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# Transnationalism vs. nationalism: the case of the right to free movement.\*

**Abstract:** The European Union is currently challenged by right-wing populism and economic stress. To understand the nature of these challenges, we need to take an interdisciplinary approach in which empirical studies of politics are combined with studies of the normative implications of European policy-making. To this end, I draw attention to the right to free movement, which is pivotal both for European politics and liberal political philosophy. I show that even though transnational rights, such as the free movement for people, products and money, are normatively sound and desirable, enhancement of free movement may challenge the heterogeneity among the national models of rights and societal commitments. The risk is that the national institutions as a political arena face difficulties in coping with current political challenges such as right-wing radicalism, social inequality, environmental regulation, immigration and financial insecurity. On the other hand, I argue that we should be aware that the transnational rights might in some countries enhance human rights, which national parliaments have not been able to accommodate.

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## Introduction

The right to free movement is a cornerstone of modern liberal theory, which until recently has only applied within national borders. The European Union has elevated the right to the transnational arena. It is a liberal innovation in modern European politics. The transnational right is no longer pure political rhetoric, a symbolic invention or vaguely defined desires for the future. Indeed, the EU has experienced “a silent revolution in the past fifteen years.”<sup>1</sup> Proponents of the free movement policy consider it to be both economically justified and morally sound. Opponents argue, however, that it primarily fulfils economic interests while neglecting political participatory concerns,<sup>2</sup> social equality concerns<sup>3</sup>, and cultural cohesion concerns.<sup>4</sup> Taking a similar approach, others argue that the free movement policy creates a market citizen, i.e. a worker, primarily suitable for the European market that risks undermining the more comprehensive national

\* Thanks to Rainer Bauböck and Marlene Wind for comments on an earlier draft.

1 Marlene Wind, ‘Post-National citizenship in Europe: The EU as a ‘welfare rights generator?’ *Columbia Journal of European Law* 15 (2009), 239-264, p. 263.

2 See in particular Rainer Bauböck, ‘Citizenship: Voting beyond Territory and Membership’, *Political Science and Politics* 38/4 (2005), 683-687; Jo Shaw, ‘EU Citizenship and Political Rights in an Evolving European Union’, *Fordham Law Review* 75 (2007), 2549-2579.

3 See in particular Christian Joerges, ‘A new alliance of de-legalisation and legal formalism? Reflections on responses to the social deficit of the European integration project’, *Law and Critique* 19 (2008), 235-253; Fritz Scharpf, ‘The asymmetry of European integration or why the EU cannot be a ‘social market economy’’, *Socio-Economic Review* 8 (2010), 211-250.

4 Joseph Weiler, ‘Fundamental Rights and Fundamental Boundaries: Common Standards and Conflicting Values in the Protection of Human Rights in the European Legal Space’. In Kastoryano, R. (ed) *An identity for Europe, the relevance of multiculturalism in EU construction* (New York: Palgrave Macmillan, 2009a), 73-102.

citizenship that can guarantee substantial social rights.<sup>5</sup>

Besides the discussion on market versus social citizenship, attention should be drawn to the possible discrepancies between the thick national communities and the thin transnational community. In the following remarks, I suggest that it is important to connect the two discussions. Currently, new right-wing parties with strong anti-immigrant and anti-Europe policies have increased their electoral support in national and European parliamentary elections.<sup>6</sup> The political explanations for the electoral success of the Front National in France, the British National Party in Britain, the *Austrian Freedom Party* in Austria, *Lega Nord* in Italy, *Jobbik* in Hungary, *The Democrats of Sweden* in Sweden, the *Danish People's Party* in Denmark, the *Party for Freedom* in Holland and more recently *True Finns* in Finland are multi-causal and complex. Nonetheless, this development in voter behaviour reflects a general increase in scepticism and distrust of EU institutions and policy, according to recent Eurobarometer polls.<sup>7</sup> Furthermore, the support for the perceived benefits of European membership is decreasing.<sup>8</sup>

It is paradoxical that while the European Union becomes freer and more open, the European people are growing more EU-sceptical. However, integrating the two discussions on free movement and national societal models may help explain the increase in anti-immigration and anti-European attitudes. This article proposes that the free movement policy may be considered as a part of a larger package of market-constitutive policies that aim at integrating and harmonising the European markets. While these policies are often considered as economically sound, they may lack, in democratic terms, a political explanation of how the policy benefits local communities. Following Chantal Mouffe's terminology, we may explain why European citizens are electing right-wing candidates by pointing to "the current inability to grasp the nature and cause of the new phenomenon of right-wing populism spreading throughout Europe" due to "the inability to understand what politics is".<sup>9</sup> This explanation rests on the idea that politics is different from economy, morality and law. Following Mouffe, the electoral success of radical right-wing parties can be construed as a reaction to the treatment of vital political questions, addressing them not as political, but as economic, moral

5 T. H. Marshall, "Citizenship and Social Class", in: T. H. Marshall and Tom Bottomore, *Citizenship and Social Class* (London: Pluto Press, 1950), 3-54; Nic N. Shuibhne, 'The Resilience of EU Market Citizenship', *Common Market Law Review* 47 (2010), 1597-1628.

6 M. Guibernau, 'Migration and the rise of the radical right', *Policy Network* (2010), 1-19, p. 2.

7 Eurobarometer, *Eurobarometer: 73 Public Opinion in the European Union. First Results* (2010), 1-43, p. 15.

8 *Ibid.*, p. 11.

9 Chantal Mouffe, *Politics and Passions: the stakes of democracy* (London: Centre for the Study of Democracy, 2002), 1-24, p. 5-6. By endorsing Mouffe's concept of politics, I am not defending her constructivist epistemological and ontological presumptions.

or juridical issues. To prevent growing political alienation from the mainstream parties, the moral and economic arguments should be supplemented with political arguments, addressing how, for example, the free movement policy is consistent with other policy objectives and how ordinary people or peripheral regions benefit from the policy.

Fritz Scharpf argues similarly that there is a current trend away from political justifications of politics. According to this view, the economic institution, the European Central Bank (ECB), and the juridical institution, the European Court of Justice (ECJ), dominate European policy-making. Furthermore, the political intergovernmental politics within the EU has been ruled in the last two-three decades by market-constitutive, or what some pronounce more critically as neo-liberal, policies.<sup>10</sup> Scharpf defines non-political policy as the policy that endorses market-based solutions to political challenges, and understands the ECJ case law as policy that favours juridical policy-solutions to political challenges.<sup>11</sup> Despite the great differences in justification and understandings between Mouffe and Scharpf, they agree that the current challenge comprises non-politicised policies. Mouffe draws attention to the risk of political alienation in radical groups, and Scharpf to (1) the risk that the traditional political policy-making institutions, such as the parliaments, lose their status as the leading institutional arena for policy solutions, and (2) the risk that market-constitutive policies crowd out traditional political problem-solving capacities. With this in mind, it is worth noticing that the quality of democracy in the European member states, according to recent survey scores, is deteriorating.<sup>12</sup> In several member states, the national political processes have neither the power nor the will to guarantee the citizens' civil, political and social rights, as stipulated in the European Charter. Decline in democratic quality may, so conceived, be an indicator of what Scharpf understands as decline in traditional political problem-solving capacities.

The discussion proceeds as follows. By drawing attention to the right to free movement within the EU, I first outline two normative arguments for the free movement policy. Second, the freedom to move across national borders is considered in relation to the different societal models in the member states, and the possible tensions between national concerns and transnational rights are discussed. Third, I suggest that whereas transnational rights represent an expansion of the EU citizens' social rights, which to some extent outmatches the social protection offered at the national level, fulfilment of the extended social

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<sup>10</sup> Fritz Scharpf, 'The Joint-Decision Trap Revisited', *Journal of Common Market Studies* 44/4 (2006), 845-864, p. 853.

<sup>11</sup> Notice that neo-liberalism differs from classic liberalism and laissez-faire. For a further discussion, see Bruno Amable, 'Morals and politics in the ideology of neo-liberalism', *Socio-Economic Review* 9 (2011), 3-30, p. 10.

<sup>12</sup> Economist Intelligence Unit (EIU), *Democracy index, 2010: Democracy in retreat. A report from the Economist Intelligence Unit* (London: Economist Intelligence Unit, 2011).

protection requires a societal model with a thick institutional capacity and the political willingness to do so. Note that the main purpose of this discussion is to propose a way of thinking about the normative implications of European policy-making, with the focus on the right to free movement. My purpose is to highlight new questions that come into view from an interdisciplinary perspective.

### **Normative justifications of the right to free movement**

Having introduced the tensions between transnational rights and national societal models, let us now consider the rights to free movement more deeply.<sup>13</sup> The right to free movement is a cornerstone of modern liberal theory. Nonetheless, the free movement policy has been criticised. Opponents argue that it primarily fulfils economic interests while neglecting political participatory concerns,<sup>14</sup> social equality concerns<sup>15</sup>, and cultural cohesion concerns.<sup>16</sup>

The purpose of this section is to discuss to what extent the free movement policy as it is stipulated in the Lisbon Treaty and the Citizenship Directive (2004/38/EC) constitutes a fundamental right or an attractive ideal that does not qualify as a fundamental right. Two normative arguments can be distinguished. First, the impermissibility of restricting people's right to free movement can be justified by the respect for individual autonomy and human dignity. As Bauböck has argued recently, to confine one's movement is not only bad because of the opportunities one thereby misses elsewhere, but also because it is experienced as a constraint on freedom itself.<sup>17</sup> This argument is grounded in a rationale in which certain rights are implied in the person's intrinsic moral status as a human being. There is, so conceived, a conceptual link between the free movement principle and the respect for individuals. Second, the impermissibility of restricting people's right to free movement can be justified by its consequences for an individual's opportunity to enjoy other political, civil or social rights. If people are not guaranteed the right to free movement, their freedom to choose personal life projects may be seriously infringed. This argument is grounded in an instrumental rationale, in which the right to free movement is not valuable in and by itself, but achieves its normative significance by constituting a necessary precondition for the fulfilment of other instrumentally or intrinsically valuable rights.

The endorsement of the intrinsic or the instrumental understanding of the right to free movement has implications for what rights within the EU should be given normative priority. Those who assume that the right to free movement is

<sup>13</sup> The European Charter is a pertinent part of the transnational rights within the EU. In this article I set discussions of the European Charter aside.

<sup>14</sup> Bauböck (2005); Shaw (2007).

<sup>15</sup> Joerges (2008); Scharpf (2010).

<sup>16</sup> Weiler (2009a).

<sup>17</sup> Rainer Bauböck, 'Global Justice, Freedom of Movement and Democratic Citizenship', *European Journal of Sociology*, 50 /1 (2009), 1–31, p. 7.

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an intrinsic value accept that it is given priority over other, for instance, national and social equality concerns. On the other hand, those who assume that it has an instrumental value in the fulfilment of other basic rights may reject its normative supremacy. Following the latter argument, there may be other and better ways to empower people's autonomy, such as (1) full political participation in national elections<sup>18</sup>; (2) the welfare state, social policies and positive rights<sup>19</sup>, and (3) social and cultural cohesion at the national level.<sup>20</sup>

It is worth pointing out that disagreements about the right to free movement are not a reflection of disputes about the extent to which human dignity and personal autonomy are morally justified values. The reasons for political participation and social cohesion are anchored in the same normative ideas as those to which advocates of the right to free movement point. Accordingly, both proponents and opponents of the right to free movement put forward liberal egalitarian arguments. But the disagreement concerns the questions of (i) the preferred societal model to fulfil the normative values, and (ii) the extent to which policies that aim at fulfilling human dignity and personal autonomy should be ascribed normative supremacy.

Is the free movement policy intrinsically linked to respect for human dignity and personal autonomy? Are there reasons to think that the right to free movement is a priori justified in the same manner we would say that the freedom from torture is? To make these questions meaningful for policy evaluation, it is necessary to introduce a scale measuring degrees of free movement. If the right to free movement indicates the freedom from physical constraint, it makes sense to understand it as a fundamental right, intrinsically linked to respect for dignity and autonomy. If the right to free movement hints at the idea of open borders within Europe or even globally, freedom to cross borders may be part of an attractive ideal of a just world, but would not qualify as a fundamental right. Hence, in what follows I distinguish between (1) the freedom from physical constraint and (2) the freedom to cross (national) borders.

It is thus reasonable to presume that freedom from physical constraint is implied in the ideas of human dignity and personal autonomy. In contrast, the right to free movement across national borders is not a fundamental right to free movement. As Lea Ypi convincingly argues, the right to free movement and the right to exit and enter national borders should be addressed in a more

<sup>18</sup> Bauböck (2005); Shaw (2007).

<sup>19</sup> M. E. Streit & W. Mussler, 'The Economic Constitution of the European Community: From Rome to Maastricht', *Constitutional Political Economy* 5 (1994), 319-353; Christian Joerges, 'States Without a Market? Comments on the German Constitutional Court's Maastricht-Judgement and a Plea for the Interdisciplinary Discourses', *European Integration online Papers* 1/20 (1997), 1-28; Fritz Scharpf, 'Legitimacy in the multilevel European polity' *European Political Science Review* 1 (2009), 173-204; Scharpf (2010).

<sup>20</sup> See for example David Miller, *National Citizenship* (Oxford: Oxford University Press, 1995) and Weiler (2009a).

comprehensive framework that takes into consideration the interests of both the countries receiving immigrants and those sending immigrants.<sup>21</sup> One concern in the sending countries is brain drain. Following Mouffe's terminology, such considerations have a political character in opposition to economic and moral concerns. A political justification of the right to free movement may claim that it is part of a larger package of rights, duties and responsibilities that may potentially be outweighed by other concerns. Accordingly, the freedom to cross borders may be outweighed by, for example, concerns for the national economy, social equality, political participation in countries of residence, support for welfare state programmes or the sustainability of social and cultural cohesion.

The freedom to cross national borders can act as a vehicle to enhance equality if, say, national authorities do not fulfil their obligations concerning the protection of social equality and vulnerable citizens.<sup>22</sup> So conceived, the right to free movement across national borders is allied with general moral concerns for the well-being of citizens. Against this background, it seems reasonable to comprehend freedom to cross borders as a part of the larger package of societal concerns, duties and obligations rather than as a fundamental human right. There are different internally consistent packages that may fulfil the objective of protecting human dignity and personal autonomy.

### **Freedom to cross borders in a multi-model polity**

Having considered the normative justifications of the right to free movement and concluded that the right to free movement across borders is an attractive liberal ideal that does not qualify as a fundamental right, I discuss in the following the right to free movement across borders within the European Union. The EU is a complex heterogenic polity. Besides being split between the national and post-national policy institutions, there is a substantial variation across the member states' institutional set-ups, packages of rights, and ideas on how to solve social and political challenges. For various – historical, political, ideological and economic – reasons, each sovereign state has developed a particular level of social coordination and a particular package of societal rights and duties. Some European countries, such as the Scandinavian ones, have taken a social-democratic route characterised by universalistic social services such as universal

<sup>21</sup> Lea Ypi, 'Justice in Migration: A Closed Borders Utopia?' *The Journal of Political Philosophy* 16 (2008), 391-418.

<sup>22</sup> According to the UN Convention (art. 1A (2)), a refugee is limited to being a person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such a fear, is unwilling to avail himself of the protection of that country". For a discussion as to what extent life-threatening conditions caused by the absence of protection of basic needs and rights in the country of origin allows asylum, see A. E. Shacknove, 'Who is a Refugee?' *Ethics* 95 (1985), 274-284.

health care and universal scholarships for higher education.<sup>23</sup> Other countries, such as the UK, have chosen a more neo-liberal route, manifesting fewer social programmes.<sup>24</sup>

Three models are normally distinguished: (1) A Scandinavian tax-financed model; (2) an Anglo-Saxon market-based model; and (3) a continental contribution-financed welfare.<sup>25</sup> As summed up by Scharpf: “These models differ not only in their average levels of total taxation and social spending, but also in the relative weights of various taxes and social security contributions on the revenue side, and of social transfers and social services on the expenditure side [...]. Of even greater importance than these operational differences, however, are differences in taken-for-granted normative assumptions regarding the demarcation line separating the functions the welfare state is expected to perform from those that ought to be left to private provision, either within the family or by the market.”<sup>26</sup> Nonetheless, the models are in transit. Consider for example the Danish case. Since the 1990s, several state-owned institutions have been outsourced or even privatised, and market-induced management has been introduced in welfare services, resembling components from the Anglo-Saxon model.<sup>27</sup>

The differences between the member states’ particular institutional models, combining for example collective bargaining and a business-friendly tax system, have implications for the scope of social commitments provided by the state. Indeed, member states differ widely in “their normative commitment to solidarity and equality”.<sup>28</sup> Notice that those endorsing an Anglo-Saxon market-based package do not necessarily reject the moral relevance of, for example, universal access to schooling and health care. According to this model and its assumptions, however, these are not something the state should provide. The claim is that market-based distribution of desires, needs and knowledge is more efficient than tax-based distribution.<sup>29</sup> Besides being economically superior, proponents may argue that the neo-liberal packages are morally superior, as they do better in

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23 Considering Denmark, extensive transfer payments are in addition provided: e.g. graduate students are paid approximately 500 EUR each month for taking a five year academic degree; families with children are paid at least 140 EUR per child in the child’s first 18 years; chronically disabled and mentally ill people and the elderly from the age of 65 are paid approximately 1000 EUR each month (Danish Statistics, 2010).

24 Görin Esping-Andersen, ‘After the Golden Age? Welfare State Dilemma in a Global Economy’ in Esping-Andersen, G. (ed.) *Welfare States in Transition: National Adaptations in Global Economies* (London: SAGE Publications, 1996), 1-31; Scharpf, 2010, p. 234.

25 Fritz Scharpf & Vivian Schmidt (eds.) *Work and Welfare in the Open Economy* (Oxford: Oxford University Press, 2000), p. 6-11.

26 Fritz Scharpf (2002) “The European Social Model: Coping with the Challenges to Diversity”, *Journal of Common Market Studies* 40 (4) (2002), 645–670.

27 Ove Kai Pedersen, *Konkurrencestaten* (Copenhagen: Hans Reitzels Forlag, 2011).

28 Scharpf (2010), p. 238.

29 Friedrich Hayek, ‘The Use of Knowledge in Society’, *The American Economic Review* 35 (1945), 519-530; for a critic, see Streit & Mussler (1994).

safeguarding the free choices of the individuals.<sup>30</sup>

Indeed, European integration has been concentrated primarily around constitutive market-making instead of around market-correcting policies and harmonisation of environmental and welfare regulation.<sup>31</sup> It is, however, worth noting that deregulation and market-making policies cause asymmetric effects in the member states' different societal models. As long as European politics are ruled by deregulation and market-making policies, the clash between the national and transnational levels will be greatest in the countries such as in Scandinavia, in which the political system constitutes a highly regulated and tax-coordinated system.<sup>32</sup>

Besides the differences in normative commitments, the European community consists of states with some of the most efficient economies in the world alongside states that have barely risen above the level of threshold economies.<sup>33</sup> To integrate the member states, despite all the differences, requires that the low security countries adjust to a higher level, or that the high security countries adjust to a lower level. Indeed, to bypass these great differences, European integration has been propelled by negative integration.<sup>34</sup> Two components are commonly recognised to have dominated the negative integration. First, a legal approach: integration by law is preferred to integration by politics.<sup>35</sup> Second, a neo-liberal approach: deregulation is preferred to harmonisation.<sup>36</sup> Due to the enlargement of the bloc, with EU membership first to the UK, Denmark and Ireland, secondly to Southern Europe, and finally to Eastern Europe, political agreements on harmonisation of national rules through European legislation became more difficult.<sup>37</sup> Up until the 1990s the costs of industrial labour in Portugal and Greece were, respectively, one sixth and one quarter of those in Germany.<sup>38</sup> With Portugal and Greece's low productivity and efficiency their competitive advantage rested on the low costs of production. If these less economically efficient member states had agreed on positive integration and harmonisation of social and environmental regulations

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30 Amable (2011), p. 23.

31 Scharpf (1996), p. 25; Christian Joerges, & F. Rödl, "Social Market Economy as Europe's Social Model" *EUI Working Paper LAW 8* (2004), 1-25, p. 5; Amable (2011), p. 10.

32 Scharpf (2006), p. 856. See Scharpf and Schmidt (2000) for a comparative study of the member states' different levels of vulnerability to economic integration.

33 Fritz Scharpf, 'Negative and Positive Integration in the Political Economy of European Welfare States' in G. Marks, F. Scharpf, P. C. Schmitter and W. Streeck (eds.) *Governance in the European Union* (London: SAGE Publications, 1996), p. 22.

34 See e.g. Scharpf (1996); C. Closa "Some Sceptical Reflections on EU Citizenship as the Basis of a New Social Contract" in M. Rhodes & Y. Mény (eds.) *The Future of European Welfare: A New Social Contract* (London: Macmillan Press, 1998), 266-283.

35 Weiler (2009a); Scharpf (2009).

36 Streit & Mussler (1994); M. P. Maduro, 'Reforming the Market or the State? Article 30 and the European Constitution: Economic Freedom and Political Rights', *European Law Journal* 3 (1997), 55-82; Scharpf, 2010).

37 Scharpf (2006), p. 851.

38 Scharpf (1996), p. 22.

at the level of the rich welfare states in the North, the result would have been the disappearance of their competitive advantage and hence deindustrialisation and massive job losses.<sup>39</sup> Accordingly, in the face of this political stagnation, other problem-solving capacities were (politically) endorsed. Here, the European Court of Justice (ECJ) and later the European Central Bank (ECB) showed their effectiveness in propelling transnational integration.<sup>40</sup>

The freedom to cross national borders within the EU may reinforce these asymmetric effects and “the foundations of the social and political construction of solidarity”, as Scharpf argues, may be shattered.<sup>41</sup> This question of transnational solidarity has been raised in relation to the bailouts of Greece, Ireland and Portugal. Most recently, the right-wing party, *True Finns*, became the third-largest party in the national election in Finland by critiquing the lack of consistency between national Finnish austerity packages and European rescue packages to Portugal and Greece.<sup>42</sup> In other words, negative integration and the freedom to cross borders seem to cohere better with the societal models which have established low tax-coordinated policy or low social and cultural cohesion policies. Note that this is not an assessment of whether freedom to cross national borders within the EU is preferable to social cohesion. Rather, seen from the perspective of the packages for rights, duties and responsibilities, the freedom to cross national borders is more compatible with the market-based socio-economic models than the universalistic welfare state models.

### **Democratic quality and problem-solving capacity**

Having established the right to free movement as an attractive ideal among other rights in societal packages, and discussed the asymmetric effects the right to free movement has on the heterogenic societal models which currently dominate the EU, let us now turn to another gap between the transnational and national dimensions of the EU. In the following, I suggest that the tension between transnationalism and national societal packages reflects a more profound disagreement on the extent to which democratically legitimated politics should be given priority or the extent to which transnational rights should be given priority, institutionally and normatively.<sup>43</sup> Let us suppose that in democratic politics people’s sentiments and their personal interests are represented. To be sure, this definition of democracy is too simple, but for present purposes it suffices as a notion of democratic legislation and legitimacy. However, if democratic

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39 Scharpf (1996), p. 23.

40 Scharpf (1996), p. 20-21; Maduro (1997), p. 55; Scharpf (2009), p. 215.

41 Scharpf (2010), p. 238.

42 A. Partanen, ‘A True Finnish Spring’ *New York Times*, *OP-ED Contributor* (2011), accessed at [http://www.nytimes.com/2011/05/14/opinion/14Partanen.html?\\_r=&scp=1&sq=%22true%20finns%22&st=cse](http://www.nytimes.com/2011/05/14/opinion/14Partanen.html?_r=&scp=1&sq=%22true%20finns%22&st=cse) on May 13, 2011.

43 For an overview of this discussion, see e.g. Ronald Dworkin, *Justice for hedgehogs* (Cambridge, MA.: The Belknap Press of Harvard University Press, 2011), chapter 15.

legitimacy presumes the protection and representation of people's interests and inclinations, what happens when people have xenophobic inclinations? Have people with 'simple and nationalistic' interests the same right to be democratically represented as those with 'altruistic and cosmopolitan' interests? Fossum & Menéndez argue in a recently published book that the European Court of Justice (ECJ) gives priority to post-national interests and individual rights at the expense of local and democratic politics.<sup>44</sup> Similarly, Weiler has criticised the allegedly 'human rights fetishism' at the European level for neglecting national and cultural concerns and opinions.<sup>45</sup>

Although the argument that the ECJ has given too low priority to national concerns is plausible, the extent to which national political interests and concerns should be given a default priority, just because they ostensibly represent the people's interests better, is nonetheless ambiguous. While in a normative analysis, priority is given to democratically legitimated politics, we cannot necessarily imply that democratic politics (empirically speaking) should always be given the same priority in practice. To reiterate, the crucial question concerns the extent to which democratically legitimated politics should be given normative and institutional supremacy, or whether and which constraints on or qualifying conditions for the primacy of democratic politics should be taken into account. For instance, while democratically legitimated policy may by default be given institutional and normative priority, it is less clear to what extent the same priority should be given if, for example, the media and the public spheres are dominated by corporate interests and/or corrupt politicians.

Lately, the trust in democratic electoral systems has been weakened. According to the Economist Intelligence Unit's *Democracy Index, 2010*, the quality of democracy is deteriorating – globally and in Europe. France, Italy, Greece and Slovenia have dropped from the category of full democracies to one of flawed democracies.<sup>46</sup> The explanation for downgrading France to flawed democracy is (1) deterioration of media freedom; (2) extremely low public confidence in political parties and government; (3) engagement in politics has declined; (4) low degree of popular support for democracy; (4) widened gap between the people and political elites; (5) violent rioting as symptom of the country's political malaise; (6) power concentration around the president; and (7) increased anti-Muslim sentiments. The explanation for downgrading Italy is primarily due to the media situation. Greece has been downgraded because low scores of government functioning and

44 John Erik Fossum, & A. J. Menéndez, *The Constitution's Gift* (Lanham: Rowman & Littlefield Publishers, 2011).

45 Joseph Weiler, 'Human Rights, Constitutionalism, and Integration: Iconography and Fetishism' in R. Kastoryano, (ed.) *An identity for Europe, the relevance of multiculturalism in EU construction* (New York: Palgrave Macmillan, 2009b), 103-114.

46 EIU (2011), pp. 5-10.

political culture. Furthermore, corruption has increased and the transparency and accountability of the government are low.<sup>47</sup> Italy was ranked 67 and Greece 78 (out of 178 countries) in the Transparency International's *Corruption Perceptions Index 2010*,<sup>48</sup> deteriorating from ranks 63 and 71 respectively in 2009 (out of 180 countries) and from ranks 41 and 56 respectively in 2007 (out of 179 countries).<sup>49</sup> Additionally, in 19 Eastern European countries the democracy score declined between 2008 and 2010.<sup>50</sup>

Against this background, the presumption that democratic politics at the national level should always be given priority is challenged. National politics do not sufficiently fulfil the conditions of democratic legitimacy and the representation of the people's interests. The challenge as I understand it is that the implementation of the transnational rights protecting the EU citizens' social needs may be constrained by obstacles at the national level, in the form of low government functioning, low public trust in politicians, corruption, politics dominated by corporate or politicians' personal interests and the weakening of free media and of the public political culture. Recall that different models for constitutional separation of power lead Europe. With the challenges to the quality of democracy and the recent economic crisis in mind, it is necessary to address the question as to which constitutional models facilitate an institutional check and balance mechanism within Europe that avoid a decline in political legitimacy and efficacy.

These discussions may address some of the concerns that boost populist right-wing parties. In fact, although several populist right-wing parties in, for example, Denmark, Sweden and Finland have taken some of the political issues to an extreme by giving morally dubious answers to certain policy areas, it would be a mistake to dismiss the political and moral relevance of the economic, social, and political concerns that help these parties thrive. Empirical findings indicate that hostile and intolerant attitudes do not fully explain why people vote for populist right-wing parties. Concerns for respect for the law, and for the welfare state, social equality and cohesion also have explanatory power.<sup>51</sup> The political areas of economic, social and political sustainability and security do not become unimportant just because right-wing populism benefits from addressing these issues in a xenophobic and anti-European way.

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47 EIU (2011), p. 16-17.

48 Transparency International, *Corruption Perception Index* (Berlin: Transparency International, 2011), accessed at [www.transparency.org](http://www.transparency.org) on May 14, 2011.

49 *Ibid.*

50 EIU (2011), p. 8.

51 Nils Holtug, "Danish Multiculturalism, Where Art Thou?", forthcoming in Raymond Taras (ed.), *Challenging Multiculturalism. Managing Diversity in Europe* (Edinburgh: Edinburgh University Press 2012).

## Concluding remarks

In this comment, I have explored the ways in which the current enforcement of transnational rights in the European Union challenges national democratic politics. On the one hand this challenge is legitimated by insufficient protection of people's civil, economic and social rights in several member states. On the other hand the challenge reveals that the success of European integration is hindered by discrepancies between different societal packages of rights, responsibility and obligations. Although transnational rights are normatively sound and desirable, they may neglect the heterogeneity among the national models of rights and societal commitments. The current risk is that we propel negative integration, which consists of transnational rights and market-constitutive policy, to a level where it becomes hardly possible for the national institutions to cope with difficult political challenges such as right-wing radicalism, social inequality, environmental regulation, immigration and financial insecurity. Whilst the free movement policy has extended the economic sovereignty above the member states, it has simultaneously, as Plant argues, "eroded the powers formerly available to state institutions to correct political and economic imbalances resulting from the operations of the market within their own borders. Indeed, many of the rules agreed under free trade agreements effectively prevent states unilaterally adopting progressive social, economic or environmental legislation".<sup>52</sup> By enforcing these non-political policies that endorse transnational rights and markets, "a systematic problem-solving gap" may be the result.<sup>53</sup> Indeed, a thin transnational society risks hollowing out the European political capacities that cope with social unrest, inequality, market failures, and political radicalisation. Hence, we may see the flowering radical nationalism in Europe as a threat to the long-term stability within the EU. However, in order to address the challenge we need to understand the complex connectedness of market-constitutive policy, transnational rights, societal packages of rights and obligations, and the current status of democratic quality and trust.

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<sup>52</sup> Raymond Plant, *The Neoliberal State* (Oxford: Oxford University Press, 2010), p. 14.

<sup>53</sup> Scharpf (2006), p. 856.

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