Editorial

Dynamics of European and national citizenship: inclusive or exclusive?

Citizenship is an eminent example of the dynamic development of European constitutional concepts. From a status to which the member states wished not to attach any significant directly effective new rights, the Court of Justice has declared European citizenship to be 'the fundamental status of nationals of the member states' (*Grzelczyck*) and has given one of the prime citizenship rights, the freedom to reside in member states, direct effect. This development and in particular the interplay between constitutional developments at European Union and at national level regarding citizenship deserve reflection. We focus on the extent to which citizenship constitutes an exclusive bond with a political community which distinguishes those who are its members from those who are not.

Two views seem to be at the basis of relevant developments: on the one hand a more cosmopolitan and liberal European approach which stresses the inclusiveness of citizenship, on the other hand a view which is more exclusive and republican. In the first view, persons are considered to have the fundamental right to free movement across borders; the refusal of entry and residence is an exception which requires special justification. Citizenship, in this view, is inclusive in as much as typical citizenship rights such as rights of abode and residence and electoral rights are not the privilege of those with formal citizenship status. The second and opposite view starts from the principle that member states have the sovereign right to decide about entry and residence; in principle a state can refuse entry to any person and the right to admission is a privilege. Citizenship is an exclusive concept in as much as its corollary rights are reserved to those who have obtained a formal status of 'citizens' only. It is not difficult to associate supranational EC law with the first approach. It is in fact and in law the principle at the basis of the relations *within* the European Union as between member states and their citizens. The second approach is typically a classic national state approach as it regards aliens, or for Union member states: non-EU-citizens, 'third country nationals'.

The two views are in permanent tension. Although this was not the prime function of *Union* citizenship, which aimed primarily at the relations with member states' citizens, this citizenship too distinguishes between 'insiders' and 'outsiders', EU citizens and non-EU citizens; inclusion in a sense implies exclusion.

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Moreover, there is another reason why one cannot escape the tension between the inclusive and exclusive citizenship which is that the Union citizenship proclaimed in the EC Treaty does not stand in isolation from national citizenship. The development of European citizenship cannot be viewed as an autonomous process. Formally Union citizenship is determined by national citizenship (Article 17 EC Treaty) because nationality of a member state determines EU citizenship status. We submit that also substantively member state citizenship determines EU citizenship. It is here that the cosmopolitan and liberal citizen meets the national and republican citizen.

However much the European Court of Justice proclaims European citizenship as the fundamental status of member state nationals, which might suggest that they derive from this status certain rights over and above those which they have on the basis of national citizenship, its case-law reveals that the rights of abode entailed in European citizenship add little which is complementary to the rights which already exist under member state law. The case-law reveals that in essence European citizenship entails non-discrimination: an EU citizen residing in another member state should enjoy the same rights as the citizens of that member state (and sometimes he may carry his own member state's rights into the member state of residence and have them respected). Citizenship is *equal* citizenship. The kind of rights which the EU citizens resident in another member state enjoys, depend primarily on the law of the member state: it may concern social benefits granted to one's own citizens (*Grzelczyck)*; entrance to university education on the same conditions (*Commission* v. *Austria*, case C-147/03); the prohibition to impose higher taxes (*Turpeinen*, case C-520/04); and the right to make use of the system of family names of one's member state of origin (*Garcia Avello*, case C-148/02). Member state rights are decisive and EU citizenship forms their guarantee. The nexus with rights as granted by member states remains intimate.

We can observe the dependence of European citizenship rights on national law also in recent case-law on electoral rights of citizens regarding the European Parliament. At the same time this case-law offers a beautiful example of the more liberal and cosmopolitan view of citizenship embraced by the Court of Justice. In *Spain* v. *UK* (case C-154/04), the Court allowed the awarding of the right to vote for the European Parliament to persons *not* having regular British citizenship, and hence to non-EU citizens. Here the Court repeated its statement about the fundamental status of EU citizens, but this time not in the framework of the prohibition of discrimination of some sort, but in order to point out the non-exclusive nature of European citizenship: 'that statement does not necessarily mean that the rights recognised by the Treaty are limited to citizens of the Union.' This implies there is a distinction between the *formal* status of being an EU citizen, and having a citizenship right. EU citizenship is indeed not necessarily exclusive: also non-citizens can enjoy citizenship rights.

This cosmopolitan approach to citizenship and citizenship rights is evident also in traditional EC law. Secondary EC law extended the right of free movement and residence to spouses and certain other relatives of an EU citizen moving from one member state to another, irrespective of the nationality of those family members. So 'third country nationals' enjoy what for all intents and purposes are typically citizenship rights.

The scope of the rights of those third country nationals has, however, become controversial. The cause of controversy lies in the ambiguity of secondary EC law: do the rules privileging the third country nationals mean that they can always claim entrance and rights of residence to EC countries under secondary EC law, even if they are not yet legally residing in a member state? Or can they only profit from this EC citizenship privilege after a member state has autonomously, on the basis of its own legislation, granted them rights of abode in the original member state of the EU citizen in the first place? The case-law had become contradictory, sometimes stressing that a spouse who is a third country national must simply be granted a visa to join her husband on the basis of Community law (*MRAX*, C-459/99), but sometimes saying the opposite, i.e., that a third country national must first be legally admitted to the member state of his EU citizen spouse, before the third country national can enjoy rights of abode under EC law in another member state (*Akrich*). The matter was expected to be clarified in the *Jia* case (case C-1/05). Behind it loom the member states' sensitivities as to their being able to exercise autonomous rights to admit or not to admit third country nationals. It is the difference between regular free movement rights *within* the Union, where the 'Community method' prevails, versus the Area of Freedom, Security and Justice (Title IV EC Treaty – sometimes referred to as the 'fourth pillar'), in which member states are the prime agents with regard to *external* border controls. In *Jia*, the Court distinguished *Akrich* by reference to the fact that in that case the non-EU citizen involved had been deported, whereas in *Jia* this was not the case. It concluded that in the former case the condition of legal presence in a member state is called for, whereas in the latter Community law does not require member states to pose such a condition. Thus, the Court decided to leave it to the member states to be restrictive towards entry of third country nationals who are family members of EU-citizens, or to take a more cosmopolitan approach.

The current political climate is not propitious to a cosmopolitan approach either in EC law or in national law when it concerns third country nationals' rights of abode. At present, some member states feel the pressure of political populism and the fear of the alien, reinforced by the perceived post-'9/11' security threats, which can only strengthen the tendency for member state control. A number of member states who previously admitted third country nationals without too much ado, now require all kinds of proof that they live up to preconditions

concerning their substantial ties with the relevant state, before they are given a right to long term residence. These so-called 'integration requirements' consist, for instance, in having sufficient knowledge of the language and society of the relevant state. This is the case in at least Austria, Denmark and the Netherlands, which have recently been pursuing similar migration policies in this regard. Instead of taking residence rights as rights which are not exclusively reserved to persons having the formal status of 'citizen', these rights are reserved to persons who are able to prove special ties (being 'integrated') with a particular state.

The consequences at grass root level are paradoxical: a third country national can only establish himself in the Netherlands after having passed an exam in order to test his level of 'integration' in Dutch society; a Greek national who only speaks Greek, a British national who only speaks English or an Estonian who only speaks Russian, none of whom has ties of language or culture with the country nor intends to develop them, is exempt from the same requirement, because otherwise that would constitute unjustifiable discrimination between Union citizens. Moreover, the national tendency to grant citizenship rights only to persons showing a particular bond with the state in question sits uneasily with the idea of a multilingual and multi-cultural Europe of diversity in which unity is vested at the personal level by the notion of a European citizenship. It becomes even more uncomfortable to see how the European Union has promoted these national tendencies by allowing member states to introduce 'integration requirements' as preconditions for enjoying rights of abode, as happened in the directives on long-term residence of third country nationals and on family reunification. It is not hazardous to speculate that the 'integration requirements' will become further entrenched, and should a common migration policy materialise, they will most likely become part and parcel of the European concept of citizenship.

Thus, European citizenship may well become more and more exclusive by excluding non-EU-citizens from certain citizenship rights which were previously not withheld from them, thus enhancing a well defined and demarcated identity of EU citizenship. At the very least, it does not seem a very virtuous manner of fostering the solidarity between the members of a political community which citizenship in a republican vision has the vocation to bring about, by doing so at the expense of solidarity with third country nationals.

One must wait and see how these various tendencies will develop and whether a more constructive citizenship will evolve over time. To a large extent it also remains a matter of the interplay between European and member state constitutional policies and practices regarding citizenship. It merits full scholarly attention and reflection in the years to come.

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