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Rethinking (EU) citizenship

by

Giuseppe Martinico and Roberto Castaldi

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Abstract

This special issue of *Perspectives on Federalism* offers a multidisciplinary collection of pieces dealing with some (selected) issues in the field of citizenship studies.

In order to investigate how citizenship has been reconceived over the years, we decided to propose a multidisciplinary itinerary where scholars interested in political and legal theory, EU, international and constitutional law produced a contribution to defining the new boundaries of this concept.

Key-words:

European Union, EU citizenship, citizenship studies

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1. Why an issue devoted to EU citizenship?

This special issue of *Perspectives on Federalism* offers a multidisciplinary collection of pieces dealing with some (selected) issues in the field of citizenship studies[I].

Despite the heterogeneity of their subjects and perspectives, the *fil conducteur* of these works is given by the impact of European Union on the classic (national) conception of citizenship.

In order to investigate how citizenship has been reconceived over the years, we decided to propose a multidisciplinary itinerary where scholars interested in political and legal theory, EU, international and constitutional law produced a contribution to defining the new boundaries of this concept.

The EU is often considered as a laboratory of new forms of multi-level government, which overcomes and challenges traditional notions of modern politics associated with the nation-state. Indeed, the EU has been considered as the laboratory of a new federalism, precisely for being made up of nation-states with centuries old stories and identities, unlike most other federations around the world. This forces the EU to identify new institutional avenues, which to a certain extent are more coherent with federalist principles, and in particular respectful of subsidiarity.

We believe that within the EU a new kind of federal system is emerging. This requires a significant revision of many old concepts and notions with regards to citizenship, sovereignty, democracy, and other key categories of modern political thought. To express in a nutshell the challenge ahead we could say that modern political thought offers essentially monistic versions of all those concepts, adequate for the centralised nation-state, characterised by one dominant level of government, demanding absolute loyalty and identification by the citizens. Federalism and the European unification process demand new pluralistic visions of all these concepts, to reflect a multi-level system of government in a world of multiple and complex interdependence.

While scholars of federalism have focused mainly on the innovative institutional features of the EU, carefully analysing its historic development and highlighting a substantial trend in the increase of competences and/or powers of the EU, relatively little

attention has been paid to the development of a new concept of multi-level citizenship and its implications. With this issue *Perspectives on Federalism* intends to contribute to this debate.

Frequently EU citizenship has been described as a sort of "Cinderella" which does not add anything "substantive" to the "real" citizenship represented by the national one. This approach was suggested by the wording of the former Treaty on the European Community, whose Art. 17 read: "*Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship*". The nationality of a Member State is thus a prerequisite in order to obtain EU citizenship and it is for each Member State to lay down the conditions for the acquisition and loss of nationality.

The Lisbon Treaty seems to change slightly the situation, since its Art. 20 Treaty on the Functioning of the European Union (TFEU) says that: "*Citizenship of the Union shall be additional to and not replace national citizenship*". The adjective used is different from that employed in Art. 17 TEC ("complementary" from the verb "to complement") and gives the idea of a relative autonomy of EU citizenship from the national one.

This suggestion has been, in a way, endorsed by the Court of Justice of the European Union (CJEU) in some recent judgments and indeed 2011 will remain in the history of the European integration as the year of the delivery of the landmark *Zambrano* decision[II] which represents, in the words of many commentators, a revolution.

2. A Revolution in few pages: Zambrano

Since *Zambrano* will be the subject of another contribution included in the same issue of this journal[III], we will limit ourselves to summing up the contents of the decision and present some considerations about the impact of this judgment.

The question originates from a preliminary reference raised ex 267 TFEU by the *Tribunal du travail de Bruxelles*.

This case concerns two Colombian citizens, Mr Zambrano and his wife, who moved from Colombia to Belgium with their first child. Belgian authorities rejected their application for asylum but because of the local situation in Colombia also decided not to

send them back there. Mr Zambrano and his family continued living in Belgium and in the following years applied for residence permits.

Their applications were rejected by the Belgian authorities. Nevertheless Mr Zambrano found a job in 2001 and from that year he worked and regularly contributed to the social security system. Mr Zambrano and his wife had other two children, both with Belgian citizenship. The children- and this is an important detail in the economy of the case- had never left Belgium.

When the Belgian authorities realized that Mr Zambrano was working without a work permit, they claimed that he did not have right of residence and consequently no right to work in Belgium.

Mr Zambrano went before a national court arguing he had right of residence and right to work in Belgium since his two children were Belgian and thus EU citizens. The non acknowledgement of such a right would have implied the necessity for all the components of the family (including the two children with EU citizenship) to leave Belgium.

The central question is whether the child of non-Union citizens but who has Union citizenship has the right of residence under Union law when the child has not exercised any right of free movement[IV].

The Court delivered a revolutionary judgment in a few pages, characterized by a poor and obscure legal reasoning and by a certain degree of disregard for the wording of Treaties, which refer to secondary legislation when evoking the limitations and conditions laid upon the freedom of movement (Hailbronner-D.Thym, 2011, 1259).

The Court did not rely on Art. 18 and 21 TFEU[V] but relied rather on Art. 20 TFEU[VI] saying that this provision "*precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union*" [para. 42 of the judgment].

The CJEU inferred from this that the situation of the two children was relevant for EU law (it did not constitute a mere international situation). As a consequence, the CJEU extended the right of residence of the children to their parents following the scheme employed in *Chen*[VII]. Moreover, the Court inferred from the right of residence of the children a right to work for their parents.

Zambrano is revolutionary because it seems to abandon the distinction between static and dynamic citizens and the necessity of the of an intra-EU cross-border component to its decision.

The evident result of this decision was the extension of the scope of citizenship: does *Zambrano* represent an extraordinary decision? Probably yes. The risk of rendering the status of EU citizens of the two young people (who did not have Colombian citizenship and who would have been forced to move to Colombia with their parents otherwise) ineffective induced the Luxembourg Court to take this decision. In any case, after Zambrano, the CJEU took the chance to return to the issue with other judgements[VIII] but there are still many question marks to be clarified. We will see what the CJEU will say in the future and how Member States will react to this judicial trend.

3. An overview of this issue

The opening piece of this issue by David Ragazzoni highlights the changing nature (the "evolution" as he says at the beginning of the paper) of the concept of EU citizenship, beginning with the work by Thomas Marshall (*Citizenship and Social Class and Other Essays*, Cambridge University Press, Cambridge, 1950), and identifying three "sources" for such a transformation: the necessity to rethink the citizenship/identity nexus; the new concept of political representation emerging in the contemporary global democracies and the emergence of the EU. In order to appreciate the impact of these three different factors, Ragazzoni goes back to the classic debate between two giants of political and legal theory: Kelsen and Schmitt, offering thoughtful reflections on the theoretical implications of the concept of citizenship.

After this conceptual introduction to the idea of citizenship, we move to the contemporary European reality in order to appreciate the impact of the already mentioned *Zambrano* judgment on classical notions of citizenship: in his piece Loïc Azoulai investigates the rationale and the implication of what he defines a decision inspired by a "genuine European integration" touch. The argument developed by Azoulai is that, with *Zambrano*, the CJEU moved away from a concept of transnational integration in order to foster a new vision, based on the existence of bonds that encompass the whole Union. However

Zambrano is just one of the latest links of the jurisprudential chain that have led the CJEU to such a conclusion, as the author shows by contextualizing the decision.

Despite the richness of contributions in this area very few contributions have been devoted to the "external" dimension of the EU citizenship which is instead "explored" in this issue by Madalina Moraru and Joris Larik

In her piece Madalina Moraru deals with the issue of the protection of EU citizens "abroad", governed by Art. 20 (2) of the TFEU, studying the new role acquired by the EU in the ambit of diplomatic and consular protection. Although the number of studies on EU citizenship is massive, the issue of the protection of EU citizens abroad has been traditionally neglected by scholars. The 2006 and 2008 Euro-barometer surveys show how EU citizens are unaware of the existence of a right to protection abroad.

In his brilliant contribution Joris Larik explores another intriguing side of the external dimension of the citizenship, showing how this dimension is still underdeveloped and arguing that it extends to the field of Common Foreign and Security and Common Defence and Security Policies. Starting from the analysis of the mandate of the *Atalanta*- the EU's anti-piracy operation- the Author demonstrates the unexpressed potential that the EU citizenship presents in this field and demonstrates the existence of "*a widening gap between the powerful notion of Union citizenship within the Union and its present weakness outside of it. Internally, the development of Union law makes it increasingly difficult to construe nationals from different Member States as proper 'foreigners'*".

Eventually, in a very sophisticated and enjoyable article Dimitry Kochenov offers a lucid analysis of the premises shaping the policies of cultural integration in some liberal democracies, by starting from his "*own first-hand experience of naturalisation in the Kingdom of the Netherlands, the pioneering jurisdiction with regards to the introduction of 'cultural integration', marked by 'politics divided from society'*" and then contextualizing this story in the general debate on citizenship, since the "*situation of newly naturalised Member State nationals is a perfect illustration of the logical disharmony between the two legal orders in the EU, affecting the same individuals simultaneously. This duality of statuses which governs the life of every single EU citizen exemplifies the archaic logic behind naturalisation, which is never questioned by politicians and is only rarely seriously criticised by scholars*".

Together, these pieces constitute a productive mixture of ideas which aims to foster the debate on the necessity to rethink the idea of citizenship and its connection with the nature of EU integration.

[I] This issue has been made possible thanks to the intense and fruitful cooperation between the *Sant'Anna Legal Studies Programme* (STALS, www.stals.sssup.it) hosted by the Scuola Superiore Sant'Anna in Pisa and the Centre for Studies on Federalism in Turin and thanks to many people who have played an important role in the organization of an initiative held at the Scuola Superiore Sant'Anna on January 23 2011 precisely on "*Rethinking citizenship*". Although many of the papers presented in that occasion have not been published, all the participants rendered that workshop an invaluable opportunity for a debate which led to this issue of the journal.

[II] C-34/09, Ruiz Zambrano, www.*curia*.europa.eu

[III] See the article by Azoulai included in the same issue, http://www.on-federalism.eu/index.php/articles/97-euro-bonds-the-ruiz-zambrano-judgment-or-the-real-invention-of-eu-citizenship.

[IV] Over the years the CJEU has used the concept of citizenship for eliminating discriminations based on nationality even in ambits that are not characterized by European competence.
This way the CJEU made Art. 12 TEC[IV] a fundamental tool of its case law in this field, that is why the Lisbon Treaty inserted Art. 18 TFEU[IV] (corresponding to Art. 12 TEC) the section devoted to citizenship while under the previous Treaties the principle of non discrimination was disciplined outside such a section.
Another fundamental instrument in the judicial toolbox of the CJEU has been represented by Art. 18 TEC[IV] which disciplines the freedom of movement of the European citizens.
It is conceived the most important right contained in the status of citizens, moreover, according to the case law of the CJEU, in order to "activate" the rights connected to the EU citizenship is necessary to exercise the freedom of movement. As we will see this point was contested by Advocate General Sharpston in the *Zambrano* case since it could pave the way to discriminations between "static" and "dynamic" citizens.

[V] Art. 21 TFEU: "*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 the Treaties and by the measures adopted to give them effect.*
2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.
3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament".

[VI] Art. 20 TFEU: "*1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.*
2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:
(a) the right to move and reside freely within the territory of the Member States;
(b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;
(c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;
(d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.
These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder".

[VII] C-200/02, Zhu and Chen, ECR 2004 p. I-9925

[VIII] For instance McCarthy: C- 434-09, Shirley McCarthy v. Secretary of State for the Home Department, www.curia.europa.eu

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