to close gaps in the protection of human rights and citizens' rights in the EU. Professor Kostakopoulou defended that it is only if people are aware of their rights, that rights can be claimed and gain authority.

The second document published by the Commission concerns the European democracy action plan.[12] In this document, the Commission recognised that liberal democracy needs to be safeguarded. Misinformation shall be countered, free and fair elections and democratic participation protected, and media freedom and pluralism strengthen. Thus, Professor Kostakopoulou argued that through this document, the Commission acknowledged the need to take action to safeguard democracy.

She then referred to a third document relating to EU citizenship.[13] In the document, we can see eighteen specific actions plan for EU citizenship. Thus, at a time of restrictions, she argued, the Commission was considering the enhancement of EU citizenship. She defended the idea of the establishment of a statute on EU citizenship that will bring together EU citizenship rights, the EU charter for fundamental rights and the European Social rights pillar.

Toward a statute on EU citizenship

Building on the proposition of a statute on EU citizenship, Professor Kostakopoulou emphasises the irrelevance of EU citizenship without enforcement of human rights by Member States. The right to data protection, the right to family life, the right to be protected against unjust dismissal, and the right to family reunion were all impacted by the crisis. Thus, the COVID-19 pandemic made it very clear that the EU needs to develop enforcement mechanisms. People need to be protected, she argued, the experience of the pandemic cannot repeat itself.

Professor Kostakopoulou then referred to the creation of a fully-fledged EU citizenship. EU citizenship was established in 1993 by the Treaty of Maastricht and is now provided by Article 20 TFEU. She recalled that Article 25 TFEU allows for the adoption of provisions that would strengthen rights listed in Article 20(2). Thus, she argued, Article 25 TFEU is an evolutionary clause and represents the belief of the Treaty drafters that EU citizenship rights should be expanded in the future. However, more than thirty years after the entry into force of the treaty of Maastricht, the opportunity has not yet been activated. EU citizenship is not only about freedom of movement rights, she argued, it is also about political rights, democracy, and citizens' ability to own their political space and to disseminate their demands.

Professor Kostakopoulou referred to the current challenges faced by the EU such as Brexit, the restrictions taken in times of emergency that fail to be proportional and the war in Ukraine. All these challenges, she argued, question the effectiveness of EU law. Reflecting on the situation of Ukrainian

[12] Communication from the Commission "On the European democracy action plan" COM (2020) 790

[13] Communication from the Commission "EU Citizenship Report 2020: Empowering citizens and protecting their rights" COM (2020) 730

refugees in Europe, she stressed the temporary aspect of the protection granted. Are we expecting them to return, she questioned, and how many of them will be willing to return?

Consequently, she stressed the necessity to be innovative for the future of EU citizenship. She argued that lessons should be taken from the COVID-19 pandemic and Brexit, and a statute on EU citizenship shall be adopted. This statute would not only list rights to make them accessible to citizens but would also consider several dynamics regarding the expansion of EU citizenship. Professor Kostakopoulou then considered the place of third-country nationals in the current system. When EU citizenship was introduced, she emphasised, there were above two million third-country nationals while today, we count more than twenty-three million. All these people have been denied free movement rights and consequently, have been excluded from the single market. She argues in favour of granting them free movement rights. She then reflected on the seven million Ukrainian refugees in Europe, and the idea that EU citizenship based on residence in addition to EU citizenship based on nationality would resolve these issues. With this, she argued, there could be a transition from temporary protection of Ukrainian refugees to an EU citizenship statute.

Professor Kostakopoulou then reflected on the reality of such a proposal. She stressed the possibility of the statute on EU citizenship becoming a reality as the European Parliament had already made this proposal in 2019 in adopting a resolution.[14] She emphasised two statements of said resolution. Firstly, the European Parliament considered that the "Successful exercise of citizenship rights presupposes that the Member States uphold all rights and freedoms enshrined in the Charter of Fundamental Rights". Thus, she argued, it entails a closer alignment between the charter of fundamental rights of the EU and EU citizenship. Secondly, the European Parliament stressed that "the principle of non-discrimination is a cornerstone of European citizenship and both a general principle and a fundamental value of EU law according to Article 2 TEU".

She then reflected on Dr Cambien's contribution and the unanswered question "who protects our rights?". Professor Kostakopoulou argued that the answer might very well reside in the establishment of a statute on EU citizenship.

Returning to her first point, she referred to the documents published by the Commission in 2020. While the Commission has been active in producing soft law documents, she regrets that no concrete actions on the establishment of EU citizenship have been taken. She considered that the Commission might propose some provisions, representing a pre-work of a statute in the next citizenship report, or citizens might propose specific provisions on a statute for EU citizenship. Professor Kostakopoulou emphasised that such a proposal has been already made in the context of the Conference on the Future of Europe.

In her conclusion, Professor Kostakopoulou stressed the necessity to adopt a statute to overcome the limitations and deficiencies that we experienced during the COVID-19 pandemic. She defended that while it has been a terrible experience, it has also allowed for some reflection. Thus, she emphasised the necessity to address the issues that arose during the pandemic to avoid normalisation.

[14] European Parliament, 2019. Report on the Implementation of the Treaty provisions related to EU Citizenship. A8-0041/2019 EP Report of 29 January 2019

Discussions and Questions

How is the definition of public policy different in migration law and EU citizenship law?

Professor Dora Kostakopoulou opened the floor for questions. She asked Professor Daniel Thym to elaborate on the definition of public policy as she was intrigued by the divergent interpretation of public policy in the field of migration law and EU citizenship.

Professor Daniel Thym referred to case C-544/15.[15] In EU law, the personal behaviour of the individual can justify a public threat. We can find the same wording in article 27 of directive 2004/38/EC relating to free movement. However, in the case C-544/15, the ECJ concluded that purely abstract risks, which would never qualify as a public policy threat in the case of EU citizens, justify the refusal of a student visa. The applicant was working at a uranium institute and might have possibly been involved in a nuclear programme, but her behaviour was not an issue. This case shows how public policy is defined similarly to start with, but then it resolves in outcomes which would be unthinkable and unacceptable in the free movement case law.

Why should we interpret public policy differently in the context of internal border control and free movement context?

The second question was asked by Professor Thym to Dr Cambien. "*To what extent we might have to interpret 'public policy' differently in the context of internal border control than in the free movement context or with regards to third-country nationals, the internal travel ban*".

Professor Thym then stressed that he is very intrigued by the coming case and agreed with the statement that the ECJ is an essential point of reference. He asked a follow-up question: "*Internal border controls should have stopped in April, we have now nine months where Member States do not comply with the judgement, and they haven't changed their practices, what to do? Can we say that in this case, the Court was not enough*?"

Dr Cambien answers the first question. He stressed that the ECJ will clarify the interpretation of public policy in the context of free movement and EU citizenship. Indeed, two questions were asked to the Court, one concerning Schengen borders and the other about free movement. He stressed that we would know more after the judgement is rendered.

On the second question asked by Professor Thym, Dr Cambien argued that the ECJ has limitations as "the court can only do what to court can do". While the ECJ can impose lump sums, if Member states

[15] Case C-544/15 *Sahar Fahimian v Bundesrepublik Deutschland* EU:C:2017:255.

refuse to comply with a judgement, it cannot be enforced by force. He referred to the case of Poland and said that it can be resolved by political means.

To which audience does the symbolism of border control answer to?

The third question was asked to Professor Thym by a member of the public. "*Professor Thym talked about the symbolism to a national audience, whereas the literature also mentions that this symbolism can answer to a European audience, to this 'European sense of belonging'. Maybe the covid crisis was an exception that border control served a national audience and that usually, the absence of internal border control inspires a sense of Europeanism*."

Professor Thym answered that the goal of Schengen was to signal Europeanism. He argued, that if EU institutions refer to Schengen as "the proudest achievement" it is not because EU citizens save two minutes when they travel from country A to country B. It is about symbolism.

He then referred to the Commission paper on the internal market of 1985, the idea of Schengen was a "signal of European integration".[16] In that respect, the absence of an internal border is a symbol that runs both ways: the absence of border control is a symbol of European integration, and the reintroduction is an opposite symbol. In his view, the British decision to not join Schengen had to do with the symbolism as much as the factual differences between an island nation and a continental nation. He then wondered "*what is the position of the Irish population while the absence of internal border control on the island of Ireland has a crucial symbolic dimension, don't the population feel excluded from the EU by not being part of Schengen?*"

Does coordination have an enabling function?

Professor Thym was asked another question by a participant: "*You pointed to the travel border as an example of success compared to ill-success on internal border control. Does it have anything to do with the enabling function of coordination or the inhibiting function of coordination?*".

Professor Thym first reflected on what enabling and restraining depend on. He stressed that with the Russian travel ban the EU coordination had a restraining element. Furthermore, from the point of view of political agents from the border regions, the coordination during the pandemic had an enabling element as they wanted to get rid of internal border control, thus, the supernational coordination was enabling as it allowed them to achieve their policy objectives.

He agrees that the idea is good, but states that we would have to expand on how enabling and restraining are defined as it depends on perspectives. For instance, Germany during COVID-19 might have been conceived as restraining something which other countries might have conceived as enabling because they were maybe against internal border control. Thus, there is a necessity to contextualise what enabling is and what restraining is. He stressed that supranational coordination is more successful if it is supported by Member States. He emphasized the importance to keep in mind

[16] European Commission to the Council, White paper on the completion of the internal market, 14 June 1985

the relevance of Member States, as supranational institutions alone, are not enough to bear the success of the European project.

How does the proposal that EU citizenship should be based on residency coincide with the recent ECJ judgement?

Dr Stephen Coutts asked Professor Dora Kostakopoulou "*Concerning the proposition that EU citizenship should be based on residency rather than nationality, how would you react with that in mind with the judgement handed out recently by the ECJ denying a British citizen who lives in France, the right to continue enjoying EU citizenship rights? The conclusion of the Court is a strong statement of the link of EU citizenship with nationality. It simply says that EU citizenship is enjoyed by EU citizens, and EU citizens are the nationals of EU Member States, if you are no longer a national of a Member State you are not able to use EU citizenship. Do you think there would be some pushback from the Court because they seemed to adopt traditional views*"?

Professor Kostakopoulou answered by stressing that we have to consider the ambivalent position of the ECJ. In a paper in 2005 she already analysed that in addition to the inter-institutional dialogue, there was an element of the climate. The climate right now is the climate that answers to governmentalism and right-wing nationalism by reasserting the link between nationality and citizenship and therefore EU citizenship does not come into question in European democracies. However, she stressed that the statute would not be adopted by the ECJ. If we have a synchronisation between the institutional triangle on an EU citizenship statute, the ECJ would have to incorporate it into its judgment.

Is there a relationship between those who take on court cases against covid restrictions and the political agenda undermining European integration?

Dr Murphy asked Dr Cambien "*Can we see a relationship developing between those who take these court cases and political agenda which might undermine the European integration process itself? Are there populists? are they about free movement rights? or is there a political agenda as well undermining European integration? is it about covid denial? the anti-vax movement etc.?"*

Dr Cambien stressed that right wings movements could use this case as an example to undermine EU institutions and convey the idea that institutions are against people and that all its construction works against people's interests. He believed that these cases have more chances to be used by sceptics rather than those advocating for free movement rights.

Professor Schiek's remarks on the discussion

Professor Schiek remarked that for the citizenship statute to work, it needs to be grounded in primary law. She stressed that the challenge remains in the coordination between the statute itself that would integrate social rights, free movement rights and others' rights and the existing '*acquis*'.

She answered Professor Thym's question relating to Schengen in Ireland. She stated that Ireland should have considered joining Schengen in 2017 when Brexit discussions were taking place.

However, that would mean that Northern Ireland should have joined Schengen at the same time. Professor Schiek then considered the Protocol on Ireland/Northern Ireland. She stressed that citizens' rights such as social rights, and free movement rights should be guaranteed by the protocol. However, in its current form, rights are all only referred to in article 2. However, she said that provision lacks specific enforcement mechanisms. Professor Schiek stressed that the protocol would need to be revised for it to be relevant for citizens of Northern Ireland and Ireland.

Professor Schiek also remarked that beyond the ECJ and the institutional triangle, EU citizenship has a societal dimension. She defended that the full exploitation of opportunity structures created by Schengen, by the ECJ, and by the EU citizenship depends on social movement as well. Otherwise, she argued, opportunity structures remain unused opportunities. She stressed that is it the research focus of the JMCE EUICR which this seminar has been a good illustration of.

Closing of the Seminar

Dr Coutts congratulated the richness of the conversation throughout the seminar. Professor Schiek remarked on how well this seminar illustrated challenges relating to EU citizenship. She emphasised the importance of taking into account the societal perspective, by looking at what is happening on the ground. Thus, the ECJ judgements need to be accompanied by social movements to make real changes. Dr Murphy thanked everyone for participating.

Further readings

- Cambien, N., Kochenov, D., & Muir, E. (Eds.) European Citizenship under Stress: Social Justice, Brexit, and Other Challenges (2020) Brill.
- Cambien, Nathan, EU Citizenship, and the Right to Care, Chapter in D. Kochenov (ed.), EU Citizenship and Federalism: The Role of Rights (Cambridge University Press, 2017) 489-508
- Kostakopoulou, Dora (with Tony Venables) Towards a Statute on EU Citizenship: A Manifesto (2023, forthcoming) European Journal of Migration and Law
- Kostakopoulou, Dora and Thym, Daniel (eds.) Research Handbook on EU Citizenship Law and Policy (2022) Research Handbook Series, Elgar
- Kostakopoulou, Dora European Union Citizenship Law and Policy: Beyond Brexit (2020) Edward Elgar, European Law Series.
- Kostakopoulou, Dora (with Sergio Carrera, Marion Pannizon and Leonhard den Hertog) The External Faces of the European Union Migration, Borders, and Asylum Policies. (eds., 2019) The Hague: Brill Publishers/Martinus Nijhoff.
- Thym Daniel, European Migration Law (forthcoming, 19 May 2023) Oxford University Press
- Thym Daniel, 'Border Closure and Visa Ban for Russians: Geopolitics Meets EU Migration Law', EU immigration and Asylum Law and Policy of 17 October 2022.

- Thym Daniel and Bornermann Jonas, 'Schengen and Free movement law during the first phase of the Covid-19 pandemic: of Symbolism, Law and Politics" (2020) 5 European Papers 1143-70.