What is Citizenship For?

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Last week, the CJEU declared Malta's citizenship for investment scheme incompatible with EU law for it "amounts to the commercialisation of the granting of the status of [...] Union citizenship, which is incompatible with the conception of that fundamental status that stems from the Treaties (90)." Setting aside the perhaps questionable quality and defensibility of the Court's legal reasoning (see here and here), the decision clearly casts Union citizenship as a status constituted by meanings and norms specific to the European Union as a normative legal project: it "is one of the principal concrete expression of the solidarity which forms the very basis of the process of integration [...] and which is an integral part of the identity of the European Union as a specific legal system [93]." If citizenship status requires the presence of a relationship "of solidarity and good faith [98]" between the state and the individual, it follows that not every individual can be declared a citizen as a conceptual matter, nor following the Court's decision, as a matter of EU law.

What are we to make of this conception of citizenship, and its use by the Court to strike down citizenship for investment schemes? Because I am no EU lawyer, I approach these questions from the perspective of normative legal theory, specifically liberal legal theory, which I believe should inform the Court's citizenship jurisprudence.

A thick(ish) conception of citizenship

From a liberal perspective, the thickening of the concept of citizenship that follows from the Court's embrace of this solidaristic ideal should ring certain alarm bells, especially in the European context. This is because many member states, with Germany perhaps the most notorious example, have a long and shameful history of instrumentalizing thick, ethno-nationalist conceptions of citizenship to justify the exclusions of some of its members from the protections against abusive state power that the status offers. This legacy, and the horrific extremes to which the logic of ethno-nationalist citizenship was taken during the Holocaust, means that we should be vigilant when the highest arbiter of Europe's supreme legal order embraces a thick(ish) conception of citizenship, and wields it for exclusionary ends.

I say thick-ish because it is important to remember that a thickening of citizenship does not necessarily involve the adoption of, nor threaten to collapse into an embrace of an ethno-nationalist conception of citizenship. The latter casts the bond that citizenship requires in a blood and soil logic. This is a far cry from the Court's insistence that the status of citizenship reflect the presence of a bond of solidarity and good faith. This is closer to an idealized conception of citizenship in the vein of republican thinking, which focuses on the quality and nature of the citizen- relationship – its participatory and democratic aspect – than idea(l)s of ethnic or cultural purity. Of course, such an idealized conception of citizenship also carries exclusionary potential and to the extent we believe this to be inherently objectionable within a liberal legal order, we may oppose its adoption.

Even if we believe that some thickening of citizenship is desirable, we may take issue with the vagueness of the idea(l) of solidarity and good faith the Court has chosen. Bonds of solidarity, just like citizenship, can be understood in thick, ethnic or identitarian terms, or in thinner, political terms, ie solidarity based on one's participation in a joint political project. However, this ambiguity provides first and foremost an argument in favour of clarifying the sort of solidarity that Union citizenship requires, and, if you believe the EU as a legal system is or ought to be premised upon a liberal legal philosophy, that it be cast in political terms; not per se an argument against the idea that citizenship

ought to reflect some sort of bond between the state and the individual.

The trouble with exclusion … of the rich

Liberal resistance to infusing the conception of citizenship with an extra-legal bond of solidarity reflects a warranted concern over the exclusionary ends in whose service this bond may be put. In Commission v. Malta, the Court wielded it to outlaw the selling of citizenship. I am undeniably sympathetic to this result, despite its exclusionary effect. This is not to say that ethically desirable results justify shoddy legal reasoning, nor should we ignore the hypocrisy of the Commission's selective outrage at the Maltese scheme, when plenty of other Member States are also busy selling off residency entitlements to the rich. But I firmly and strongly believe that governments, whether European or otherwise, should have no business selling citizenship – or in fact long-term residency entitlements – to the highest bidder, *in the absence of requiring any other form of 'link' or 'bond' to the state*.

Why, you may ask. Given Europe's historical embrace of thick, ethno-nationalist, and unjustly exclusionary citizenship regimes, isn't there something liberalizing and thus attractive about turning citizenship into a tradeable commodity that is accessible to anyone who can afford it? From a global justice perspective, there also appears something redistributive about providing the option to individuals to simply buy themselves out the most arbitrary determinant of one's life chances of them all: the birthright lottery. There might be even something radically diversifying about these schemes: just like the U.S.' diversity visa program, a proliferation of these schemes across Europe could lead to a citizenry that is much more diverse in terms of ethnicity, religion, culture and so on. After all, rich people are not a racially, ethnically, or culturally homogenous group. They exist in every state, including those whose citizens the EU otherwise seeks to exclude with so much legalized violence and death.

Citizenship's protective function

Perhaps. But this gives only part of the picture. Whatever the liberalizing or redistributive benefits of citizenship's marketization may be, these are far outweighed by the contribution such policies make to the overall stratification of both our global and national societies. Citizenship policies are highly expressive acts: they convey value judgments about who the state considers (un)desirable. CBI schemes solidify the idea that wealth makes one worthy of membership in what are effectively islands of wealth and opportunity in a foundationally unjust global order, with the flip side being that lack thereof renders one un- or at least less deserving thereof. It does so despite the fact that the wealthy are often in fact terrible citizens, understood in a politically solidaristic sense here, for they are both prone to and masters at tax evasion and generally hostile to the implementation of progressive, redistributive tax regimes that would allow the state to ensure that all of their citizens, not just the 1%, can thrive or at least live a minimally dignified life. More recently, some of them also show a concerning degree of enthusiasm for dismantling democracy and the rule of law.

But, more fundamentally, I object to schemes of this sort because they are part and parcel of the erosion of citizenship's principal point and purpose in a liberal legal order. We cannot ignore that the privileging of the rich in the distribution of citizenship in highly developed states occurs alongside the restriction of access for those governing majorities deem undesirable, and who are, precisely for that reason, much more in need of citizenship and its associated rights. For the rich, citizenship simply means an additional passport that allows them to live the ultimate cosmopolitan, property-owning lifestyle, spending summers in the Hamptons and on the Amalfi coast and winters in the Bahamas. But for the politically and economically marginalized, citizenship means the right to work, to reside in security from the state's illiberal and often life-destroying deportation power, and to possess minimal but foundational protections against domination and subordination within the soci-

eties they live and labour. Citizenship possesses, in other words, a vital protective function against the threat majoritarian-led state power poses to the realization of individual liberty, dignity and equality – a protective function that erodes the more authority we grant states in matters of citizenship attribution, including by treating citizenship as nothing but a commodity state officials may sell off to the highest bidder.

The inclusionary potential of citizen 'bonds'

Viewing citizenship's purpose in these protective terms within a liberal legal system could make the Court's insistence on the presence of some form of bond less suspicious, perhaps even desirable. For while the idea of a bond may have served an exclusionary purpose in this particular judgment, it can also serve an inclusionary one. Liberal citizenship scholars have long insisted that citizenship policies, specifically policies of attribution and naturalization, should reflect an individual's bond or tie to the polity, whose presence, they generally suggest, should be inferred from the simple fact of long-term residence. Interestingly, the Court seems to somewhat acknowledge the integrative force of residence over time, when it highlights the lack of a meaningful residence requirement in Malta's naturalization scheme [106] to determine the scheme's transactional nature and thus its incompatibility with the solidaristic ideal that is the normative core of Union citizenship. The underlying assumption appears to be that prolonged residence is necessary (though perhaps not sufficient) to give rise to the bonds of solidarity that Union citizenship now requires.

If conceived in the right terms – and this is admittedly a very big if – the requirement of a 'bond' can ensure that citizenship remains a status for *de facto* members of the European polity, as opposed to those the majority of the day – whether at the national or European level – believes to be desirable additions. Perhaps then at least as a matter of normative theorizing the CJEU may not have gotten it all wrong, at least for now. I say for now because the Court's critics are right to warn that the thickness and ambiguity of the solidaristic ideal of Union citizenship has the capacity to turn into an exclusionary pandora's box. The Court would thus do well to wave its newly minted magic wand of Union citizenship carefully and in line with an inclusionary and liberal vision of who is sufficiently bonded to the European political community. To quote wise Uncle Ben, with the great power the Court just awarded itself comes great responsibility.

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