

# European “Freedom’s”: A Critical Analysis

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CATHERINE AUDARD\*

*Abstract.* Faced with the present migrant crisis and the dismal record of Europe in protecting vulnerable refugees’ and migrants’ rights, what could be the view of the moral philosopher? The contrast between the principles enshrined in the European Charter of Fundamental Rights and the reality of present policies is shocking, but more scrutiny will show that it is the result of a larger trend towards an understanding of freedom mostly in economic terms, at a time when economists such as Amartya Sen have revised their approach to economic growth and prosperity, noting the central role played by a much richer conception of freedom. The paper will scrutinize these inconsistencies and the conception of the person from which they derive and will provide an alternative and more coherent moral vision that could strengthen the legitimacy of the European Charter, at a time of growing dissatisfaction and so-called democratic deficit. Such a vision could help reconnect the Charter with a conception of the human person as in need not solely of passive legal protection, but also of active promotion of her self-respect and capabilities, and of her aspiration to a valuable life.

Over thirty years ago, on August 19, 1989, citizens of central and eastern Europe under communist rule started to vote with their feet, crossing forbidden borders and flooding into the so-called free world. They hoped that a union of law-governed, prosperous countries, “founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities” (Art. 2 of the Treaty on European Union),<sup>1</sup> would welcome them and give them the support that they needed. Is the European Union still as attractive as it was in 1989? How do the so-called European freedoms stand in respect to these tremendous aspirations? Are the dignity, security, prosperity, and legality taken for granted in the Union still holding in spite of recent historical and political developments? Are not many political, economic, and moral weaknesses still unfixed, threatening the very survival of the Union?

In 2015, as a result of armed conflicts, terrorism, and civil wars in Syria and Iraq, migrants from the Middle East started pouring through the southern borders of the

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<sup>1</sup> The 2009 Charter of Fundamental Rights of the European Union (Lisbon Treaty) states in its preamble that “the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity.”

European Union. The response of the Union and the detention camps on Lesbos or Samos, reminiscent of concentration camps, shed a sinister light on the promises created by the so-called European freedoms. Limited in reality to European nationals, disconnected from universal human rights and freedoms, in particular the right to life and security, to respect for one's dignity, they reveal a trend which I will describe not solely as an obvious return to protectionism and nationalism, but fundamentally as an understanding of freedom in mostly economic terms, a tendency towards the "commodification" of freedom (Esping-Andersen 1990, 35–7). This leads to access to freedoms and rights for non-EU migrants being evaluated mostly in terms of costs and benefits, that is to say, of their utility, rather than in terms of universal duties to fellow human beings. I suggest this trend echoes similar worrying developments concerning social policies and social rights for EU migrants that have led to "freedom of movement of persons increasingly being seen as politically problematic, and most likely unsustainable; it has been reduced to just another form of 'immigration' like others, that must be subject to the same kinds of sovereign control, restriction and selectivity imposed on conventional forms of international migration from outside the EU" (Barbulescu and Favell 2020, 151).

How did that come about?

The main values and norms of the European Union, short of a constitution and its bill of rights, are enshrined in the European Charter of Fundamental Rights of 2000 and the Lisbon Treaty of 2009 as well as in the European Convention on Human Rights of 1953. But different norms are also at work in the institutions and policies of the EU, namely, the famous "fourth freedom," expressed in the Treaty of Rome of 1950 and omnipresent during the Brexit negotiations: freedom of movement for goods, services, capital, and labour (then enlarged to citizens). One cannot fail to be struck by a feeling of inconsistency and of conflicting strategies when one takes a closer look at such an extension from "goods" to "citizens," which has proved highly problematic and leads to treating people as mere commodities.

My aim in this paper, as a political and moral philosopher, not a specialist of the EU, will be, firstly, to scrutinize these inconsistencies and the conception of the person from which they derive and, secondly, to provide an alternative and more coherent moral vision that could strengthen the legitimacy of the Charter, at a time of growing dissatisfaction and so-called democratic deficit, and could help reconnect it with a conception of the human person as in need not solely of passive legal protection, but also of active promotion of her self-respect and capabilities, and of her aspiration to a valuable life. Whereas, among economists, the realization that a strict focus on growth of GNP could be extremely limiting and detrimental has led to a new vision of the importance of freedom to measurements of wellbeing (Sen 1999, 5), the Union seems to have regressed and adhered to a narrow focus on utilities, income, and wealth to justify its more recent immigration policies.

## 1. Freedom: A Conceptual Analysis

Let us start with a point of vocabulary. Freedom is not the same as liberty and, usually, constitutionalists and political philosophers talk of liberty, that is, the possibility to act, think, work and move around within the boundaries of the law according to the principle *Nullum crimen, nulla poena sine lege*. Liberties and rights are synonymous in a rule-based political context, with corresponding duties to abide by the law. Liberty is freedom within the law, the main questions being, of course, that of who

makes the law and establishes its boundaries and, equally importantly, of the many forms of boundaries and limitations other than lawful interference.

### 1.1. Freedom, Power, and Agency

Freedom, however, is a wider and more problematic concept that involves much more than the constraints of the law. It is usually defined as the possibility of “free choice” or “free will,” and, in its more extreme form, as “the ability to do as we please.” The problem arises, then, of the perception of what makes a choice really “free” and, here, we should follow Spinoza when, in *Ethics*, he warns us that imagining a constraint-free choice is as meaningless as when

[a] baby thinks that it freely seeks milk, an angry child that it freely seeks revenge, and a timid man that he freely seeks flight. Again, the drunken man believes that it is from the free decision of the mind that he says what he later, when sober, wishes he had not said. (Spinoza 2002, pt. III, proposition 2, *scholium*, p. 281)

This extreme view of freedom is nevertheless widely shared by libertarians, who claim that any interference with individuals’ ability “to do as they please” is potentially destructive and an infringement of their sovereignty; any constraint imposed by duties and responsibilities towards others can all too easily lead to erasing “free choices,” according to the principle of the “slippery slope.”

This view is generally labelled as “negative” freedom (Berlin 1969),<sup>2</sup> the absence of constraints or obstacles, or as “freedom from” limits and conditions. The focus is on choices among various outcomes, resources, and goods, whatever value they have, not on what has real *worth* for the person in question.<sup>3</sup> This leads to envisioning “market freedoms” as the ultimate form of freedom in democracies, whatever the value of the choices in question, as long as people feel they are free to do as they please. As a consequence, in a consumerist context and a market economy, democratic freedom risks being devalued as the freedom to choose and vote for whatever programme or politician pleases most, typical of a mere majority-rule form of government with all its dangers (Tocqueville 2004; Mill 1977).

If, however, we reject this limiting conception of democratic freedom, and agree that freedom is not simply “the ability to do as we please,” the main task remains to define the necessary and sufficient conditions for effective human agency in contrast to this chimerical view. We need to connect freedom with agency, not simply with mere choices or possibilities. This is where Sen’s analysis is a real game changer, as it shows that rights and status are not sufficient conditions, even if they are necessary, for people to fully function and “do the things one has reason to value” (Sen 1999, 18). The focus should be on agency itself, or on “functionings,” as Sen would say. It is important to understand and scrutinize both the scope and the limits of the “agency aspect” of individual freedom, be they seen as “subjective”—“internal,” personal, natural, such as health, gender, character, desires, intelligence—or as “objective”—“external,” contextual, cultural, political, economic, and social, such as rights, opportunities, income, education. (Note here that the two are of course inextricably

<sup>2</sup> “The defense of liberty consists in the ‘negative’ goal of warding off interference” (Berlin 1969, 127).

<sup>3</sup> The analysis of “adaptive preferences” or of the adjustment of wants to possibilities has shown how easily choices can become alienated from what we have reason to value and has real worth for us, from what makes us act upon it (Elster 1983, 25).

linked.) However, if these conditions allow for mere possibilities for agency, but we do not or cannot realize them because of other obstacles and limitations, then we cannot be free. Freedom is inseparable from existing conditions for agency: It is an “exercise” concept, not an “opportunity” concept (Taylor 1985). Freedom concerns agency, the power to act, and as such cannot be satisfied by mere possibilities, by a mere status and set of rights. It relies instead on multifaceted conditions for action, on policies and interventions that are able to prevent, lift, or minimize these limitations and obstacles—unlawful interferences being only a fraction of these. It measures a relationship between, on the one hand, cold “facts,” and, on the other, preferences, aims, aspirations, values, etc. The difficulty is that these conditions are constitutive of freedom itself. Freedom, in this sense, is ontologically a relation, never an absolute.

Only then does freedom cease to be an empty promise and becomes meaningful, thanks to the recognition of the link between freedom and agency, a link which is at the forefront in Amartya Sen’s definition of freedom as the “capability to lead the kind of lives we have reason to value” (Sen 1999, 285), to act according to one’s ends; and, as Charles Taylor (1985, 213) says, freedom so understood “involves essentially the exercising of control over one’s life.” This is why we often talk about “positive freedom” (Berlin 1969)<sup>4</sup> or of “freedom to.” Freedom, in that sense, is connected to a certain conception of a person’s agency and power. Individuals are autonomous, active, and able to choose and develop their own aims and values against political, social, and cultural conditions, but also to accept, when justified, certain responsibilities and limitations on the scope, means, and consequences of their actions.

As Rawls puts it, “citizens are free” in three respects: “they conceive of themselves and of one another as having the [...] *moral* power to form, revise, and rationally pursue a conception of the good” (Rawls 1993, 30; my emphasis); “they regard themselves as self-authenticating sources of valid claims” (ibid., 32); and they “are viewed as capable of taking responsibility for their ends” (ibid., 33).

Let us pause an instant and reflect on the consequences of this link between freedom and agency for migration. What does “freedom of movement” mean for migrants? Is it really freedom, and in what sense? Did people freely “choose” to migrate after 1989 and the opening of western Europe to the previous Communist countries, or in 2015 in the middle of civil wars in the Middle East? Is it not highly hypocritical to talk about “free choice” for “freedom of movement” as if a choice was possible between poverty, war, or famine and prosperous and stable Europe? The iron law of survival, economic necessity, and security has prevailed and led to decisions forced upon people with no other choice but to flee dire living conditions. In that case, free choice is certainly an illusion, but we should recognize that what still exists is human agency, the positive power to act and to decide to go, “freedom to.”

### 1.2. *Four European Traditions*

Now, it is clear that our understanding of freedom varies according to the emphasis we put on the various obstacles as well as on the respective value of “freedom from” and “freedom to.” We can then draw on at least four traditions of thought to understand the European vocabulary of freedom used in the Charter: liberal, in both the classical and social traditions of liberalism; republican; and socialist.

<sup>4</sup> “The ‘positive’ sense of the word ‘liberty’ derives from the wish on the part of the individual to be his own master” (Berlin 1969, 131).

The classical liberal view defines freedom in individual and legal terms, as an “opportunity” concept and as noninterference or “freedom from,” the legal status opening up possibilities and choices that may or may not be made, depending on individual aptitudes and character. Civil rights are the first stage in the development of rights (Marshall 1950, 14) and they guarantee “the great principle of economy, that individuals are the best judges of their own interest” (Mill 1900, bk. V, chap. xi, § 12, p. 583). The removal of all unnecessary interference should be the aim of a free society, as “the only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs” (Mill 1991, 33). Here, as long as migrants respect the law and do no harm, they should be able to pursue their good in their own way, which puts the focus on the present unjust European legislation.

The republican view, in contrast, is an “exercise-based” conception that sees “real” choices as dependent on the struggle against excessive political power and domination (Pettit 1997). One cannot be free in an unfree and unequal state. Political liberties are the result of a conquest and have priority over personal liberties or the “liberties of the moderns” (Constant 1988). Noninterference is too often compatible with both political and socioeconomic inequalities and apathy, leading to abuse of power. As Rousseau wrote in *The Social Contract*: “There is peace in dungeons, but is that enough to make dungeons desirable?” (Rousseau 1968, bk., I, chap. 4, p. 54). For the republican tradition, for Spinoza for instance, freedom cannot be exercised on one’s own, but depends on political institutions (such as the republic) that guarantee political freedom: the “liberties of the ancients” (Constant 1988). Without political rights and the possibility to intervene in the public domain, migrants remain ostracized in the nation-state which is the only locus of political struggle even in Europe today, the defence of migrants being left to private individuals or NGOs.

The social liberal view of the early twentieth century (for example, of the British Labour party), in contrast, goes beyond and tries to reconcile socioeconomic rights and legal and political protections, combining “freedom from” and “freedom to” in more socioeconomic terms, Mill himself being a representative of that kind of social liberalism in his *Principles of Political Economy* (1900) and his *Chapters on Socialism* (1967). I would like here to quote T. H. Green, who has perfectly formulated these four dimensions of freedom—individual, moral, political, and social:

Freedom is a positive power or capacity of doing or enjoying something worth doing and enjoying, and something that we do or enjoy in common with others. We mean by it a power which each man exercises through the help or security given him by his fellowmen and which he helps in turn to secure for them [...]. The mere removal of compulsion, the mere enabling of a man to do as he likes, is in itself no contribution to true freedom. (Green 1991, 21)

In liberal Europe, then, migrants should be granted specific civil, political, and socioeconomic rights in order to secure their “freedom from want [...] and fear” (as FDR put it in his 1941 state of the union address: see Roosevelt 2016, 21), and to help them realize their aims and integrate. The abject failure to make any progress on those counts shows how restricted the vision of liberalism is in liberal Europe!

The socialist view, finally, defines freedom as responsibility in social terms and leads to the concept of a social Europe, sharing social responsibilities for the welfare of its population. Without consideration for both social conditions and consequences and for social relations, individual agency is no freedom. To quote Karl Polanyi:

The true significance of social freedom is based on the actual relation of one human to another. It forces this demand upon us through the double realization that *on the one hand there is no human relation which is without social consequences and that on the other hand in society there is and there can be no existence, no power, no structure, no law that is not based on the behaviour of individual beings*. For the Socialists, “to act freely” means to act in the consciousness of the fact that we have the responsibility for our part of human relationships—outside of which there is no social reality, *that we must carry this responsibility*. (Polanyi 2004)

This is where the very conception of social progress in Europe is put to the test, and where disagreements are at their strongest.

Let us conclude that, even with respect to these four traditions, European freedom is failing to provide a coherent view of all these four dimensions:

*Agency*: Agent X is free only if she can act and realize her objectives. Having opportunities is not enough. Freedom is an exercise concept.

*Values*: Aim Z ought to be worth it, both in itself—for otherwise the action wouldn’t take place—and in its means and consequences. Freedom is a moral concept and rests on a conception of the good, of what is seen as meaningful and valuable by the agent.

*Power*: Agent X is free if she is not subjected in arbitrary ways to the capricious will of another, but only to the rule of law. Freedom is a political and legal concept.

*Solidarity*: Agent X is dependent on the collaboration and solidarity of others. Freedom is a social concept.

## 2. The Kantian Roots of European Freedom

The problem, now, looking at the European Charter, is that these complex ambitions are disconnected, the mostly economic view of freedom as “freedom from” being dominant. Is it enough to define “freedom from” as solely “freedom from want,” or should we / could we not go beyond an ideal of sufficiency, and aim instead at a richer ideal of equal freedom for all to realize their aims, where “freedom from” and “freedom to” are inextricably connected, as in T. H. Green’s proposal that I just mentioned?

The idea is not simply to assist those who lose out through accident or misfortune (although this must be done), but instead to put all citizens in a position to manage their own affairs and to take part in social cooperation on a footing of mutual respect under appropriate equal conditions. (Rawls 1999, xv)

This leads me to my main criticism that the list of “freedoms” included in European treaties, conventions, and charters shows no awareness of the tensions, or even of the contradictions, between socioeconomic freedoms, on the one hand, and personal, political, and cultural freedoms, on the other. The thinking simply appears to have been that free markets—for capital, goods, services, and labour (the latter becoming “citizens” at the stroke of a pen!)—will lead to political freedom and democracy and that prosperity is the key to the Union and its success. There is an underlying belief at work in this list of freedoms that they can be unified under the overriding aim of peace through prosperity and economic growth, which was the exact ambition of the founding fathers of the EU. According to Montesquieu, free markets and the *doux*

commerce would bring prosperity and peace,<sup>5</sup> even if the “commodification” of freedoms risks destroying the possibility of free agency itself, making money and the bargaining power that it entails the main basis for the Union.

The root of the difficulties is the conception of persons implied in the European Charter, which I would qualify as utilitarian, contrasting it with the more Kantian vision of human freedom and dignity enshrined in the 1948 Universal Declaration of Human Rights. One could stress similar tensions in President Roosevelt’s 1941 Four Freedoms speech—freedom of speech, freedom of worship, freedom from wants, freedom from fear.<sup>6</sup>

Persons have a right to these freedoms in view of their moral personality, because, to use Kant’s formula, they are “ends,” not simply means or “things.” *What makes us “persons or ends in themselves,” and not solely means, is the moral power to set ourselves conceptions of the good, and to construct plans of life accordingly. It is the capacity to lead a life, not simply to submit to nature, that defines our moral personality.* Such an analysis should allow for a better sense of what freedom really means, as the American philosopher Christine Korsgaard shows:

So, Kant asserts, the unconditionally valuable thing must be “humanity” or “rational nature,” which he defines as the capacity to set an end [...]. We must regard ourselves as capable of conferring value upon the objects of our choice, the ends that we set, because we must regard our ends as good. But since “every other rational being thinks of his existence by the same rational ground which holds also for myself,” we must regard others as capable of conferring value by reason of their rational choices and so also as ends in themselves. Treating another as an end in itself thus involves making that person’s ends as far as possible your own [...]. For this reason, it is our duty to promote the happiness of others—the ends they choose [...]. The goodness of rationally chosen ends is a matter of the demands of practical reason rather than a matter of ontology. (Korsgaard 1996, 260–1)

Realising this capability should be the aim of a free society, as these freedoms are necessary for the human person and her higher-order interests to develop, not only for her happiness or wellbeing. To deprive people of them is to treat them only as things or means, not as “ends in themselves.” Kant connects freedom with agency and practical reason, that is, the capacity to set oneself ends within the limits of reason. This is what he means by freedom as autonomy. Whereas the emphasis in Kant is certainly on justifying universal norms, these norms are not derived from any given conception of the good, but originate in the capacity we have as free agents to synthesize our various experiences through time into a meaningful goal-directed whole—“my” experiences coupled with the recognition that this capacity defines our moral personality and our common humanity.<sup>7</sup> Contrary to the utilitarian “container-like” view of the self, Kant saw human beings as active beings and as capable of setting themselves goals and orientations through time.

<sup>5</sup> Montesquieu wrote that “everywhere there are gentle mores, there is commerce and [...] everywhere there is commerce, there are gentle mores” (Montesquieu 1989, bk. 20, chap. 1, p. 338). And: “The natural effect of commerce is to lead to peace” (ibid., bk. 20, chap. 2, p. 338). Cf. Lebaron 2019.

<sup>6</sup> The four freedoms were goals articulated by United States President Franklin D. Roosevelt on Monday, January 6, 1941. In an address known as the Four Freedoms speech (technically the 1941 State of the Union address), he proposed four fundamental freedoms that people “everywhere in the world” ought to enjoy (see Roosevelt 2016).

<sup>7</sup> I am grateful to Andreas Niederberger for his comments on this point.

In order for the European list of ideal freedoms to make sense, then, they must be reconnected with the Kantian conception of persons, not the utilitarian one or the *doux commerce* (Montesquieu 2018, bk. XX, chap. 1) and *l'intérêt bien entendu* (Tocqueville 2012, tome III, pt. II, chaps. VIII and IX).<sup>8</sup> As Karl Polanyi would have said, the choice is between a “market society” and a free democratic polity. Failing to do that leads to treating “migrants” not as human persons, but only as “things,” worthless commodities, “deprived of their normative authority” and even of “the right to have rights” to contest the decisions and the violence to which they may be subject (Andreas Niederberger, commenting on this article).

### 3. The “Commodification” of Freedom and the Erosion of Social Rights

One root of this treatment of migrants resides in what I would call the “commodification” of freedoms and the collision between free markets and fundamental liberties. Here it is obvious that the aim of creating a unified Europe around the main values of utility-maximizing and prosperity has blinded the authors of the Charter to the dangers of a utilitarian conception of freedom.<sup>9</sup>

Utilitarianism may lead to sacrificing the rights of a minority if that increases the general or average well-being of the population. This is exemplified in the present treatment of non-EU migrants, who are seen not only as foreigners, but also as dangerous and threatening “aliens,” with local politicians exploiting the fear of minority cultures and religions, widespread since 2001 and the “war on terror,” as well as the failure of multicultural policies in Europe to fully integrate ethnic minorities. Utilitarianism can justify sacrificing rights and freedoms for protecting the greater good and well-being of majorities. As the French philosopher Helvétius wrote in 1758:

When a vessel is surprised by long calms, and famine has, with an imperious voice, commanded the mariners to draw lots for the unfortunate victim who is to serve as a repast to his companions, they kill him without remorse: this vessel is the emblem of a nation; every thing becomes lawful, and even virtuous, that procures the public safety. (Helvétius 1807, essay II, chap. VI, p. 63)<sup>10</sup>

For the greater good of the majorities, the figure of the right-less individual, drawn by Arendt is a necessary sacrifice.

<sup>8</sup> Translated as “self-interest properly understood” in Tocqueville 2004, vol. 2, pt. II, chaps. 8 and 9.

<sup>9</sup> In a 1998 letter to Philippe Van Parijs on the European Union and global justice, John Rawls wrote: “One question the Europeans should ask themselves [...] is how far-reaching they want their union to be. [...] Isn't there a conflict between a large free and open market comprising all of Europe and the individual nation-states? [...] The large open market including all of Europe is the aim of the large banks and the capitalist business class whose main goal is simply larger profit. The idea of economic growth, onwards and upwards, with no specific end in sight, fits this class perfectly. [...] The long-term result of this [...] is a civil society awash in a meaningless consumerism of some kind” (Van Parijs and Rawls 2003, 15). See Van Parijs's reply in favour of the common market (Jean Monnet and Jacques Delors) (*ibid.*, 19).

<sup>10</sup> The French original: “Lorsqu'un vaisseau est surpris par de longs calmes et que la famine a, d'une voix impérieuse, commandé de tirer au sort la victime infortunée qui doit servir de pâture à ses compagnons, on l'égorge sans remords: ce vaisseau est l'emblème de chaque nation; tout devient légitime et même vertueux pour le salut public” (Helvétius 1988, discours II, ch. VI, pp. 83–4).



At the same time, an increasingly older population in Europe will need an influx of young migrants, and the Global Compact for Safe, Orderly and Regular Migration (2018) and the “New Pact on Migration and Asylum” (EC 2020) do not hesitate to draw a line between a desirable and undesirable flux of migrants.<sup>11</sup> Utility is the dominant value that justifies European regulation and legislation, not justice and the protection of individual freedom.

Migration is obviously connected to economic hardship and unemployment and can be understood as an individual rational choice. However, it would be too simplistic to ignore the role of the demands of the global economy and its own rationality to explain the pressures of migration. Labour markets, for instance, cannot be “free markets,” as people enter into them on very unequal bargaining terms. Far from being morally neutral, free markets are destroying the weaker parties to the bargain, if they are not regulated and constrained by social and economic policies. The needs of economic competition at a global level lead not only to huge displacements of workforce, but, more worryingly, to social and ethnic exclusions and expulsions that create populations which are rejected in their own country and end up being seen as useless elsewhere too (Sassen 2014). What does freedom of movement mean when it leads to the loss of educated elites through immigration that “freedom of movement for labour and citizens” has caused for many poor southern and eastern European countries or sub-Saharan Africa? Markets are certainly a central institution in any free and open society, and have been proved historically to make people free and also to make them rich, but they must be regulated by normative principles, or, following Karl Polanyi’s expression, they risk ending up creating a “market society” (Polanyi 1944), where everything, in particular people, is for sale (Sandel 2012; Satz 2010), and where the losers are left to their own devices.

It would be useful here to check on the “de-commodification” score of the European Charter: How much do the European freedoms work toward treating people as persons, not as simply workers or consumers (Esping-Andersen 1990, 49 and chap. 2)? This would shed a significant light on its policies towards migrants.

Let us take another example, that of the continuous restriction of social rights for EU migrants since the first waves of the 1990s (Barbulescu and Favell 2020) and its connection with anti-non-EU migration policies. The “hostile environment” to non-EU migration in European countries has been applied to EU migrants as well and has led to reshaping welfare entitlements and removing the welfare rights of EU job-seekers. The trend has been towards a highly selective offshore model for freedom of movement that contradicts the European principles of the Charter. Discrimination in the allocation of social rights and benefits to EU migrants is an obvious infringement of the principle of free movement. “Freedom of movement rights [have been] undone on all sides” (Barbulescu 2020, 158). The European Court of Justice, too, has played a role in restricting social rights and freedom of movement only to highly qualified workers, leading to a two-tier migration system. The migration crisis is definitely

<sup>11</sup> An illustration of this utilitarian view would be the European immigration policies concerning medical personnel. Only Germany follows the 2010 WHO Global Code of Practice on the International Recruitment of Health Personnel and has refused to allow the immigration of medics and nurses originating from countries with acute shortages of these professions where basic needs risk not being met.

embedded in values and policies that affect the whole of European freedom of movement and make it unjust.

This trend towards the “commodification” of freedom is prevalent too in the evolution of social policies in Europe. The treatment of non-EU migrants is just one aspect of wider social policies and their understanding of the principle of freedom.

Since 2000, the Lisbon Treaty and the European Employment Strategy have encouraged European states to implement new social policies—called active workfare policies—that put the emphasis on people’s ability to function and that treat them as active members of society, not as inert recipients of social welfare. The social investment model treats people as precious “human capital,” valuable for the wider society and that, as such, should be invested in, not wasted. One could object to such a utilitarian approach that it values human agency mostly for its contribution to economic production, and that freedom is again seen as a means for economic progress and innovation, not as having intrinsic value (Sen 1999, 36). But it can also be seen in another light as being more respectful of people’s agency, and, as a consequence, of their dignity.<sup>12</sup> More importantly, the language of social investment policies can show how wasteful the present inhuman treatment of migrants is for the wider society. One could use this argument in order to remedy fully the negative contexts created by the single market and the single currency.<sup>13</sup> Instead, unfortunately, the European devaluation of freedom has led to disregard of the “human capital” that migrants represent and to a situation where they end up being no longer employable or “useful” and being excluded from the labour market because of their time spent in camps and the loss of skills that ensues (Agier 2018).

#### 4. The “Privatization” of Freedom and the Erosion of Political Rights

The second and connected contradiction, and my second criticism, of the dominance of narrowly understood so-called “economic values” in the Charter is the “privatization” of freedoms and the impoverishment of public life that such an interpretation generates. If the dominant accepted values are prosperity and economic growth, there is no space left for public debates on alternative views when other objectives such as justice, solidarity, and equality or the protection of the environment could be argued for. A dominant conception of the good such as utilitarianism crowds out the public space, making it impossible to freely exercise “public reason” (Rawls 1993). The dominance of the markets has weakened civic involvement in Europe (see the “yellow vests” crisis in France) and has undermined the appeal of public reason through the weakening of political freedoms (see the example of Brexit), which have a limited place and no priority in the Charter (Art. 12).

What is striking, in the present crisis, is the lack of any public voice to protest against the obvious infringement of fundamental principles. Neither politically nor legally has it been possible to build a wide movement of contestation of decisions

<sup>12</sup> On the difference between “human capital” theories and the “capability approach,” see Sen 1990, 292–7.

<sup>13</sup> “The ambiguity of the Lisbon Strategy has allowed policy makers a selective use of and reference to the message of the European Employment Strategy, and a bias in favour of commodification and flexibility rather than social investment and security” (Morel, Palier, and Palme 2012, 372).

which, as I have shown, are part of a wider erosion of social rights that has consequences for political rights and freedoms. The possibility to contest all these restrictions, exclusions, and mistreatments has been denied, and migrants are not only without rights, but also without a voice. Interestingly, the only movements of contestation have been those of private individuals or NGOs (Agier 2018), of civil society, a fact that underscores the process of “privatization” of freedom in Europe.

My main worry is that, given that not all freedoms on the list are always compatible with each other and cannot all be protected at the same time—for example, freedom of religion (Art. 10) and the right to marry (Art. 9)—one needs a way to arbitrate among them, and, in a democracy, this can only be achieved through public deliberation, public reason, and justificatory processes that establish the priority of some basic liberties over others, such as property rights (Rawls 1993). This could explain the democratic deficit of the Union: There exists no vibrant European public space as a condition for realized agency and freedom.

Among the basic liberties in the Charter, political freedoms should have priority, as they are key to protecting other liberties through public and political engagement. As John Rawls writes, “social and economic inequalities in the background are ordinarily so large that those with greater wealth and position usually control political life and enact legislation and social policies that advance their interests” (Rawls 2001, 148). Most people do not have the means to properly understand and exercise their rights, and these remain mostly formal possibilities. Political liberties are then crucial to guarantee equal access to legislative power and to protect the fairness of the political process. “The fair value of the political liberties ensures that citizens similarly gifted and motivated have roughly an equal chance of influencing government’s policy and of attaining positions of authority irrespective of their economic and social class” (Rawls 2001, 46; 1993, 358). “The guarantee of fair value for the political liberties is one way in which justice as fairness tries to meet the objection that the basic liberties are merely formal” (Rawls 1993, 328). This necessitates that European institutions be in place to guarantee the effectiveness of political liberties in all various member states and that voices of contestation be properly heard.

Hopefully, the 2009 Lisbon Treaty and the Pact on Migration and Asylum initiated in July 2020 by European commissioners Margaritis Schinas and Ylva Johansson are opening up new perspectives towards the democratisation of European freedoms, especially with the creation of a European Citizens’ Initiative (2012), which could give a voice to criticisms and contestation of the present migration policies.

## 5. Postnational Freedom: A Failure? (European and National Identities and Their Differing Views on Freedoms)

The last contradiction stems from the origins of the Charter in the 1948 Universal Declaration of Human Rights and its claims to universalism. I would like to call it, if I may, the failure of postnational freedoms against national identities. The European project was always ambiguous, fundamentally transnational or “postnational,” but also submitting to the resistance of national identities and interests. This was of course the contradiction that made any agreement on a European constitution impossible in the Maastricht Treaty.

Where does the “European” in the European Charter stand? What is European about the Charter and not simply universal? Are European rights universal human rights and, in that case, how can they allow discrimination against non-EU migrants? Should European identity be understood in cosmopolitan terms or in terms of so-called “European values” with the risk of some nations/religions/cultures hijacking the European dimension as Christian, white, etc.? Defining “freedoms” in a vague and very general sense as a fundamental right obviously helps to compromise, but does not recognize the plurality of conceptions that divide national cultures and traditions. This lack of recognition is dangerously harmful, as the present developments in Europe show. Dissolving national identities into an abstract European model is not a satisfactory answer, as it leads to rejections and feeds nationalistic fervour.

Here some thinking about pluralism is needed. One would have hoped, following John Stuart Mill (1977, chap. XVI), that pluralism would have helped the European project and to weaken nationalism through the effects of freedom of movement, mobility, contacts, and interdependencies (Van Parijs and Rawls 2003, 11), but this has not been the case, and the issue of a polyethnic European demos is still not resolved.

In contrast with abstract universalism, pluralism recognizes the diversity and tensions that exist among different historical traditions and values. It defines universality as “within reach,” as a goal, not as a given; and, more importantly, it values diversity and dialogue. Agreement is never a given but the result of the transformative and integrative power of the public sphere and of public debates. A consensus, not a compromise, should be possible once we abandon the illusions of unanimity or of overwhelming allegiance to “common” values. A good example of that sort of pluralism would be a debate on the various interpretations of European freedoms, on the value of its de commodification and of free public reason.

## 6. An Alternative Freedom-Based Moral Compass

We need to turn away from the dominance of utilitarian values and find another freedom-based moral compass which I would now like to sketch (Audard 2019).

### 6.1. *Freedom, “Plans of Life,” and “Self-Realization” (John Rawls)*

One distinctive feature of Rawls’s analysis of freedom is its *developmental* view of the person, referring to plans of life, not, as in utilitarianism, to present needs and instant satisfaction. “A person’s good is determined by what is for him the most rational *long-term plan of life* given reasonably favourable circumstances” (Rawls 1999, 79; my emphasis) and “a person may be regarded as a human life lived according to a plan,” not simply as a thing (ibid., 358).

Three ideas are of note here. To be rational is, first, to be able to plan and to schedule activities and resources for the long term, envisaging the consequences of so doing: A temporal horizon is a necessary condition for rationality; hence the need for freedom. Instead, to take “men’s propensities and inclinations as given, whatever they are, and then seek the best way to fulfil them” is a mistake concerning the very nature of rationality (Rawls 1999, 27). Second, to be rational is to be capable of using the means necessary to promote one’s ends, and thus to project oneself in the future within a temporal horizon. “Rational individuals, whatever else they want, desire certain things as prerequisites for carrying out their plans of life” (ibid., 348). Taking

interests as given without any consideration for the *ends* pursued is also a mistake in that second sense. Thirdly, and as a consequence, a degree of freedom to choose and rank satisfactions is necessary for rationality. To ignore that is another mistake leading to the familiar dilemmas of interpersonal comparisons of welfare. Defining the good in developmental terms or plans of life allows interpersonal comparisons not of satisfaction—which is impossible—but of the *means* to promote satisfaction. What is compared are not subjective states of mind or satisfactions, but “things which it is assumed they all normally need to carry out their plans” (ibid., 81). A conception of the person as a developing being, capable of choosing, planning, and adapting resources for its own ends, is implied here.

This conception is reinforced when Rawls analyses the temporal sequence in which our activities are carried out and the role of deliberative rationality in properly organizing this sequence of activities. For long-term plans, the principle of inclusiveness is added to the familiar principles of rational choice: Human beings have a higher-order interest in following the principle of inclusiveness, stating that the more inclusive plan is to be preferred; rationality means “preferring, other things equal, the greater means for realizing our aims and the development of wider and more varied interests” (Rawls 1999, 363). This is where Rawls introduces the notion of *self-development* as self-realization: “human beings enjoy the exercise of their realized capacities (their innate or trained abilities), and [...] this enjoyment increases the more the capacity is realized, or the greater its complexity” (ibid., 364). This leads to rejecting the view that our interests are fixed. As a consequence, the principles of rational choice, in particular that of maximization, are not sufficient for ranking our plans of life. Instead, Rawls moves towards a fuller description of rationality in the face of long-term decisions. The principle of responsibility to self is derived naturally from the idea of a plan of life: “a rational individual is always to act so that he need never blame himself no matter how his plans finally work out” (ibid., 370–1). “Acting with deliberative rationality can only insure that [...] we are responsible to ourselves as *one person over time*. [...] One who rejects equally the claims of *his future self and the interests of others* is not only irresponsible with respect to them but in regard to his own person as well. [...] The principle of responsibility to self resembles a principle of right” (ibid., 371; my emphasis).

From the idea of long-term planning, Rawls now moves to the idea of a developing self, striving to implement its plans and getting pleasure from their realization. As he puts it, according to the Aristotelian principle, “human beings enjoy the exercise of their realized capacities (their innate or trained abilities)” (ibid., 364) and “we are led to expect even greater satisfaction once we acquire a greater repertoire of skills” (ibid., 375). The more complex activities give even more pleasure over time, and a companion principle states the *social interdependency* of rational plans of life as others confirm and take pleasure in what we do. Our nature as self-developing beings and the type of satisfaction we gain from that development are dependent on others’ validation and reciprocity and on fair and just social conditions. My conclusion, at this stage, is that the shift to a *long-term* conception of our ends combined with the Aristotelian principle yields a better understanding of the connection between self-development and freedom.

## 6.2. Freedoms as “Capabilities” (Amartya Sen)

Amartya Sen’s critique of rational choice theory is another source of inspiration for a similar understanding of the person as a developing being. In *Rationality and Freedom* (Sen 2002) as in *The Idea of Justice* (Sen 2009), he rejects the “extremely limited understanding of reason and rationality” (Sen 2009, 179) in favour of a distinction between, on the one hand, having “reason to choose” something (ibid., 180) as a capacity to project ends in a temporal horizon, and, on the other hand, “what would be rational for us to choose” (ibid.) at a certain point in time. The main argument for “real” freedom here is the ability to sustain the choice after scrutiny, that is, the *time-relevant* conception of rationality. But it is mostly in Sen’s interpretation of *freedom* as a component of human wellbeing that we find the link with *self-development* (Sen 1999). The “*process of choice itself*” is significant (Sen 2009, 228; italics in the original), and “individual advantage is judged [...] by a person’s capability to do things he or she has reason to value” (ibid., 231). “The capability approach focuses on human life, and not just on some detached objects of convenience, such as incomes or commodities that a person may possess” (ibid., 233). Like Rawls and against resource-based or utility-based conceptions of the good, Sen is looking for a freedom-based approach, a way of understanding social justice in terms of the treatment of persons, not solely the distribution of goods. The developmental conception of persons is the answer to this concern for justice, which is perfectly expressed by Elizabeth Anderson, as justice should be considered “as a relationship among people rather than merely as a pattern in the distribution of divisible goods” (Anderson 1999, 336): “injustices may be better remedied by changing social norms and the structure of public goods than by redistributing resources” (ibid.).

## 7. Conclusion

What is at stake, really, in my opinion, is that the economic conception of the person dominates the liberal view of freedoms in the European Charter of Fundamental Rights and that this is damaging the credibility of the Charter that can be seen in the end as promoting economic liberalism and free markets (mere opportunities) at the cost of moral individual self-realization and autonomy (“real” freedom), of a vibrant public sphere (free public reason), and of a pluralistic view of European identity.

*Department of Philosophy, Logic and Scientific Method  
London School of Economics and Political Science  
Houghton Street  
London  
WC2A 2AE  
Email: c.audard@lse.ac.uk*

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