



# How Fundamental is the Right to Free Movement of Persons within the European Union?

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## Abstract

The free movement of persons is a key pillar of European integration. However, whether it constitutes a fundamental right remains contentious. This article argues that the fundamental status of free movement has been interpreted inconsistently, and highlights the need to bridge the gap between rhetoric and reality by clearly affirming it as a fundamental right. The claim is that a legal redesign of this right is required. The article uses Rawls' theory of justice to formulate a clearer normative standard for evaluating and redesigning European law on free movement of persons. The proposed shift towards a human-rights-based, residence-anchored conception of free movement can thus be framed as an effort to align the European Union's basic structure more closely with Rawlsian principles: securing free movement as an equal basic liberty for all legally resident persons and restructuring mobility-related rules to promote, rather than undermine, fair equality of opportunity across the Union.

## Keywords

free movement of persons, European residence, principle of equality of opportunity, fundamental rights, European Court of Justice, Rawls' theory of justice

## 1 Introduction

The free movement of persons is portrayed as one of the critical pillars and major achievements of European integration, largely due to its role in establishing the internal market (Barnard, 2016). However, its importance extends beyond this, significantly impacting the lives of citizens within the European Union (EU). The right, therefore, has an internal market and citizen-oriented scope, and may be viewed through both economic and human rights lenses. However, whether it constitutes a fundamental right remains unclear, though it is often assumed – especially since the introduction of the citizenship of the Union (the current Article 20, para. 1 of the Treaty on the Functioning of the European Union, henceforth: “TFEU”) (Hyltén-Cavallius, 2020, 26; de Cecco, 2014, 388; Jacobs, 2007, 595; White, 2005, 886). In the case of the free movement of workers, it has largely been linked to its instrumental, though not exclusive, role in supporting the internal market (de Cecco, 2014; Tryfonidou, 2016). In addition, despite the great significance

of free movement, the legal rules governing it (for the present purposes: Articles 20, 21 and 45 of the TFEU and Article 45 of the Charter of Fundamental Rights of the European Union, henceforth: “Charter”) do not explicitly reference any principle to connect it to the core values of citizens, within its framework.

The 2020 pandemic created a context in which the balance between the functioning of the internal market and the protection of citizens’ wider interests – particularly regarding the restoration of free movement – came to the forefront. This context raised questions about which fundamental values are better protected and the EU’s capacity to safeguard citizens’ broader interests on an equal footing with internal market protection. This directly impacts the characterization of free movement as a fundamental right and raises questions about how fundamental this right truly is within the EU.

This article provides a fresh analytical lens for assessing the free movement of persons as a fundamental right, starting from the discontinuity of its underlying values, as evidenced by current interpretations. On the one hand, there are the interpretations of European legal provisions and rulings by the European Court of Justice. On the other hand, there is the reality reflected in the legislative measures agreed at the Union level to facilitate the exercise of this right in practice. A key factor contributing to this discontinuity is that there are two different objectives – internal market and citizens’ rights – associated with the free movement of persons. The problem is that these objectives often stand in opposition, leading to tensions that undermine the free movement as a fundamental right serving the interests of citizens. This was the case, for example, in the context of the pandemic. The reintroduction of border controls and the initial exceptions granted only to cross-border workers revealed a predominant focus on sustaining the internal market, while the broader interests of citizens were largely overlooked.

The article argues that a solution to the problem posed by the overlapping – and at times conflicting – internal market objectives and citizen-centered protection would be to redesign the legal framework of this right on an exclusive human-rights basis. This proposal introduces an innovative shift by framing free movement as a fundamental right, not contingent on economic and nationality-based conditions, rooted in human rights considerations, rather than internal market logic. It suggests using legally acquired residence – not Union citizenship or economic status – as the basis for accessing this right. This would ensure an equal opportunity for all citizens within the EU. It would also ensure an equitable balance between citizens’ rights and Member States’ welfare interests. Uniquely, it calls for legislative reform, rather than reliance on European Court of Justice jurisprudence, to embed this rights-based approach and provide a clearer, more inclusive legal framework. The envisaged solution guarantees the *continuum* of the movement and migration of people within the EU, exercised with the intention of enhancing their lives, and not of gaining access to a better social welfare system. The latter has emerged as a core basis of the opposition to viewing free movement as a right available to all.

The article is organized into six sections. The first section details the methodology employed, while the second introduces Rawls’ theory of justice. Specifically, the article adopts a normative, Rawls-inspired framework that proposes to integrate the principle of equality of opportunity into a new approach to this right, using it as an analytical filter to identify the core values underlying citizens’ movement. The third section examines key aspects surrounding the contextualization of the development of free movement as a fundamental right, closely linked to the European project’s evolution. It is followed by a fourth section that turns to the actions of European institutions in relation to ensuring the exercise of this right. Together, these discussions help to assess the extent to which the fundamental rights dimension of free movement can transition

from rhetoric to reality. The fifth section considers a way forward for addressing this right – as the proposed solution – by redesigning its legal framework through a human rights perspective.

The conclusion brings together the findings of the article to further the discussion on how fundamental free movement is or might be thought to be within the EU. At a pragmatic level, strengthening this right as fundamental is linked to the need to consolidate the protection afforded to those who wish to exercise it. This means that any attempt to restrict this right must be viewed in the context of fundamental rights and the impact such measures would have on individuals (de Cecco, 2014, 398), rather than on the internal market. This article argues that efforts to bring the European project closer to its citizens, along with the socio-political context, require better addressing the fundamental rights dimension of free movement, and reconsidering the very basis of its legal framework.

## 2 Methodology

The article's methodology combines doctrinal legal analysis, historical interpretation, literature review, and normative theorizing to examine whether the free movement of persons in European law is or might be thought to be a fundamental right and to outline a rights-based redesign of its legal framework.

Regarding research design, the article employs a qualitative, doctrinal approach grounded in the interpretation and systematic analysis of EU primary and secondary law, the case law of the European Court of Justice, and relevant legal and political theory. The study is both descriptive and normative: it reconstructs the historical interpretation of free movement and puts forward a proposal to reconceptualize it as a human-rights-based fundamental right grounded in equality of opportunity.

The analysis draws on four main bodies of material: EU primary law (particularly Articles 20, 21, and 45 TFEU, as well as Article 45 of the Charter); EU secondary legislation (notably Regulation (EEC) No 1612/68 (1968) on freedom of movement for workers within the Community, henceforth: "Regulation 1612/68", Regulation (EU) No 492/2011 (2011) on freedom of movement for workers within the Union, henceforth: "Regulation 492/2011", and Directive 2004/38/EC (2004) on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, henceforth: "Directive 2004/38"); European Court of Justice case law on free movement and Union citizenship; and academic literature on Union citizenship, internal market freedoms, and fundamental rights. These materials are supplemented by examinations of institutional practice and discourse from the European Commission, the European Parliament, and Member States, especially in response to the 2008 financial crisis and the 2020 pandemic.

The article reconstructs the historical development of the legal understanding of the free movement of persons, distinguishing pre- and post-Maastricht phases and the shift from an economic to a more rights-oriented framing, while noting the continued influence of internal-market logic. It then pursues a thematic analysis of academic debates, European Court of Justice jurisprudence, and European institutions' actions and discourse on free movement, especially during a crisis. The emphasis is placed on cases balancing human-rights arguments against market freedoms, and on whether practice reflects a fundamental-rights-based or a market-oriented conception of free movement. The article adopts a Rawlsian normative framework to guide future legislative changes related to free movement of persons, ensuring

equal access to fundamental rights and life opportunities for all individuals legally residing in the EU, regardless of their economic activity or Union citizenship status.

In developing its proposal for reforming free movement, the article integrates the doctrinal, historical, and normative analyses to outline a legislative blueprint for redesigning the EU's legal framework. This includes specifying how relevant Treaty provisions (Articles 20, 21, para.1, and 45 TFEU, and Article 45 of the Charter) and key secondary instruments could be reinterpreted or revised to reflect a rights-based understanding of mobility.

### 3 Rawls' Theory of Justice

Rawls' theory of justice offers a useful foundation for reconceptualizing the free movement of persons in the EU as a fundamental right rather than a primarily market-oriented freedom. Rawls articulates a model of a just basic structure grounded in two principles of justice chosen under fair conditions that remove knowledge of individuals' social positions, talents, or preferences (Rawls, 2016). This perspective illuminates the distributive and status-related consequences of how access to movement and residence is organized in the EU and allows the article to treat free movement as a matter of equal access to core opportunities rather than a by-product of economic integration. Scholars working at the intersection of the EU and fundamental rights frequently rely on Rawls (Klaser, 2021, 1–30), and his theory is widely regarded as “the most influential contemporary theory about justice” (de Boer, 2013, 149).

Rawls's framework is valuable because it structures a just society around two lexically ordered principles (Rawls, 1971, 54–56). The first guarantees a fully adequate scheme of basic liberties for all, including freedoms of movement and association – liberties that must be equal and cannot be sacrificed for aggregate economic benefit. The second regulates social and economic inequalities: they must be attached to positions open to all under conditions of fair equality of opportunity, and they must benefit the least advantaged. Applied to the EU, these principles call into question legal arrangements that frame cross-border mobility primarily as an economic freedom or a privilege tied to specific labor-market roles.

When applied to the EU's free movement regime, Rawls's first principle suggests that movement and residence across Member States should be understood as part of a broader set of basic liberties available to all individuals within the Union's jurisdiction. If free movement is to qualify as a fundamental right in Rawlsian terms, it must protect interests central to individuals' life plans – such as access to work, education, family life, and personal development in another Member State – regardless of their economic status. This supports an interpretation of free movement rooted in human-rights values and oriented towards the protection of persons, rather than the facilitation of cross-border economic activity.

Rawls' second principle, particularly the requirement of fair equality of opportunity (Rawls, 1991), directly engages with the dual structure of the current EU regime, which distinguishes sharply between economically active and inactive movers, and between Union citizens and other legally resident individuals. Fair equality of opportunity demands more than formal non-discrimination: it requires that individuals with similar talents and ambitions have comparable real prospects of accessing valuable life opportunities, irrespective of their social background. Transposed to free movement, this implies that the legal framework should avoid entrenching structural advantages for certain groups – such as workers with stable employment – while imposing restrictive conditions on others, such as students, economically inactive citizens, or family members, that limit their ability to relocate and integrate.

On this reading, a system that ties full access to movement-related rights to economic contribution or to a specific formal status (Union citizenship) risks violating fair equality of opportunity. It produces a stratified regime in which some individuals enjoy broad mobility and associated rights, while others face legal and practical barriers that constrain their life plans. A Rawlsian approach, therefore, strengthens the article's proposal to shift the basis of mobility-related rights from economic activity and formal citizenship to legally acquired residence. Treating all legally resident persons as potential holders of a fundamental right to free movement better aligns with the requirement that access to core opportunities should not depend on arbitrary features such as birth nationality or immediate employment status.

Rawls emphasizes that his principles apply to the “basic structure” of society – the central political, legal, and economic institutions that shape life prospects (Rawls, 1978). Although the EU is not a state, its legal order and internal market nonetheless function as a basic structure for those living under its jurisdiction: they allocate opportunities, distribute rights, and define membership boundaries in ways that deeply affect individuals' life chances. From a Rawlsian viewpoint, this basic structure should be evaluated based on whether its core freedoms, including the free movement of persons, are arranged to secure equal basic liberties and fair opportunities for all who are subject to it.

This perspective clarifies the normative tension at the heart of the current EU free movement regime. When free movement is framed primarily as a market freedom, restrictions are frequently justified by appeals to economic efficiency, fiscal protection, or labor-market management. A Rawlsian approach, by contrast, requires that any limitations on a fundamental right to move and reside be shown to respect basic liberties and fair equality of opportunity, giving priority to the protection of individuals' core interests over aggregate economic considerations (Rawls, 1975). This does not rule out all restrictions, but it does require that the starting point of legal design be the status of free movement as a basic liberty – not its utility for market integration.

By integrating Rawls' theory of justice into the analysis, the article articulates a clearer normative standard for evaluating and redesigning European law on the free movement of persons. The proposed shift towards a human-rights-based, residence-anchored conception of free movement can thus be framed as an effort to align the EU's basic structure more closely with Rawlsian principles: securing free movement as an equal basic liberty for all legally resident persons and restructuring mobility-related rules to promote, rather than undermine, fair equality of opportunity across the Union.

## **4 The Contextualization of Free Movement of Persons as a Fundamental Right**

### **4.1 Free Movement of Persons – *Pre-Maastricht Treaty***

The free movement of persons was introduced in the original Community Treaty not from a human rights perspective, but as an economic instrument to facilitate the creation of the internal market (Alston & Weiler, 1998, 665; Barnard, 2016, 204). Nonetheless, within the complex context of the integration process, free movement gradually detached from the purely economic origin (Wollenschläger, 2011, 4–10).

What can be observed is that the free movement of workers was being reshaped as an individual and fundamental right at this early stage (Jacobs, 2007, 595–596; de Cecco, 2014, 386–387; Tryfonidou, 2017a, 76), primarily through secondary legislation and European Court of Justice rulings. In Regulation 1612/68, the preamble states that “freedom of movement

constitutes a fundamental right of workers and their families”. This statement has been interpreted as setting the ‘wider aims’ of the free movement of workers (AG Jacobs Opinion, Case C- 344/87 *Bettray* 1989, para. 28),<sup>1</sup> as it clarifies “that labour is not, in Community law, to be regarded as a commodity and notably gives precedence to the fundamental rights of workers over satisfying the requirements of the economies of the Member States.” (AG Jacobs Opinion, Case C- 344/87 *Bettray* 1989, para. 29) It follows from these legal interpretations that the early establishment of free movement of persons as a fundamental right was rooted in a broad understanding of the notion of “work” as being more than just an instrument for the internal market.

These secondary legal provisions laid the groundwork for several significant European Court of Justice rulings regarding the free movement of workers (de Cecco, 2014, 386–387; O’Leary, 2011, 505–506). Even though the rulings do not explicitly label this right as fundamental, they refer to it as “[...] one of the fundamental objectives of the Treaty” and recognize that “free access to employment is a fundamental right which the Treaty confers individually on each worker in the Community”.<sup>2</sup>

Scholarly arguments for assessing the free movement of workers as an individual and fundamental right are rooted either in the idea of an emerging form of citizenship (Kochenov & Plender, 2012, 373) or in the existence of values beyond market-oriented ones associated with the movement of people (de Cecco, 2014, 387). While acknowledging the early expansion of free movement of persons interpretation, some scholars argue differently regarding the reasons for this, linking it more to the need to ensure the proper functioning of the internal market (Barnard, 2016, 204; Wollenschläger, 2011, 6–7). This article contends that what is often viewed and debated as early features of a fundamental rights dimension instead reflects the adaptation of an economic instrument – the free movement of persons – to a broader European context in which the internal market remained the predominant objective in relation to the movement of people. Therefore, neither of the arguments is persuasive enough to label free movement as a fundamental right, in the absence of a clear legal basis that directly connects this right to human rights interests inherent for the protection of citizens’ core values.

#### 4.2 Free Movement of Persons – *Post-Maastricht Treaty*

A formal development of the fundamental rights dimension of free movement began with the legal basis established by the Maastricht Treaty. It introduced a provision on Union citizenship and set the framework to include not only the economically active, but also the economically inactive Union citizens as beneficiaries of this right. However, this development is argued to convey the broader transformation of the European project and of fundamental rights discourse, which are not fully aligned with human rights considerations *per se*.

Thus, it is argued that the rhetoric of the free movement of persons as a fundamental right was part of the effort to transform the European project into a political community. This is because of the potential that the concept of fundamental rights has to provide legitimacy and

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<sup>1</sup> Advocate General Jacobs Opinion, *Bettray* (1989) Case C- 344/87, ECLI:EU:C:1989:226, European Court of Justice.

<sup>2</sup> *Heylens* (1987) Case C-222/86, paras. 12, 14, ECLI:EU:C:1987:442, European Court of Justice. *Lawrie-Blum* (1986) Case C-66/85, para. 16, ECLI:EU:C:1986:284, European Court of Justice. *Bosman* (1995) Case C-415/93, paras. 93, 129, ECLI:EU:C:1995:463, European Court of Justice.

“[...] a moral grounding to a legal order which on its face was established principally to support the pursuit of economic goals [...]” (de Búrca, 1995, 43). Framing the free movement of persons as a fundamental right could thus be seen as serving a purpose beyond the internal market’s economic interests, contributing to the legitimation of the new European political community. However, such a perspective on free movement overlooks the essence of a fundamental right for citizens – specifically, its underlining core values and the opportunity of equal access to them. At the same time, a perspective of this kind reflects that the initial regulation of fundamental rights within the EU was primarily focused on ensuring the autonomy and supremacy of European law within Member States, rather than on the protection of human rights *per se* (de Búrca, 2011, 668; Williams, 2009, 563–564; Varju, 2014, 5, 7).

The Union citizenship concept had a significant contribution to how the free movement of persons is perceived as a fundamental right. Nonetheless, the extent of this impact depends on judicial interpretation, as the wording of the Treaty brings minimal details.

The interpretation evolved significantly beginning in 2001, with the European Court of Justice frequently affirming that “Union citizenship is destined to be the fundamental status of nationals of the Member States [...]”.<sup>3</sup> For some, this reading of Union citizenship laid the groundwork for the European Court of Justice’s recognition of the right to free movement and residence as both an independent (Jacobs, 2007, 595) and a fundamental right (de Cecco, 2014, 388; White, 2005, 886) granted to all Union citizens. This recognition marked the shift in focus from economic considerations to citizens’ rights (Spaventa, 2004; Kochenov & Plender, 2012; Nic Shuibhne, 2002). This article argues that this shift has supported the development of fundamental rights aspects within the free movement of persons, but it primarily occurred in the context of the European Court of Justice’s interpretation of Union citizenship as the fundamental status of Member States’ nationals, not as a direct emphasis on the protection of human rights *per se*.

It has been argued that the aim of Union citizenship is to establish “a general freedom of movement, independent from economic freedoms” (Kadelbach, 2010, 454). Where this article departs from other scholars is in its argument that, to achieve this goal, the design of a general free movement of persons should be grounded in human rights considerations, as this would reinforce its fundamental status. The goal is to prevent overlap with internal market objectives, while avoiding reliance solely on Union citizenship. This is because it is argued that, despite its powerful rhetoric, the Union citizenship as a basis for free movement limits, rather than ensures, its realization as a fundamental right. The *Rottmann* (Case C-135/08 2010),<sup>4</sup> *Zambrano* (Case C-34/09 2011) line of case law strengthens Union citizenship as a tool to protect citizens’ rights associated with it, however in an attempt to depart from the requirement to have exercised the right to free movement. This undermines what free movement in itself could represent as a fundamental right for citizens and their equal access to core values in another Member State. In

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<sup>3</sup> *Grzelczyk* (2001) Case C-184/99, para. 31, ECLI:EU:C:2001:458, European Court of Justice. *Baumbast, R* (2002) Case C- 413/99, para. 82, ECLI:EU:C:2002:493, European Court of Justice. *Garcia Avello* (2003) Case C-148/02, para. 22, ECLI:EU:C:2003:539, European Court of Justice. *Zhu and Chen* (2004) Case C-200/02, para. 25, ECLI:EU:C:2004:639, European Court of Justice. *Bidar* (2005) Case C-209/03, para. 31, ECLI:EU:C:2005:169, European Court of Justice. *Zambrano* (2011) Case C-34/09, para. 41, ECLI:EU:C:2011:124, European Court of Justice.

<sup>4</sup> *Rottmann* (2010) Case C-135/08, ECLI:EU:C:2010:104, European Court of Justice.

*Mirin* (Case C-4/23 2024)<sup>5</sup> the emphasis falls back on safeguarding the right to free movement as a core element of Union citizenship status. However, in this case, the free movement rationale is employed as a means to protect transgender rights.

There are, however, other shortcomings arising from the set-up of Union citizenship. These relate to issues concerning the personal scope of free movement of persons, which in practice goes beyond the limits of the legal status of Union citizenship. What is more is that despite the internal market and Union citizenship not being conflated, the legal reading of the latter concept has frequently resembled a return to the idea of market citizenship (Spaventa, 2017, 208, 221–222), where movement is conditioned on the exercise of an economic activity. This new approach treats Union citizenship “as a mere and minor *addition* [original emphasis] to national citizenship, rather than a true supranational status.” (Spaventa, 2017, 224) In this narrower interpretation, “Union citizenship has lost much of its innovative potential” and adds little to the right to move and reside freely, as this right already existed for economically active individuals (Spaventa, 2017, 221). Alongside, there are situations in which the legal reading of Union citizenship has been confined to a minimalist interpretation according to which the free movement of persons exists only by virtue of the internal market and once a Member State withdrew from the European project, the rights of free movement were no longer available to the nationals of that Member States (Spaventa, 2023, 179). It is argued that these new readings may have a significant impact on the assessment of free movement of persons as a fundamental right, as they prioritize economic considerations and internal market objectives.

Legal and judicial developments related to the right to move and reside freely following the introduction of Union citizenship were consolidated into a single legal instrument (Guild et al., 2014, 2). However, Directive 2004/38 did not fully succeed in establishing a framework that ensures a consistent, human-rights-based approach to the right to move and reside freely – both in general and for economic purposes. This may be because the principles underlying Union citizenship – equal treatment and non-discrimination – and applicable to economically active citizens cannot be indefinitely extended to economically inactive ones, as they represent two different realities (Thym, 2019, 104). In addition, Directive 2004/38 did little to clarify the fundamental rights dimension of the free movement of persons, as many aspects related to free movement for economic reasons remain closely tied to the instrumental role of this right within the internal market.

The freedom of movement and residence is incorporated in Article 45, para.1 of the Charter as one of the rights of Union citizens. However, the Charter provisions outlining this right merely mirror the wording of Article 21, para. 1 of the TFEU – the right to move and reside freely – and provide no further details about the intrinsic values of citizens that they aim to protect. The Charter contains an enumeration of rights that arguably cements that there is no fundamental right of free movement beyond rhetoric, and does not extend the scope of rights to groups that were previously not included in the circle of beneficiaries of free movement rights. Moreover, the movement of workers under Article 45 of the TFEU continues to be framed primarily as a functional right serving internal market objectives. This is because Article 15, para.2 of the Charter recognizes only the right to work and seek employment as fundamental freedoms of Union citizens. By contrast, the freedom of movement for workers as a fundamental right is expressly articulated as such *merely* in the preamble of secondary legislation, notably Regulation 492/2011.

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<sup>5</sup> *Mirin* (2024) Case C-4/23, ECLI:EU:C:2024:845, European Court of Justice.

To conclude, the fundamental rights dimension of free movement of persons remains a concept insufficiently defined by the legal framework. It emerges from the foregoing that the duality within the scope of this right – internal market objectives and citizens’ interests – challenges its assessment as a fundamental right. This duality arises from the European project development and instruments such as Union citizenship, making it difficult to set a clear legal basis for defining the right as fundamental in human rights terms without overlapping with internal market considerations.

## 5 Exploring the Fundamental Rights Dimension of Free Movement in Action

This section argues that the actions undertaken by European institutions – the European Court of Justice, the European Parliament and the European Commission – to ensure the exercise of free movement of persons reflect the contextual particularities of the development of this right and the tendency to prioritize internal market objectives. An overview of these actions helps to assess whether the fundamental rights dimension of free movement, including that of workers, can transition from rhetoric to reality. This assumption rests on the argument that the values embedded in a fundamental right are reflected in European institutions’ actions, and take precedence over other values, particularly economic ones (de Búrca, 1995, 44).

### 5.1 Free Movement in the European Court of Justice’s Rulings

This article notes that the European Court of Justice’s approach to the protection of free movement of persons as a fundamental right through a focus on human rights interests has been mixed because of the close connection between this right, citizens’ interests, and internal market objectives, and the absence of a clearly defined EU concept of fundamental rights.

The European Court of Justice has tended to focus on internal market objectives by prioritizing the protection of fundamental freedoms (Douglas-Scott, 2011, 677; Kriki, 2020, 80–81) over fundamental rights. This occurred to the extent that some considered the protection of fundamental freedoms “[...] the leading rule to which other grounds may or may not qualify as exceptions.” (Heliskoski, 2003, 441) This approach relates to the scholarly debates on the EU’s lack of a “clearly developed, substantive sense of human rights” (Douglas-Scott, 2011, 678) and the fact that principles developed by the European Court of Justice jurisprudence, like respect for fundamental rights, are not grounded in coherent fundamental values (Williams, 2009, 560–561).

In contrast to the leading rule of fundamental freedoms protection, in cases such as *Gebhard* (Case C-55/94 1995)<sup>6</sup> and *Carpenter* (Case C- 60/00 2002)<sup>7</sup> – which touch on both citizens’ rights and market considerations – the European Court of Justice has framed its reasoning to remove Member States’ obstacles to freedom of movement from the perspective of citizens’ interests, rather than that of the internal market. Likewise, in the *Nordic Info BV* ruling (Case C-128/22 2023),<sup>8</sup> the Court did not treat the travel restrictions as mere market obstacles. Instead, it interpreted them through the lens of fundamental rights – including the right to private/family life, freedom of movement, freedom to conduct a business (Case C-128/22 *Nordic Info BV* 2023,

<sup>6</sup> Gebhard (1995) Case C-55/94, ECLI:EU:C:1995:411, European Court of Justice.

<sup>7</sup> Carpenter (2002) Case C- 60/00, ECLI:EU:C:2002:434, European Court of Justice.

<sup>8</sup> Nordic Info BV (2023) Case C-128/22, ECLI:EU:C:2023:951, European Court of Justice.

paras. 92–95, 98). This approach aligns with a more explicit citizens-rights focus adopted by other European institutions later in the 2020 pandemic and moves beyond a purely internal-market proportionality analysis of travel restrictions.

Moreover, in rulings not involving conflicts between fundamental freedoms and rights, the Court approaches the free movement of persons from the perspective of the protection of citizens' rights. This was the case in *Sala*,<sup>9</sup> *Grzelczyk*, *Collins*,<sup>10</sup> *Garcia Avello*, *Bidar*, *Baumbast*, *R*, *Zhu and Chen*, *Zambrano*. However encouraging, in these cases, the European Court of Justice had gradually built on the reading of Union citizenship as the fundamental status of Member States' nationals, strengthening its role as a tool to protect citizens' rights at the European level and increasingly loosening its link to the actual exercise of the right to free movement.

An interesting aspect is noted in cases concerning the workers' movement. Notably, the European Court of Justice has appeared willing "to re-read the market freedoms in light of the status of Union citizenship", although this has been limited to economically active citizens (Tryfonidou, 2017b, 327). This was the case in the *Ritter-Coulais* (Case C-152/03 2006)<sup>11</sup> in which the Court interpreted the intent of the freedom of movement for workers to go beyond internal market interests towards facilitating the needs of Union citizens. This raises the question of whether the characterization of free movement as a fundamental right is conditional on the economic involvement of its beneficiaries.

In conclusion, the European Court of Justice largely confines to its initial approach to human rights discourse, whereby the scope of the application of the principle of respect for human rights "is to be determined by the preservation of the EU and in particular the construction of an internal market." (Williams, 2009, 566)

## 5.2 Free Movement in Other European Institutions' Actions

The actions taken at the European level by other European institutions to guarantee the exercise of the free movement of persons are mostly visible in specific circumstances, such as transnational challenges. Alongside, these circumstances question the extent to which the possible limitations on free movement align with the requirements as interpreted through the first paragraph of Article 52 of the Charter to respect the essence of the right to free movement and uphold the principle of proportionality. Relevant here are the effects of the 2008 financial crisis and the 2020 pandemic on the free movement of persons.

The 2008 financial crisis justified the temporary restrictions adopted by some Member States, such as Spain and the UK, later endorsed by European institutions, to limit access to their labor markets for Romanian and Bulgarian workers (Ludera-Ruszel, 2015, 166–167). These measures recalled, in effect, the restrictions introduced in 2007 when Romania and Bulgaria joined the EU and transitional arrangements temporarily limited their workers' free movement. A further study of changes in European institutions' discourse on the free movement of persons highlights the impact of the 2008 financial crisis (Roos & Westerveen, 2020). It notes that the European Commission's and the European Parliament's discourse shifted from treating the freedom of movement as an individual right to advocating for more restrictions on its exercise (Roos & Westerveen, 2020, 63, 75). Thus, it has been argued that "[t]he EU of equal rights and

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<sup>9</sup> Sala (1998) Case C-85/96, ECLI:EU:C:1998:217, European Court of Justice.

<sup>10</sup> Collins (2004) Case C-138/02, ECLI:EU:C:2004:172, European Court of Justice.

<sup>11</sup> Ritter-Coulais (2006) Case C-152/03, ECLI:EU:C:2006:123, European Court of Justice.

opportunities for all European citizens is being challenged by the idea of the EU as a marketplace to which access is conditional.” (Roos & Westerveen, 2020, 65) In other words, the essence of free movement of persons as a fundamental right has been challenged by its understanding as an economic instrument confined to workers’ mobility.

The context of the 2020 pandemic highlighted the aspect of overlapping interests associated with the free movement of persons. At the European institutions’ level, the initial response to this crisis was consistent with their obligation to ensure the internal market’ functioning. They sought and implemented exceptions to travel restrictions with the primary aim to safeguard workers’ mobility and access to the labor market (Guild, 2020, 3; Duić & Sudar, 2021, 36–37). This indicates that internal market interests are prioritized in addressing the exercise of free movement of persons.

Additionally, these initial actions raised questions about which values are better protected within the EU. In this sense, scholars questioned why, if exceptions to travel restrictions complying with public health standards were possible, similar measures were not taken on a broader basis (Ramji-Nogales & Goldner Lang, 2020, 597–598) to cover all aspects of the free movement of persons, beyond workers alone. Thus, an initial human-rights-based approach would have included the impact of travel restrictions on individuals, not just on the internal market. This is because the considerable measures taken to restrict the exercise of the free movement of persons effectively eroded the very essence of this right, were “[...] likely to undermine everyone’s sense of belonging to the EU” (Paccès & Weimer, 2020, 288) and represented genuine challenges to the fundamental principles of the EU and human rights (Ramji-Nogales & Goldner Lang, 2020, 599).

The subsequent measures and actions by European institutions reflected an emphasis on human rights considerations and the broader impact of travel restrictions on citizens’ lives – a change also evident in the Court’s approach, as highlighted in the case previously discussed, the *Nordic Info BV*. Although not the norm, these are important steps towards a human-rights-based approach to the free movement of persons. Making the shift effective requires revising the legal framework for this right.

To sum up, the various actions and measures taken by European institutions – whether on a case-by-case basis or in response to transnational challenges – largely prioritize internal market interests in addressing the free movement of persons. In light of the argument raised at the beginning of section five, European institutions’ actions reflect little about the free movement of persons as a fundamental right of citizens through a focus on the wider aspects of human rights interests.

## **6 A Way Forward to Deal with the Free Movement of Persons in the European Union**

This article helps determine that, in relation to the free movement of persons, there are aspects that sometimes overlap. These aspects relate to the various interests – citizens and internal market – associated with this right. Consequently, due to the different components of free movement, there remains a discontinuity in terms of its underlying principles. There is also a difference in how free movement is understood and protected. On the one hand, there are the interpretations of European law and European Court of Justice rulings; on the other hand, there is the practice of the EU, as indicated by the measures it has taken to protect the exercise of this right. This situation raises the question of the extent to which the free movement of persons, including workers, as a fundamental right can transition from rhetoric to reality and be protected in practice from the perspective of citizens rather than the internal market interests.

A solution and way forward to deal with this would be to redesign the European legal framework of free movement of persons, primarily through the lens of human rights considerations. The argument holds that while free movement as a fundamental right originates in Union citizenship, the aim is to extend beyond it. In this light, a better-regulated legal framework should not focus on further expanding the principles of equal treatment and non-discrimination based on Union citizenship, but rather on establishing an equitable approach between the citizens' rights and Member States' welfare interests. The human-rights-based rationale views free movement as a fundamental entitlement enjoyed by all individuals legally residing within a given space, grounded in human rights considerations and operating independently of internal market objectives. The citizenship rationale, by contrast, is inherently selective and more readily aligned with internal market logic: it grants free movement only to those falling within the category of Union citizens, whose mobility is often seen as contributing to the functioning of the internal market. The human-rights-based rationale aims to structure the free movement of persons as a right that is not divided into categories of beneficiaries or defined through the lens of the rights to which it may or may not give access.

This could be achieved through new legislation – rather than European Court of Justice rulings – that explicitly establishes free movement of persons as a fundamental right that is unconditionally available to citizens. This right would be grounded in the principle of equality of opportunity as a guiding filter, ensuring that citizens can access fundamental rights in a host Member State, prioritizing their individual interests over those of the internal market. The access would, however, be limited by the requirement that citizens are legally residing in the EU. Legally acquired residence would therefore become a key criterion for grounding this right and the principles underlying it. This approach takes into account the hierarchy of norms within the EU at present, which determines, according to Article 21, para. 1 of the TFEU, that the right to free movement is “[...] subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.” Thus, these existing limitations and conditions would need to be reconsidered by primary and secondary legislation. The aspects of the solution previously outlined are detailed below.

This article departs from other scholars' approaches by aiming to redesign the free movement of persons through a new lens – one grounded in human rights considerations that are intrinsic to protecting citizens' core values. These core values can be broadly defined as “[...] those ends deemed worth pursuing” (Williams, 2009, 559) and “[...] as intersubjectively shared preferences.” (Habermas, 1996, 255) They correspond not only to the core values embedded in the right to free movement of persons, but also to the fundamental rights that citizens are entitled to, with equal access, once they have exercised their right to free movement within the EU.

The method for concretely defining citizens' core values draws on other scholars' approaches (de Boer, 2013, 159) and is guided by a normative framework rooted in Rawls' theory of justice (Rawls, 1971, 54–56, 60). Accordingly, the principle of equality of opportunity is proposed as an effective tool for understanding citizens' core values. This principle is to be interpreted broadly – not confined to economic opportunities or a person's economic standing in society (de Boer, 2013, 166–167). This principle helps outline a free movement genuinely grounded in citizens' interests rather than internal market objectives. Hence, the article argues that the redesigned free movement of persons framework must incorporate equality of opportunity – as a filter to ensure emphasis on intrinsic human rights considerations tied to citizens' core values.

The proposed solution for redesigning the free movement of persons legal framework aims to broaden the personal scope of this right beyond the current limitations set by the Treaty and Union citizenship, to include citizens legally residing in the EU as beneficiaries. This approach

rests on the principle that a right's fundamental nature should not depend on the nationality of its beneficiaries. Moreover, the approach reflects the current reality and resonates with the ongoing scholarly debate about Union citizens' rights already extended to third-country nationals provided they reside legally in a Member State (Kochenov, 2013, 106, 132; de Cecco, 2014, 397; Raucea, 2016; van den Brink, 2019, 28–29). The proposal is innovative in that it involves amending the Treaty provisions and seeks to firmly establish the residence requirement within primary law.

Legally acquired residence is argued to be a better criterion for determining free movement of persons beneficiaries because it also clears the traditional distinction between economically active and inactive Union citizens and reflects the European Court of Justice's tendency to progressively dilute the requirement to actively participate in an economic activity (Tryfonidou, 2016, 83). However, the concept of legally acquired residence must be defined more broadly than the framework set by the European Court of Justice in some rulings,<sup>12</sup> which cautiously limited it largely to the situations listed in Directive 2004/38 (Carter & Jesse, 2018, 1181, 1193–1202). Achieving a broader definition implies considering Member States' conditions for access to nationally based rights, while respecting their perspectives in setting legal residence criteria without imposing economic requirements, such as participation in the host state's labor market. Their involvement in adopting the new legislation helps address concerns about making the free movement of persons a fundamental right. This is because the legal residence requirement establishes a criterion for equal treatment other than Union citizenship, particularly relevant in relation to citizens' access to social benefits.

The aim is to integrate the aspects of the solution outlined in this paper by amending primary legal provisions – Articles 20, 21, para.1, and 45 of the TFEU, and Article 45 of the Charter. By amending Article 20 of the TFEU, the primary legislation would define Union citizenship as a legal status, but distinct from the specific rights granted to citizens in the EU. Consistent with this, the legal framework governing the right to move and reside freely – under Article 21 para.1 of the TFEU – should apply to all individuals legally residing in the EU. It should also incorporate the principle of equality of opportunity – as a guiding framework for clearly identifying the core values informing citizens' free movement. In addition, Article 45 of the Charter must reinforce the underlying rationale of the free movement of persons – as set out in the amended version of Article 21 para.1 of the TFEU. The idea of disconnecting Union citizenship from its associated rights, and redefining eligibility based on legally acquired residence, is currently under debate among European scholars (van den Brink, 2019, 28).

Moreover, this paper's arguments for reforming the free movement legal framework prioritize citizens' rights protection over internal market objectives and equal access to fundamental rights across all Member States. It is maintained that the right to free movement should be treated separately from the specific rights it grants access to. Consequently, it is contended that Article 45 of the TFEU should be amended to explicitly address only the right to work, as a right that reflects one of the citizens' core values, equally accessible to all citizens legally residing in the EU.

Changes to primary legislation would require corresponding amendments to EU secondary legislation to align with and effectively implement the new legal framework for free movement

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<sup>12</sup> Dano (2014) Case C-333/13, ECLI:EU:C:2014:2358, European Court of Justice. García-Nieto (2016) Case C-299/14, ECLI:EU:C:2016:114, European Court of Justice. Alimanovic (2015) Case C-67/14, ECLI:EU:C:2015:597, European Court of Justice.

of persons. Moreover, existing requirements related to economic activity in EU secondary legislation would need to be reconsidered in relation to the exercise of free movement, as they are incompatible with the very notion of a fundamental right.

In view of the foregoing, the protection of citizens' core values must be at the heart of European legislation regulating the free movement of persons, encompassing all citizens legally residing in the EU. To achieve this, the European Commission must offer a legislative proposal to initiate changes to the legal framework governing this right. Such reform would establish a solid legal basis for addressing the question of how fundamental the right to free movement of persons within the EU is, or might be perceived to be.

## 7 Conclusion

To address the central question posed in this article, it has been necessary to situate the free movement of persons within the context of the European project's consolidation. As discussed in the third section, interpretations based on European legislation and European Court of Justice case law have favored the understanding of the free movement of persons as a fundamental right at an early stage. However, this development counts largely as the adaptation of the economic instrument – the free movement of persons – to the need of ensuring the functioning of the internal market. In addition, the close link between the fundamental rights dimension of free movement and Union citizenship – despite its powerful rhetoric – may create limitations in the assessment of this right as fundamental. This is the case due to the often market-oriented and minimalist interpretations of Union citizenship, the limitations its structure imposes on the personal scope of free movement, and the efforts to strengthen this concept as a source of rights no longer contingent on the exercise of free movement. On the other hand, as shown in the fourth part, European institutions' actions in relation to ensuring the exercise of the free movement of persons highlight the tendency to prioritize internal market objectives in association with this right.

The solution proposed by this article envisages the redesign of the free movement of persons legal framework through the legislative process, thereby establishing it as a fundamental right unconditionally available to citizens and ensuring them an equal opportunity to access fundamental rights in a host Member State. However, this access would be limited by the requirement that citizens are legally residing in the EU. The solution approaches the free movement of persons from a perspective grounded in human rights considerations, intrinsic to protecting citizens' core values, that would reinforce its status as a fundamental right.

It is argued that a legislative proposal, integrating aspects of the solution discussed in this article, should be put forward by the European Commission to initiate amendments, either to European secondary legislation or the Treaty provisions. The aim is to provide a solid legal basis for addressing how the issue of free movement of persons as a fundamental right, within the EU, should be handled. This proposal ought to employ legally acquired residence as the basis for determining who benefits from free movement, while integrating the principle of equality of opportunity as a safeguard to ensure that the right is grounded in human rights rather than driven by internal market objectives. This legislative proposal would enable the opportunity to address existing limitations and conditions on the right to free movement through legislation. It would also enable reaching an equitable balance between citizens' rights and Member States' welfare interests.

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