

A comparative approach to European Union citizenship

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“Citizenship of the Union is destined to be the fundamental status of nationals of the Member States.”

Court of Justice of the European Communities²

In 1992, the concept of a European Union citizenship was introduced into the structure of the European Union in the Treaty of Maastricht.³ In the first years, this separate notion did not attract much attention. Of course, the European Community, later accompanied by the European Union in this respect, already provided many rights and duties to nationals of the Member States, rights and duties which would traditionally be given at the national level. Over the last years, in contrast, the notion of European Union citizenship itself has given rise to much discussion, leading to a re-appraisal of the notion of citizenship at the European level. In this paper, the contents of the notion of a European Union citizenship will therefore be placed opposite the contents of citizenship at a state level. A central question is whether a type of citizenship is needed at the European level which resembles the ‘classical’ national citizenship in all aspects. As Habermas⁴ already stated, it is not necessary to have all powers represented at the highest, i.e. European, level, which citizens traditionally possess at a

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² Case C-148/02 (Garcia Avello), Court of Justice of the European Communities, 2 October 2003.

³ It was introduced in the Treaty on the European Community, not in the Treaty on the European Union.

⁴ Jürgen Habermas, Why Europe Needs a Constitution, in: *New Left Review*, 11, September-October 2001, <http://www.newleftreview.net>

national level, as long as the total package of the two levels combined represents the general rights and duties of citizenship.

At the traditional national level, citizenship represents powers for the citizens at government level. These include the right to vote, to be represented in parliament etc.⁵ At the same time, the notion of citizenship is closely linked to the notion of nationality,⁶ not only in everyday language but also in powers linked to it. The idea to be able to move from place to place, from country to country, for instance, is usually considered to be part of both notions. Without suggesting that the European Union should move towards European nationality, replacing the present nationalities of the Member States, it will be very useful to compare the ideas about and contents of citizenship and nationality in several states with the present and possible future contents of European Union citizenship.

After a short description of the theoretical and philosophical background of the notions of citizenship and nationality, the contents of European Union citizenship will therefore be described. This notion of European Union citizenship will then be compared to the notions of citizenship and nationality in several countries. In this way, it will be possible to comprehend the scope and implications of European Union citizenship. Three European countries were selected for this purpose; European, because similar roots imply comparability. Firstly, the situation in the Netherlands will be described since it is one of the founding members of the European Union and has therefore left its mark on the structure of the European Union. Next, several European federal systems will be discussed – Belgium and Switzerland most notably – because many federal systems had to cope with similar problems as the European Union, namely to

⁵ See a.o. Earl M. Maltz, *Citizenship and the Constitution: A History and Critique of the Supreme Court's Alienage Jurisprudence*, in: 28 *Ariz. St.L.J.*, 1996, pp. 1135 ff.

⁶ 'Nationality' is often seen as the international law aspect, while 'citizenship' refers to its implications in national law. See Stephen H. Legomski, *Comment: Why Citizenship?*, in: 35 *Va.J.Int'l L.*, 1994, pp. 279 ff.

combine stated and federal citizenship, thus a two-level citizenship. A discussion of USA citizenship will be added in order to provide a full view of federal citizenship through a system which lays so much emphasis on the rights and duties of its citizens.

In this way, a new form of transnational citizenship will be the subject of discussion. Is the European Union paving the road for a type of citizenship which transcends more traditional national citizenship or is European Union citizenship the consequence of the existence of a state-like structure which already possesses many yet not all characteristics of a state?

1. A Theory of Citizenship

It is necessary to first establish the theoretical contents of citizenship before it is possible to assess European Union citizenship. Traditionally, citizenship is linked to the nation-state.⁷ It represents rights and duties of the citizens of the state, most prominently of their nationals:

Citizenship is the embodiment of the strongest link between the individual and the State, a link which is reflected by the fact that the citizen is entitled to all the rights which the State grants and is subject to all the duties which it imposes.⁸

The link with nationality turns out to be very crucial in constitutional thinking since most discussion of citizenship in Western Europe are part of nationality issues; many countries emphasize the rights and duties given to nationals with much more limited rights for non-nationals.⁹ There are several possibilities to approach the issue of what is meant by citizenship. An historical approach would involve

⁷ Keith Faulkes, *Citizenship*, London 200, pp. 29-54.

⁸ Yaffa Zilbershats, Reconsidering the Concept of Citizenship, 36 *Tex. Int'l L.J.*, 2001, p. 689 ff.

⁹ The problems concerning dual nationality will largely remain outside the scope of this paper.

an indepth discussion of citizenship in, among other things, the ancient Greek city-states, the French Revolution and the American Civil War and early Constitutional developments.¹⁰ It is, however, for the purpose of this paper more efficient to look at theories containing essential elements for citizenship.

Citizenship can in this approach be considered to contain two aspects,¹¹ namely a functional aspect and a nonfunctional one. The nonfunctional aspect concerns a sense of cultural identity and community. This aspect is very difficult, if not impossible, to establish in a legal context. Yet, because it represents the legal relationship between the individual and the state, the functional aspect is about an individual's membership of a political community. It excludes those who are not part of this political community, thus those who usually do not have the nationality of the state in which they reside.

Recapitulating, as the most notable characteristics of national citizenship can be considered: (1) protection from the state by basic rights, (2) the right to move freely within the state, (3) the duty to obey the laws of the state, (4) the right of suffrage, and (5) the right to receive welfare protection. These rights and duties tend to be given in full extent to those who possess the nationality of the state, and only in lesser extent to non-nationals who have a permanent residency permit:

Nationality is the legal concept which defines the legal membership of an individual to a state. Citizenship may or may not ensue from nationality.¹²

¹⁰ For a more detailed discussion of this approach: see Nanda Beenen, *Citizenship, Nationality and Access to Public Service Employment*, Groningen 2001, pp. 35-38; and Peter Riesenberg, *Citizenship in the Western Tradition*, North Carolina 1002.

¹¹ As described in a Note: The Functionality of Citizenship, June 1997, 110 *Harv. L. Rev.*, pp. 1814 ff.

¹² Nanda Beenen, *op.cit.*, p. 43.

Nationality is therefore a commonly used link with citizenship in many states¹³ and shows an assumption of loyalty to the state.

Yet, in many states, including the USA,¹⁴ there is a movement towards extending the rights and duties of citizenship to non-nationals or to share those rights and duties with other states. In the Netherlands, for instance, third-country nationals have the right of suffrage in municipal elections. This is an indication that the contents of citizenship are shifting.

2. European Union citizenship

Turning to the notion of European Union citizenship, an important point in the present and possible future Treaty texts is that European Union citizenship exists next to the national citizenship of the Member States. It is interesting to check whether the total of rights and duties at the European level is sufficient compared to that at the national level. Especially concerning sovereignty that was at least partially transferred to the European level, it is important that citizens have been given the contrasting rights and duties. These do not directly result from the introduction of the notion of European Union citizenship but need to be deduced from the complete text of the treaties, secondary legislation and case law.

European Union citizenship is most notably present in the text and structure of the EC Treaty. The basic provision in this respect is Art. 17 TEC:

¹³ Zilbershats, *op.cit.*

¹⁴ Peter H. Schuck, The Re-Evaluation of American Citizenship, Fall 1997, *12 Geo. Immigr. L.J.*, pp. 1 ff; and Earl M. Maltz, *op.cit.*

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.
2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.

Striking aspect of this notion of citizenship is its link to nationality; if you take someone's nationality of an EU Member State away, the European Union citizenship disappears with it.¹⁵ This strong link is a direct result of the origin of the European Union, especially of the European Economic Community. The emphasis on economic activities meant that the system was designed to give the economically active nationals of the Member States the opportunity to work in other Member States. This did therefore not include rights of non-employees or the economically inactive, rights of third-country nationals, and did certainly not include social benefits for any of these categories. Only recently were there developments concerning rights for third-country nationals like the freedom of movement between the Member States once one has a long-term residence permit in one of the Member States.¹⁶

In the same chapter of the EC Treaty, the different provisions contain the essential elements of European Union citizenship, in addition to the details of free movement of persons, which has its own dynamics while its basis is laid down in Art. 18 TEC. The right of suffrage in the Member State in which a national of one of the Member States resides, is secured at the municipal level in Art. 19 TEC, along with similar rights for the election for the European Parliament. The remaining elements concern the right of petition (Art. 21 TEC) and the right to consular protection in third countries (Art. 20 TEC). This means

¹⁵ H.U. Jessurun d'Oliveira, *Het Europese Hof activeert het Europese burgerschap*, in: *Nederlands Juristenblad*, 28 November 2003, pp. 2238-2243.

¹⁶ Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, (COM(2001) 257 final (still pending)).

that some of the more traditional elements of citizenship are extended to the nationals of other Member States. Added to this is the protection of basic rights on all levels: the national level (via the national constitutions) and the European level (via the – non-binding – European Union Charter of Fundamental Rights), assuring that the citizens are protected from unlawful acts by any governmental institution.

As stated above, an important factor in the structure of the European Union is free movement of persons (Artt. 39-42 TEC), most notably of the economically active nationals of the Member States. This is laid down in the EC Treaty and in more detail in secondary legislation, in regulations¹⁷ in particular. This element of European Union law is sometimes even described as a clear move towards citizenship in itself.¹⁸ It includes rights of family members of workers,¹⁹ students,²⁰ and retired workers.²¹ The free movement of persons is closely linked to another basic element of European Union law: the prohibition of discrimination on the basis of nationality, as laid down in Art. 12 TEC. This principle means that a Member State is not allowed to treat nationals of the other Member States worse than its own nationals.²² This is necessary in order to allow free movement of persons to take place without any obstacles raised by governments.

Other aspects of European Union citizenship were given substance in case law by the Court of Justice of the European Communities. These aspects concern social benefits for nationals of other Member States by avoiding indirect

¹⁷ Regulation 1612/68 lays the basis for this system.

¹⁸ A. Castro Oliveira, *Workers and Other Persons: Step-by-step from Movement to Citizenship – Case Law 1995-2001*, in: *Common Market Law Review* 2002, pp. 77-127.

¹⁹ As laid down in Regulation 1612/68.

²⁰ Good examples are the famous EC student exchange programs ERASMUS and SOCRATES. See als H. André de la Porte & L. Zegveld, *Mobiliteit van studenten en docenten binnen de Europese Unie*, Nuffic Papers no. 4, 1996.

²¹ Directive 90/364-366.

²² R. Barents & L.J. Brinkhorst, *Grondlijnen van Europees Recht*, Deventer 2003, pp.333-334.

discrimination,²³ several social basic rights like the rights to receive medical treatment in other Member States,²⁴ and the position of family members of migrant workers.²⁵ In addition to these sources of European Union citizenship, the Court of Justice has recently gone one step further and has used to notion as a link to bring cases within its reach which would otherwise probably fall outside the scope of European law. This concerns most notably the position of students and of third-country nationals. One of the first of these probably was the Martínez Sala case.²⁶ In this case, the Court of Justice ruled that child allowance had to awarded to a mother from another Member State who did not have a residence permit but used to have one in the past. In the Grzelczyk case,²⁷ it was stated by the Court of Justice that, when having fulfilled the same conditions as the national of the Member State of residence, a European Union citizen with the nationality of another Member State is entitled to similar social benefits. A similar line of reasoning was used in the D’Hoop case,²⁸ in which a Belgian national was denied social benefits in Belgium because she been at school in France. A striking case on the consequences of European citizenship was the Carpenter case,²⁹ which was ruled on the same day as the D’Hoop case. In this particular case, being married to a European Union citizen meant for an illegal third-country national that she couldn’t be extradited because she made it possible for the European Union citizen to exercise his right to free movement. This selection of case law shows that not only the idea of citizenship was partly brought to the European level, but also that it was extended in many ways beyond the traditional elements of citizenship.

²³ A recent example is Köbler, C-224/01, Court of Justice 30 September 2003.

²⁴ For instance Müller-Fauré & Van Riet, C-385/99, Court of Justice 13 May 2003; and Van der Duin & Onderlinge Waarborgmaatschappij ANOZ, C-156/01, Court of Justice 3 July 2003.

²⁵ I. Sewandono, *Werknemersverkeer en gezinsleven*, Deventer 1998.

²⁶ Case C-85/96, Martínez Sala, 1998.

²⁷ Rudy Grzelczyk, C-184/99, Court of Justice 20 September 2001.

²⁸ Marie-Nathalie D’Hoop, Case C-224/98, Court of Justice 11 July 2002.

²⁹ Mary Carpenter, Case C-60/00, Court of Justice 11 July 2002.

European Union citizenship is thus at present specifically mentioned in the EC Treaty, with elaborations in secondary legislation and case law. This system is proposed to be complemented in the draft European constitution,³⁰ in which the notion is mentioned in even more detail in Art. 1-8:

1. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship; it shall not replace it.
2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Constitution. They shall have:
 - the right to move and reside freely within the territory of the Member States;
 - the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;
 - the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;
 - the right to petition the European Parliament, to apply to the European Ombudsman, and to address the Institutions and advisory bodies of the Union in any of the Constitution's languages and to obtain a reply in the same language.
3. These rights shall be exercised in accordance with the conditions and limits defined by the Constitution and by the measures adopted to give it effect.

This list resembles the Artt. 17-21 of the present EC Treaty. The separate elements of this new text have been given form and substance in other provisions in the text of the draft Constitution. It shows a more clear-cut way of approaching the notion of European Union citizenship. In conclusion, it has to be noted that there are two complementing aspects to European Union citizenship. Firstly, European integration has made it both possible and necessary to extend citizenship to the European level. Secondly, it has had its own, unique development which works trans-nationally and supra-nationally.

3. A Comparison with National Citizenship

³⁰ Draft Treaty Establishing a Constitution for Europe, submitted by the European Convention to the European Council meeting in Thessaloniki, 20 June 2003

Comparing this to national citizenship in the Netherlands, for instance, it first needs to be noted that most of its contents are linked to the Dutch nationality.³¹ Simultaneously, several of these rights and duties are given to third-country nationals as well as to Dutch and EU nationals. In basis, the third-country nationals enjoy the same basic rights laid down in the national Constitution, usually formulated as “everyone has the right to ...”. Yet, these rights tend to be limited by law, especially immigration legislation, limiting possibilities to stay in the country. On the other hand, third-country nationals were given the right to vote in municipal elections after a five-year legal stay in the country, a right not limited to the nationals of the other Member States of the European Union. In this way, the Netherlands is one step ahead of European Union citizenship.

When we now look at citizenship in federal state systems, it is important to pay attention to the rights and duties attached to citizenship both at the state level and at the federal level. First, it needs to be established from which level citizenship stems, which can easily be derived from the level which gives nationality and which gives basic rights and the right to vote. The importance of establishing this lies in the distribution of state powers between federation and state and may show whether the federal level is additional to the state level or the other way around. Thus, the question is whether there already exists a kind of post-national citizenship within a federal structure or whether European Union citizenship is not all that different from existing forms of citizenship. It needs to be noted simultaneously that the European Union is not (yet) a federal system but does have some federal characteristics.³² For the federal states which are also Member States of the European Union, it needs to be noted that European Union citizenship comes on top of this national citizenship.

³¹ Th. Holterman, *Vreemdelingenrecht: toelating en verblijf van vreemdelingen in Nederland*, Deventer 2002.

³² F.A.N.J. Goudappel, *Powers and Control Mechanisms in Federal Systems*, Deventer 1997.

All federal systems differ in this respect. Germany, for example, regulates nationality at the federal level, as well as voting rights, which is also regulated at the state level for the elections in the states or Länder.³³ However, the situation is much more complicated where the basic rights are concerned: both the federal Basic Law as the constitutions of some of the states contain basic rights. It needs to be noted here that those state constitutions all precede the federal Basic Law and formed, at the time of adoption, the only basic right protection the citizens of the states had.

The situation in Switzerland deserves attention in this context as well because Swiss citizenship has a larger basis at state level in the systems described above, the position of the Cantons is stronger in this respect. Nationality, for instance, is in principle given by the states: each Canton has its own regulation for nationality. Federal nationality is in this way derived from state nationality. Voting rights (only for Swiss nationals) is given at all levels, both by the federal and the state constitutions. This right is even traditionally extended to direct democracy in the form of referendums.³⁴

For practical reasons, it can be said that traditional citizenship in the USA involves the following rights and duties: the right to travel throughout the state, the right to be domiciled anywhere in the USA, the right of suffrage, the right to qualify for public office, the right to serve as jurors, and the right to attend the public schools.³⁵ It needs to be kept in mind that these elements were developed under the 14th Amendment to the US Constitution, dating from the 19th century.

³³ Joanna Apap, Shaping Europe's Migration Policy. New Regimes for the Employment of Third Country Nationals: A Comparison of Strategies in Germany, Sweden, the Netherlands and the UK, in *European Journal of Migration and Law*, 2002, pp. 309-328.

³⁴ Ulrich Häfelin & Walter Haller, *Schweizerisches Bundesstaatsrecht*, 3rd ed., Zürich 1993.

³⁵ Chester James Antieau, *The Intended Significance of the Fourteenth Amendment*, Buffalo N.Y., 1997.

The right to serve as jurors is not considered to be part of each citizenship in each state, but is more part of the Anglo-American legal tradition. The discussion has since then focused on the position of minority groups, while distinguishing between state and federal citizenship. While immigration legislation is in general regulated at the federal level, welfare citizenship and residency requirements are regulated at state level.³⁶

4. Concluding remarks

The above shows that European Union citizenship is not the odd one out in filling the notion of citizenship. All traditional elements of citizenship are represented within the European Union system, either at the European Union level or the Member State level. Although the combination of the two levels is unique in itself, a country like Switzerland also bases citizenship upon nationality given by the composing states, for instance.

In general, it can therefore be concluded that on more than one level, there is a move towards residency as a basis for citizenship rather than nationality.

Referring to ongoing discussions in the USA on this issue, it is striking that similar points play an important part in the forming of the notion of European Union citizenship, that is points concerning rights and duties of non-nationals which resemble citizenship rights and duties. This is contrary to the notion of citizenship as it still is in the states used for comparison because the link with nationality for citizenship remains strong in those cases.

³⁶ Hiroshi Motomura, Comment: Immigration and Alienage, Federalism and Proposition 187, 35 *Va.J.Int'l L.*, 1994, pp. 201 ff.

Does this mean that citizenship moves towards trans-national citizenship? The answer to this question is affirmative, but it is not the only movement for citizenship. A second movement has sometimes been described as a normative notion of citizenship.³⁷ This means that citizenship becomes more and more universalistic instead of restrictively legal, moving away from nationality and the link with the nation-state.

³⁷ Kim Rubenstein, *Citizenship Law: Citizenship and the Centenary – Inclusion and Exclusion in 20th Century Australia*, in: *24 Melbourne U.L.R.*, 2000, pp. 576 ff.