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Abstract

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SINK OR SWIM TOGETHER? DEVELOPMENTS IN EUROPEAN CITIZENSHIP

*Annette Schrauwen**

> The dissimilarity in the rules of naturalization has long been remarked as a fault in our system, and as laying a foundation for intricate and delicate questions.
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> —James Madison, *The Federalist Papers*, No. XLII

INTRODUCTION

Descriptions of European Union ("EU" or "Union") citizenship, as introduced by the Treaty on European Union[1] in 1992, usually present its importance as largely symbolic. It is true that the first European Commission (or "Commission") proposals on the subject as well as the original proposal put forward by the Spanish Prime Minister at the time, Mr. González, were meant to "encourage a feeling of involvement in European integration."[2] Article 17 of the Treaty establishing the European Community[3]

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1. Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719 [hereinafter TEU] (amending Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty], *as amended by* Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA]). The Treaty on European Union ("TEU") was amended by the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Oct. 2, 1997, O.J. C 340/1 (1997) [hereinafter Treaty of Amsterdam]. These amendments were incorporated into the TEU, and the articles of the TEU were renumbered in the Consolidated version of the Treaty on European Union, O.J. C 340/2 (1997), 37 I.L.M. 67 [hereinafter Consolidated TEU], *incorporating changes made by* Treaty of Amsterdam, *supra*.

2. RICHARD CORBETT, THE TREATY OF MAASTRICHT. FROM CONCEPTION TO RATIFICATION: A COMPREHENSIVE REFERENCE GUIDE 232 (1993).

3. Treaty establishing the European Community, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 573 [hereinafter EC Treaty], *incorporating changes made by* TEU, *supra* note 1. The TEU amended the Treaty establishing the European Economic Community ("EEC Treaty"), *as amended by* Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA]. The Treaty establishing the European Community ("EC Treaty") was amended by the Treaty of Amsterdam, *supra* note 1. These amendments were incorporated into the EC Treaty, and the articles of the EC Treaty were renumbered in the Consolidated version of the Treaty establishing the European Community, O.J. C 340/3 (1997), 37 I.L.M. 79 [hereinafter Consolidated EC Treaty],

("EC Treaty") defines Union citizenship as complementary: "Every person holding the nationality of a Member State shall be a citizen of the Union."[4] Besides, its second paragraph links EU citizens' rights and obligations specifically to those already existing: "Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby."[5] Small wonder the concept is seen as symbolic and limited to what already exists in the field of rights accorded to nationals of other EU Member States.

Six years after the introduction of the notion, the European Court of Justice (or "ECJ") had an opportunity to rule on its supposedly symbolic value. The case concerned a Spanish woman living in Germany who wanted to get a child-raising allowance on the basis of her European citizenship.[6] The ruling raises questions related to the rights connected with European citizenship. Furthermore, it gives rise to the discussion of the basis of European citizenship. Finally, it questions the value of European citizenship to the benefit of raising popular support of European integration.

I. *BENEFIT OF RIGHTS ATTACHED TO THE STATUS OF EU CITIZENSHIP*

A textual interpretation of the provisions on citizenship certainly leads to the conclusion that Union citizenship does not give any extra rights in addition to those already conferred by the EC Treaty or by the measures adopted to give it effect. It supports EC Member States' views that EU citizenship would not change the guarantees as given to them by the three residence directives,[7] *e.g.*, that non-economically active persons using their free movement rights shall not become a burden upon the host state. And yet two years ago, the ECJ ruled that a Spanish EU-citizen could get a German child-raising allowance on the basis

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incorporating changes made by Treaty of Amsterdam, *supra*; Consolidated EC treaty, *supra*, art. 17, O.J. C 340/3, at 186 (1997), 37 I.L.M. at 82 (ex Article 8).

4. *Id.*

5. *Id.*

6. María Martínez Sala v. Freistaat Bayern, Case C-85/96, [1998] E.C.R. I-2691.

7. Council Directive No. 90/364, O.J. L 180/26 (1990); Council Directive No. 90/365, O.J. L 180/28 (1990); Council Directive No. 93/96, O.J. L 317/59 (1993) [hereinafter Council Directives].

of her EU-citizenship.[8]

In order to appreciate the benefit of rights attaching to EU-citizenship, it is necessary to make a distinction between the rights related to free movement and the right to equal treatment. This distinction is a current one in the field of free movement of workers, where paragraph 3 of Article 39 of the Consolidated EC Treaty[9] (ex Article 48) deals with migration rights and paragraph 2 with the prohibition of discrimination based on nationality. Jobseekers enjoy full benefit of their right to free movement (limited only in time) and a very limited benefit of their right to equal treatment (related only to access to employment, not to other benefits).[10] It can be concluded from the *Sala* case that these benefits operate in reverse for persons relying on their EU-citizenship. The court's recent ruling in *Wijsenbeek*[11] confirms that EU-citizens have a right to equal treatment, but no right, at least not yet, to completely free movement.

A. *Right to Equal Treatment*

In its ruling in the *Sala* case last year, the ECJ declared that the prohibition of discrimination based on nationality applies to all EU-citizens who lawfully reside in another Member State. As already stated, the case concerned a Spanish citizen, Mrs. Martínez Sala, who had lived in Germany for over thirty years. From 1986 onwards, she lived on social welfare. The German authorities could not require her to leave Germany, because of Article 6(a) of the European Convention on Social and Medical Assistance.[12] This article prohibits repatriating a national of another Member State "on the sole ground that he is in need of assistance." The German authorities were not inclined to give her a residence permit either. Instead she received a document stating that she applied for further extension of her residence per-

8. *Sala*, [1998] E.C.R. I-2691.

9. Consolidated EC Treaty, *supra* note 3, art. 39, O.J. C 340/3 at 193 (1997), 37 I.L.M. at 86 (ex Article 48.)

10. The Queen v. Immigration Appeal Tribunal, ex parte Gustaff Deriderius Antonissen, Case C-292/89, [1991], E.C.R. I-745, [1991] 2 C.M.L.R. 373.

11. Criminal Proceedings v. F.A. Wijsenbeek, Case C-378/97 (ECJ Sept. 21, 1999) (not yet reported).

12. European Convention on Social Medical Assistance (visited on Feb. 28, 2000) <http://www.coe.fr/eng/legaltxt/14e.htm> (on file with the *Fordham International Law Journal*).

mit. In order to receive a child-raising allowance, Mrs. Sala was required to produce a formal residence permit, whereas German nationals had only to show that they were residing in the country. This clearly is discrimination on grounds of nationality[13] and, *within the scope of application of the Treaty,* forbidden by Article 12.[14] The ECJ held that the child-raising allowance was a family benefit under Regulations 1612/68[15] and 1408/71[16] and therefore fell under the *material scope* of the EC Treaty.[17] Mrs. Sala tried to come within the *personal scope* of the EC Treaty by relying on her former status of worker. The ECJ, however, did not receive sufficient information of this and left it to the national court to investigate whether she could be considered a worker within the meaning of Article 39 of the Consolidated EC Treaty and Regulation No. 1612/68 or Regulation 1408/71. The ECJ then considered whether her EU-citizenship could bring her within the scope of application of the EC Treaty.

The key question of the case was whether *all* EU-citizens residing in another EU Member State can rely on their EU-citizenship or only citizens who reside there *on the basis of EC law.* Mrs. Sala did not come under the general provisions on free movement of persons, but she resided lawfully in Germany under international law, that is the European Convention on Social and Medical Assistance. This did not refrain the ECJ from ruling that

> [a]s a national of a Member State, lawfully residing in the territory of another Member State, the appellant in the main proceedings comes within the scope *ratione personae* of the

13. The court draws an analogy with the Jean Noël Royer, Case 48/75, [1976] E.C.R. 497, [1976] 2 C.M.L.R. 619, where it held that a residence permit can only have declaratory and probative force and cannot be of a constitutive nature for the purposes of recognition of the right to residence.

14. Consolidated EC Treaty, *supra* note 3, art. 12, O.J. C 340/3, at 185 (1997), 37 I.L.M. at 82 (ex Article 6).

15. *See* Council Regulation No. 1612/68, 257 J.O. 2 (1968), O.J. Eng. Spec. Ed. 1968 (II), at 475 (concerning freedom of movement for workers within Community).

16. Commission Regulation No. 1408/71, O.J. L 149/2 (1971).

17. It is argued that the Eurpopean Court of Justice (or"ECJ") fails to make a distinction between *lex specialis* and *lex generalis* and does not take into account the fact that the Regulations apply only if all conditions are met. This means, according to Sybilla Fries and Jo Shaw, that the child-raising allowance falls within the material scope of the EC Treaty only if the case comes under the free movement of worker provisions. Sybilla Fries & Jo Shaw, *Citizenship of the Union: First Steps in the European Court of Justice,* 4 EUR. PUB. L. 533, 543 (1998).

provisions of the Treaty on European citizenship.[18]

Equal treatment is accorded on the basis of EU-citizenship; citizens of Member States keep the status of citizenship at all times, no matter where they are within the Union and regardless of legal basis.[19]

The *Sala* ruling fits perfectly in case law on the prohibition of discrimination, which has been interpreted broadly and progressively. As Advocate-General La Pergola in the *Sala* case pointed out, the prohibition on discrimination has been "recognised as a *corollary* of the freedom of movement."[20] Thus, his vision of the prohibition to discriminate "embraces the domain of the new legal status of common citizenship."[21]

B. *Right to Free Movement*

Mrs. Martínez Sala was lawfully residing in Germany, and thus there was no need for the ECJ to rule on whether a new right of residence could be derived from Article 17 of the Consolidated EC Treaty. Yet the possible right of residence deriving from EU-citizenship got much attention in the early years of its existence. Member States certainly would not want citizenship to imply "benefits tourism:" citizens going around the EU looking for the most beneficial social security system.

The right to move freely was not addressed by the ECJ in its ruling, but the Commission wanted it to be the basis on which to solve the case. According to the Commission, whose suggestions were described in the opinion of the Advocate-General,[22] "the right to move and reside freely throughout the Union flows *directly* from the Treaty. The limitations and conditions provided for in Article 8a [at present Article 17 Consolidated EC Treaty] therefore relate solely to the *exercise* of that right, established by primary law as a freedom of the citizen." In the Commission's

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18. *Id.* at 544.

19. In their commentary on this case, Sybilla Fries and Jo Shaw conclude on the basis of a series of U.K. cases that "there is little if anything the Member States can do in relation to their immigration sovereignty once Community nationals have lawfully taken up residence." Fries & Shaw, *supra* note 17, at 547-49.

20. *Sala*, [1998] E.C.R. I-2705, ¶ 23; *see* Cowan v. Trésor Public, Case 186/87 [1989] E.C.R. 195, [1990] 2 C.M.L.R. 613 (entitling tourist, as recipient of services, award of compensation for assault under national law.)

21. *See Sala*, [1998] E.C.R. I-2701, ¶ 23. This is an argument against the vision of Fries and Shaw. Fries & Shaw, *supra* note 17, at 540.

22. *Sala*, [1998] E.C.R. I-2705, ¶ 59.

view, citizens are free to move to another EU Member State, and entitled to equal treatment, unless the host State makes use of its limited power to restrict free movement.

1. Justification of Limitations on Free Movement Rights

More than a year after its ruling in the *Sala* case, the ECJ ruled on the entitlement to free movement rights in a case that was more or less arranged by a Dutch member of the European Parliament, Floris Wijsenbeek.[23] Returning from a European Parliament meeting in Strasbourg, Wijsenbeek refused to show his identity papers, as was required by national law, to the national authorities at Rotterdam airport. According to Wijsenbeek, controls at the border are contrary to the provisions on both the internal market as well as on citizenship (at present Articles 14 and 17 of the Consolidated EC Treaty). The Advocate-General in this case, Cosmas, took the opportunity to interpret systematically the contents and legal consequences of the provisions of Articles 14 and 17 of the Consolidated EC Treaty, and of free movement of persons in general.

Starting with an analysis of the "classic" EC free movement provisions (workers and self-employed), Cosmas concluded that border controls are justified limitations, because these provisions serve to establish a person's nationality and thereby his entitlement to free movement. He then continued with an investigation of the "new" provisions, the ones concerning the internal market and citizenship, in order to establish if they modify the justifiability of border checks. In relation to the internal market, he pointed to the necessity of accompanying measures before free movement within the Community can be completed; measures are needed to check external borders, to cooperate in the field of visas and asylum, etc. Regarding EU-citizenship, Cosmas indicated that it gives a fundamental personal right to citizens of the Union, which is different from the "classic" free movement rights.[24] Article 17 of the Consolidated EC Treaty gives EU citizens the right to move and reside freely within the Community. The exercise of these rights can be limited, however, as long as such limitations are justified and do not affect the core of the citizenship rights. In this view, border controls are no longer

23. *F.A. Wijsenbeek, supra* note 11.
24. *Id.* ¶ 95.

generally accepted and automatically justified, but their compatibility with Community law needs to be accounted. This supposes the proportionality test; border checks must be mandatory, applied without distinction, and they must be necessary and proportional in order to be admitted under Community law. A lack of Community arrangements thus may limit free movement of persons.

Cosmas proposed an even stricter interpretation of possible limitations of free movement. He wanted the national judge to take into consideration non-Community legislation as well. Border controls will not be compatible with Community law if international measures exist that harmonize external border checks, such as measures based on the Schengen Agreements.[25] This means that it is no longer only Community law that determines the limitations on free movement of citizens. This vision matches the ECJ's ruling in the *Sala* case, where the exercise of citizenship rights was also made possible on the basis of (non-Community) international law.

The ECJ does not completely follow the suggested interpretation of the Advocate-General. It links possible limitations on the exercise of free movement rights with the existence of Community provisions:

> However . . . as long as Community provisions on controls at the external borders of the Community, which also imply common or harmonised rules on, in particular, conditions of access, visas and asylum, have not been adopted, the exercise of those rights presupposes that the person concerned is able to establish that he or she has the nationality of a Member State.[26]

2. Justification of Limitations to the Right of Residence

Border checks may limit the right to move freely, obligations to be able to provide means of subsistence may limit the right to reside in another EU-Member State. In Community law, the right to reside elsewhere has always been bound to the condition that one is not going to be a burden on the public finances of the host state. In the traditional free movement cate-

25. Treaty of Amsterdam, *supra* note 1, Protocol integrating the Schengen *acquis* into the framework of the European Union, O.J. C 340/1, at 93-96 (1997).

26. *Id.* ¶ 42.

gories, workers and self-employed, the economic activity is some sort of guarantee for the host state.[27] In the more recently created free movement rights by secondary legislation of 1990 and 1993,[28] conditions for the exercise of those rights are formulated in such a manner that a national from another Member State can not rely on public support from the host Member State: those who wish to rely on the directives must have full sickness insurance and sufficient resources.

Does citizenship bring changes to these financial conditions? The *Sala* case adds nothing on this point. As we have seen, the ECJ did not have to answer the question whether citizenship creates a new right to residence. The question is interesting for it clarifies the nature of the EU-citizenship status. Even though the practical outcome will most probably still be that for the time being only non-economically active EU nationals with sufficient resources to maintain themselves can exercise their right to reside elsewhere in the Union. If Member States have an absolute right to ask for financial guarantees, then EU-citizenship is clearly limited in its nature. If this right is not absolute, and on the contrary a justification from the Member States is demanded, then EU-citizenship establishes a universal right of residence.[29] Only then will citizenship truly be a "*fundamental* legal status guaranteed to the citizen of every Member State by the legal order of the Community and now of the Union."[30]

In April 1997,[31] more than a year before the *Sala* ruling, the Court of First Instance ("CFI") seemed to suggest that free movement and residence rights based on citizenship do not affect the financial conditions as given by secondary legislation. The case concerned an ex-spouse of a retired European Parliament official, Mrs. Kuchlenz-Winter, who wanted to return to her home country Germany, but was refrained from doing so by fear of losing her sickness cover in Luxembourg, which was dependent on her residence there. She had no cover under the German

27. *See* Kempf v. Staatssecretaris van Justitie, Case 139/85, [1986] E.C.R. 1741, [1987] 1 C.M.L.R. 764 (stating that guarantees are not absolute).

28. *See* Council Directives, *supra* note 7 (explaining directives on retired persons (90/365), those of independent means (90/364), and students (93/96)).

29. *Cf.* Fries & Shaw, *supra* note 17, at 545-46 (referring to early ECJ case law on citizenship provisions and showing that ECJ is rather reluctant in its interpretation).

30. *Sala*, [1998] E.C.R. I-2700, ¶ 18.

31. Hedwig Kuchlenz-Winter v. Commission, Case T-66/95, [1997] E.C.R. II-637.

social security system, since she did not complete the requisite periods of insurance in Germany. Private health insurance schemes would refuse her, because she was suffering from a serious illness. One of the arguments she used to get sickness insurance in Germany was based on Article 8A of the EC Treaty (Article 18 of the Consolidated EC Treaty),[32] which gives Union citizens the right to reside freely within the Union 'subject to the limitations and conditions' laid down in the EC Treaty and in secondary legislation. Mrs. Kuchlenz-Winter reasoned that the inability to get health insurance in Germany limited her right to free movement as given by Article 8A of the EC Treaty (Article 17 Consolidated EC Treaty). Interestingly enough, the Commission in this case follows an opposite reasoning from the suggestions it gave a year later in the *Sala* case. There is no mention whatsoever of rights flowing directly from the EC Treaty. Instead the Commission points to the 1990/1993 free movement directives for showing that persons without an occupation can only rely on those directives to exercise their right of residence. The directives make the right of residence subject to the condition that the person concerned is covered by sickness insurance in the host State.[33] The CFI acts upon the Commission's suggestions and leaves aside any claims to a limitation of free movement rights.

Would the practical outcome of the case have been different if the ECJ's reasoning in the *Sala* case had been followed all the way? It is difficult to say. The view that citizenship rights are absolute implies that limitations have to be justified by the Member States. A likely justification here would have been the need to preserve the financial balance of the social security system.[34] It might have been interesting to see what the ECJ would have done: honor that justification or reject it because this single case does not have sufficient effect on the financing or balance of the social security system.[35]

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32. Consolidated EC Treaty, *supra* note 3, art. 18, O.J. C 340/3, at 186 (1997), 37 I.L.M. at 82 (ex Article 8a).

33. *Id.* ¶ 47.

34. *See* Hanns-Martin Bachmann v. Belgium, Case C-204/90, [1992] E.C.R. I-249, [1993] 1 C.M.L.R. 785 (presenting justification by Belgium to limit tax deductions of sickness insurance premiums paid abroad.)

35. *See* Nicolas Decker v. Caisse de Maladie des employés privs, Case C-120/95, [1998] E.C.R. I-831, ¶ 40 [1998] C.M.L.R. 879.

Until now, Member States invoke traditional case law, such as *Centre public d'aide sociale de Courcelles v. Lebon*,[36] in order to limit access to welfare rights and act on the balance of the system.[37] According to case law, nationals of the Member States who move to another Member State in search of work are precluded from equal treatment in the field of social and tax advantages. This argument was also raised by the United Kingdom in a case where a British national, Mr. Robin Swaddling, returned to the United Kingdom after having worked in France.[38] He applied for income support, but which was refused to him because he was not "habitually resident." U.K. legislation requires migrant workers who return to their own State to have resided an appreciable period in the territory of the United Kingdom in order to receive income support. Mr. Swaddling argued that this was contrary to Article 48 of the EC Treaty (Article 39 Consolidated EC Treaty),[39] for it placed him in a more unfavorable position than British nationals who did not use their right to free movement. As Sybilla Fries & Jo Shaw point out,[40] the case seemed to present a confrontation between traditional case law, which permits Member States to refuse non workers the access to welfare rights and the "new" citizenship case-law, which forbids Member States to discriminate against EU citizens lawfully residing in their territory. The ECJ, however, found a solution in the applicability of Regulation 1408/71.

In conclusion of this section it can be stated that EU-citizenship has welfare implications. Though up till now there is not a "hard case" to show that Member States have to justify denial of income support to EU-citizens who do not fall under "classic" free movement categories, it has been shown that there is a tendency in that direction. A (negative) implication might be that Member States will apply more strictly their right to remove per-

36. Centre public d'aide sociale de Courcelles v. Lebon Case 316/85, [1987] E.C.R. 2811, [1989] 1 C.M.L.R. 337.

37. *See* Raymond Kohll v. Union des Caisses de Maladie, Case C-158/96, [1998] E.C.R. I-1931, [1998] 2 C.M.L.R. 928 (presenting justification by Belgium to limit tax deductions of sickness insurance premium paid abroad).

38. *See* Robin Swaddling v. Adjudication Officer, Case C-90/97, [1999] E.C.R. I-1075, [1999] 2 C.M.L.R. 679.

39. Consolidated EC Treaty, *supra* note 3, art. 39, O.J. C 340/3, at 193 (1997), 37 I.L.M. at 86 (ex Article 48).

40. Fries, *supra* note 17, at 551.

sons whose residence rights under Community law have ended.[41]

II. *THE BASIS FOR EUROPEAN CITIZENSHIP*

European citizenship is additional and complementary to national citizenship. Two citizenships coexist, the national citizenship is the primary and original status, the European one is secondary. It has been said that the importance of the citizenship provisions "lies not in their content, but rather in the promise they hold out for the future."[42] The relationship between two citizenships as formulated in the European Union can be found in the beginning of the respective federative processes in the United States and in Switzerland. As the central power was consolidated over that of the Member States, local citizenship became the secondary one and faded more into the background.[43]

Is this the promise for the future of EU-citizenship? Before European citizenship can grow into an original and autonomous status, two prior conditions have to be fulfilled. First of all, Member States have to give all EU-citizens the same legal treatment when they are in their territory and in the second place the accordance of EU-citizenship should be set by a central authority (such as the Council). A comparison between the benefit of rights for migrant workers in the European Community and the one in the United States has been made by Bryant G. Garth, and some of the cases he describes are also very interesting in the light of possible future implications of EU-citizenship.[44]

Within the European Union, same legal treatment is limited to EU-citizens *lawfully residing* in another Member State. The solidarity that exists between citizens of one State is not present in EU-citizenship. The U.S. Supreme Court, however, found such

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41. *See id.* at 547-48 (showing that at present, national authorities are reluctant to expel persons who are not or who are no longer entitled to rely upon Community residence rights because of costs involved.)

42. David O'Keeffe, *Union Citizenship, in* LEGAL ISSUES OF THE MAASTRICHT TREATY 87, 106 (David O'Keefe & Patrick Twomey eds., 1994).

43. Vicenzo Lippolis, *European Citizenship: What It Is and What It Could Be, in* EUROPEAN CITIZENSHIP: AN INSTITUTIONAL CHALLENGE 317, 318-19 (Massimo La Torre ed., 1998).

44. BRYANT G. GARTH, MIGRANT WORKERS AND RIGHTS OF MOBILITY IN THE EUROPEAN COMMUNITY AND THE UNITED STATES: A STUDY OF LAW, COMMUNITY AND CITIZENSHIP IN THE WELFARE STATE, INTEGRATION THROUGH LAW, EUROPE, AND THE AMERICAN FEDERAL EXPERIENCE 85-163 (Cappelletti ed., 1986). U.S. case law given in the present contribution is taken from his comparison.

solidarity an element of the United States and ruled accordingly. In *Edwards v. California*,[45] the Court overruled a Californian statute that permitted the arrest of a person who tried to bring his brother-in-law from Texas into California. California argued that other states should not be able to get rid of their poor and drive them into California, which had higher welfare allowances. It wanted to limit access to its public finances. Where EU Member States remain largely sovereign on welfare issues and the ECJ is reluctant to affect their sovereignty (the *Sala* ruling presents a very tentative step in that direction), the Supreme Court in 1941 had no problem to find limits on state power:

> [T]he peoples of the several States must sink or swim together, and . . . in the long run prosperity and salvation are in union and not division.[46]

As Garth points out, the Supreme Court's opinion largely followed from the recognition of the duty to share the burden, not only by state governments, but also by the Federal Government as well. In 1969, in *Shapiro v. Thompson*,[47] the Supreme Court confirmed that no state could limit welfare benefits to persons who had resided for at least one year in that state. The Supreme Court however linked equal treatment in respect of welfare benefits to a fundamental right to travel. No state could come up with sufficiently compelling interests that could justify burdening the right to travel by limiting access to welfare provisions. U.S. citizens thus have a fundamental right to travel freely and can move in order to seek higher welfare benefits. A federal social security system surely helps to overcome the reluctance that Member States of the Union have to free movement and to equal treatment regarding social security. If the number of EU-citizens residing lawfully in another Member State and applying for social benefits is high, then it might be a reason for the Member States to put harmonization of social security schemes on the agenda. But the absence of a harmonized social security system in the Union is not the only reason that the benefit of rights attaching to EU-citizenship is less than that attaching to U.S. citizenship. A second, and probably even more fundamental, reason is the lack of a central authority that grants EU-citizenship.

45. Edwards v. California, 314 U.S. 160 (1941).
46. *Id.* at 174.
47. Shapiro v. Thompson, 394 U.S. 618 (1969).

European citizenship is a derived status. Requirements are the same as those for national citizenship. Therefore it is the competence of the individual Member States to determine who their full citizens are. The implication is that a Member State has no influence whatsoever on other Member States' discretionary power to grant national citizenship and thereby EU-citizenship. Thus, the host Member State has no way of controlling the influx of immigrants from other EU Member States, even the EU as a community has no control over the identification of those entitled to European citizenship. Therefore it does not come as a surprise that national authorities keep to financial conditions on permitting residence to EU-citizens as long as Member State nationality remains the basis for EU-citizenship.

It has been suggested to base European citizenship on residence in a Member State, and no longer on nationality.[48] Within the Union, each Member State has its own criteria for access to its nationality. These criteria are determined by historical, demographic, and political elements. Access to Union citizenship through the naturalization process of one Member State might be easier than through that of another. The resulting inequality in obtaining Union citizenship could be an argument in favor of residence as a basis for European citizenship. Harmonization of nationality laws could also bring the inequality to an end, but is unrealistic because of Member States' reluctancy to give up their prerogatives in this field.

Marie-José Garot studied the feasibility—for the rights to vote attached to European citizenship—of basing European citizenship on residence instead of on nationality.[49] As she points out, citizenship and nationality would become two distinguished statuses. In order to formulate a concept of "Community residence" upon which Union citizenship may be founded, she turns to several texts of secondary law, such as a 1993 Commission Recommendation regarding 'the taxation of certain items of income received by non-residents in a Member State other

48. *See, e.g.*, Álvaro Castro Oliveira, *The Position of Resident Third-Country Nationals: Is it too Early To Grant Them Union Citizenship?*, *in* EUROPEAN CITIZENSHIP: AN INSTITUTIONAL CHALLENGE 185 (Massimo La Torre ed., 1998); Rut Rubio Marín, *Equal Citizenship and the Difference that Residence Makes*, *in* EUROPEAN CITIZENSHIP: AN INSTITUTIONAL CHALLENGE 201 (Massimo La Torre ed., 1998).

49. Marie-José Garot, *A New Basis For European Citizenship: Residence*, *in* EUROPEAN CITIZENSHIP: AN INSTITUTIONAL CHALLENGE 229 (Massimo La Torre ed., 1998).

than that in which they are resident'[50] and to ECJ case-law.[51] She concludes that a Community notion of residence exists, "which notion is defined in very broad terms as 'the permanent centre of interests.'"[52]

European citizenship based on residence can easily be applied to the rights to vote attached to citizenship, but can it also be applied to the right to move freely and to the right to equal treatment in the social field? One of the arguments against free movement without internal border checks was the lack of compensating measures at the external border. If internal free movement attached to citizenship is based on EU-residence instead of on nationality, then it might be easier to attain the abolition of internal border controls. There will be no more need to check a person's nationality, once that person is within the EU territory. Compensating measures at the external border comprise the harmonization of visa and asylum policy, which the Treaty of Amsterdam made into a matter of Community competence.[53] Though still very difficult, harmonization in this field is more realistic than harmonization of nationality legislation.

An argument against free movement without financial guarantees was the lack of harmonization of social security systems and the wish to avoid "benefits tourism." In this field, a change in the basis of European citizenship from nationality to residence could make Member States more "flexible" in the allocation of benefits such as family allowances or education. As Garth[54] demonstrates, the particular vulnerability in present Community law is the fact that Member States "*must* provide certain benefits to *any* national of another Member State." It might lessen Member States' reluctance to give up financial guarantees related to free movement if they have the possibility to allocate (non work-related) social benefits to only those who intend to reside permanently.

In their comment on the *Sala* ruling, Fries and Shaw see two

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50. Commission Recommendation No. 94/79 EC, O. J. L 39/22 (1994).

51. *Rigsadvokaten v. Nicolai Chrisian Ryborg*, Case 297/90, [1991] E.C.R. 1943, [1993] 1 C.M.L.R. 197; *Pedro Magdalena Fernandez*, Case 452/93, [1994] E.C.R. 4295, *De Witt*, Case 282/91, [1993] E.C.R. 1221.

52. Garot, *supra* note 49, at 247.

53. Annette Schrauwen, *People in the Community. A Recurring Fraction*, 25 LEGAL ISSUES OF EUR. INTEGRATION 93, 110 (1998).

54. *See* GARTH, *supra* note 44, at 109-10.

possible consequences of linking the equal treatment principle to citizenship.[55] It may lead to a 'race to the bottom' in welfare entitlements, or by contrast, it may create more solidarity in relation to welfare 'because the right to migrate and the consequent burdens which might then fall upon public authorities will be regarded as a normal incident of EU citizenship, just as many argue that the right to travel and the consequences including those in relation to public goods that flow from that is an incident of U.S. national citizenship.'[56] In my opinion, the latter option is more likely to happen, if citizenship is based on residence and Member States are not automatically obliged to allocate all social benefits to any national from another Member State who found a job in its territory.[57]

III. *EUROPEAN CITIZENSHIP AND SUPPORT OF INTEGRATION*

SOME FINAL REMARKS

In creating European citizenship, the Treaty on European Union made clear that Europe was gradually finding a political dimension. A common citizenship was believed to contribute to the creation of "an ever closer union among the peoples of Europe" (Article 1 of Consolidated TEU).[58] National citizenship expresses a political bond whereby a person becomes a member of the national community, it is the status of those who belong to the people of the state.[59] European citizenship by analogy is supposed to express the political bond between those who belong to the people of the European Union. With the creation of a European citizenship, however, some felt concerned about their national citizenship and the preservation of national identity and

55. *See* Fries & Shaw, *supra* note 17, at 558.

56. *Id.*

57. An example of such an "automatic" allocation that seems an excrescence of the present free movement system is Meeusen v. Hoofddirectie van de Informatie Beheer Groep, Case C-337/97, (ECJ June 8, 1999) (not yet reported), where a Belgian student, living in Belgium and pursuing her studies in Belgium received a Dutch study grant because her mother, also living in Belgium, worked in the Netherlands.

58. Consolidated TEU, *supra* note 1, art. 1, O.J. C 340/2, at 152 (1997), 37 I.L.M. at 68 (ex Article A).

59. Lippolis, *supra* note 43, at 317.

national cultural traditions.[60] The complementarity of European citizenship had to be mentioned explicitly in a protocol in order to meet certain concerns of the Danish population that contributed to a negative outcome of a referendum on the Treaty on European Union. It is a sign that European citizenship in itself is not enough to create a European identity or a sense of belonging.

European citizenship contains a non-discrimination principle, which could inspire a sense of solidarity, concern and engagement. The extent of the non-discrimination principle however, is not yet clear. It is partly limited to competences of the Community and thus functionally determined. Solidarity and belonging find their expression mainly in political and social rights.[61] Nevertheless, benefits of such rights attached to European citizenship are also functionally determined and based on free movement as traditional Community concept.

Political rights attached to citizenship only include electoral rights at the level of municipal and European Parliament elections (Article 19 of the Consolidated EC Treaty). The aim of participation in municipal elections is not political participation of European citizens in national politics, but "integration of individuals within their community of residence."[62] Though political participation on a European level is enhanced by voting rights for the European Parliament elections, there is no real impact on EU policy-making due to the limited powers of the European Parliament.

The extent of social rights attached to European citizenship is not yet clear. In its *Sala* ruling, the ECJ made explicit that European citizens lawfully residing in another Member State have equal access to social benefits. In order to become a lawful resident, citizens will have to rely on traditional free movement principles and thus be either economically active or self-supporting. The EC Treaty remains silent on the right of people to receive social security and Member States are not inclined to share the burden in this respect.

European citizenship is built on the principle of free eco-

60. Andrea Biondi, *The Flexible Citizen: Individual Protection After the Treaty of Amsterdam*, 5 EUR. PUBLIC L. 245, 257 (1999).

61. Lippolis, *supra* note 43, at 321.

62. *Id.*

nomic movement and is definitely not the expression of belonging to a political or a social community. Over the years, engagement in European integration has been a concern of the Community. Attempts to stimulate engagement for integration always had to cope with the economic character of the integration process. From the 1963 landmark decision in *van Gend & Loos*,[63] where the ECJ stated that the Community constitutes a new legal order, which imposes obligations upon and confers rights to nationals of Member States, to the 1997 introduction of Article 255 of the Consolidated EC Treaty[64] that gives citizens access to documents of the European Parliament, Council, and Commission, involvement in European integration remains limited to the technical, economic enterprise that the European Union basically is. Obligations and rights of nationals given by the EC Treaty are economic rights; access to documents equals access to technical documents. The only way the Union will be able to engage its citizens is the creation of a political and social community that goes beyond economic integration. Giving lawfully residing citizens equal access to social benefits is only a very minor step in that direction.

63. *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case 26/62, [1963] E.C.R. 1, [1963] C.M.L.R. 105.

64. Consolidated EC Treaty, *supra* note 3, art. 255, O.J. C 340/3, at 282 (1997), 37 I.L.M. at 130 (ex Article 191a).