



# ***European Citizenship after Martínez Sala and Baumbast***

*Has European law become more  
human but less social?*

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## Abstract

*Martínez Sala* and *Bambaust* have become the leading cases on free movement of persons in Community law. It has become standard to see both rulings as heralding a 'civic' turn of European integration, by expanding the personal scope of the freedom of personal movement from workers to citizens, and thus redefining the value basis of the law of the European Union. This would prove again the emancipatory potential of Community law, closely related to its redrawing the economic and political boundaries of Europe, and getting rid of discriminatory obstacles in the way of citizens' freedom. This paper contests this interpretation. It shows why *Martínez Sala* and *Baumbast* are not epochal judgments, but logical extensions of the pre-Maastricht case of the Court. Furthermore, it reveals why and how *Martínez Sala* and *Baumbast* have radicalised the processes of Europeanisation of what used to be exclusive national competences, and the judicialisation of decision-making processes where representative institutions used to have the exclusive word. This has rather negative consequences, both in terms of the democratic legitimacy of the Union and the distributive consequences of Community law. European law may have become more humane only at the expense of its being less social, to the extent it imports a non-solidaristic logic into provinces of the legal system before sheltered from economic pressure, and may end up forcing a social retrenchment. The market citizen has not been overcome, but has only been dressed in political clothes.

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## Introduction

It is one thing to eliminate divisions and quite another to establish ties.

Helen S. Feldstein<sup>1</sup>

The rulings by the European Court of Justice (ECJ) in the cases *Martínez Sala* and *Baumbast* have become milestones in case law at the European level. A good deal of the academic literature,<sup>2</sup> perhaps influenced by the self-praising narrative of the ECJ and its Advocates General,<sup>3</sup> has hailed these judgements as path-breaking decisions which have operated a 'civic turn' in Community law, putting flesh on the bones of the citizenship provisions inserted by the Treaty of Maastricht.<sup>4</sup> In particular, it is frequently referred to the Court's redefinition of the value basis of Community law by expanding the scope of freedom of personal movement from the economically defined category of a 'worker' to the general category of a 'citizen' (from *free movement of workers* to *free movement of persons*). The Court has interpreted the newly enacted provisions as requiring to push the freedom protected by Community law beyond economically active individuals, and thereby applying it to all European citizens without further qualifications.<sup>5</sup> Consequently, the

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<sup>1</sup> Helen Fieldstein, 'A Study of Transaction and Political Integration: Transnational Labour Flow within the European Economic Community', 6 (1967) *Journal of Common Market Studies*, pp. 24-55, p. 30.

<sup>2</sup> See for example Dora Kostakopoulou, 'Ideas, Norms and European Citizenship: Explaining Institutional Change', 68 (2005) *Modern Law Review*, pp. 233-67.

<sup>3</sup> AG Jacobs already set the tone in the Opinion in Case C-168/91 *Konstantinidis* [1992] ECR I-1191, par. 46: 'A Community national who goes to another Member State as a worker or self-employed person under Articles 48, 52 or 59 of the Treaty is entitled not just to pursue his trade or profession and to enjoy the same living and working conditions as nationals of the host State; he is in addition entitled to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values, in particular those laid down in the European Convention on Human Rights. In other words, he is entitled to say *civis europeus sum* and to invoke that status in order to oppose any violation of his fundamental rights'. *Konstantinidis* was decided after the signature of the Treaty of Maastricht, but before it entered into force. See also Francis Jacobs, 'Citizenship of the Union. A legal analysis', 13 (2007) *European Law Journal*, pp. 591-610.

<sup>4</sup> As is well-known, one of the major amendments introduced by the Maastricht Treaty on the Rome Treaty was precisely the creation of the new status of European citizen. Although the Treaty was signed in 1992, it entered into force in November 1993. Given that cases take quite some time to arrive to the Court, and to be decided by it, it is not surprising that *Martínez Sala*, decided in 1998, came more than four years after the entry into force of the Treaty.

<sup>5</sup> See the excellent Álvaro Castro Oliveira *Workers and other persons: 'Step-by-step from movement to citizenship'*, 39 (2002) *Common Market Law Review*, pp. 77-127.

emancipatory potential of European law, closely related to its redrawing of the economic and political boundaries of the old continent, is once more demonstrated. *Martínez Sala* and *Baumbast* have given a new and more explicit turn to this old screw, by making the Community right-holder a civic and solidaristic political citizen and not merely a solitary and egoistic market actor.<sup>6</sup>

This paper poses a moderate but straightforward challenge to this assessment, and calls for a less triumphant evaluation of the jurisprudence of the Luxembourg Court. True, some citizens probably enjoy rights and freedoms now which were denied to them before; it may also be accurate to say that some of the rulings in the trail of *Martínez Sala* and *Baumbast* might have laid the basis of a European we-feeling without which social integration through Community law may erode over time.<sup>7</sup> Still, it seems as if the standard interpretation is not easy to sustain, neither in purely legal nor wider political terms. From a legal-dogmatic perspective, there is a trifle of exaggeration in characterising *Martínez Sala* and *Baumbast* as epochal judgments, given that most of the structural and substantive changes claimed to have been brought about by the two judgments were already under way in the pre-Maastricht case law. From a politico-normative standpoint, a proper assessment of the two rulings should combine attention to the implications for concrete plaintiffs with an assessment of their systemic effects, and in particular, its institutional and (re)distributive implications. On such a basis, it is only fair to say that *Martínez Sala* and *Baumbast* have actually radicalised a trend that was already at work, and in doing so have exacerbated the processes of Europeanisation of what used to be exclusive national competences, and the judicialisation of decision-making processes where representative institutions used to have the exclusive word. If though, there is more continuity than change, and if the process leads to outcomes which are far from obvious blessings from a democratic standpoint, the story about the unstoppable emancipation of European citizens from their national and economic chains is simply wrong. On the contrary, it seems as if the case law of the Court is deeply ambivalent. European law may have become more human, as it has forced national legal orders to partially dismantle some criteria of exclusion from the enjoyment of rights, although only at the expense of it becoming less social, to the extent that it may import a non-solidaristic logic into provinces of the legal system

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<sup>6</sup> Or perhaps one should say market citizen, following the apt term coined by Michelle Everson in her 'The Legacy of the Market Citizen', in Jo Shaw and Gillian More (eds), *New Legal Dynamics of European Union*, Clarendon: Oxford, 1995, pp. 73-89.

<sup>7</sup> Specifically, by means of putting into question the lines of exclusion built around nationality.

before sheltered from economic pressure, or may even force a social retrenchment.

To ground such claims, I proceed in three steps. Firstly, I situate the case law on European citizenship within its legal-dogmatic context by means of reconstructing the legal and judicial definition of Community fundamental freedoms, in particular the free movement of physical persons before *Martínez Sala* and *Baumbast*. Secondly, I analyse the reasoning of the Court in the two cases, and offer a systematic reading of the ensuing case law. Finally, I assess the ambivalent implications of the two judgments for the evolution of European law and European integration in general.

## **Free movement as a fundamental economic freedom and as a vehicle of integration: from the creation of the Communities to the Treaty on European Union**

Both the 1951 Treaty of Paris, establishing the Coal and Steel Community, and the 1957 Treaty of Rome (EEC Treaty), establishing the European Economic Community, contained provisions which enshrined the principle of free movement of workers as a cornerstone of European Community law.<sup>8</sup> The key provision, Article 48 of the EEC Treaty, stated in its decisive second and third paragraphs that:

2. Freedom of movement of workers shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
  - a) to accept offers of employment actually made;
  - b) to move freely within the territory of the Member States for this purpose;
  - c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
  - d) to remain in the territory of a Member State having been employed in that State, subject to conditions which shall be

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<sup>8</sup> Cf. Articles 68 and 69 of the Paris Treaty; Articles 48 to 51 of the Rome Treaty.

embodied in implementing regulations to be drawn up by the Commission'

The literal tenor of the provision enumerated a limited set of clear negative prescriptions, which required the abrogating of many national laws regulating the access of foreigners to employment in national 'labour markets'. In the first half of the twentieth century, European nation-states had perfected the institutional and normative instruments with which they controlled the flows of people in and out their borders.<sup>9</sup> The dramatic military, economic and social consequences of two world wars virtually led to the creation of the state capacities which resulted in an intense and close monitoring of the movements of persons in the second half of the century.<sup>10</sup> Indeed, the original drafting of articles 48 to 51 of the EEC Treaty refers to all the key obstacles that those willing to migrate to other European countries were likely to meet on their way. Entry was made conditional upon permission of the recipient state, which could be rescinded (indeed, foreigners were regarded as buffer labour, to be called and dismissed at national convenience) and lasted for short periods of time (rarely longer than a year). Furthermore, foreign workers enjoyed not only a lesser protection of their political rights, but also had their

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<sup>9</sup> Although the consolidation of the nation-state as the virtually exclusive form of political community at the end of the 18th century came hand in hand with the forging of legal criteria to distinguish nationals from foreigners, this did not result in the curbing or even the formal controlling of movement of people across European borders. On the evolution of the distinct set of civil rights assigned to foreigners (including limited rights to inherit or bequeath property, subjection to special taxes, commercial and financial restrictions, and limits to their right to free movement within the state), see Peter Sahlins, *Unnaturally French: Foreign Citizens and the Old Regime and after*, 2004, Ithaca: Cornell University Press. Perhaps the explanation lies with the rather simple and straightforward fact that until the end of the First World War, the destination of most European immigrants was almost exclusively North and South America, and not European countries (with the exception of France, see Patrick Weil, *La France et ses étrangères*, Paris: Gallimard, 2004, p. 21ff) .

<sup>10</sup> Firstly, pressing concerns of national security (or what were perceived as being so, i.e. the risk of a fifth column of enemy aliens undermining the war effort) led to the perfecting of the state capacities to control population movements, from the creation and maintenance of a network of border outposts to the universalisation of identity cards (Klaus Bade, *Europa en Movimiento*, Barcelona: Crítica, 2003, 194; on identity cards, see among others, John Torpey, *The Invention of the Passport*, Cambridge: Cambridge University Press, 2000). Secondly, the foreign population to be controlled increased dramatically. After the First World War, the fragmentation of the Austrian Empire, the revolution in Russia, and the redrawing of many national borders along the principle of national self-determination resulted in massive flows of outgoing population. Internal flows of populations after Second World War had to do with the huge number of people who were displaced and with the redrawing of borders (especially in Central and Eastern Europe). Thirdly, the emergence of national welfare insurance which required a stronger distinction between nationals (or permanent foreign residents) and foreigners, if only to ensure that eligibility conditions were respected.

civic and social rights severely curtailed.<sup>11</sup> Thus, they were negatively discriminated regarding terms of payment and working conditions, and had no guarantees that social security contributions would be aggregated at the time of calculating their pension neither in their country of origin nor destination (or for that matter, that they could enjoy their pension at all). Furthermore, they confronted draconian limits on several of their occupational rights, including the right to choose employment (especially if they had gained access to the country to fulfill a different job, they could be forced to apply for a new labour permit, which could or could not be granted); their right to join trade unions; their right to be elected as workers' representatives, and their right to strike or engage into some other form of collective action. At the same time, housing, educational and general welfare benefits were provided in less generous terms than those available to national workers. Free movement of workers was supposed to change these conditions, first, by means of transforming working permits from gratuitous concessions to regulated rights of workers if vacancies existed (as essentially foreseen in Article 49 TEC); and second, by means of ruling out discriminations based on nationality on what concerned access to the job, payment and working conditions (as required in Articles 48 and 51 TEC).

Thus, the core and uncontroversial content of Community free movement of workers resulted from *both* a normative vision of equal rights, related to the shattering of the European moral conscience by the atrocities committed by Nazi, Fascist and fellow travellers governments, *and* from the economic needs of the founding six Member States in the postwar period (the prototypical Community right-holder being the economically active person moving across borders to undertake remunerated employment).<sup>12</sup> Five Member States were in need of an inflow of labour to render their economic recovery plans feasible, while the sixth, Italy, had a surplus labour force anxious to seek work abroad.<sup>13</sup>

Still, it was far from obvious whether the legal substance of the Treaty provisions was exhausted by the rules which were to be derived rather uncontroversially from the literal tenor of the provisions, or whether a far

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<sup>11</sup> A masterful recreation of the socio-economic circumstances of migrants in the twenties and thirties in Bruno Traven, *The Death Ship*, 1926 (first translation into English 1934).

<sup>12</sup> Helen Feldstein, *supra* note 1.

<sup>13</sup> See on the contemporary literature, among others, Attilio Oblath, 'The Problem of Surplus Manpower in Europe', 70 (1954) *International Labour Review*, pp. 301-22; Xavier Lannes, 'International Mobility of Manpower in Europe' 73 (1957) *International Labour Review*, pp. 1-24 and 135-151, especially p. 143. It was widely accepted that migration would alleviate social tensions in Italy, while providing much needed remittances with which to finance capital investments.

more ambitious legal and political program was to be drawn through the systematic and teleological construction of the mentioned sections. The answer to this question hinged very much on the conception of the European Communities according to which integration should proceed; indeed, different conceptions entailed different views on the purpose and rationale of free movement of workers. It goes without saying that such uncertainty was closely connected to the overall unclear legal and political status of European integration in its early days.<sup>14</sup>

A 'functional' characterisation of European integration would naturally support a literal and rather narrow interpretation of Articles 48 to 51, on the assumption that free movement of workers was one of the several pulls and levers at the disposal of the supranational administrative structure created by the founding Treaties. In this view, free movement of workers would indeed be a tool of problem-solving, the problem being insufficient productive efficiency, and the solution being the opening of national labour markets. Hence, labour could move where a higher salary was paid, and be utilised in a better and more productive way.<sup>15</sup> Both the end of the administrative management of the movement of people and the assignment of a fully equal status to foreign workers were operative requirements of a well-functioning (and rather self-regulating, or at least self-correcting) market.

Free movement of workers could also be regarded as a vehicle of political integration. By making workers free to move within the European Communities, the gains would not only be economic, but also political, as workers would generate social ties binding across borders. Even so, the Treaty provisions, whose literal tenor was crowded by prohibitions to national

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<sup>14</sup> Point worth insisting upon, given the anachronistic (but in legal-dogmatic terms rather unavoidable) tendency to read an inevitability in the development of integration which was far from obvious at the time. It may suffice to keep in mind the recent failure of the Defense and Political Communities, the decision of the United Kingdom not to join either the ECSC or the EC, and the soul-searching of French governments under De Gaulle. Indeed, it may be fair to say that the main importance of the ECSC – and one may adventurously add of the EC – was pshychological, not economic (as Tony Judt points in *Postwar*, London: Allen Lane, 2005, p. 158).

<sup>15</sup> It is pertinent to keep in mind that Part II of the EEC Treaty keeps to this day a division in Titles which reveals the central role assigned to free movement of goods, and the ancillary roles assigned to free movement of workers, services and capital. Thus, Title I deals with free movement of goods, and free movement of goods only, while the other three fundamental economic freedoms are spelt out in Title III; the second Title is devoted to Agriculture. This formal organisation was perfectly coherent with the contemporary understanding that the free flow of goods actually required the adequate regulation of the other factors of production. Thus, the other economic freedoms were so to the extent that they were a necessary precondition for the realisation of free movement of goods.

legislatures, should be systematically and teleologically interpreted, aiming at drawing the more general principle of freedom of action underlying it. From this principle, more positive derivative norms could then be drawn,<sup>16</sup> which could fill the gaps and construct concrete secondary Community and national norms, and maximise the degree of realisation of the principle of free movement thus constructed. In the long run (perhaps in that long run in which we all will be dead, following the famous Keynes dictum), the process would result in the affirmation of a status of European citizen fully dissociated from engagement into economic activity.<sup>17</sup>

The tension between these two alternative conceptions of free movement of workers was never solved (or even addressed) explicitly, but secondary law and the jurisprudence of the Court came to be influenced by the second conception, which percolated into the legal and general public conceptions of European integration in general, and of free movement of workers in particular. Indeed, by 1975, the Court could claim that ‘the migrant worker [was] not regarded by Community law (...) as a mere source of labour but [was to be] viewed as a human being’.<sup>18</sup> The case law of the European Court of Justice enlarged the scope of the provisions on free movement of workers by expanding the understanding of who was entitled to the right to free movement, and by means of recharacterising the value basis of free movement of workers.

Firstly, a long series of cases expanded the numbers of those qualifying as workers, and thus entitled to Community rights when moving across borders or when legally staying in another Member State. The opening move of the Court was to affirm the autonomous and differentiated interpretation of the concept of ‘worker’ in Community law.<sup>19</sup> This quite obviously did not entail

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<sup>16</sup> The slow work of the Court of Justice led later to consolidation by the Commission. See for example Action Program in favour of migrant workers and their families, COM (74) 2250, p. 7. Available at <<http://aei.pitt.edu/>>.

<sup>17</sup> See for example the speech delivered by Jean Monnet on the delivery of the first passports entitling the holders to free movement within the Community to public servants of the ECSC, in which such passports are regarded as the forerunners of a generalised European passport; thus, implying that free movement was a political goal. Available at <<http://www.ena.lu?lang=1&doc=5114>>

<sup>18</sup> Case 7/75, *Epoux F.* [1975] 2 CMLR 442, at p. 450.

<sup>19</sup> A strategy that, as is well known, has been typically followed by the Court when suiting pro-integration objectives. Cf. Case 75/63, *Hoekstra (née Unger)*, [1964] ECR 177, par. 1: ‘If the definition of this term were a matter within the competence of national law, it would therefore be possible for each Member State to modify the meaning of the concept of ‘migrant worker’ and to eliminate at will the protection afforded by the Treaty to certain categories of person (...) Articles 48 to 51 would therefore be deprived of all effect and the

neglecting national definitions,<sup>20</sup> but merely reconstructing the rights and duties which characterised and distinguished an employment relationship in national legal orders in a critical fashion, aiming to realise the objectives of the founding Treaties of the Communities.<sup>21</sup> At the same time, the Court preserved room for the exercise of its own discretion by underlining that different provisions of the third Title of the second Part of the Treaty had different purposes, and drawing the conclusion that there was no need for a univocal definition of a worker in Community law.<sup>22</sup> This first move created the structural conditions under which the concept of worker could be stretched beyond its characterisation as a factor of production.<sup>23</sup> This led to 1) the expansion of the rank and file of workers by analogically extending the characterisation to family members, prospective workers and former workers;

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above-mentioned objectives of the Treaty would be frustrated if the meaning of such a term could be unilaterally fixed and modified by national law’.

<sup>20</sup> Thus, whether co-habitants should be assimilated to workers for the purpose of determining who has a right to reside in each Member State was decided negatively in Case 59/85, *Reed* [1986] ECR 1283, pars 13 and 15: ‘In the absence of a general social development which could justify a broad construction, and in the absence of any indication to the contrary in the regulation, it must be held that the term spouse in article 10 of the Regulation refers to a marital relationship only’.

<sup>21</sup> Case 66/85, *Lawrie-Blum*, [1986] ECR 2121, par. 17. The extensive interpretation moved the Court to reject the implicit differentiation of the status of the Community official, favoured by AG Rozès in Case 152/82 *Forcheri*, [1983] ECR 2323. I have consulted the Opinion of the AG in [1984] 1 CMLR 334. Page 340 is the key one: ‘It is necessary to exclude any consideration of the similar situation of migrant workers which requires the interpretation of provisions without relevance to the present case’.

<sup>22</sup> The Court has clearly distinguished the concept of worker for the purposes of free movement of workers and the concept of worker for the purpose of securing the coordination of national social security systems. Cf. Case 66/85, *Lawrie-Blum*, [1986] ECR 2121, par. 17: ‘The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for an under the direction of another person in return for which he receives remuneration’ with Case 182/78 *Pierik II*, [1979] ECR 1977, par. 4: ‘Article 4(1) of Regulation No 1408/71 defines the concept of ‘worker’ as any person who is compulsory or voluntarily insured under one of the social security schemes referred to in subparagraphs (I) (II) or (III) of that provision’ (...) such a definition has a general scope, and in the light of that consideration, covers any person who has the capacity of a person insured under the social security legislation of one or more Member States, whether or not he pursues a professional or trade activity.’

<sup>23</sup> Case C-53/81, *Levin* [1982] ECR 1035, pars 9 and 13: ‘Although the rights deriving from the principle of freedom of movement for workers and more particularly the right to enter and stay in the territory of a Member State are thus linked to the status of a worker or of a person pursuing an activity as employed person or desirous of so doing, the terms ‘worker’ and ‘activity as employed persons’ are not expressly defined in any of the provisions on the subject (...) In this respect, it must be stressed that these concepts define the field of application of one of the fundamental freedoms guaranteed by the Treaty and, as such, may not be interpreted restrictively’.

and 2) the systemic reconstruction of free movement of workers (together with freedom of establishment and the freedom to receive services, derived from the right to provide them across borders) as part of a more general personal freedom of action. In the following, these points will be explored closer.

Examining the first point, secondary legislation and jurisprudence assimilated the status of several persons which were not necessarily economically active to the status of worker, either based on previous or possible future occupation, or based on the existence of a personal relationship linking them to a worker. This was to a great degree the case of family members, prospective workers and persons who had been employed in the national labour market but were no longer working. In the following, each category will be considered in detail.

a) *Family members*: Article 48 did not make reference to spouses of family members as ancillary or derivative beneficiaries of the right to free movement of workers. Regulation 15<sup>24</sup> already granted Community rights to family members, although confined to the spouse and a limited amount of children. Regulation 38/64/EC<sup>25</sup> and Regulation 1612/68<sup>26</sup> extended the rights to all children and also to elderly dependents (parents and grandparents dependent on the worker).<sup>27</sup> Directive 68/360 affirmed that such rights were independent of the nationality of the family members, thus making the rights eligible also to citizens of third countries.<sup>28</sup> Regulation 1251/70 extended the rights beyond the death of the worker.<sup>29</sup> The Court of Justice pushed this assimilation further, by means of affirming (1) that the legal separation of spouses did not put an end to the rights deriving from marriage;<sup>30</sup> (2) that even unmarried companions could be granted rights, by means of regarding the granting in national law of a leave of residence to non-married partners of nationals as a 'social advantage';<sup>31</sup> and (3) that even spouses or partners without a valid national identity card or passport could gain access to the Member State,

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<sup>24</sup> OJ No 57, 26.8. 1961, p. 1073.

<sup>25</sup> OJ No 62, 17.4. 1964, p. 965.

<sup>26</sup> OJ L 257, 19.10. 1968, p. 2.

<sup>27</sup> Cf. Kenneth A. Dahlberg, 'The EEC Commission and the Politics of the Free Movement of Labour', 6 (1968) *Journal of Common Market Studies*, pp. 310-323.

<sup>28</sup> Article 4.4, OJ L 257, 19.10. 1968, p. 13.

<sup>29</sup> OJ 142 30.6.1970, p. 24.

<sup>30</sup> Case C-267/83, *Diatta*, [1985] ECR 567, pars 17-20.

<sup>31</sup> Case 58/95 *Reed*, [1986] ECR 1283. While in pars 15-6 the Court denies that a right of residence could be derived from Article 10 of Regulation 1612/68, it considers in pars 29-30 that it can be regarded as a 'social advantage' ex Article 7 of the referred Regulation, regarding which nationals of other Member States should not be discriminated against

provided that they could identify themselves and offer evidence of the link to a Community national.<sup>32</sup>

b) *Prospective workers*: Entry into the territory of another Member State was originally assumed to be conditioned by a previously and definitively offered position. Community law transformed the obtainance of a working permit under such circumstances from a discretionary prerogative of the receiving Member State into a right of the prospective worker. This explains the relevance of the institutional and substantive provisions concerning the coordination of national employment services contained in Regulation 15, 38/64 and 1612/68. The right to enter another Member State to seek employment without previous offer was established due to a Declaration attached to Regulation 1612/68. The Declaration required all Member States to acknowledge a right of abode of at least three months (which could be shortened only if the job seeker became dependent on welfare assistance, in which case he or she would have to leave without further ado). The Court interpreted such a right even more extensively, by affirming that it would be opposable by the job seeker as long as he could offer evidence of genuine chances of being engaged.<sup>33</sup>

c) Those who *had been employed but were no longer working*: Regulation 3 and its replacement 1408/71 applied the worker status to those who were insured against one of the risks regulated in the Regulations when they would enjoy the benefits, something which in most cases entailed the beneficiaries who were no longer working, temporarily or definitively. This was the case with sickness, invalidity, old-age, work accidents and occupational diseases and unemployment benefits, all of them governed by Regulation 1408/71. In addition, retired persons have been the object of a specific directive regulating the right of residence in 1990.<sup>34</sup>

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<sup>32</sup> Case C-459/99, *MRAX*, [2002] ECR 6591, par. 62: 'The answer to the first question referred for a preliminary ruling must therefore be that, on a proper construction of Article 3 of Directive 68/360, Article 3 of Directive 73/148 and Regulation No 2317/95, read in the light of the principle of proportionality, a Member State may not send back at the border a third country national who is married to a national of a Member State and attempts to enter its territory without being in possession of a valid identity card or passport or, if necessary, a visa, where he is able to prove his identity and the conjugal ties and there is no evidence to establish that he represents a risk to the requirements of public policy, public security or public health within the meaning of Article 10 of Directive 68/360 and Article 8 of Directive 73/148'.

<sup>33</sup> C-282/89, *Antonissen*, [1991] ECR 745, pars 21-22.

<sup>34</sup> Directive 90/365, [1990] OJ L180, of 13.7.1990, p. 28.

Considering the second point, free movement of workers was defined, together with freedom of provisions and receipt of services and freedom of establishment, as concrete manifestations of a larger personal freedom of action, and concretely a freedom of movement of persons.<sup>35</sup> This resulted in the drawing of manifold connections, both in the legislation and in the case law, between the rights and duties assigned to nationals of Member States as workers, providers and recipients of services or entrepreneurs.<sup>36</sup> In particular, the right to enter any Member State on the mere production of an identity card as part of the right to provide and receive services.<sup>37</sup> An even further step was taken when the condition of mere recipient of services was regarded as making anybody entitled to the protection afforded by the principle of non-discrimination on the basis of nationality (given the obvious fact that it is hard not to become a recipient of services once one moves to another State, as modern societies are based on the division of labour and the use of the money medium).<sup>38</sup> The mutual influence of the personal freedoms explains the promulgation of two directives regulating the right of non-economic active citizens to reside in other Member States, the so-called 1990 general Directive,<sup>39</sup> and the 1993 directive applicable to students.<sup>40</sup> In both instances, the right of residence is subject to the double condition of full medical insurance and possession of sufficient means as not to become a burden on the welfare system of the host state.

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<sup>35</sup> See Preamble of Regulation 38/64/EC, OJ No 62, 17.4.1964, p. 965.

<sup>36</sup> On right of entry and residence, see Directives 68/360 and 73/148; and the interpretation offered of them in Case 48/75 *Royer*, [1976] ECR 497, pars 12 and 15: 'Nevertheless, comparison of these different provisions shows that they are based on the same principles both in so far as they concern the entry into and residence in the territory of Member States of persons covered by Community law and the prohibition of all discrimination between them on grounds of nationality'. On the substantive implications of the right to equal treatment, see Case 118/75, *Watson and Belmann*, [1976] ECR 1185, par. 9 and see C-106/91 *Ramrath* [1992] ECR I-3351, paragraph 17, and C-107/94, *Asscher*, [1996] ECR I-3089, par. 29.

<sup>37</sup> Cf. Joined Cases 286/82 and 26/83 *Luisi and Carbone*, [1984] ECR 377, par. 16: 'It follows that the freedom to provide services includes the freedom, for the recipients of services, to go to another Member State in order to receive a service there, without being obstructed by restrictions, even in relation to payments and that tourists, persons receiving medical treatment and persons travelling for the purpose of education or business are to be regarded as recipients of services'.

<sup>38</sup> Case 186/87, *Cowan*, [1989] ECR 195; [1990] 2 C.M.L.R. 613 AG Lenz: 619 'delimitation of its substantive scope must be oriented towards the model of a common market in which all economic activities within the Community are freed from all restrictions on grounds of nationality or residence.'

<sup>39</sup> Directive 90/364, [1990] OJ L180, of 13.7.1990, p. 26.

<sup>40</sup> Directive 93/96 [1993] OJ L 317, of 18.12.1993, p. 59.

Secondly, the objective scope of free movement of workers was progressively widened by reconceptualising its grounding principle (from non-discrimination on the basis of nationality to the idea of personal freedom of action as just described)<sup>41</sup> and by the consequent refashioning of the substantive yardstick against which the European constitutionality of national laws was to be determined (from national constitutional standards to transcendental and self-standing Community standards). The Court operated that change by what apparently was a further expansion of the subjective scope of free movement of workers, namely by progressively relativising the assumption that freedom of movement was a liberty enjoyed by foreign workers who took remunerated employment in another Member State; the Court broke with such an assumption and brought free movement of workers to bear in relationships between Member States and their own nationals, provided that such citizens had been economically active (or had prepared for economic activity) in another Member State. The first line of cases concerned the refusal of home Member States to recognise trade qualifications acquired in another Member State.<sup>42</sup> Secondly, the Court ruled that it was contrary to Community law to refuse computation of periods of work in another Member States when calculating pension rights,<sup>43</sup> or to impose greater social security contributions when the worker had been posted to another Member State by its employer, and kept on being insured in the home State while being regarded as non-resident for tax purposes.<sup>44</sup> Thirdly, it moved to apply the same rationale to *actual job seekers*, by considering contrary to Community law the refusal to acknowledge periods of employment in other Member States,<sup>45</sup> and then to *potential job seekers*, by means of affirming explicitly that the question of whether a post-graduate academic title obtained in another Member State was to be recognised by the country of which a citizen is national is governed by Community law, even if there was no secondary legislation on the matter.<sup>46</sup> Fourthly, it extended the protection of Community law to third country spouses who had the right of residence when the citizen was resident in another Member State, but not immediately had it when returning home (in the case at hand, on account of suspicions concerning the genuinity of the marriage).<sup>47</sup> Finally, the Court ruled that Community law also

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<sup>41</sup> A process closely related to the systemic interpretation of economic freedoms to which we have just referred.

<sup>42</sup> Case 115/78, *Knoors*, [1979] ECR 399, pars 20 and 24.

<sup>43</sup> Case C-443/93, *Vougioukos* [1995] 4033, pars 39-41.

<sup>44</sup> Case C-18/95, *Terhoeve*, [1999] 345, par. 28.

<sup>45</sup> Case C-419/92, *Scholz*, [1994] ECR I-505, par. 9.

<sup>46</sup> Case C-19/92, *Dieter Kraus*, [1993] ECR 1633, pars 16-22.

<sup>47</sup> Case C-370/90, *Singh*, [1992] ECR I-4265, par. 23: 'Accordingly, when a Community national who has availed himself or herself of those rights returns to his or her country of

applied when a German citizen acquired French nationality by marriage (while not renouncing her previous nationality) and sets her residence in France but works in Germany.<sup>48</sup> What was at stake here was not a further overstretchment of the term worker to include the national worker, but the narrowing down of the scope of *internal situations* to which Community law did not apply. To the extent that discrimination *against the own nationals of a Member State* (paradoxically enough, usually labelled as ‘reverse discrimination’)<sup>49</sup> remained being considered as unobjectionable according to European constitutional law,<sup>50</sup> the Court could only pretend that free movement of workers governed the relationships between a Member State and its own nationals by shifting the value basis of free movement from the principle of non-discrimination on the basis of nationality to the principle of freedom (essentially economic freedom) said to underlie the four economic freedoms enshrined in the Treaties, and by the consequent recharacterisation of what used to be internal situations as Community relevant situations on account of the *obstacles* to the exercise of free movement of workers resulting from national legislation, even if exclusively applicable to nationals. Such a change pointed to a major shift in the source and content of the yardstick of European constitutionality, which I will examine closer below.<sup>51</sup>

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origin, his or her spouse must enjoy at least the same rights of entry and residence as would be granted to him or her under Community law if his or her spouse chose to enter and reside in another Member State’.

<sup>48</sup> Case C-336/96, *Gilly*. [1998] ECR 2793, par. 21.

<sup>49</sup> The scent of paradox comes from the fact that the term was coined in US schooling law in the aftermath of *Brown* to refer to what is now generally known as ‘affirmative action’ or ‘positive discrimination’.

<sup>50</sup> The soundness of reverse discrimination is grounded on a logical and a normative basis. In logical terms, the assumption that there is a clear-cut division of legislative competences between the European Union and its Member States entails that certain situations may be defined as purely internal ones, where a standard different from the Community one would necessarily be applicable. In normative terms, reverse discrimination needs not be tackled through the judicial review of the European constitutionality of national norms, as the national political process, in which the discriminated national citizens are represented, can sooner or later rectify the discrimination if that is perceived as adequate and/or necessary. On reverse discrimination on the free movement of goods, see Miguel Maduro, *We the Court*, Oxford: Hart, 1997, pp. 154-9.

<sup>51</sup> As we will see in section 3 in more detail, whereas economic freedoms as operationalisations of the principle of non-discrimination on the basis of nationality necessarily refer back to national constitutional standards (non-discrimination being a purely formal standard to be filled in with national substantive principles), (economic) freedom was bound to be linked to self-standing, transcendental standards directly derived from the Treaties (as the very idea of obstacles to the economic freedoms of nationals pointed beyond national constitutional standards).

To conclude this section, both the case law of the European Court of Justice and the secondary legislation spelling out the implications of free movement of workers were underpinned by the view that free movement of workers was to be properly constructed as a vehicle of both economic and political integration. This goes a long way to account for the expansionary construction of the term worker in 'free movement of workers', which well before *Martínez Sala* and *Baumbast* had led to what could only be characterised as overstretching from a narrow literal point of view, to a change in the understanding of which national norms and according to which standard could be subject to a constitutional review to determine their compliance with the requirements of free movement of workers. This had anticipated the change in the characterisation of this fundamental freedom as a concretisation of the principle of non-discrimination on the basis of nationality to a self-standing (and mainly economic) freedom.

## **The two-headed leading case: What it means and what it has implied**

The leading character of *Martínez Sala* and *Baumbast* derives from the fact that the former case set, and the later confirmed, the course which the ECJ has followed in the construction of the legal consequences of the insertion of the citizenship provisions in the Treaty establishing the European Community (ex. Article G of the Treaty of Maastricht) upon the scope of the Community right to personal free movement.<sup>52</sup>

Before analysing the questions covered in this section, it may be pertinent to refresh the content of the citizenship provisions as inserted by the Treaty of Maastricht. The literal tenor keeps on being the same, although the numbering has changed: The two key sections for our present purposes (Articles 8 and 8a) read as follows:

### Article 8

1. Citizenship of the Union is hereby established.

Every person holding the nationality of a Member State shall be a citizen of the Union.

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<sup>52</sup> On European citizenship, see Carlos Closa, 'The Concept of Citizenship in the Treaty on European Union', 29 (1992) *Common Market Law Review*, pp. 1137-70; Massimo La Torre (ed.), *European Citizenship. An institutional challenge*, Dordrecht: Kluwer, 1998, and Pietro Costa, 'From National to European Citizenship: A Historical Comparison', in Richard Bellamy, Dario Castiglione and Emilio Santoro (eds), *Lineages of Citizenship*, London: Palgrave, 2004, pp. 207-226.

2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.

Article 8a.

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.

2. The Council may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1; save as otherwise provided in this Treaty, the Council shall act unanimously on a proposal from the Commission and after obtaining the assent of the European Parliament.

This section is structured in three parts. First, a summary of the facts and the main elements of the rulings in *Martínez Sala* and *Baumbast* is presented. Next, I consider the extent to which the case law of the ECJ refers to *Martínez Sala* and *Baumbast* to justify departures from the pre-Maastricht case law. Finally, I analyse the ensuing case law to determine the extent to which *Martínez Sala* and *Baumbast* is regarded as an authority on elements of the freedom of movement of workers which had been established in the pre-Maastricht jurisprudence. The intention is to test the extent to which the symbolic importance of *Martínez Sala* has replaced the previous leading cases as the authoritative reference on free movement of persons (quite obviously, including workers).

## **Facts and main arguments of the rulings in *Martínez Sala*, *Baumbast* and *R***

### *Martínez Sala*

The plaintiff *Martínez Sala* was a Spanish national who had been resident in Germany since her childhood, except for two years which she spent in her native country. From 1976 to 1986 she had different jobs, and spent some occasional time on social welfare. From 1986 to 1989 she was mostly unemployed and received welfare assistance from local and regional authorities. The plaintiff had seemingly always complied with the requirement of applying for residence permits in accordance with German law, which were issued to her without further ado until 1984. Between 1984 and 1994 she only managed to obtain the receipt of her application, presumably due to delays in the bureaucratic machinery. In January 1993, still waiting for a residence permit to be issued, her second child was born. Given the fact that she did not have any full-time employment, or any employment for that purpose, she was in principle eligible for the payment of the child-raising allowance, a non-

contributory benefit which is a part of the family policy in Germany. However, her application was rejected on the grounds that although she was resident in Germany, the granting of the allowance to non-nationals was conditioned by a valid residence permit.

Given that all parties agreed that the German decision was sound from a purely national perspective, but void when considered from a Community perspective, the key question was whether the case was governed by domestic German law or by Community law.<sup>53</sup> Before Maastricht, this may have been a clear-cut case. Martínez Sala was not a worker or an economically active person, and under such circumstances, Community law simply did not apply.<sup>54</sup>

Accepting the suggestion of the counsel of the plaintiff, the ECJ was ready to explore whether a European citizen, if legally resident in another Member State, could invoke rights granted by Community law against the Member State where she resided, and particularly, the right not to be discriminated on nationality grounds ex Article 8a (now 17). The Court affirmed that this was the case:

As 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 provisions of the Treaty on European citizenship.<sup>55</sup>

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<sup>53</sup> All parties of the case, including the German government, acknowledged that denying Martínez Sala the allowance resulted in a discrimination exclusively based on her nationality. However, the German government further argued that the case did not fall within the scope of Community law, because Martínez Sala could not be regarded as a worker, either for the purposes of Article 48 TEC and Regulation 1612/68 or for the purposes of Article 51 and Regulation 1408/71. In straight opposition to such a claim, the counsel to the plaintiff argued that the very fact that Martínez Sala was a European citizen brought the case under the scope of European law, independently of whether she was or was not a worker in a Community law sense. Thus the plaintiff was claiming that the insertion of citizenship provisions should require the Court to review its previous case law in depth, and further extend the subjective scope of Community law, transcending the idea that it only applied to persons engaged in cross-border economic activity.

<sup>54</sup> Pars 34 and 45 of the Judgment. Similarly the AG in his Conclusions, although in par. 12 he claimed that if it was the case that she was receiving social assistance at the time the child was born, she was to be regarded as covered against one of the risks described in Regulation 1408/71, and consequently, would fall within the scope of application of the Treaty.

<sup>55</sup> Par. 61 of the Judgment.

On such basis, the ECJ concluded that the denial of child allowance by German authorities was a breach of Community law; concretely, it led to a discrimination based on nationality against a person who was entitled to equal treatment. After Maastricht (and in particular, after European citizenship), the relations between a Member State and legally resident nationals of another Member State were governed by Community law, even if the European citizen was economically inactive. Still, the ruling of the Court left unanswered several key legal questions,<sup>56</sup> including the following three: a) whether Article 17 would be said to have direct effect; b) whether a right to enter into the territory of another Member State would stem from it; and c) whether nationals could invoke the new right against their own states.<sup>57</sup>

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<sup>56</sup> There were several reasons why *Martínez Sala* left so many questions open, but two questions were perhaps the most important ones. Firstly, the facts of the case were very peculiar. It is not far-fetched to say that, was it not for the very restrictive character of German law on what concerns the acquisition of citizenship, *Martínez Sala* would have become a citizen many years before the facts of the case took place. In any other Member State of the Union at the time, she could have been naturalised and would have in all likelihood opted for such an option if only to avoid further bureaucratic hazzles. Because she was for all purposes and according to all possible criteria a 'de facto' member of German society, even if not in possession of a German passport, the teutonic authorities were in a very weak position when it came to justifying their decision. Indeed, AG La Pergola affirmed explicitly that where the conditions required from Germans to be applied to Community nationals legally resident in Germany, such as *Martínez Sala* was, abuse was improbable (cf. par. 22 of his conclusions). Secondly, the Court limited the triggering effect of Article 17 to previous 'legal residence' in the host Member State, and intentionally set aside the question of what are the concrete implications of European citizenship in terms of gaining entry into another Member State. As can be read in par. 60 of the Judgment: 'It should, however, be pointed out that, in a case such as the present, it is not necessary to examine whether the person concerned can rely on Article 8a of the Treaty in order to obtain recognition of a new right to reside in the territory of the Member State concerned, since it is common ground that she has already been authorised to reside there, although she has been refused issue of a residence permit'. The decision to muddle through may also have been favoured in order to avoid the question of when the right of *Martínez Sala* not to be discriminated against was created. This was specially relevant in the case given that the child was born in early 1993, while the Treaty of Maastricht entered into force on November 1st, 1993. The Advocate General stated the obvious when he explicitly excluded that it could be invoked with a view to gain access to political rights reserved to nationals precisely because they are so; cf par. 21 of his Conclusions: 'A claim by a resident who is a national of another Member State in relation to nationals of the host State will therefore be unfounded if it relates to rights which are to be understood as being reserved for the latter precisely on the ground that they are nationals of that State'.

<sup>57</sup> As acknowledged by AG LA Pergola in his conclusions, par. 23: 'This case is therefore a test case for a range of problems which could be referred to the Court in future'.

Indeed, the core implications of *Martínez Sala* became clearer when the Court gave its judgment on *Baumbast* and *R*, which is why it is proper to talk of a two-headed leading case.

### *Baumbast* and *R*

The joined cases concerned different, although related issues. Both cases referred to couples in which one person was a non-Community citizen. In *Baumbast*, she was a Colombian citizen, he a German national; in *R*, she was a US citizen, he a French national. Both couples established at some point their residence in the United Kingdom, and were later denied leave to reside there.

In *Baumbast*, the couple had a common child (who held both the nationality of his mother and of his father), and one daughter from a previous marriage of the wife. When they arrived the United Kingdom, Mr. Baumbast worked for a British company, and all the family members were issued a residence permit valid until 1995. By then, however, Mr. Baumbast had ended his work relationship and started working as a self-employed. After 1993 he was on and off social welfare, undertaking temporary contracts with German companies in third countries. When Mrs. Baumbast asked in 1995 for indefinite leave of residence, she was denied it. The Baumbasts lived in the United Kingdom, where they owned a mortgaged home, and where their children attended school. Notwithstanding that, British authorities claimed that none of them was a worker according to Community law, and thus they were not entitled to a residence permit according to the secondary law then in force. The key point was that Mr. Baumbast no longer worked in the United Kingdom, and was not insured against social risk in Great Britain (the whole family was covered by the German social insurance system, which did not cover emergency treatment in the United Kingdom). This was considered by the authorities as proof that Mr. Baumbast was not entitled to reside in Britain according to Directive 90/364, which then established the general regulation of the right of abode of nationals of Member States.<sup>58</sup>

The facts of *R* were somehow different. The couple had two common children with dual US-French nationality. The husband had a right of residence on account of being a worker, and when his wife entered the UK she was granted a residence permit as a spouse of a Community national, valid until 1995. The couple divorced in 1992, following which the mother took primary care of the

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<sup>58</sup> For the sake of completeness, it must be added that before the preliminary question was actually solved, the children were acknowledged the right to reside in the United Kingdom on the basis of Article 12 of Regulation 1408/71, and so was Mrs. Baumbast as prime carer; but Mr. Baumbast kept on being denied leave of residence at the time the case was brought before the ECJ.

children (although it was explicitly stated that the children had to have contact with the father). She established herself as an interior decorator. When she applied for a new residence permit in 1995, it was denied (although granted to the children) on account of her being a non-Community citizen who no longer was married to a Community national. Before the Court decided the case, she married a UK national and was granted leave of residence.

The Court was consequently presented with three different sets of legal problems: (1) whether the children of the two couples had a right of residence; (2) whether the spouses, even if non-Community nationals, had a right of residence; (3) and whether Mr. Baumbast himself, a Community national who no longer qualified as a worker under Article 48 or 51 TEC, had a right of residence. In all three cases, the Court concluded that the concerned plaintiffs had a right of residence. While the first two problems posed legal questions which were far from requiring concerning the interplay between the case law of the Court and the citizenship provisions (and were decided without major innovation upon the pre-Maastricht case law),<sup>59</sup> the third problem, the right of residence of Mr. Baumbast himself, replayed the legal questions underpinning *Martínez Sala*, precisely because what Mr. Baumbast asked for amounted to the acknowledgment of his right to reside in the United Kingdom *even though he was no longer a worker*, not even according to the overstretched definition which the ECJ had come to sustain in its pre-Maastricht case law.

The Court, in contradiction with the submissions of the British and German governments and the Commission, claimed that European citizenship affirmed that Article 18(1) did have direct effect,<sup>60</sup> and thus conferred to all nationals of Member States<sup>61</sup> the right to move and reside freely in the

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<sup>59</sup> The Court affirmed in each case the existence of a right of residence. On the first problem, the Court applied pretty straightforwardly the previous case law, affirming that the prospect of the children being denied the right to pursue their education in the host Member State on account of changes in the working or personal circumstances of the parents would create an obstacle to the effective exercise of the freedom of movement of workers (pars 51-52 of the Judgment). The Court only went slightly beyond its previous case law when claiming that the effectiveness of free movement of workers required granting leave of residence to all children living with the spouses, even if some of them were descendants of only the non-Community national (par. 57 of the Judgment). On what concerns the second problem, the Court affirmed that the right of the children to reside would be rendered ineffective if it would not imply the right of residence of the partner who is in actual charge of them, in case that she or he did not have another title of residence (as said in par. 71 of the Judgment; par. 72 affirms that this result is also required by the right to family life as enshrined in the European Convention of Human Rights).

<sup>60</sup> Par. 84 of the Judgment.

<sup>61</sup> Par. 84.

territory of all other Member States even if economically inactive.<sup>62</sup> Such rights, as most rights, were not unlimited, but had to be weighed and balanced with the legitimate interests of the Member States if in conflict.<sup>63</sup> However, limitations had to respect the core content of the right<sup>64</sup> (the Court speaks of being in line with the limits imposed by EC law) and be proportional.<sup>65</sup> This obviously implies that any differentiated treatment of nationals and non-nationals becomes suspect, and could be the object of review by national courts. In the case at hand, it was out of any proportion to deny the right of residence to a self-sustaining citizen, who was not a burden on the British public finances, on account of his German insurance not covering emergency treatment in the United Kingdom.<sup>66</sup>

### ***Martínez Sala* and *Baumbast* as leading cases: the subjective and objective scope of free movement in a European citizenship perspective**

In this section, I consider the main doctrines on the meaning of Community free movement brought about by the case law developed following the lead of *Martínez Sala* and *Baumbast*. My core claim is that the Court has established that by creating a bond uniting all nationals of Member States as citizens of the European polity, also a transformation in the value basis of Community law in general has taken place, and in particular of the four economic freedoms (more specifically, personal freedom of movement). The Court found that the establishment of a European citizenship requires reconstructing the fundamental economic freedoms as aiming not only at the realisation of the principle of non-discrimination on the basis of nationality, but more widely and generally at the achievement of equal treatment of all nationals of Member States qua European citizens. Such a shift would require a reading of the provisions of free movement of workers resulting in the broadening of both their subjective and objective scopes. On what concerns the former, the Community right of personal freedom of movement should be reputed to be held not only by 'workers' (that is, economically active citizens and those assimilated to them in the pre-Maastricht case law of the ECJ) but also by 'supranational citizens', the term by which we could refer (and do refer hereafter) to the larger category of persons who are either workers or economically inactive legal residents in another Member State, where they have already developed a network of social relations. On what regards the

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<sup>62</sup> Par. 81 of the Judgment.

<sup>63</sup> Par. 90 of the Judgment.

<sup>64</sup> Conclusions by AG Geelhoed, p. 110.

<sup>65</sup> Par. 91 of the Judgment.

<sup>66</sup> Par. 93 of the Judgment.

objective scope of personal freedom of movement, the 'citizenship turn' has led to an expansionary construction of the horizontal constitutional bite of the freedom, thus 'Europeanising' policy areas where Member States retain exclusive powers and which were regarded as fully excluded from the scope of Community law in the previous case law of the ECJ, and meddling to a larger extent than before in the relationships between the state and its own nationals.

### **Expanding the subjective scope of Community law: From market citizen to supranational citizen as subject of Community law**

The rulings in favour of both *Martínez Sala* and *Baumbast* necessarily led to the final abandonment of the concept of 'worker' as drawing the personal scope of Community law. The Court found that the insertion of citizenship provisions, and in particular of section 1 of article 8a, required enlarging the rank and file of those holding Community rights. Consequently, the concept of worker remains important to determine the scope of application of the bundle of rights assigned on account of taking employment in another Member State, but failure to qualify as a worker does not immediately entail not being granted rights by Community law.

A systematic reconstruction of the cases following on the trail of *Martínez Sala* and *Baumbast* shows that the Court has not proceeded to replace the concept of a worker by European citizen simpliciter as the category drawing the sphere of application of Community law, but instead has favoured that of the 'supranational citizen'. Working remains an avenue of choice to develop such ties, but is not the exclusive one. Provided that entry and residence were legally enjoyed,<sup>67</sup> the mere fact of residence would trigger that status, even if the person has not become economically active while being resident.

The legal status of the supranational citizen has been defined positively in *Martínez Sala*, *Grzekzyck*, *Baumbast*, *Ninni-Orasche* (only in the Opinion of the

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<sup>67</sup>Although European citizens do have a right to enter any other Member State, it could be the case that entry took place when the state of the nationality of the relevant individual was not yet a Member State (this hypothesis is far from artificial considering the fact that membership of the Union has almost doubled since 2004). Moreover, it is still the case that residence is conditioned to not becoming a burden on national health and welfare systems, as restated in Article 7(1)(b) of the 2004 Directive on free movement and residence of European citizens Directive 2004/38/EC of the European Parliament and the Council, of 29 April 2004, OJ L 158, of 30.4.2004, p. 77]. Thus, although nationals of any Member State have the right to enter any other Member State to seek employment, and they can persist in their search for a rather long time, they do not have an unconditional and unlimited right to residence.

AG),<sup>68</sup> *Trojani*, *Bidar* and *Ioannidis*, as that of a person who is legally resident in another Member State even though the person concerned is no longer or has never been a worker. Martínez Sala had spent most of her life in Germany; Grzekzyck had already spent three years in Belgium; Baumbast had been living for a long period in the United Kingdom, and even owned a home there; Ninni-Orasche had been resident for two years and her residence permit was valid for another three; Trojani had been living in Belgium for two years, and had become engaged in a socio-occupational reintegration program of the Salvation Army, Bidar had been living in the United Kingdom for two years, and Ioannidis had spent close to ten years in Belgium. In *Collins*, the concept of 'supranational citizen' was negatively defined by means of excluding from its breadth those European citizens who had not developed consistent ties to the host State of their residence. Concretely, the ECJ found it problematic that eligibility for a job-seeker allowance would be conditioned by long-term residence, but considered proper to require a connection between persons who claim entitlement to such an allowance and the employment market.<sup>69</sup>

The contours of the right of residence of supranational citizens have also been considered in the case law. In *Baumbast* the ECJ declared unjustified to deny a new leave of residence to a self-sustaining citizen on account of his insurance not covering emergency treatment. *Grzekczyk* also did incidentally touch on the issue, by redefining the resuming condition of becoming an 'unreasonable burden' on the public finances of the host state. The assignment of a permanent right of residence after five years of continued legal residence in the host state by Article 16 of the Residence Directive of 2004 constitutes a partial 'codification' of the rights stemming from this line of jurisprudence.<sup>70</sup>

Particularly important is the affirmation of the rights of non-Community spouses of national citizens to residence (in terms affirmed from *Akrich*<sup>71</sup> onwards). While Advocate General Geelhoed was extremely cautious in his conclusion, arguing that there were good reasons to restrict the free entry and

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<sup>68</sup> Although the Court limited itself to answer the questions posed by the referring Court, and avoided the question of what implications Article 18 TEC had in the case at hand, the Opinion of AG Geelhoed in C-413/01, *Ninni-Orasche*, [2003] ECR I-13187 constitutes the most clear effort to determine what concept of rightholder underlies the *Martínez Sala* jurisprudence; cf. especially par. 91 of the Opinion.

<sup>69</sup> C-138/02, *Collins*, par. 71. The Court hinted at the requirement that the person had genuinely sought work in the Member State. This fell short of the most strict standard suggested by the Advocate General, who considered that residence was a perfectly adequate condition of eligibility (par. 75 of his Opinion) as it will allow to discourage 'benefit tourism'.

<sup>70</sup> Directive 2004/38/EC, supra note 67.

<sup>71</sup> C-109/01 *Akrich*, [2003] ECR I-9607.

establishment of non-nationals when their only title to such entry and residence was marriage to a Community national, the Court ruled that limitations were virtually confined to Member States having good evidence of the marriage being fake (the right to family life in EC law would rule out the automatic denial of the right of residence even if the spouse was not legally resident in the EU country where established before entering the State of which her husband or his wife are nationals).

The 'supranational citizen' is a creature of the social, political and economic dynamics unleashed by integration.<sup>72</sup> Still, it was only partially within<sup>73</sup> (when not totally outside) the scope of application of Community law, and the enjoyment of the ensuing rights, until the Treaty of Maastricht and its 'operationalisation' in *Martínez Sala* and *Baumbast*. By giving the supranational citizen a full 'droit de cité', the ECJ could not but redefine the objective scope of Community law, and in particular, of the personal freedom of movement.

### **The 'objective' scope of personal free movement: Constitutional 'horizontal' framing and the communitarisation of the relationships between Member States and their own nationals**

The 'citizenship' turn of personal freedom of movement has not only justified expanding the subjective scope of the freedom (from worker to supranational citizen), but has also led to a reconsideration of the objective scope of the freedom. The ECJ has broadened the horizontal constitutional bite of free movement, or put differently, the ECJ has reviewed the European constitutionality of national laws of a larger number of national laws using freedom of movement as a yardstick. In particular, the Court has opened up to review of European constitutionality laws in exercise of exclusive national competences (and significantly, on non-contributory welfare provisions) and has increased the teeth of the principle of freedom of movement in relations between a state and its own nationals. As a result, the province of 'purely internal situations' in free movement of persons has got dramatically reduced.<sup>74</sup>

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<sup>72</sup> Quite obviously, there were workers migrating to other states well before the Treaty of Rome entered into force. We have now grown so accustomed to the fact that a high number of Europeans spend parts of their lives in another Member State to that we do not realise that it is the twin result of the technologies which make travelling easy and affordable and the legal framework established by Community law.

<sup>73</sup> Partially inside because some of the supranational citizens had been absorbed as 'workers' in the overstretched definition of the term (especially, as was indicated in the parallel line of jurisprudence starting in *Cowan*).

<sup>74</sup> Indeed, the redefinition of the value basis of free movement is closely connected to the redefinition of the subjective scope of the right. If economically inactive citizens of another

## New areas of national law to be constitutionally reviewed against European standards

The characterisation of the supranational citizen as a holder of rights and obligations under Community law implies *de facto* an enlargement of the scope of application of Community law which corresponds to the social and economic problems of supranational citizens which were not governed by Union law before. The new breadth of Community law did not come hand in hand with the assignment of positive or vertical competence to the Union, but with the affirmation that the validity of all national laws, even those promulgated in exercise of exclusive national competences, was dependent on its compliance with the requirements deriving from the right to free movement in the citizenship phase of Community law.

The 'horizontal constitutional effect of freedom of movement'<sup>75</sup> has had a major impact on the design of national welfare systems, and particularly on the design of non-contributory benefits. The main concrete implication of *Martínez Sala* and *Baumbast* for the supranational citizen has been access to non-contributory social benefits, precisely the kind of benefits which basically fell outside the scope of application of Community law until Maastricht.<sup>76</sup> The Union had virtually no competence on the matter (and essentially powers remains in the hands of Member States to this day); moreover, these benefits were barely affected by the horizontal effect of the economic freedoms given that they were granted on 'citizen' and not on 'market' grounds (i.e. eligibility did not depend on holding the condition of worker or economically active person characteristically subject to Community law) and presupposed a 'long-

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Member States are to be regarded as Community rightholders (as indeed *Martínez Sala* and *Baumbast* explicitly do), then the bonds uniting Europeans cannot be regarded to be based on mere economic interest, but must have transcended that stage and reached one of trust based on solidarity.

<sup>75</sup> Indeed, AG Kokott in C-192/05, *Tas Hagen*, [2006] ECR I-10451, pars 34 and 36 talk of a horizontal effect of the citizenship provision, echoed by the Court in paragraph 23 of its judgment. AG Geelhoed in C-209/03, *Bidar*, [2005] ECR I-2119, pars 29 and 52 constructs in such a way the judgment in *Collins*. And he follows such line of reasoning in the case at hand. The Court assumed in par. 40 of its judgment that the Communities already had acquired competences on education.

<sup>76</sup> Explicitly, AG Geelhoed in C-209/03, *Bidar*, [2005] ECR I-2119, 28: 'By placing emphasis on the fundamental character of EU citizenship, the Court makes clear that this is not merely a hollow or symbolic concept, but that it constitutes the basic status of all nationals of EU Member States, giving rise to certain rights and privileges in other Member States where they are resident (...) various social benefits which Member States previously granted to its nationals and to economically active persons under Regulations Nos 1612/68 or 1408/71 now have been extended to EU citizens who are lawfully resident in the host Member State'.

term' relationship between the political community and the beneficiary (and consequently were clearly beyond the reach of the *Cowan* line of jurisprudence). By granting the supranational citizen the Community rights, *Martínez Sala* and *Baumbast* have turned suspicious any criteria of eligibility of non-contributory benefits which excludes them from the scope of eligibility, placing the argumentative burden on the side of the Member States. In *Collins*, the Court made it clear that the application of any limitation 'must rest on clear criteria known in advance and provision must be made for the possibility of a means of redress of a judicial nature'.<sup>77</sup> Thus, in *Martínez Sala* it was impossible to justify enjoyment of a child-rearing allowance to the obtainance of a merely declaratory residence permit; in *Grzejszyk* it was unreasonable to assume that the right of residence of a student came to an end because he applied for the *minimex* (a non-contributory benefit ensuring a minimum income); in *Trojani* the same argument was extended to the case in which the claimant was neither a worker nor a student; in *Ninni-Orasche*, the Advocate General (although not the Court) found the denial of a study grant on account of nationality unjustified, given that she had genuine ties with Austria and there were clear indications that she did not change her residence to become eligible for such a benefit; in *Bidar* it was unreasonable to require a period of four years of residence to be eligible for a maintenance grant while completing university studies; in *Ioannidis*, it was unreasonable to deny a tide-over allowance because the applicant had followed a training program in another Member State.

### The EU law government of relationships between citizens and their own state and the shrinking internal situation

The expansion of the objective breadth of Community law has not only resulted in the constitutional framing of policy areas which were traditionally considered out of the reach of Community law, but also in an increased bite of Community law in the discipline of relationships between Member States and their own nationals, which has led to a dramatic reduction of the scope of purely internal situations to which Community law would not apply. Indeed, some Advocates General have sustained that Community law should also apply to cases of 'residual' reverse discrimination, something which would only be a step away from fully leaving aside the pretence of drawing the line between purely internal and Community situations.

The persistence of the rights acquired as a mover, and the relationship between citizens and states

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<sup>77</sup> C-138/02, *Collins*, par. 72.

As argued in section I, relations between a Member State and its own nationals were brought within the scope of application of Community law even before the Maastricht Treaty, to the extent that nationals had already exercised their right to free movement taking employment (or preparing for doing so) in another Member State.

The ECJ has expanded the constitutional role played by free movement after *Martínez Sala* and *Baumbast* by claiming that relationships between a state and its nationals are regulated by Community law when nationals have previously exercised the right to personal free movement to another Member State, *whether for economic or non-economic purposes*. Thus, not only workers, but also students or pensioners enjoyed rights against their own Member States if they were somehow treated worse than another national who had not spent part of their life in another Member. <sup>78</sup> If we make use of the same metaphor we employed when considering the expansion of the personal scope of application of Community law, what we are dealing with here is the acknowledgment that supranational citizens do not stop being so when they return to their home country.

In this particular relation, the emboldening of the right to free movement of nationals resulted in their access to benefits and tax deductions available both to nationals (and European citizens) who have had continuous residence and to nationals who had exerted their right of free movements as workers. The easiest cases concerned citizens who had already returned to their Home state or were still resident in another Member State. *D'Hoop* was based on the lack of justification of the denial of a tideover allowance on the ground that the applicant had not completed all her studies in Belgium, but also studied in France. In *Tas Hagen*, the subjection of entitlement of a compensatory pension aimed at war victims to residence in the country lacked any good reason. In *Turpeinen*, a Finnish norm applying a higher tax rate to the pension paid by Finnish authorities on account of residence in Spain was found groundless.<sup>79</sup> In *Pusa*, enjoyment of a rule which limits of the attachment order on a pension so that the debtor still receives an amount equal to the minimum income was rendered ineffective when not considering the income tax payable in the country of residence.<sup>80</sup> Rather more complicated were the cases of frontier workers discriminated by their own state on account of being resident in a second Member State. In a handful of cases, the ECJ seemed to have no major

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<sup>78</sup> Cf. C-540/99, *Reisch*, AG Geelhoed, par. 58, where he claimed that citizenship resulted in bringing within the scope of Community law the owner of a second residence in another Member State.

<sup>79</sup> Case C-520/04, *Turpeinen*, [2006] ECR I-10685, pars 63-66.

<sup>80</sup> Case C-224/02, *Pusa*, [2004] ECR I-5763, pars 34 and 35.

difficulty in figuring out the sense of its ruling. In *Elsen*, the fact that residence (or actual payment of contributions) was required by German law to assimilate child-rearing periods during which the mother does not work to working periods for the purpose of calculating pension benefits was found utterly unjustified.<sup>81</sup> In *Ritter Colais*, the differential treatment of negative income losses stemming from the family home depending on the location of the home in Germany or in another Member State was regarded as lacking good reason. In *Schwarz*, German tax law denied deductibility of school expenses incurred in another Member State, on account of them not being incurred in Germany, which was found contrary to the free movement exercised by the students themselves.<sup>82</sup> In *Van Pommeren*, the denial of benefits associated to invalidity pension on account of residence in Belgium was quashed even if the plaintiff did not qualify as 'market citizen' because the only 'Community' factor was her residence in Belgium. However, some latter cases have revealed the complexities involved here, and have perhaps moved the Advocates General to be less certain about the proper way in which the case law should develop. In *Hartmann*, AG Geelhoed put forward the claim that the rights on which citizens could oppose their Member States should only be those which they could have acquired as a result of moving to another State. He doubted that the Hartmanns would have acquired such a right if they both had moved to Austria or Germany. In *Hendrix*, AG Geelhoed was open to consider whether the nature of the benefit complementing earnings of handicapped people was 'more closely connected with the social environment of the claimant' and thus it was justified to subject it to the residence criteria' (par. 77).<sup>83</sup> Moreover, in *Schempp*, the Court refused to consider the denial of a tax deduction on account of maintenance payments as discriminatory, because the recipient was an Austrian national, and no evidence was produced of her income being subject to tax in Austria. If the spouse had been resident in Germany, *Schempp* would have been entitled to the deduction. However, the Court claimed that the outcome was due to the disparity in tax laws, which was the result of the allocation of powers between the Union and the Member States.<sup>84</sup>

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<sup>81</sup> Case C-135/99, *Elsen*, [2000] ECR I-10409, par. 35.

<sup>82</sup> Case C-76/05, *Schwarz*, not yet reported, par. 90; AG Stix Hackl par. 91.

<sup>83</sup> The ECJ limited this conclusion claiming that such restriction had to be justified and proportionate to the objective pursued (par. 54 of the judgment).

<sup>84</sup> Case C-403/03, *Schempp*, [2005] ECR I-6421, pars 17-18.

## What is left of the 'purely internal situation' in personal movement?

Perhaps the most radical implication of the citizenship turn of the ECJ is the dramatic reduction of the scope of 'purely internal situations'.

The drawing of a clear and meaningful line between 'internal' and 'Community' situations was predicated on a conception of the Community subject and of the project of European integration which has been progressively eroded in the case law of the ECJ, not only that concerning the understanding of economic freedoms, but also that concerning the legal basis of Community acts. At any rate, the legal doctrines that the ECJ has built after *Martínez Sala* and *Baumbast* do necessarily imply a reduction of the breadth of purely internal situations.

The so-called doctrine of 'residual discrimination', proposed to the Court by Advocate General Maduro in a case concerning free movement of goods,<sup>85</sup> and applied to free movement of persons by AG Sharpston,<sup>86</sup> may accelerate the progress towards constitutional oblivion of the category of purely internal situations. The doctrine claims that Community law should govern purely internal situations when the review of European constitutionality results in invalidating a national norm which mainly applies to non-nationals, but still governs a residual number of nationals. The very use of the term 'residual' and the ensuing normative arguments (which seem to revolve around the necessity of Community law protecting victims of a discriminatory normative standard only applicable to a very diminished minority once constitutional European law leads to its being set aside and rendered inapplicable to most of its original addressees; that is, Community law should apply because victims

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<sup>85</sup> Opinion of AG Maduro in Case C-72/03, *Carbonati Apuani*, [2004] ECR I- 8027, especially pars 68 and 69. The case involved an Italian law which imposed a tax calculated by reference to weight on all marble excavated in Carrara, with the exception of that transformed within the same municipality. Although this was a case of free movement of goods *par excellence*, Maduro invoked *Martínez Sala* and *Baumbast* to ground that also residents in Italy should benefit from the declaration of European unconstitutionality of the national law; otherwise Union law would tolerate a 'residual' discrimination of the minority of those who were neither from the municipality or the whole of the Union except Italy.

<sup>86</sup> Opinion of AG Sharpston in C-212/06 *Gouvernement de la Communauté française and Gouvernement wallon*, not yet reported, pars 154 and 157. Sharpston concludes that subjecting to a condition of residence a social benefit aimed at those who have at their charge disabled persons, is not only constitutive of a breach of the Community right not to be discriminated of non-Belgian European citizens who work in Flandres but do not have their residence there, but also that Belgians have a similar Community right if they are in the same situation. This cannot be regarded as a purely internal situation because it is another case of residual discrimination. Quite cunningly, the AG predicts that the Court was unlikely to follow her train of reasoning, which it actually did not.

only became a tiny minority, unlikely to be heard in national political process, *after* the application of the Community standards of constitutionality apply) suggest that the expansion of the scope of Union law in these cases may indeed be a rather modest enterprise. Still, the symbolic, political and systemic implications cannot but be described as radical.

### ***Martínez Sala* as the fundamental leading case on free movement of persons: How it became an authority for all the case law**

The symbolic importance of *Martínez Sala* is proven by the fact that it has become a jurisprudential authority even on aspects of free movement of persons which had been a settled part of the case law of the Court before it (and of which it was not a leading case, but a mere application of such leading cases). Up to January 2008, *Martínez Sala* was put to such use in the following cases:

- In five Opinions of AGs and in one judgment of the Court the the claim that there is no single definition of worker in Community law was based on paragraph 31 of the judgment in *Martínez Sala*.<sup>87</sup>
- In eight Opinions of AGs and in two judgments of the Court there was a reference to paragraph 32 of the judgment of *Martínez Sala*, which restated the broad interpretation of worker for the purpose of Article 48 TEC and Regulation 1612/68.<sup>88</sup>
- In six Opinions of AGs and in five judgments of the Court paragraph 36 of the judgment in *Martínez Sala* was referred to since it restated the broad interpretation of what constitutes a worker for the purpose of Article 51 TEC and Regulation 1408/71.<sup>89</sup>

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<sup>87</sup> Opinion of AG Cosmas in C-411/98, *Ferliri*, [2000] ECR I-8081, par. 50; Opinion of AG Jacobs in C-95/99, *Khalil*, [2001] ECR I-7413, par. 46; Opinion of AG Geelhoed in C-256/01, *Allonby*, [2004] ECR I-873, par. 63; Opinion of AG Kokott, in C-313/02, *Wippel*, [2004] ECR I-9483, par. 43; Opinion of AG Kokott, in C-302/02, *Laurin Effing* [2005] ECR.I-553, par. 26; Judgment of the Court in C-543/03, *Dodl*, [2005], I-5049, par. 27.

<sup>88</sup> Judgment in Case C-337/97, *Meussen*, [1999] ECR I-3289, par. 13; Opinion of AG Geelhoed, C-109/01 *Akrich*, [2003] ECR I-9607, par. 75; Opinion of AG Mischo, C-369/01, *Abatay*, [2003] ECR I-12301, par. 159; Judgment in C-138/02, *Collins*, [2004] ECR I-2703, par. 26; Opinion of AG Geelhoed in C-256/01, *Allonby*, [2004] ECR I-873, par. 67; Opinion of AG Kokott, in C-302/02, *Laurin Effing* [2005] ECR.I-553, par. 47; Opinion of AG Léger, in C-152/03, *Ritter Coulais*, [2006] ECR I- 1711, par. 32; Opinion of AG Léger, in C-20/03, *Burmanjer*, [2005] ECR I-4133, par. 19; Opinion of AG Ruiz Jarabo, in C-258/04, *Ioannidis*, [2005] ECR I-8275, par. 39; Opinion of AG Léger in C-520/04, *Turpeinen*, [2006] ECR, I-10685, par. 56.

<sup>89</sup> Judgment in Case C-275/96, *Kuusijärvi*, [1998] ECR I-3419, par. 21; Judgment in Case C-262/96, [1999] ECR I-2685, par. 86; Opinion of AG Cosmas in Case C-411/98, *Ferliri*, [2000] ECR I-8081, par. 44; Opinion of AG Saggio in Case C-135/99, *Essen*, [2000] ECR I-10409, par.

- Twice Advocates General and once the Court affirmed that the right to residence stemming from 1408/71 and 1612/68 could overlap on the basis of paragraph 27 of *Martínez Sala*.<sup>90</sup>
- Four Opinions of Advocates General and one judgment of the Court invoked paragraph 25 of *Martínez Sala* to determine how social advantages should be defined in Community law.<sup>91</sup>
- Five Opinions of Advocates general and three judgments of the Court made use of paragraph 32 of *Martínez Sala* to substantiate the premise that the end of the employment relationship did not entail that all rights stemming from the status of worker ceased immediately.<sup>92</sup>
- One Advocate General invoked paragraph 53 of *Martínez Sala* to affirm the declaratory, not constitutive nature, of the residence permit.<sup>93</sup>
- One Advocate General invoked *Martínez Sala* to ground the characterisation of the child-rising allowance as a benefit for the purpose of Regulation 1408/71; and one Advocate General did the same with regard to the definition of family benefit for the purpose of the same Regulation.<sup>94</sup>

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16; Opinion of AG Tizzano in Case C-212/00, *Stallone*, [2001] ECR I-7625, par. 14; Opinion of AG Jacobs in C-28/00, *Kauer*, [2002] ECR I-1343, par. 43; Judgment Court in C-302/02, *Laurin Effing* [2005] ECR.I-553, par. 32; Judgment Court in C-372/02, *Adanez Vega*, [2004] ECR I-10761, par. 46; Opinion of AG Jarabo Colomer in C-138/02, *Collins*, [2004] ECR I-2703, par. 54 (reference was to par. 44 of *Martínez Sala*); Opinion of AG Geelhoed, in C-543/03, *Dodl*, [2005] ECR I-5049, par. 11; Judgment Court in C-543/03, *Dodl*, [2005] ECR I-5049, par. 30.

<sup>90</sup> Judgment in C-185/96, *Commission v. Greece*, [1998] ECR 6601, par. 19; Conclusions of AG Alber in Case C-85/99, *Offermanns*, [2001] ECR I-3337, par. 68; Conclusions of AG Alber in C-184/99, *Grzelczyk*, [2001] ECR I-6193, par. 92-3.

<sup>91</sup> Judgment in C-185/96, *Commission v. Greece*, [1998] ECR 6601, par. 20; Conclusions of AG Jarabo Colomer in C-138/02, *Collins*, [2004] ECR I-2703, par. 19; Conclusions of AG Geelhoed in C-413/01, *Ninni-Orasche*, [2003] ECR I-13187, par. 43; Conclusions of AG Tizzano in Joined Cases C-502/01 and 31/02, *Gaumain-Cerri*, [2004] ECR I-6483, par. 134; Conclusions of AG Kokott, in C-302/02, *Laurin Effing* [2005] ECR I-553, par. 60.

<sup>92</sup> Conclusions of AG Alber in C-33/99, *Fahmi*, [2001] ECR I-2415, par. 66; in the same case, judgment of the Court, par. 42; Conclusions of AG Jacobs in C-43/99, *Leclere and Deaconescu*, [2001], ECR I-4265, par. 94; in the same case, judgment of the Court, par. 55; Judgment of the Court in Case C-388/99, *Rundgren*, [2001] ECR I-3731, par. 32; Conclusions of AG Jarabo Colomer in C-138/02, *Collins*, [2004] ECR I-2703, pars 29-33; Conclusions of AG Geelhoed in C-413/01, *Ninni-Orasche*, [2003] ECR I-13187, par. 42; Conclusions of AG Kokott, in C-302/02, *Laurin Effing* [2005] ECR.I-553, par. 50.

<sup>93</sup> Conclusions of AG Alber in C-184/99, *Grzelczyk*, [2001] ECR I-6193, par. 87.

<sup>94</sup> Conclusions of AG Kokott, in C-302/02, *Laurin Effing* [2005] ECR I-553, par. 61; Conclusions of AG Jacobs in C-333/00, *Maaheimo*, [2002] ECR I-10087, par. 27.

This practice may suggest that *Martínez Sala* has become the reference ruling on free movement of persons, that indeed Advocates General and even the Court have come to see the legal force of elements of the case law predating *Martínez Sala* and *Baumbast* dependent on the above mentioned causes confirming them. This fundamental role assigned to *Martínez Sala* may be best illustrated by the use made of the precedent by AG Tizzano in *Stallone*. In paragraph 14 of his Conclusions, Tizzano supports his claim that the situation at hand is not a purely internal one on the fact that the fifth recital of Regulation 1408/71 refers not only to workers, but also to the members of his or her family; the argument is backed by a reference to paragraph 44 of the judgment in *Martínez Sala*, which actually concerns a very different matter (indeed, whether the plaintiff could be regarded as a worker if insured in respect of one single risk in Germany). Even if merely an editing mistake, it may reveal the importance acknowledged to *Martínez Sala*, which European judges feel is necessary to quote as a leading authority in the field

## **Legal and normative assessment of *Martínez Sala* and *Baumbast***

After having reconstructed the pre-Maastricht case law on free movement of workers, and analysed the changes brought about by the rulings of the ECJ led by *Martínez Sala* and *Baumbast*, it is time to assess the implications of the 'citizenship' turn of Community law in legal-dogmatic and in wider political terms. In particular, it is pertinent to consider (1) whether it is appropriate to characterise the two-headed leading case as a major turning point in the evolution of Community law, which have exerted a major influence in the nature of Community law as a legal order and resulted in the transformation of free movement of workers into free movement of citizens; (2) whether *Martínez Sala* and *Baumbast* have actually renewed the emancipatory promise of Community law by making the political and not the market citizen the central reference point of Community law. In the following we will see that although these questions are different and should be treated individually, their answers are strongly connected.

### **A legal revolution?**

As argued in Part II, the key innovations in the rulings in *Martínez Sala* and *Baumbast* consist in the broadening of the subjective and objective scope of personal freedom of movement under Community law. The insertion of citizenship provisions in the TEC has been taken to mean that free movement of persons is not to be considered mainly as a specification or concretisation of the principle of non-discrimination on the basis of nationality, but more

widely constructed as one of the key faculties attached to European citizenship as the fundamental status of all Europeans (although not the only right against being discriminated on the basis of nationality). This has led to the acknowledgement of a Community right to personal freedom of movement to citizens who were not economically active, and thus could not qualify as workers. This, however, does not immediately entail that European citizens have the same rights of abode as nationals in all Member States. As we saw in section II, the case law of the Court following *Martínez Sala* and *Baumbast* has made it clear that the expansion of the personal scope of freedom of movements falls shorter than that, and indeed only extends to 'supranational citizens', who may be economically inactive but at least have stable social links and bounds with the Member State on account of previous legal residence. Similarly, national laws and policies which were before regarded as fully outside the breadth of the review of European constitutionality has been brought into the scope of Community law, as well as increasing the bite of free movement in relationships between a state and its own nationals.

It suffices to consider briefly the case law of the Court as it developed before the Treaty of Maastricht to realise that *Martínez Sala* and *Baumbast* are not so much revolutionary judgments, as important cases which render explicit and push forward the main elements of jurisprudence of the Court. Put differently, their importance does not reside so much in their revolutionary character (their structural and substantive implications are rather congenial to the previous case law of the Court, a point to which one may argue that the ECJ could have decided in similar terms even without the explicit insertion of citizenship provisions in the primary law of the Union)<sup>95</sup> as in the fact that they push quite far the process of 'abstraction' and 'humanisation' of the definition of right-holders of the Community freedom of movement, at the same time as they increase the regulative salience of Community law in the legal relationships between a state and its own nationals.

Indeed, *Martínez Sala* and *Baumbast* can have contributed to the further realisation of the 'political' understanding of free movement of persons which has animated the case law of the Court of Justice since its first rulings on the subject matter, thus further disproving the soundness of the conception of free movement of persons as a mere means of problem-solving and efficiency enhancement. The only major difference being perhaps the fact that the pre-Maastricht jurisprudence seemed to anchor its understanding of free

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<sup>95</sup> An equivalent judgment in the absence of the citizenship provisions may have come later rather than sooner. But the successive 'stretching' of the meaning of 'market citizen', which reached its peak in *Cowan*, led logically to the acknowledgment of the status and problematique of the supranational citizen.

movement in the implicit general freedom of action which necessarily underpinned the four fundamental economic freedoms; whereas since *Martínez Sala*, the new principled grounding of free movement of persons is European citizenship as a supranational political bond. Besides the discussion concerning the relationship between citizenship and general freedom, especially when specified by reference to economic powers, it must be stressed that continuity is proven by the fact that citizenship, like general freedom before, play the same structural role in justifying the declaration of unconstitutionality of national laws on account of their being non-discriminatory but placing obstacles on the way of enjoying any of the fundamental economic freedoms.

The logical and substantive connections between the traditional jurisprudence on freedom of movement of workers and *Martínez Sala* and *Baumbast* may be obscured by the laconic style of some of the judgments of the Court,<sup>96</sup> but they are easier to spot in the opinions of the Advocates General, more specifically of AG La Pergola in *Martínez Sala*. Indeed, the argument of AG La Pergola was built around the premise that European citizenship constituted an autonomous ground on which to claim the bundle of rights and protections offered by Community law:

Citizenship of the Union [...] is the fundamental legal status guaranteed to the citizen of every Member State by the legal order of the Community and now of the Union. This results from the unequivocal terms of the two paragraphs of Article 8 of the Treaty [...] [It] comes through the fiat of the primary norm, being conferred directly on the individual, who is henceforth formally recognised as a subject of law who acquires and loses it together with citizenship of the national state to which he belongs and in no other way.<sup>97</sup>

However, he was very explicit in claiming that this new ground was the result of elucidating the more abstract legal principle underlying the pre-existing rights to freedom of movement of workers, to freedom of establishment and to freedom to provide and receive services, thus stressing the logical continuity in the evolution of the jurisprudence on freedom of movement:<sup>98</sup>

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<sup>96</sup> But see C-274/96 *Bickel and Franz*, [1998] ECR I-07637, pars 15-16 where the Court makes a revealing reference to *Cowan*.

<sup>97</sup> Conclusions of AG La Pergola, par. 18.

<sup>98</sup> AG Geelhoed in *Baumbast* explicitly refers to the evolution of the scope of application of freedom of movement, at the same time that he tries to relate such changes to socio-economic transformations, some of which had not been duly thought through by the Community legislator. See his Conclusions, pars 22-33.

Article 8a extracted the kernel from the other freedoms of movement – the freedom which we now find characterised as the right, not only to move, but also to reside in every Member State: a primary right, in the sense that it appears as the first of the rights ascribed to citizenship of the Union. That is how freedom of residence is conceived and systematised in the Treaty. It is not simply a derived right, but a right inseparable from citizenship of the Union in the same way as the other rights expressly crafted as necessary corollaries of such status (see Article 8b, c and d) – a new right, common to all citizens of the Member States without distinction<sup>99</sup>

and

In other words, the Union, as conceived in the Maastricht Treaty, requires that the principle of prohibiting discrimination should embrace the domain of the new legal status of common citizenship [...] I would, however, point out that the solution I propose represents a logical development of the case law, which has already interpreted the prohibition of discrimination broadly and progressively [...] I wonder, however, whether once the right of a recipient of services – of the abstract indiscriminate range of services which may be provided to him in any host State – not to suffer discrimination has been recognised [in the judgment given in the Cowan case], the Court ought not, in the interests of consistency, to take the further step which, I believe, the solution of the present problem requires and rule that this potential recipient of every kind of service may now also rely on his or her status of citizen of the Union in order to assert the principle of non-discrimination, throughout the entire area in which the case law applies.<sup>100</sup>

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<sup>99</sup> Conclusions of AG La Pergola, par. 18.

<sup>100</sup> Par. 23 of the Opinion. Similarly AG Geelhoed in *Baumbast*, par. 105: 'Article 18 EC adds to these two sets of rules a general right of residence in favour of citizens of the European Union'. In the words of Advocate General La Pergola, that right is inseparable from citizenship. Article 18 EC – and these are my words – establishes a fundamental right in favour of citizens of the European Union to move and reside freely within it. It subsumes the rights to move and to reside in favour of both economically active and economically non-active citizens under a single denominator. For the economically non-active Article 18 EC has additional significance. Since the introduction of Article 18 EC – in the Maastricht Treaty – the right to move and reside in favour of economically non-active persons stems directly from the Treaty and is no longer fully subject to the assessment of those entrusted with the enactment of secondary legislation. See also Opinion of AG Geelhoed in *Akrich*, case C-109/01, [2003] ECR I-9607, pars. 82-90. Indeed, many cases could be argued the same way without *Martínez Sala* and *Baumbast*. Take, for example, *Grzelczyk*. It could be claimed that by means of establishing a right to reside of students, the Community law-maker was rendering

To summarise, *Martínez Sala* and *Baumbast* are two important judgments which definitely should be regarded as leading cases on free movement of persons, not because they broke radically new ground, but because they pushed to its logical conclusion and rendered explicit the premises which were implicitly at work in the previous case law of the European Court of Justice.

### **More human, but less social?**

If we must conclude that there is more continuity than change in the case law of the Court, it becomes rather obvious that we should ponder about the soundness of the unqualified normative assessment of the two-headed leading case, as a major driving force in the process of the 'politicisation' of the European Union.<sup>101</sup> After all, how can a major break be operated by a case law which operates according to a conception of European integration shared with those cases from which it is said to break apart, and which pushes to its logical conclusion the premises implicit in the previous case law?

Indeed, it is my claim in the remainder of this sub-section that *Martínez Sala* and *Baumbast* also push to its logical conclusion the normative shortcomings of the case law of the European Court of Justice on free movement of persons. The attempt to advance a political conception of the process of European integration through what is a fundamental *economic* freedom has been paradoxical all through. The limitations of the approach have become increasingly clear. In particular, the line of jurisprudence led by *Martínez Sala* and *Baumbast* renders very clear the ensuing set of three main problems. First, the 'citizenship' turn has resulted in a structural process of Europeanisation and judicialisation of major areas of national law and policy, a development highly problematic according to a political and democratic characterisation of integration. Second, it has aggravated the bias in favour of 'individualistic' outcomes and 'commutative' distributive logics against 'collective' outcomes

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effective the conditions for the enjoyment of educational opportunities across the Union. This will require interpreting the phrase 'unreasonable burden on public finances' in Directive 93/96 in a restrictive way because the very purpose of allowing entry in a Member State to pursue studies could be frustrated if students were to lose such a right if and when their financial situation were to change for the worse; thus, 'unreasonable burden' cannot be equal to 'temporary burden'; This interpretation is supported by the way in which AG Geelhoed distinguished *Grzelczyk* and *Ninni-Oresche*, see Case C-413/01, [2003] ECR I-13187, par. 86 of the Opinion; see also Opinion of AG Jarabo Colomer in C-138/02, *Collins*, [2004] ECR I-2703, par. 67.

<sup>101</sup> After all, if it is usually claimed that the narrow economic conceptualisation of the process of European integration, the focus on economic issues and means to the detriment of political matters and solutions, is the very jurisprudence of the Court of Justice, it is hard to understand how a major political break could have been operated by two very important wagons of the very train of legal reasoning of the Court of Justice.

and 'solidaristic' distributive logics, at the same time as it has promoted the emancipation of Community standards of constitutional review from the common constitutional traditions of the Member States, and thus severed a key democratic connection ensuring the legitimacy of Community constitutional law. Third, it has resulted in problematic distributive outcomes, strengthening the structural power of mobile (and better off) workers to the detriment of immobile (and generally worse off) ones, and thus quite likely undermining the effective power of democratic decision-making processes.

### **Furthering the Europeanisation and judicialisation of national law and policy**

The explicit affirmation of a wider subjective and objective scope of the right of personal free movement in Community law has propelled the twin processes of Europeanisation and judicialisation of national law and policy. In particular, it has extended it to sensitive areas until then regarded as exclusive national competence and excluded altogether from the scope of Community law (as already mentioned, the paradigmatic case of non-contributory welfare benefits).

The rulings resulted in the **Europeanisation** of policies to the extent that the larger scope of freedom of movement necessarily entails its constitutional horizontal framing of all national laws and policies, including those regarding which the European Union has no substantive competence, and which were supposed to be fully excluded from the scope of Community law before.<sup>102</sup> Because Europeanisation proceeds exclusively through the subjection of ever increasing areas of national law to the review of European constitutionality, without affirming any law-making or decision-making powers at the supranational level,<sup>103</sup> it comes hand in hand with the transfer of decision-making powers from political and representative processes to judicial ones. This might also be referred to as a process of Europeanisation through **judicialisation**.

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<sup>102</sup> This was rather obvious in the way in which the facts and the law of the case was presented by the parties to *Martínez Sala*. There was wide agreement on what would be the proper solution to the case according to German law, and according to German law disciplined by the Community freedom of movement. Disagreement revolved on whether there was a genuine Community link which will bring the case into the normative space of European Union law.

<sup>103</sup> It could be further added that even if such powers were created, the present division of labour between law-making procedures generates a structural bias in favour of market-making and against market-correcting norms that will also lead to Europeanisation through judicialisation or accretion of power to judges, not political decision-making processes.

Unless one assumes that the cause of integration is always best served by adding new powers to the supranational level of government, irrespectively of what kind of powers are transferred and how they are exercised, it is far from obvious that Europeanisation *per se* is to be regarded as a positive development in normative terms. This is certainly the case when Europeanisation entails a shift of power from representative political institutions to courts. Not only the democratic credentials of any court are by definition problematic besides the syllogistic application of law, but also those of the ECJ on welfare matters are problematic. All courts have institutional limitations when dealing with distributive and solidaristic legal institutions, because they lack the knowledge and normative competence to review the key political decisions underlying them. It must be added here that the dramatic reduction of the scope of the 'purely internal situations', and, more importantly, the increasing meddling of the Court on situations of reverse discrimination, adds to the argument that the ECJ has entered a terrain where it can only erode the legitimacy of European Union law. Indeed, the classical scope of the principle of non-discrimination on the basis of nationality was grounded on the assumption that national political processes may result in pathological discrimination against non-nationals because they were not *represented* politically; while the discriminatory treatment of nationals will, sooner or later, be properly taken into account by national political processes. That is why reverse discrimination was taken to be not justiciable.

It is important to notice that the redefinition of the value basis of free movement (from non-discrimination to European citizenship) furthers a process of '**emancipation**' of the yardstick of European constitutionality from national constitutional traditions.<sup>104</sup> As long as free movement of persons was considered as an operationalisation of the principle of non-discrimination on the basis of nationality, the constitutional standards being applied were still national ones, an outcome in full accordance with the key legal role played by the collective of national constitutions as the deep constitution of the European Union, and consequently as the key source of democratic legitimacy of the synthetic constitutional order.<sup>105</sup> This is so

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<sup>104</sup> Indeed, the Court followed here a path very similar to that trailed by the case law on all other fundamental economic freedoms, the main difference concerning the timing and the rationale for the shifts in the jurisprudence. In legal-dogmatic terms, the ratio decidendi of the first leading cases revolved around the characterisation of free movement of persons as the operationalisation of the interdiction of direct discrimination on the basis of nationality, which was later expanded to comprise indirect discrimination. Finally, a national law could be considered unconstitutional from the standpoint of European Community law even if not discriminatory, as long as it posed obstacles to the exercise of free movement.

<sup>105</sup> On the synthetic character of European constitutional law, see Agustín José Menéndez, 'The European Democratic Challenge', 15 (2009) *European Law Journal*, pp. 277-308.

because non-discrimination calls for the review of the equality of treatment between nationals and non-nationals, and as is well-known, equality is a purely formal criterion, which needs to be filled in by reference to specific substantive standards. As noted above, such standards were not imposed upon by Community law, but were directly taken from national constitutional law. Once we affirm that the freedom of movement may be infringed by non-discriminatory national measures, we are necessarily emancipating the Community standard of constitutional review from the substantive standards of national constitutional law, and implicitly making reference to a supranational and transcendental standard to be drawn by the Court of Justice (who else?) from the rather abstract and general provisions of the Treaties. The democratic legitimacy of the latter is highly problematic, to say the least, given the peculiar supranational blend of the inexistent discipline of constitutional debates on the fundamental law of the Union, the inchoate character of the European political process, and the structural disconnection of European constitutional adjudication from national political processes.

### **The structural substantive bias against distributive and solidaristic legal norms: the negative framing of socio-economic rights**

*Martínez Sala* and *Baumbast* have also exacerbated the substantive bias in Community law against distributive and solidaristic legal norms. The reason is relatively simple. The key standards of European constitutional review are the fundamental economic freedoms. Although the recognition of protection of fundamental rights is an unwritten principle of Community law, and the progressive development of the case law up to the solemn proclamation of the Charter of Fundamental Rights have fleshed out a second key component of the European yardstick of constitutionality,<sup>106</sup> it is still the case that the Court structurally favours fundamental economic freedoms in its review of national laws (as the judges first consider compliance with economic freedoms, and only afterwards consider whether the furthering of a 'non-economic' fundamental right justifies the breach of the economic freedom).<sup>107</sup> It is perhaps even more important that the absorption of a given policy area within the scope of Community law tends to lead judges to reframe the relevant issues in the mould characteristic of economic freedoms, namely by means of identifying the subjective, individualistic rights at stake, and policing the observance of principles of commutative justice. However, the nature of many

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<sup>106</sup> Agustín J. Menéndez, 'Chartering Europe', 40 (2002) *Journal of Common Market Studies*, pp. 471-90.

<sup>107</sup> Indeed, two recent and much debated judgments of the ECJ concerned the unconstitutionality of European norms on account of its breach of fundamental rights. See C-402/05, *Kadi*, not yet reported and C-345/06, *Heinrich*, not yet reported.

of the underlying questions is thus simply distorted, resulting in what could be labelled as a 'subreptitious economisation'. The formal logic of economic rights hides in plain sight the substantive logic of solidaristic obligations, which are founded on collective goods, not individual rights, and which are characterised by complex multilateral relations to be governed according to principles of distributive, not commutative justice. This can indeed be observed in the judgments of the European Court of Justice on the implications of *Martínez Sala* and *Baumbast* for the granting of non-contributory welfare benefits to supranational citizens. Whereas the extension of economic freedoms to non-nationals may result in a positive-sum game, that is not necessarily the case when we are dealing with welfare benefits, which institutionalise what some citizens owe others, and thus necessarily entail a redistribution of resources. It is surely the case that a common citizenship should entail a modicum of solidarity towards the nationals of other Member States, but that does not wipe out the million euro question of any welfare policy, which is determining who is and who is not eligible. Pretending that the extension of welfare rights always lead to a better protection of the welfare objective is simply illusionary, because the key point of any redistributive program is to use the taxes collected from some to comply with the obligations of distributive justice they had towards others.<sup>108</sup>

Indeed, it could be argued that the rethoric of European citizenship has provided a nicer value ground to the process of transformation of economic freedoms, from concretisations of the principle of non-discrimination to transcendental freedoms which require setting aside all national laws which may be an obstacle to the operation of the single market (no matter what aim they pursued). Although this is not the place to do so, it would be worth exploring the relationship between *Martínez Sala* and *Baumbast*, the redefinition of the importance of free movement of capital in the *Golden Shares* judgments, the recharacterisation of market-making as a competence basis in *Tobacco Advertising* and the upper hand given to freedom of establishment to the detriment of collective socio-economic rights in *Viking* and *Laval*.<sup>109</sup>

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<sup>108</sup> Which does not mean that an overall well-funded and generous welfare system may not increase the overall wealth of a society. There is wide and ample proof of that being the case. For a recent restatement, see Robert E. Goodin, Bruce Headey and Ruud Muffels, *The Real Worlds of Welfare Capitalism*, Cambridge: Cambridge University Press, 1999.

<sup>109</sup> See cases C-376/98, *Germany v Parliament and Council (Tobacco Advertising)*; [2000] ECR I-8419 C-367/98, *Commission v. Portugal (Golden Shares)*, [2002] ECR I-4731; C-438/05, *Viking*, not yet reported; C-341/05, *Laval*, not yet reported; and C-346/06, *Rüffert*, not yet reported. The most persuasive theoretical account of European integration in recent years, Alexander Somek, *Individualism*, Oxford: Oxford University Press, 2008, starts connecting the dots in this regard.

## **The substantive distributive implications of the case law**

Beyond the structural process of transformation of the standards of review of European constitutionality, it is possible to ask the perhaps simpler question of who benefits from *Martínez Sala* and *Baumbast*? Or put differently, can we observe any pattern on the socio-economic profile of the new right-holders?

At first sight, it may seem that the beneficiaries, as in *Martínez Sala* or *Grzekzyck*, are not necessarily the better off in society. After all, *Martínez Sala* was an unemployed mother asking for a child allowance, and *Grzekzyck* was a student applying for a grant to be able to drop part-time working and concentrate on finishing his studies. But is this first impression correct? In my view clearly not, based on the following reasons. First, the rightholders added by *Martínez Sala* and *Baumbast* to the subjective scope of Community law would by definition be those capable of assuming the costs of establishing themselves in another Member State without the support of a remunerated employment.<sup>110</sup> That is likely to be a mixed lot, which may include a far from negligible number of citizens who would be hard to describe as the worse off in society. Still, a good deal of the non-nationals now given the shelter of Community law may indeed deserve protection from a distributive, welfare perspective. Second, and more to the point, the key distributive implications revolve around the expansion of the objective scope of freedom of movement, notably in the expansion of the breadth of the review of European constitutionality through the assignment of rights to citizens against their own states. These rights are not only bound to be enjoyed by the most mobile nationals (which in many cases tend to be among the best off in society, as indeed reflected in a good deal of the recent cases of the Court); but it also empowers nationals who can empower themselves through rather artificially bringing the case into the scope of Community law, or simply rendering their movement credibly potential thanks to their own economic position. Third, the horizontal expansion of the potential rightholders of non-contributory benefits may be a disincentive for Member States willing to establish more generous welfare benefits. The deterring effect might well derive not so much from the actual costs incurred on account of *Martínez Sala* and *Baumbast*, but from the impossibility of keeping under control the actual cost of the program once entitlement is no longer governed by national law, but partially determined by Community law.

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<sup>110</sup> And, in addition, capable of mobilising Community law in their favour through the hiring of the adequate legal services.

## Conclusion

*Martínez Sala* and *Baumbast* reveal the ambivalent nature of unqualified expansions of rights in what may look like a 'cosmopolitan' direction. Because all fundamental rights, especially socio-economic fundamental rights, are institutionalisations of complex relationships of mutual obligation, it is far from obvious that the granting of new rights does not come at the price of denying, or at least weakening, other pre-existing rights. The case is not whether we should expand the breadth of one right, but rather how we should rebalance the relationship between several conflicting rights. Similarly, the key question is not whether Europeans should be solidaristic, but through which concrete institutional means and on the basis of which obligations. Thus, not only the cultivation of European solidarity is important, but also *whose* European solidarity Community law enforces. From this perspective, *Martínez Sala* and *Baumbast* are very ambiguous rulings, as they may have rendered the criteria of allocation of solidaristic contributions more encompassing at the price of actually reducing the substantive content of the entitlements. Perhaps the market citizen is not dead, but only has been dressed up as a political citizen.