Is European Union (EU) citizenship the primary legal status of nationals of EU Member States (MS)?

The legal concept of EU citizenship was first codified in the Maastricht Treaty. Although the concept was not greatly varied in the Lisbon Treaty, Articles 20-25 TFEU created new political and electoral rights, and most importantly, they strengthened the existing rights of movement and residence already protected under the umbrella of EU citizenship by associating them to the prohibition of discrimination on grounds of nationality.

Before Maastricht, the incipient concept of EU citizenship was reserved for those who took part in the internal market. The definition of the recipients of the rights granted by EU citizenship such as worker, service provider or recipient and those with the right of establishment, was determined supranationally and not applicable to those who fell outside the established categories. However, pre-Maastricht cases such as Cowan and Werner show the discrepancies brought about by ECJ rulings when determining who was deemed to be contributing to the market and fell within the parameters of EU law. In Cowan, the European Court of Justice (ECJ) ruled that a British citizen who was robbed in Paris could rely on EC (now Union) law because he was considered a service recipient, while Dr. Werner, a German dentist who practiced in Aachen but whose residence was in the Netherlands was not considered to have sufficient status as an economic migrant, and didn't qualify.

The pre-Maastricht concept of citizenship associated with the free movement of workers, was linked to commercial purposes and the movement of people to pursue an economic activity, linked to inter-state movement for economic purposes: a market citizenship. The ECJ's test had three limbs: (i) the exercise of inter-state movement, (ii) the exercise of an economic activity and (iii) the impediment to inter-state movement.

The codification of EU citizenship in Maastricht was deemed necessary in order to clarify its application. It influenced the development of the law of free movement of workers and the overlap between the two categories, workers and citizens was consolidated in Directive 2004/38 on the free movement for EU citizens and their non-EU family members. The Directive not only included workers but also their families, self-employed persons, students and other type of non-economically active EU nationals. By removing the need to pursue an economic activity in order to be considered a EU citizen, it has been argued that the scope of the ratione personae was raised from around 2.3 percent of member state (MS) nationals to 100 percent in 1993. Spaventa argues that any citizen of a member state falls within the scope of EU citizenship, without having to establish inter-state activity. All that is required is that the person holds nationality of a MS. This was demonstrated in Grzelcyk, where a French national student was able to apply for social assistance from the Belgian government. It was stated that Belgium was under an obligation to provide the assistance on grounds of non-discrimination by virtue of being a EU citizen. He could not be treated differently from Belgian students.

The new post-Maastricht position, where non-economically active persons are included within the rights bestowed by EU citizenship make it difficult to reconcile with the ethos of the EU: that the internal market was the core for integration. It became clear that if the ECJ interpreted the concept of citizenship as stated in the Treaties, it would not be possible to implement the new view of citizenship. This meant that the ECJ started to move away from textual interpretation in order to depart from the internal market and it started to allocate EU citizenship its own legal attributes.

Article 20 of the Lisbon Treaty states that EU citizenship is an additional right and it does not replace national citizenship. Furthermore, there are limitations imposed under Article 21,

which states that such limitations are imposed not just by the Treaties but also by measures adopted to give effect to the Treaties, and some of those measures concern social security or social protection. The provisions in Articles 20 and 21 indicate that EU citizenship is contingent upon a person having the nationality of a MS in the first place and it does not replace national citizenship in Europe. As such, acquiring EU citizenship was left under the exclusive competence of the MS by allowing national laws to determine nationality.

However, the non-textual interpretation of the Treaties and the addition of non-discrimination on grounds of nationality resulted on a re-interpretation of the limitations under Articles 20 and 21, and removing decision powers from the MS. A good example can be found in Martinez Sala, where the ECJ stated that by virtue of Articles 18 and 20(2) TFEU, an unemployed Spanish worker was allowed to claim benefits in Germany, which had been denied by the German authorities. Despite being unemployed, the ECJ also stated that Maria Martinez Sala could be considered a worker, therefore also expanding the definition of worker under the Treaties. The principle of non-discrimination allowed the ECJ to circumvent the limiting conditions of Articles 20 and 21 by disposing of the requirement of being economically active and the requirement that the person should have sufficient resources to avoid becoming a burden on the social assistance system of the host MS.

The ECJ continued to advance the concept of EU citizenship in Rottmann, where the Court not only stated that EU citizenship had the capacity to confer rights upon citizens but it further stated that EU citizenship was an issue separate from the internal market. Rottmann also raised the issue of whether revocation of nationality was a matter for EU law or it was purely a wholly internal matter for the MS. In this case, Janko Rottmann, an Austrian national had acquired German nationality through naturalisation in order to avoid criminal proceedings in Austria. The ECJ stated that the withdrawal of German nationality would lead

to de facto and de jure statelessness, and therefore the issue was a matter of EU law and not a wholly internal matter.

Rottmann paved the way for Ruiz Zambrano, where the claimant, a Colombian national had two daughters born in Belgium during irregular stays in the country. His applications for asylum and residence were rejected several times by the Belgian authorities. The ECJ stated that granting a work permit and residence for the father of two EU citizens was necessary to safeguard 'the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'. The ECJ ignored the objections of the Belgian court, which stressed the purely internal character of nationality issues. In Ruiz Zambrano, the ECJ also abandoned cross-border issues because the EU citizens were minors who had never left Belgium. The implications of the decision for the independence of MS on issues of nationality and the further intrusion of the ECJ on internal matters prompted a great deal of academic criticism because it was seen as a challenge to MS's sovereignty on nationality law.

Not only is this new approach to EU citizenship a sensitive political issue but it has blurred the concept that EU citizenship was linked to the existence of being a citizen of a MS. Citizenship seems to have become a matter of EU competence which is contrary to the wording of the Treaties. The Ruiz Zambrano judgment shows a reconceptualisation of the meaning of 'wholly internal' matters, and it has removed powers from the MS when making decisions on issues of nationality and immigration, placing instead those powers in the hands of the people, by virtue of being 'EU citizens'.

Furthermore, the concept of citizenship based on "the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union' has created a further burden for MS not only because they are bound to justify their actions and decisions but also because the determination of what constitutes a 'wholly internal' matter falls upon the ECJ. A

MS is unable to issue legislation that can undermine the concept of EU citizenship, and this has made it difficult to deport a EU citizens even in cases where they may be in contravention of secondary law or even if they fail to meet the minimum requirements to establish residence. This is because the MS would be going against the principle of non-discrimination on grounds of nationality. By giving EU citizenship the capacity to confer rights, MS have been deprived of being able to choose who they want to admit in their territory or not, which should be their prerogative.

The limits established under Article 21 have been eroded by ECJ rulings. In Baumbast, The ECJ stated that Article 21(1) is directly effective and therefore EU citizens can use the national courts to enforce those rights. This contradicts the rights allocated through EU citizenship pre-Maastricht because the residence EU directives required that a person who wanted to become a resident of a MS needed a level of economic sufficiency and health insurance. The new legislation, the Citizens Directive, created new rights such as the right of permanent residence. This has prompted Dougan to argue that there has been a shift from 'market citizenship' to 'social citizenship' in which a person acquires rights completely independently from any productive activity. He further argues that this project of social engineering by the EU is imposing an unreasonable burden on public resources in the various MS.

It is no longer necessary to have a cross-border situation to access the rights conferred by EU citizenship because of the link the ECJ has made between citizenship and non-discrimination. It can be argued that apart from making EU citizenship per se a purveyor of rights, the ECJ has also allocated itself extra powers. In cases such as Ruiz Zambrano, where Article 8 of the European Convention on Human Rights was engaged, the ECJ has overlapped the jurisdiction of the European Court of Human Rights (ECtHR). Yet, the ECtHR has not

contradicted in its rulings the decisions of policies made by MS, regarding internal issues such as immigration control. Had the application of decisions by the ECtHR been followed, Ruiz Zambrano would have been resolved differently. It is questionable whether this is something the ECJ can do, but by stating that nationality decisions by the MS are subject to principles of proportionality the ECJ could create a new opening for the inclusion and applicability of fundamental rights in its rulings, thereby expanding its jurisdiction. More recent cases such as McCarthy crystallise the fundamental distinction of rights conferred by EU law to its citizenship by virtue of being an EU citizen.

In conclusion, EU citizenship is the primary legal status of nationals of EU MS, and it is capable of conferring rights upon EU citizens. Although originally the aim of EU citizenship was to further the single market and it was not only linked to the free movement of workers but applicable only to those who took part on it, this changed post-Maastricht. Originally, only workers and other categories such as service providers or service recipients and those with the right of establishment qualified for EU citizenship. The codification of EU citizenship into the Maastricht Treaty brought about changes to the concept. Through the rulings of the ECJ and in order to obliterate borders between MS and therefore promote federalism, EU citizenship started to acquire another dimension through the removal of the requirement of cross-border issues and it became a concept capable of conferring rights on its own.

It has allocated rights upon EU citizens to challenge immigration, nationality and residence issues successfully through cases such as Ruiz Zambrano. As a consequence, the unique status conferred by the ECJ to EU citizenship has created problems for the autonomy of MS and it has allowed the ECJ to expand its jurisdiction to the inclusion of fundamental rights. This has been achieved by departing from the textual interpretation of the Treaties and by

interpreting EU citizenship as being linked to issues of non-discrimination on grounds of nationality. EU citizenship altered the meaning of worker to included people who are not economically active, their families and dependents, creating pressure on the public services of the host MS. The ECJ has circumvented the limitations imposed in Article 21 of the Lisbon Treaty by making it directly effective and allowing EU citizens to be brought to court. The ECJ has further changed the meaning of 'wholly internal issues' in order to strengthen the rights conferred by EU citizenship. Although the concept is not fully developed, there is no doubt that the ECJ will continue to develop it in the future.

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