Patricia Mindus*

Towards An Entangled Model?

Abstract

The citizen is the «simple element of a polity», as Aristotle put it. Citizenship thus appears as prolegomena to other core questions concerning public policy and constitutionalism. We now deal with a threefold concept of citizenship and we need to understand how it is built up in order to assess some recent trends on citizenship, third country national status and civic participation. A good test for analyzing this is EU citizenship. The three models today merging in EU citizenship can be accounted for by looking at the opposite of «citizenry». By emphasizing inclusiveness, the sociological focus is on the marginalized subject, migration and asylum policies. Law and jurisprudence look at citizenship by trying to limit the numerous hard cases arising in a world of migration where the opposite of the citizen is still the alien. The political model holds the subject (sujet) in opposition to the citizen (citoyen), entailing problems related to the democratic quality of EU institutions. These different standards tend to overlap in the current debate and this engenders misunderstandings. As a result of the erosion of traditional nationality, we now face a legal patchwork, which produces an array of hard cases. Building on a strong philosophical tradition, this essay suggests a possible method for bridging these three standards, shedding new light on transnational citizenship-building.

Keywords: Citizenship – Inclusion – Democracy – Lawfulness – Transnational Civil Society Building

Resumen

El ciudadano es el «elemento simple de una forma de gobierno», en palabras de Aristóteles. La ciudadanía aparece, de este modo, como el preámbulo de otros problemas fundamentales relativos a las políticas públicas y al constitucionalismo. Nos vemos confrontados ahora con un concepto triple de ciudadanía, y necesitamos entender cómo se halla constituido a fin de ponderar algunas tendencias recientes en la aproximación al concepto de ciudadanía, la condición nacional de tercer país y la participación cívica. Una buena herramienta para analizar esto es la ciudadanía de la UE . Puede rendirse cuenta de los tres modelos que se combinan hoy en la ciudadanía de la UE considerando al concepto opuesto de «conjunto de ciudadanos». Al enfatizar la inclusión, el centro de atención desde un punto de vista sociológico es el sujeto marginado, la migración y las políticas de asilo. El derecho y la jurisprudencia estudian la ciudadanía tratando de limitar los numerosos casos difíciles que surgen en un mundo de migraciones, donde el opuesto del ciudadano

*Department of Political Studies. Faculty of Political Science University of Uron, Italy.

es aún el extranjero. El modelo político presenta al sujeto (sujet) en oposición al ciudadano (citoyen), ocasionando problemas relacionados con la cualidad democrática de las instituciones de la UE. Estos diferentes criterios tienden a solaparse en el debate actual, engendrando confusiones. Como resultado de la erosión de la nacionalidad tradicional, enfrentamos ahora una colcha de retazos a nivel legal, lo cual produce un conjunto de casos difíciles. Sobre la base de una fuerte tradición filosófica, este ensayo propone un posible método para tender un puente entre estos tres criterios, arrojando nuevas luces sobre el proceso de construcción de la ciudadanía trasnacional.

Palabras Clave: Ciudadanía, Inclusión, Democracia, Formación de la Sociedad Civil Internacional.

Introduction

In 2007, fifteen years after the «complementary status» of European citizenship was introduced into the still flying «Ufo» of the Union, it is about time to ask what kind of status this really has entailed. It is indispensable to recognize that the nature of citizenship still appears like a sort of prolegomena for answering other pressing questions: How can cross-national rights be guaranteed in the context of migration, if citizenship is equivalent to fully sharing in the social heritage of a nation's identity? How can social integration be enhanced through transnational public services if for example third country nationals or stateless are kept out of the system? How can active participation among European citizens be promoted, if citizenship is viewed only as a judicial status distinct from the democratic quality of EU institutions? The current challenges of EU-citizenship are becoming tougher, in part, because the model it is supposed to achieve still presents indistinct features.

After a decade and a half of intense debate and of EU-case law on citizenship, it looks as we are now dealing with a threefold concept: political, legal and social. We need to understand how it is built up in order to test some recent trends on citizenship, third country national status and civic participation. The three standards today merging in EU citizenship can be adequately explained by looking at what is opposed to citizenry. Yet, analyzing these three standards is not enough to clear the ground from unwarranted conclusions. We still need to bridge the different standards. I suggest this might be possible by using a specific theoretical paradigm, taken from philosophy. By building on this framework, a series of problems that have been emerging during the last fifteen years find a more reasonable assessment. On the one hand, this enables us to evaluate the current development of EU-jurisprudence, which is departing from some basic standards in International Law, such as the effectiveness principle, and understand why this is becoming highly problematic in a world of migration. On the other hand, it provides us with a counterfactual grid, which is helpful when we deal with significant issues on the political agenda, like the denationalization process of citizenship for instance.

This essay comes in six sections: the first three establish the theoretical perspective. We shall first have a look at the state-of-the-art in today's debate on citizenship and hereby appraise the different standards that prevail in the

different disciplinary fields (section 1). Attention will be directed foremost to political, legal and social sciences. I suggest that we are now dealing with a threefold concept of citizenship (section 2). Then we shall look at how elements taken from the various standards are being merged together in a somewhat undifferentiated way, which might lead to further misunderstandings (section 3). Particular emphasis will be laid on some hard cases arising from art. 17 TUE (section 4), and the polarization between the ECJ and other EU institutions concerning residency (section 5). Finally, a comprehensive paradigm for bridging the previous standards will be proposed and we shall see how it can be used to examine concrete issues of the present day (section 6). Therefore, the aim is not only to analyze scholarly work, but also to design a functional device for facing a range of different questions that citizenship raises in today's complex society.

State- Of-The- Art

Citizenship has become a very popular topic generating a complex and articulated debate that has grown significantly over the last ten years. Some estimate that over 50% of all scholarly literature has been published after 1990 (Isin, Turner 2002: 9).

As known, much of the contemporary debate on citizenship was stimulated by the work of the British sociologist Thomas Humphrey Marshall (1893-1981), who intended citizenship as our fully belonging to the community (Bulmer, Rees 1996). By assuming that citizenship is the status conferred on those who are full members of a community, Marshall's idea was to use citizenship as a tool in order to strike a balance between entitlements and provisions (Dahrendorf 1988), allocative and integrative requirements of society (Turner 1993). Perhaps, it should be added that Marshall's landmark in social sciences, Citizenship and Social Class from 1949, did not really get particular attention until 1963, when the editor Heinemann made it into the central piece in Sociology at the Crossroads and, more specifically, after the T.H. Marshall Memorial Lectures, organized by the University of Southampton in the early Eighties. So it really is a quite recent field of study.

Moreover, a common feeling among scholars has pointed to the necessity of adopting an interdisciplinary approach to citizenship research. Until a few

years ago not a single line on citizenship was generally found in handbooks, encyclopedias and dictionaries dedicated to political thought or to social sciences (Sills 1968; Boudon 1982; Borgatta 1992). Thomas Janoski could still claim in 1998 that «although citizenship is the lingua franca of socialization in civic classes, as well as the cornerstone of many social movements seeking basic rights, and a key phrase in speeches by politicians on ceremonial occasions, oddly enough, citizenship has not been a central idea in social sciences» (Janoski 1998: 8). Since the late Nineties, however, scholars have increasingly directed attention towards interdisciplinary perspectives covering the fields of politics, sociology, history and cultural studies that moves beyond conventional notions of citizenship. So today, citizenship is often analysed in the context of contemporary processes involving globalisation, multiculturalism, gender, changes to the state and political communities. But all this is very recent and we should not forget that the prevailing view has been another.

The customary legal perspective holds citizenship unequivocally to be the status conferred on those who are entitled to various active and passive positions in relation to the State. An emblematic way of putting it is to use the German wording for citizenship, Staatsangehörigkeit. The judicial standard of citizenship has roots in Roman Law, where civis is a status showing the way in which a person is connected to the legal order (Sherwin-White 1939). This standard is still the focus of most legal scholars and practitioners and it pivots around the idea of «belonging to the State,» «pertinence to State territory,» or – in Hans Kelsen's phrase – it is equivalent to «the personal sphere of validity of the legal order.» This viewpoint is, in fact, an heir of the Modern political and legal world centered on sovereignty and nationality. In the long history of the legal civis, the problem of entitlement has been connected to the extension of the legal order and its homogeneity. The aim was to avoid, as much as possible, an «uncertain» legal space. This is basically the very same problem Jean Bodin tackled with his theory of citizenship in Six livres de la République (I, 6) in 1576, where «the citizen is nothing but the free subject under sovereignty» (Bodin 1977: 68). And it represents the core issue of first modern case on nationality: the Calvin's case from 1608 (Price 1997).

It is precisely this customary outlook that has started to disintegrate. In the last century, legal positivism, in its monistic and formalist tendencies, tried to

establish a bi-univocal correspondence between the legal order and «its» citizens, following a status conferred by positive law, sovereignly defined. This provoked the collapse of an already worn-out model which could no longer uphold its raison-d'être, i.e., to avoid the multiplication of incompatible legal positions imposed on the same human being. Indeed, the «Hobbesian» anarchy of International relations leaves little or no room for overarching legal agreements, such as the Convention of Den Haag signed the 12th of April 1930 on the limitation of statelessness, or the U.N. Convention on the citizenship of married women, signed the 29th of January 1957 in New York. So, the main instrument for preventing potential conflict remains bilateral treaties. By accentuating the vacuity of the citizenship category – susceptible to be filled with a great variety of content, rights and duties, while the only constant attribute seems to be subjecthood to the legal order – the traditional conception of citizenship paved the way for an international disorder in which migration ends up together with the state's sovereign right of defining its own citizens. In other words, the customary legal perspective on citizenship provokes perverse effects, like the increase of statelessness and multiple nationality, besides from new phenomena like the so-called «legal tourism», a kind of «forum shopping» where free movement enables people to avoid compliance with rigid national regulations in areas such as bioethics.

The bankruptcy of the conventional legal standard also brought about the contemporary debate. It is warranted to speak of a debate, notwithstanding the different disciplinary proveniences and conflicting views. A common feature that can be recognized in most citizenship scholars is the target of their criticism: That is, the way citizenship found systematization in modern legal thought. To be accurate, criticism predictably has also been directed to Marshall's account (Giddens 1982; Barbalet 1988; Mann 1996). But what really seems to have disconcerted scholars is modern legal thinking. This latter systematization is frequently accused of reducing citizenship to a void legalism, a dull administrative inscription and a cold technical status. Therefore, the point of much citizenship research is basically to reassert the very opposite of Berthold Brecht's sarcastic claim: «the passport is the most noble part of Man.»

Yet, the understanding of citizenship often lingers on more traditional assessments, characterized by clear-cut disciplinary divides. The result has been

that attempts to bridge the various perspectives at hand continue to meet increasing difficulties. In fact, legal scholars hardly ever take into consideration sociological case-studies, while political scientists turn a blind eye to issues addressed in international private law and so on.

In turn, this disciplinary entrenchment has boosted the side-effect of deepening misunderstandings. Legal scholars insist that the «sociological concept of citizenship is totally unsatisfactory» (Costa 1999: 48) or that «sociological studies on citizenship programmatically ignore positive law (...) resulting in a generic inclination towards Natural Law» (Ferrajoli 1999: 275). On the other side of the fence, legal scholars are accused of retrograde arguing so that «legal definitions of citizenship seem to short-circuit citizenship because they remain the realm of passive rights and do not extend into active rights of political and social democracy» (Janoski 1998: 238).

Nonetheless, the scholastic and puerile attempt to keep one's academic field to oneself cannot be held to be especially worrying. Of greater weight are some of the misinterpretations embedded in the debate, which seem to be far too common on both sides of the fence. Certainly, all the emphasis laid on citizenship has brought the notion into the limelight. However, it has also contributed to loosening up the fundamental difference between status civitatis and status personae. In the current debate, the two figures of citizenship and personhood seem to be exceedingly confused. An interesting statement is for example that T.H. Marshall's account on citizenship is «probably the most influential (...) interpretation of the development of human rights» (Bellamy 1994: 239). Such claims usually make jurists blush: human or fundamental rights are granted to all human beings, not to citizens of any given state. There seems to be a very peculiar form of inflation behind this blurring of genres, which consists in trying to entitle the citizen to a long list of rights, which in reality has a quite different basis, namely the person as such. This is why it is important to clarify the conditions enabling a specific right to be plausibly referred to the category of citizenship.

One of the major problems for the citizenship scholar is that the disciplinary entrenchment and embedded misconstrual has led to the current situation: We lack a comprehensive model for understanding citizenship, which consequently brings on a failure to cope with pressing and urgent questions, especially when

it comes to citizenship, civic participation, denationalization-trends and civil society-building.

Three Standard on Citizenship

The outcome of the contemporary debate on citizenship may be defined in terms of a threefold concept of citizenship. We need to understand how it is built up in order to evaluate some recent proposals. My suggestion is that the standards today merging in EU citizenship can be properly explained by looking at what is opposed to «citizenry».

This way, three different semantic areas emerge, each one grounded on a specific dichotomy with two variables: content and structure. Each semantic area, in turn, corresponds to the prevailing disciplinary viewpoint: political, legal and social sciences. The basic dichotomies are the outcome of different kinds of problems, which ought to be kept distinct, even though they do not lack connections or links overall. Here, I will present these three standards or models in a chronological order, based on their evolution in history.

The political standard or model for assessing citizenship is grounded in a dichotomy which opposes the citizen to the subject, or in the traditional terms of the French Revolution: citoyen and sujet. On the one hand, the citizen is therefore the active member of the state, who contributes to the formation of collective will or self-government, by making decisions (in the classic form of direct democracy) or by voting for representatives (in a modern representative democracy). On the other hand, the subject is the passive member of the political community who does not participate in the shaping of the law and in collective decision-making. But s/he is nonetheless subject to the laws that others – i.e., the citizens and/or their representatives – have chosen. It should be stressed that this distinction does not correspond to that between citoyen actif and citoyen passif, which became popular with Sièyes in 18th Century France. As a matter of fact, it has a different origin and can be traced back to Aristotle's theory of citizenship in the third book of Politics (Düring 1974; Johnson 1984; Mossé 1993).

In the modern world, this political conception of citizenship regained popularity with the French revolution (Rosanvallon 1992), although it started to overlap, at least to a certain extent, with the idea of «nationality» in the same period (Colas 1991; Brubaker 1992; Guiguet 1999). The problem this model

deals with concerns deliberation and decision-making with erga omnes validity within a certain territory. On a deeper level, this standard aims to respond to the question of legitimacy. Today, the problem of extending political rights to non-nationals residing within the state – an issue which has been appearing regularly on political agendas all around Europe – corresponds to this political model and it attempts to answer the central questions of legitimacy and political obligation. This is an open issue that EU-citizenship still faces (Köchler 1999). For example, we might mention the 800 000 Poles now living in the UK. From the political citizenship standard, this recent migration wave poses serious problems. On the one hand, these people retain their right to vote in Poland even though they do no longer live there. However, they only have a limited access to political rights in the host country. On the other hand, the possibility of a double vote for the same scrutiny of the EU-Parliament, which is left unsanctioned in Europe, jeopardizes the principle of one man, one vote (Garot 1999).

The jurisprudential standard, to which some reference has been made, is also based on a rigid dichotomy – aut aut – opposing the citizen to the one who does not belong to a given legal order. The citizen, who in modern times has come to be the equivalent of the national since the legal order has assumed the national and sovereign character, is opposed both to the alien and the stateless (Krajewski/Rittstieg 1986, Lagarde 1997, Preuss 2003). There is no room in this model for in-betweens. Here, the citizen is not active but only passive: s/he may or may not be granted enfranchisement without any substantive change in the model. Actually, the construction is purely formal and can hence incorporate most contents (Kelsen 1929; Kelsen 1945). This is also why it is compatible with most political regimes, independently from the democratic tenure or constitutional framework. This assessment of citizenship or Staatsangehörigkeit became predominant with the rise of the modern state. I have already cited Jean Bodin and the comments of Francis Bacon and Edward Coke to Calvin's case. The fully developed theory of citizenship in Jurisprudence can be found in the German Public Law scholars from 19th Century. The problem this model deals with is certainty or rule of law, as opposed to arbitrary, random and unpredictable rulings. The reason Jurisprudence developed this citizenship apparatus is to avoid the multiplication of so-called hard cases, where incompatible yet judicially relevant positions are ascribed to the same individual (Verwilghen

1999). Most bilateral treaties in International Private Law tend to avert that specific situation, just like international agreements (Marakov 1962; Bauböck 2006). Even if the legal model has met with harsh criticism as being a «recipe for chaos» (Bauböck 1997) in a world of migration, it does not mean that the problem the model addresses has been resolved. It only implies that the means through which Jurisprudence hoped to cope with the problem failed. Today, the problem addressed by the legal citizenship-standard has not yet been worked out and it is still tangible in relation to Europe and EU-citizenship.

From this viewpoint, it suffices to mention statelessness, where the person deprived of nationality becomes judicially «invisible,» a condition which entails other problems in accessing rights. It is not uncommon that wedlock and marriage contracts are inaccessible for the stateless individual. In Europe, a case of mass statelessness can be found for instance in Estonia that has not signed the 1954 Convention relating to the status of stateless persons and the 1961 Convention on the reduction of statelessness. When Estonia joined the Union on May 1, 2004, around 160 000 Russian-speaking persons were still stateless, that is around 12 percent of the total population. It should be added that Estonia's stateless persons decline every year and currently only 9 percent of residents are carrying so-called gray passports, compared to 32 percent just 15 years ago. But the figures are still eloquent. Quite some refugees also end up in a similar situation (Marrus 1986), since they cannot «avail themselves of the protection of the government of the country of their nationality», following the UN Convention on the Status of Refugees from 1951.

According to the sociological standard, which is the most recent, not only does the content of its basic dichotomy vary, but so does also its structure. The opposite of the citizen is neither the subject as in the political model, nor the stranger (alien/stateless) as in the legal assessment of citizenship. It is the marginalized individual or the excluded person, as developed by Robert Ezra Park (Park 1928) and Gino Germani (Germani 1973). The sociological model, grounded in T.H. Marshall's description of the three categories of rights (civil, political and social) for which the citizen struggled in modern times (Marshall 1950), does not rely on a rigid dichotomy, but on a gradualist one. This means that we can point to intermediate positions in between maximum exclusion and full integration in society. This latter condition thus becomes the equivalent status

of civis optimo iure. This gradualist element has led to the development of a vocabulary using expressions such as «limited citizenship,» which do not belong to the other models or standards. The key-problem the sociological approach to citizenship intends to address is, of course, social cohesion (Turner 1993). The fact that Europe continuously presents urgent dilemmas of this latter type needs no mention.

These three different standards continue to live side by side in today's debate. They offer different perspectives on citizenship and lay emphasis on different fundamental problems. Obviously, «different» does not mean «incommensurable» and the basic issues – social cohesion, legitimacy and rule of law – are all unquestionably necessary elements for enabling peaceful living. Yet, what should not be forgotten is that, in accordance with the problematic field of investigation one chooses, the type of «citizenship» varies and so does also the procedures and methods for acting in response to the problem. For instance, by promoting deeper social integration in Europe, the so-called «democratic deficit» of the Union's institutions remains intact. It is telling that the symposium organized in late April 2007 by the European Council on e-democracy stressed the importance of engaging citizens in decision-making by calling on e-campaigning and social networking. Such practices are certainly crucial for developing preconditions of democracy like public opinion, converging media policies, etc. These are all issues that are being assessed from the sociological viewpoint, focusing on inclusive citizenship. These topics, however important, remain logically distinct from, say, improving accountability of the institutions, enhancing vote-participation in Parliamentary elections, reducing levels of concurring normatives or simplifying the treaties and EU-law, which are instead core issues for the political model.

Another example is the argumentation of the European Council when justifying the introduction of art. 19 into the TEC which grants the right to vote and stand as candidate in municipal elections and in the European Parliament. These political rights were viewed as «an application of the principle of non-discrimination between nationals and non-nationals and a corollary of the right to free movement and stay declared in the Art. 8 of the Treaty» (see the two directives 93/109/CE of the 30th of December 1993, GU L 329/34 and 93/109/

CE of the 6th December 1993, GU L 368/38). Now, what kind of citizenship can explain why voting should be a «corollary to free movement» and promote integration? Neither the political standard, nor the legal one. My suggestion is that by keeping the three standards distinct it becomes easier to see inconsistencies and to find adequate means for specific purposes.

Overlapping Standars. A Source of Difficulty?

The interpretation (and wording) of some articles on EU-citizenship has evolved over the last decade. Part of this development has not been considered favorably by legal scholars since it is held to contribute to confusion. What is striking is that this evolution can be viewed as introducing a «sociological standard» on citizenship into the legal discourse on EU-citizenship. The reference goes to the art. 21.1 (right to petition), art. 21.2 (right to apply to the ombudsman) and art. 18 TEU on free movement, as far as personal scope is concerned. Indeed, an often overlooked novelty of the Nineties on EU-citizenship is that applying to the ombudsman or petitioning the Parliament in Strasbourg was initially among the rights of the EU-citizen. But these rights are today recognized for any physical or moral person having declared residency in the Union. In the Nice Charter these rights are included under the title V «Citizenship,» even though these rights were no longer benefits related to the status of EU-citizenship. This leads to a paradox of the Nice Charter: As these rights were extended to all persons and no longer linked to the status civitatis, EU-citizens were stripped of a privilege! Another innovation of the Nice Charter was to extend the personal scope of the right to move and reside freely within the Union to include all persons, and hence to disconnect access to free movement from the status of EU-citizens. Without discussing the legal relevancy of the Nice Charter, what should be noticed is that while extending the art. 18 on free movement to all persons, three categories remain excluded: citizens of member states without social insurance or equivalent economic resources, individuals under measures for public order or safety, and Third-Country Nationals (TCN) legally resident in a single member state (Nascimbene 1995; Dollat 1998; Giubboni 2007). However, what I would like to point to is that the social standard of citizenship as integration has its «legal» fall out in the fact that a right explicitly extended to all persons is inscribed not in the European Convention for the Protection of Human Rights, but under the title

«citizenship» in the Nice Charter. These innovations are grounded in the social standard for citizenship. And this can potentially lead to further inconsistencies.

Another case of overlapping standards is the rationale of art. 19.1 on the participation of EU-citizens to local elections. The argument has been that admitting participation in local elections would strengthen integration of EU-citizens living in a member state from which they are not ressortissants. This has been a recurrent argument ever since the Delhousse project in the Sixties and the Spinelli project from 1984. Inadvertently, this led to the failure of arguing why these very EU-citizens should not be admitted to national elections. The (quite convincing) counterargument was that admission to national elections would enhance integration even more. Besides some technicalities mostly used in France where local elections can be considered administrative and hence not political, it became harder to argue against political participation of EU-citizens resident in other member states. This is also why the decisions in the early Nineties by the German supreme court, the Bundesverfassungsgericht restating an exclusively German suffrage met so much criticism. However, some Member States already recognize alien suffrage like in the cases of the UK, Ireland, and Spain (usually on the basis of reciprocity). A rhetoric use of the social standard instead of the political standard led to the current situation. The question of allowing participation in local or national elections is not merely a question of «social integration» (which can be the outcome of a paternalistic decision-making), as much as it is a question of legitimacy (which cannot be simply auctroyé). So, if enhancing social integration is posited as an end or goal, a viable way to reach there is probably not so much the extension of political rights as, say, job placement or adult education. In other words, the right to vote as a tool for the advancement of equal treatment has severe limitations.

Finally, another recent case of hybrid application of various citizenship standards can be found in the Charter of e-Rights, adopted by the Eurocities Group in June 2005. All the rights mentioned are ascribed explicitly to the EU-citizen. Yet the objective that the Charter declares to pursue is to reduce the so-called digital divide. It is clear that the digital divide, whether in access or use of e-related technology, is not linked to status civitatis. Rather, it is a social problem afflicting various and heterogeneous groups within the EU. Again, the legal

designation is used for a purpose that cannot be adequately handled with such (ambiguous) tools.

Erosion of Nationality: A legal Patchwork

In the making of the EU-citizen, some elements tend to deviate from the traditional legal model, based on the principles of ius soli and of ius sanguinis. In Léo Tindemans report on special rights from 1974, one of the first steps in the making of EU-citizenship, it was already stressed that EU-citizenship had to be built by avoiding to apply the so-called principle of naturalization, i.e., the loss of citizenship of birth and acquisition of the citizenship of the host country in case of inter-European migration. Nevertheless, evidence shows that this break with the traditional legal model has been partial and weak.

Besides that Article 20 TEU – as well as art. I-10(c) of the Draft Constitution – only grants a very traditional, delegated «protection of the diplomatic and consular authorities», the foremost element for claiming that the rupture was softened down remains Article 17: «Citizenship of the Union shall complement and not replace national citizenship.» The Declaration on Citizenship of a Member State, annexed in 1992 to the Maastricht Treaty explicitly states: «wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned» (GU C 191/1992). The goal is to limit controversy, but these precautions are actually the root of many unsolved problems and judicial hard cases. Let's see why.

The provision of Article 17 TEU does not imply subordination, but coexistence of various member states' nationality laws and regulations. Some even claim we face concurrent provisions. This means that member states enjoy a large zone of discretion. Some effort has been made towards harmonization in the realm of Nationality Law, but we still deal with very different regulations around Europe today (Schade 1995, De Groot 2002). The Commission claims, on the basis of a study from 2000, that nationality laws converge, albeit the period of legal residence required for applying for naturalization goes from 3 years in Belgium to 18 in Finland (Groenendijk 2000). The wording of Article 17 gives member states the possibility to influence indirectly who is considered

EU-citizen. The paradox is that there are, so to say, citizens of member states that are not EU-citizens! For example, this is the case of the inhabitants of the Färø Islands who are technically Danes but not EU-citizens, contrarily to the Danish inhabitants of Greenland. It might seem even more puzzling if we add that the inhabitants of the Dutch Antilles, residents in Aruba or in the French territories d'outre-mer are EU-citizens.

Another interesting case is Spain: Spanish citizens who also have the citizenship of one of the twelve Latin-American states with which Spain has bilateral agreements, are and are not EU-citizens depending on residency. According to the Spanish Civil Code (art. 20), Spanish citizenship entailing EU-citizenship is given by sole declaration on the basis of the ius sanguinis principle if a parent was born in Spain. This is the case of about 80 000 Cubans, including Fidel Castro (De Groot 2004:7). In 2002, this problem was raised also for around 200 000 British overseas territories citizens. It is enough to mention the case of British overseas citizen Manijt Kaur, of Indian descent, born in Kenia in 1949, who claimed she had been stripped of her EU-citizenship (ECJ 20 February 2001, Case 192/99 ECR I-1237).

These cases are not only the bitter fruit of the malfunctioning of the legal citizenship standard, but they also entail problems for the political standard. On the one hand, it is obvious that a large number of non-EU citizens living in the Union are under the obligation to observe European regulations, without having the possibility to vote for the Parliament. On the other hand, the fact that member states enjoy discretion when defining their national citizens also has a feed-back effect on the design of the constitutional framework of the Union. For example, since one of the so-called «parameters of representation» is population size, the way «population» is defined (all residents, all citizens of member states, all nationals...) induces change in population size and hence the weight of a member state in the Union. It is enough to recall that Greece, Hungary, Ireland but also Italy and Spain have a considerable amount of expatriated citizens, while Germany and the Baltic States have a significant number of TCN. It is no wonder that member states could be interested in «increasing» their population: without recalling all the fuss between Poland and Spain during the negotiations for the Constitution Draft, it is enough to mention the recent request made by Poland that the damage in its population-size due to Second World War ought to be

accounted. This was one of the reasons why negotiations stalled in June 2007. In the recent history of the UK, something similar to this artificial population increase happened when UK-citizenship entailing EU-citizenship was extended in 1997 to the population of Hong Kong and in 2002 to the British overseas territories citizens. Of course, the use of member state legislation on Nationality Law is not totally unrestricted: it needs to observe international law, l'acquis communautaire and solidarity obligation (Gemeinschaftstreue). Still it is not clear what would have happened if Cyprus had not been accepted in the Union and Greece had extended its citizenship to all Greek Cypriots (Kotalakidis 2000: 299). The legal standard modeled on the principles of ius sanguinis and of ius soli thus triggers new problems.

Towards Residence-Based Entitlement?

In the wake of the Amsterdam Treaty, especially with its Title IV on the area of freedom, security and justice, some trends of denationalization have been shedding new light on the idea of connecting citizenship to residency. On May 14, 2003 the Economic and Social Committee proposed the extension of European citizenship to non-nationals of member states on a criterion of residence. This led to the status of long-term residency for TCN. At the Tampere Summit, in October 1999, the European Council added a new political objective: «the EU should ensure fair treatment of third-country nationals residing lawfully on the territory of Member States and that a more vigorous integration policy should aim at granting them rights and duties comparable to those of citizens of the European Union» (Preamble 6). The result was the long-term residency status defined in the Directive 2003/109/CE from November 2003 (it does not include Denmark, Ireland and the UK on the basis of the Amsterdam Treaty and annexed protocols). According to this directive, its aim is to «bring the legal status of TCN closer to that of the citizens of the Member States.»

There seems, however, to be something schizophrenic between the positions of the executive and judicial branches of the Union on the same issue. On the one hand, the Council, along with the Commission and the Parliament often address the problem of TCN from a purely social stance. Long-term residency is hence sustained with the purpose of boosting social integration. On the other hand, the ECJ focuses on the problem from a classic legal viewpoint.

With the Micheletti-case from 1992 (ECJ 7 July 1992, Case C-369/90 ECR I-4258), European case law departed from the effectiveness principle which rules International Law.

In International Law, the effectiveness principle, based on art. 5 of the Convention of Den Haag, was acknowledged in 1955 with the Nottebohm-case, when it became clear that «nationality is a juridical bond, based on a social fact of linkage». Having the passport of a determined state is not enough for claiming to have that nationality. Citizenship hence depends on the «habitual residency». The reasoning of the ECJ goes in the opposite direction, following a more formal and less pragmatic tendency. Citizenship is not determined through effectual residency, but through formal status certification. Mario Vincente Micheletti, who was an Argentinean dentist living in Spain with an Italian passport obtained iure sanguinis, could not be excluded from art. 19 TUE on free movement and settlement. In the name of non-discrimination, European case law takes a step away from connecting EU-citizenship to domiciliation. This in turn has led to further problems (Davis 2005).

Besides the reluctance of the EJC, what should be stressed, as far as ius domicilii is concerned, is that this principle of residency primarily seems to have the purpose of promoting social integration, through the reduction of discrimination between EU-citizens and TCN lawfully residing in the Union. It therefore responds most of all to a requirement of the social citizenship standard. Anyhow, de-nationalization has not entailed re-civification. The «democratic deficit» remains largely unaffected, because the political standard for assessing citizenship is seldom in the focus. It might be presumed that the discrepancy between «those who rule and those who are ruled» depends on what citizenship standard is adopted, and on the complementary character of the legal status that still relays on the traditional ius soli- and ius sanguinis-principles.

Bridging The Models: A Comprehensive Framework

I suggest a model for bridging these paradigms in order to shed new light on some crucial problems for boosting up transnational citizenship. In particular this meta-model aims to give a rational standard for measuring the adequateness of proposed means for declared ends in today's institutional and scholarly debate.

pefully, such a perspective can give a more adequate explanation to a series of problematic cases.

This model builds on the argumentation we find in Aristotle's theory of citizenship in the third book of Politics. Here, the philosopher uses two different questions for examining the institution of citizenship which, in his view, amounts to being in turn «ruler and ruled»: what is the citizen? and who is the citizen? These two key-queries, when adequately combined, offer a comprehensive model for citizenship. Such a model can be labeled «comprehensive» because it provides the dual or binary elements for a rational investigation into the matter. In other words, it makes clear what the philosophical stake of the issue is. To reflect on the nature and role of the citizen requires answering these two queries.

What is the citizen? is a question of substance and it concerns the essential feats and features that define the citizen. By answering this question it becomes possible to distinguish the concept of citizenship from other, more or less analogous or closely related notions. Therefore, the first query helps us to indicate what kind of activity is connected to the status. Needless to say that for Aristotle, whose model of citizenship is essentially political, the main activities associated with the status are voting in assembly and participating in popular juries.

The second query, who is the citizen?, is a matter of function correlated to the first issue. It refers to the quality or ability a person has to enjoy in order to be plausibly designated as a citizen. To answer this second question you need to have stipulated in what the citizenship activity consists. Thus, this second key-question stresses entitlement and its preconditions: who is entitled to access the status? As we know, for Aristotle, as for most Greeks of his time, only free Athenian men in adulthood can aspire to the title for various reasons that I will not be discussing here.

These two key-queries form what I would like to call an equation with two incognita. The interesting problem is hence to set up the elements of the operation and the modus operandi, i.e., to establish whether it is plausible or reasonable that a person has to have the attribute x in order to carry out the task or function y in which citizenship consists.

Let's take the following example in order to show how this model works. It is meant to be particularly uncontroversial. If one takes Aristotle's definition of citizenship activity as equivalent t o participation in public deliberation, a

reasonable criterion for accessing citizenship status is the capacity of the person to execute that specific task. A precondition for that execution is, for instance, age. In order to become a citizen the person would need to have passed the ephebìa, a test assuring maturity, which in Athens was commonly done at the age of 20.

This binary combination-based model is interesting today since it provides a rational standard for discussing some of the normative assumptions according to which citizenship is bestowed. Some of these assumptions have become highly problematic, as in the case of the principle of ius sanguinis. For instance, if we posit that citizenship activity is to take active part in the political community analogous or closely related notions. Therefore, the first query helps us to indicate what kind of activity is connected to the status. Needless to say that for Aristotle, whose model of citizenship is essentially political, the main activities associated with the status are voting in assembly and participating in popular juries.

The second query, who is the citizen?, is a matter of function correlated to the first issue. It refers to the quality or ability a person has to enjoy in order to be plausibly designated as a citizen. To answer this second question you need to have stipulated in what the citizenship activity consists. Thus, this second key-question stresses entitlement and its preconditions: who is entitled to access the status? As we know, for Aristotle, as for most Greeks of his time, only free Athenian men in adulthood can aspire to the title for various reasons that I will not be discussing here.

These two key-queries form what I would like to call an equation with two incognita. The interesting problem is hence to set up the elements of the operation and the modus operandi, i.e., to establish whether it is plausible or reasonable that a person has to have the attribute x in order to carry out the task or function y in which citizenship consists.

Let's take the following example in order to show how this model works. It is meant to be particularly uncontroversial. If one takes Aristotle's definition of citizenship activity as equivalent to participation in public deliberation, a reasonable criterion for accessing citizenship status is the capacity of the person to execute that specific task. A precondition for that execution is, for instance, age. In order to become a citizen the person would need to have passed the ephebìa, a test assuring maturity, which in Athens was commonly done at the

age of 20.

This binary combination-based model is interesting today since it provides a rational standard for discussing some of the normative assumptions accordingto which citizenship is bestowed. Some of these assumptions have become highly problematic, as in the case of the principle of ius sanguinis. For instance, if we posit that citizenship activity is to take active part in the political community (which was the aforementioned stipulation taken from Aristotle), by voting for representatives like it is generally intended in European democracy, it becomes problematic to confer entitlement to citizenship on ius sanguinis basis, since it is far from obvious that election ability is linked to the prerequisite of being born of certain parents.

This meta-model might be useful in order to assess difficulties linked to the principle of ius domicilii or residence-based entitlement. But most of all it opens a new perspective on the core problem, i.e. what we really need to determine today is who, when and under what conditions a person is a stakeholder in the EU-polity. A challenge, indeed for European Citizenship.

References

Barbalet, J.M. (1988). *Citizenship, Rights, Struggle and Class Inequality,* Open University Press, Milton Keynes.

Bauböck, R. (1997). 'Citizenship and National Identities in the European Union', in *Integration durch Demokratie. Neue Impulse für die europäische Union*, eds E. Antalosvsky, J. Melchior, S. Puntscher-Riemann, Metropolis, Marburg, pp. 302-20.

Bauböck, R., Ersbøll, E., Groenendijk, K. (eds.) (2006). *Acquisition and Loss of Nationality, Volume 2: Policies and Trends in 15 European Countries: Country Analyses*, Amsterdam University Press, Amsterdam.

Bellamy, R. (1994). 'Tre modelli di cittadinanza', in *La cittadinanza. Appartenenza*, identità, diritti ed D. Zolo, Laterza, Roma-Bari, pp. 223-242.

Bellamy, R. Castiglione, D. (eds) (2004). *Lineages of European Citizenship: rights, belonging and participation in Eleven Nation-States*, Palgrave Macmillan, London.

Bodin, J., *Six Books of the Commonwealth [*1583] (Aalen : Scientia 1977).

Borgatta, E. & M. (1992). 'Citizenship' in *Encyclopedia of Sociology,* Macmillan, New York.

Boudon, R. & Bourricaud, F. (1982). 'Citoyenneté' in *Dictionnaire critique de la sociologie*, PUF, Paris.

Brubaker, R. (1992). *Citizenship and Nationhood in France and Germany*, Harvard University Press, Cambridge (Mass.).

Bulmer, M. & Rees, A.M. (eds) (1996). *Citizenship Today. The Contemporary Relevance of T.H. Marshall,* UCL Press, London.

Carrera, S. (2005). 'What Does Free Movement Mean in Theory and Practice in an Enlarged EU?', *in European Law Journal*, vol. 11, n. 6, pp. 699-721.

Colas, D. & Emeri, C. (eds) (1991). *Citoyenneté et nationalité*, PUF, Paris.

Cordini, G. (1998). *Elementi per una teoria della cittadinanza,* Cedam, Padova.

Costa, P. (1994). 'La cittadinanza: un tentativo di ricostruzione archeologica', in *La cittadinanza. Appartenenza, identità*, diritti, ed D. Zolo, Laterza, Rome, pp. 47-92.

Dahrendorf, R. (1988). *The Modern Social Conflict. An Essay on the Politics of Liberty*, Weidenfeld and Nicolson, New York.

Davis, G. (2005). 'Any Place I Lay My Hat? or: Residence is the New Nationality', *European Law Journal*, vol. 11, n. 1, 43-56.

Dollat, P. (1998). *La libre circulation des personnes et citoyenneté européenne: enjeux et perspectives*, Bruylant, Bruxelles.

Düring, I. (1966). *Aristoteles. Darstellung und Interpretation seines Denkens*, Winter, Heidelberg.

Ferrajoli, L. (1994). Dai diritti del cittadino ai diritti della persona, in *La cittadinanza. Appartenenza, identità*, diritti ed. D. Zolo, Laterza, Rome, pp. 263-292.

Garot, M.J. (1999). *La citoyenneté de l'Union européenne*, L'Harmattan, Paris.

Germani, G. (1973). *El concepto de marginalidad. Significado, raíces históricas y teóricas, con particolar referencia a la marginalidad urbana*, Ediciones Nueva Visión, Buenos Aires.

Giubboni, S. (2007). 'Free Movement of Persons and European Solidarity', *European Law Journal*, vol. 13, n. 3, pp. 360-379.

Groenendijk, K. & Guild, E. (eds), *Le status juridique des ressortissants de pays tiers résidents de longue durée dans un Etat membre de l'Union européenne*, University of Nimega, April 2000.

Groot, de G.R. (2002). 'Zum Verhältnis der Unionsbürgerschaft zu den Staatsangehörigkeiten in der Europäischen Union' in *Europäisches Integrationsrecht in Querschnitt*, ed P.C. Müller-Graf, Nomos, Baden-Baden, pp. 67-86.

Groot, de G.R. (2004). 'Towards a European Nationality Law', *Electronic Journal of Comparative Law* [online] Available at: http://www.ejcl.org/83/art83-4.html.

Groot, de G.R. (2006).'Nationality', in *Encyclopedia of Comparative Law ed*_J.M. Smits, Edward Elgar, Cheltenham, pp. 476-492.

Guiguet, B. (1999). 'Citizenship and Nationality: Tracing the French Roots of the Distinction' in *European Citizenship: An Institutional Challenge,* ed M. La Torre, Kluwer Law International, Den Haag, pp. 95-111.

Isin, E.F. & Turner, B.S. (eds) (2002). *Handbook of Citizenship Studies,* Sage, London.

Janoski, T. (1998)._*Citizenship and Civil Society: A Framework of Rights and Obligations in Liberal, Traditional, and Social Democratic Regimes,* Cambridge University Press, Cambridge.

Johnson, C. (1984). 'Who Is Aristotle's Citizen?', *Phrónesis: a Journal for Ancient Philosophy,* vol. 29, pp. 73-90.

Kelsen, H. 'La naissance de l'Etat et la formation de sa nationalité. Les principes, leur application au cas de la Tchécoslovaquie', *Revue de droit international*, 1929, II, p. 613.

Kelsen, H. (1945)._*General Theory of Law and State*, Harvard Univ. Press, Cambridge (Mass.).

Krajewski, M. & Rittstieg, H. (1986). *German Nationality Law in Nationality Laws in the European Union* ed. B. Nascimbene, Butterworths, London, pp. 357-387.

Köchler, H. (1999). Decision-making procedures of the European Institutions and Democratic Legitimacy. How Can Democratic Citizenship be exercised on the transnational level?, *Report prepared for the Council of Europe,* Innsbruck, pp. 1-23.

Lagarde, P. (1997). *La nationalité française*, 3d edn, Dalloz, Paris.

La Torre, M. (1999). (ed), *European Citizenship: An Institutional Challenge*, Kluwer Law Internacional, Den Haag.

Mann, M. (1996) 'Ruling Class Strategies and Citizenship', in *Citizenship Today. The Contemporary Relevance of T.H. Marshall,* eds M.Bulmer & A.M. Rees, UCL Press, London.

Marakov, A.N. (1962) *Allgemeine Lehren des Staatsangehörigkeitsrechts*, Kohlhammer, Stuttgart.

Marrus, M.R. (1986) *Les exclus. Les réfugiés européens au XXè siècle,* Calmann-Levy, Paris.

Marshall, T.H. (1950) *Citizenship and Social Class and Other Essays*, Cambridge University Press, Cambridge.

Mossé, C. (1993) *Le citoyen dans la Grèce antique,* Nathan, Paris.

Park, R.E. (1928) 'Human Migration and the Marginal Man', *American Journal of Sociology* (may).

Preuss, U.K. (2003) 'Citizenship and the German Nation', *Citizenship studies*, vol. 7, n. 1, pp. 37-55.

Price, P. J. (1997) 'Natural Law and Birthright Citizenship in Calvin's case', *Yale Journal of Law and the Humanities*, Winter, pp. 73-129.

Rosanvallon, P. (1992) *Le sacre du citoyen. Histoire du suffrage universel en France,* Gallimard, Paris.

Schade, H. (1995) 'The Draft European Convention on Nationality', *Austrian Journal of Public and International Law*, vol. 49, n. 2, pp. 99-103.

Shaw, J. (2007) *The Transformation of Citizenship in the European Union,* Cambridge University Press, Cambridge.

Sherwin-White, A.N. (1939) *The Roman Citizenship*, Clarendon Press, Oxford.

Sills, D. (1968) 'Citizenship' in *International Encyclopaedia of the Social Sciences*, MacMillan, New York.

Turner, B.S. (ed) (1993) *Citizenship and Social Theory*, Sage, London.

Verwilghen, M. (1999) 'Conflit de nationalités. Plurinationalité et apatridie', *Recueil des cours de l'Académie de droit international*, vol. 277.