

The European Welfare State between Transnational Migration and Exclusion

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The research paper explores the tensions between the EU's principle of free movement and the restrictions on social benefits for EU citizens. While EU citizens can move and seek employment in another Member State, they might be excluded from social assistance benefits in the other Member State.

The compatibility of these exclusions from social assistance benefits with the European law is questionable. Legal conflicts arise between the Regulation on the Coordination of Social Security Systems, which ensures equal treatment, and the Free Movement Directive, which allows exceptions during initial residency.

In the 2010s, the European Court of Justice approved the exclusion of EU citizens from social assistance benefits in several decisions. However, a decision from 2021 begins to recognize a fundamental right to a minimum subsistence level, suggesting that the Member States must ensure that a refusal to grant social assistance does not expose Union citizens to an actual and current risk of violation of their fundamental rights.

This paper argues that a fundamental rights guarantee of a minimum standard of living can be constructed on the basis of Article 1 and Article 34 Section 3 of the European Charter of Fundamental Rights.

Keywords: EU law, social law, social assistance, European Charter of Fundamental Rights, free movement, minimum standard of living, subsistence benefits.

Europos gerovės valstybė: tarp transnacionalinės migracijos ir atskirties

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Šiame straipsnyje analizuojama įtampa tarp ES laisvojo judėjimo principo ir socialinės paramos ribojimo ES piliečiams. Nors ES piliečiai turi teisę persikelti ir dirbti kitoje valstybėje narėje, tačiau jiems gali būti nesuteikiama socialinės paramos išmokų.

Keliamas klausimas, ar tokie ribojimai neprieštaruoja ES teisei. Teisinių konfliktų kyla dėl Reglamente dėl socialinės apsaugos sistemų koordinavimo įtvirtinto vienodo požiūrio principo ir Laisvojo judėjimo direktyvos, kuria leidžiama išimtis pradinio gyvenimo laikotarpiu, nuostatų neatitikties.

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2010-aisiais Europos Sąjungos Teisingumo Teismas keliais sprendimais pripažino socialinės paramos išmokų nesuteikimą ES piliečiams teisėtu. Tačiau remiantis šio teismo 2021 m. priimtu sprendimu pradėtas formuoti požiūris, kad egzistuoja pagrindinė teisė į minimalų pragyvenimo lygį. Jame nurodoma, kad valstybės narės privalo užtikrinti, jog socialinės paramos nesuteikimas nesukeltų realios ir neišvengiamos grėsmės asmens pagrindinėms teisėms.

Straipsnyje teigiama, kad minimalus pragyvenimo lygis gali būti teisiškai grindžiamas Europos Sąjungos pagrindinių teisių chartijos 1 straipsniu ir 34 straipsnio 3 dalimi.

Pagrindiniai žodžiai: ES teisė, socialinė teisė, socialinė parama, Europos Sąjungos pagrindinių teisių chartija, laisvas judėjimas, minimalus pragyvenimo lygis, socialinės paramos išmokos.

Introduction

One of the greatest achievements of the European Union is the free movement of persons. The idea of the freedom of movement creates a common sense of identity for nationals of the various EU Member States. Nonetheless, it depends on the financial means of the respective EU citizen whether they are actually capable of exercising their right to free movement. The Member States' interest in shielding their tax-financed social assistance systems from claims by other EU nationals creates tension with the European idea of free movement.

This paper aims to explore the exclusion of EU citizens from subsistence benefits in other EU Member States under the European Law. By using a comparative law approach, this investigation aims to illustrate the different legal situation regarding the access to subsistence benefits in Lithuania and Germany with the help of a fictitious case study.

Based on the case law of the European Court of Justice, this article seeks to examine the compatibility of the exclusion of Union citizens from subsistence benefits with the European Law. The jurisprudence of the European Court of Justice will be contrasted with the criticism that EU citizens without sufficient resources are effectively unable to exercise their right to freedom of movement.

In addition to this criticism, it shall be demonstrated that the exclusion of Union citizens from subsistence benefits needs a justification on the basis of the EU primary law. Starting from a remarkable but widely underestimated judgement of the European Court of Justice in 2021 (Judgment of the Court (Grand Chamber) of 15 July 2021 – CG), this article aims to establish a further approach to develop a fundamental rights guarantee of a minimum standard of living in accordance with human dignity on the basis of the European Charter of Fundamental Rights.

In the framework of the ECJ's Case Law, this investigation relies on research conducted by such scholars as Anuscheh Farahat, Astrid Wallrabenstein, Ferdinand Wollenschläger, and others.

1. Good News: The right to Free Movement under the EU Free Movement Directive

The above-mentioned tension between the European idea of freedom of movement and the Member States' interest in shielding their welfare systems can be illustrated by using a fictitious example: What would happen if a German PhD candidate falls in love with the wonderful city of Vilnius and decides to live and to seek employment in Lithuania? *Vice versa*, what if a Lithuanian PhD candidate decides to move to Germany for the purpose of seeking employment? Assuming that both fictitious doctoral students have no significant financial resources, the question arises as to whether they can receive social assistance benefits in their new country of residence.

Luckily for our fictitious PhD Candidates, as EU citizens they are both able to benefit from the advantages of the EU Free Movement Directive. Article 6 of the Free Movement Directive grants the

right of residence on the territory of another Member State for a period of up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport.

After that period of three months, Article 14 Section 4 of the Free Movement Directive enables Union citizens to stay in the territory of the Member State for as long as they can provide evidence that they are continuing to seek employment and have a genuine chance of being engaged.

In practice, they will only be capable of seeking employment in another Member State, as long they can satisfy their basic needs. So, the more crucial question is: Are they entitled to claim subsistence benefits in their state of residence?

2. Bad News: Exclusion from Subsistence Benefits within the Member State's Welfare Systems

A comparison between the legal situation of our fictitious German citizen in Lithuania and our fictitious Lithuanian citizen in Germany reveals remarkable differences, even though both of them are Union citizens exercising their right to freedom of movement.

According to the database of the *Mutual Information System on Social Protection* (MISSOC), the entitlement to cash social assistance is conditional to residence in Lithuania. Citizens of an EU Member State who have the right of residence in Lithuania are entitled to cash social assistance (MISSOC, 2024). There does not seem to be an exception for EU citizens whose right of residence is solely for the purpose of seeking employment. The above-mentioned fictitious PhD Candidate from Germany would be entitled to social assistance benefits in Lithuania as long as they are seeking employment.

In contrast, the access to subsistence benefits would be far more complicated for our fictitious Lithuanian Citizen in Germany. The German Social Code excludes foreigners from subsistence benefits if their stay is solely for the purpose of seeking employment (§ 7 Section 1 Sentence 2 no. 2 lit. b Sozialgesetzbuch Zweites Buch). The same applies to EU nationals within the first three months of their residence in Germany (§ 7 Section 1 Sentence 2 no. 1 Sozialgesetzbuch Zweites Buch). In these cases, a travel allowance to leave the country is the only support granted. For our fictitious Lithuanian PhD Candidate, this ultimately means that they would have to abandon their job search and return to Lithuania, even though they have a right of residence under the EU Law to seek employment in Germany.

This leads to the question: What does the European Law say about this wide-reaching exclusion of EU nationals from subsistence benefits in Germany?

3. The Exclusion of EU Nationals from Subsistence Benefits under EU Secondary Law

In order to answer this question, two legislative acts in the European Law are of particular importance: the Regulation on the Coordination of Social Security Systems, and the Free Movement Directive.

3.1. The clash of the Regulation on the Coordination of Social Security Systems and the Free Movement Directive

These two legislative acts were adopted both on the same day, on the 29th of April, 2004, but they contradict each other.

On the one hand, the *Regulation on the Coordination of Social Security Systems* establishes a principle of equal treatment for EU nationals. Article 4 of the Regulation states that any person to whom

this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.

On the other hand, the Free Movement Directive establishes an exception from the principle of equal treatment in certain situations. According to Article 24 Section 2 of the Free Movement Directive, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14 Section 4 of the Directive.

3.2. The ECJ's case law: Dano, Alimanovic and García Nieto

In the mid-2010s, the European Court of Justice dealt with the exclusion of EU Citizens in German subsistence law on several occasions.

While doing so, the Court moved away from its previously inclusive case law on access to social benefits for EU citizens (Judgement of the Court of 20 September 2001 – Grzelczyk) and took up the Member States' interests in shielding their social welfare systems from poverty-related migration.

In its Dano decision, the ECJ followed the logic of the Free Movement Directive and allowed the Member States to make the granting of social benefits to EU nationals conditional on the existence of a right of residence under this directive (Judgment of the Court (Grand Chamber) of 11 November 2014 – Dano).

In 2015, the Court stated in its Alimanovic case that the Member States may refuse to grant social assistance to a Union citizen whose right of residence is based solely on Article 14 Section 4 of the Free Movement Directive (Judgment of the Court (Grand Chamber) of 15 September 2015 – Alimanovic).

And, finally, the Court completed this line of case law in the García-Nieto case by making clear that Member States may exclude EU nationals from entitlement to social assistance if their right of residence is based solely on Article 6 Section 1 of the Free Movement Directive (Judgment of the Court (First Chamber) of 25 February 2016 – García-Nieto).

This Case law has been widely criticized (Farahat, 2016, p. 49–51, 53–55; Wallrabenstein, 2016, p. 116–117, 119–120). It has been accused of weakening the integrative content of Union citizenship. European citizenship loses its identity-forming function, if it only provides social participation to those who are economically active. EU citizens who do not have sufficient resources are effectively unable to make use of their right to freedom of movement. This threatens to turn them into second-class EU citizens. Conceptually, the Union citizenship has not developed into a social citizenship. Instead, it has remained an economically driven market citizenship (Thym, 2015, p. 130).

4. The Exclusion of EU Nationals from Subsistence Benefits under EU Primary Law

But what about the EU primary law? Is the exclusion of EU Citizens from social assistance compatible with the European Charter of fundamental rights?

4.1. The ECJ's remarkable judgement in 2021

In 2021, the European Court of Justice set a new course and started to recognize a fundamental right to a minimum standard of living within the European Charter of Fundamental Rights:

National authorities within the Member States are required to check that a refusal to grant social assistance does not expose the Union citizens to an actual and current risk of violation of their fun-

damental rights, as enshrined in Articles 1, 7, and 24 of the Charter (Judgment of the Court (Grand Chamber) of 15 July 2021 – CG). Where a Union citizen does not have any resources to provide for his or her own needs and those of his or her children and is isolated, those authorities must ensure that, in the event of a refusal to grant social assistance, that citizen may nevertheless live with his or her children in dignified conditions (Judgment of the Court (Grand Chamber) of 15 July 2021 – CG).

After all, this approach is at the beginning of its development and still falls short of a substantive fundamental rights guarantee of a minimum subsistence level. The specific case concerned a female EU Citizen who did not receive social benefits from the Member State authorities while seeking refuge with her children in a women's shelter. Under these circumstances, it seems very understandable that the European Court of Justice had thought of a possible violation of Article 7 and Article 24 of the EU Charter of Fundamental Rights.

4.2. Towards a European fundamental rights guarantee of a minimum standard of living

In addition to the above-mentioned approach of the European Court of Justice, it can be argued that a substantive fundamental rights guarantee of a minimum standard of living in accordance with human dignity can be constructed from Article 1 and Article 34 Section 3 of the European Charter of Fundamental Rights.

In particular, the provision of Article 34 Section 3 of the European Charter of Fundamental Rights is worth to be mentioned (Wollenschläger, 2014, p. 1630). It says that, in order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by the Union law and national laws and practices. Article 34 Section 3 of the Charter of Fundamental Rights would be the perfect textual basis for establishing a EU fundamental right to a minimum subsistence level.

As consequence, the existing possibility under secondary law to exclude economically inactive EU citizens from subsistence benefits would require justification based on the standard of primary law according to Article 52 of the European Charter of Fundamental Rights. This could counteract exclusionary tendencies of the Member States regarding the participation of EU citizens in their national welfare systems.

Conclusions

1. The above-mentioned tension between the Member States' interest in protecting their social assistance systems and the European idea of freedom of movement cannot be resolved without considering the European Charter of Fundamental Rights.
2. In the cases of Dano, Alimanovic, and García-Nieto, the European Court of Justice does not sufficiently recognize the Union citizens' social rights enshrined in the European Charter of Fundamental Rights.
3. A fundamental rights guarantee of a minimum standard of living in accordance with human dignity based on Article 1 and Article 34 Section 3 of the European Charter of Fundamental Rights could enable every EU citizen to actually exercise their right to seek employment in another Member State. And, finally, the Union citizenship would come one step closer to the idea of a European social citizenship.

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