Citizenship as a legal and political privilege of the sovereign state? The case law of the European Court and the construction of a status Europeus.

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Abstract

This paper deals with the borders of the traditional concept of citizenship under the paradigm of the nation-state, and explores its new dynamics in the international and the European level. The notion of citizenship is under the threat of losing its constitutional source and strength because the criteria of its acquisition are gradually no longer conceived as a political choice and a privilege of the sovereign state, due to the new collective bonds that are being created and the multiple criteria of social inclusion that are being implemented. Certainly, the complete abandonment or the total deconstruction of the concept of citizenship is normatively neither feasible nor desired, since citizenship is not only the precondition for being a member of a political community and for the enjoyment of civil liberties, but also a valuable tool for the reasonable and effective organizing of the relations between the persons and the democratic polity. However, the connection of each person to many public spheres and multiple identities calls for the reconception of citizenship in a new, modern and effective way and the re-definition of its acquisition criteria.

Studying Greek constitutional history and the Greek case law regarding the laws on citizenship, the paper sketches the evolution of the concept in the national and the European level and presumes that citizenship is conceived and presented as a legal and political privilege of the sovereign state, since it formulates migration policy and the criteria for becoming a citizen as part of public and not of European law. Thus, the paper explores a new “effective citizenship” in the context of nation states, through a comparison between European citizenship and national citizenship, and concludes that a shift is being made from an economic to a social conception of European citizenship in the case-law of the European Court (EC). In particular, one can observe that the EC, through a pragmatist approach, tries to detach European citizenship from nationality and from the obstacles that the different constitutional identities of the member states pose, and with a view to a social or political unification, supports a social dimension of the European citizenship, enhancing the implementation of national laws under the light of a socio-economic solidarity as a nascent European principle between European citizens. Of course, this practice is insufficient to lead to the independence of the European citizenship from the inherent constraints set by the national identities, nevertheless, it puts again in the forefront the question of the construction of a status Europeus as a bond of individuals in a process of creating a European political community.

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I. The European Union as a new case in the history of citizenship.

Examining the case law of the European Court one can trace arguments for a new conception of citizenship not as a selective and legalist collection of rights (by several legal texts such as constitutions, charters and international conventions) but as a status of rights and duties inextricably linked to a political community, either national, or post-national. In this context, the emphasis is given in the democratic deficit of the European Union not as a question of participation of the citizens in the making of the European decisions (functional criterion), but as a question of citizens as members of a political community [substantial criterion]. Thus, in the case law of the European Court, the judges deploy arguments of ratione personae και ratione materiae in the implementation of the European law and not only do they construct a transition from the European citizen as an economic agent to a European citizen as holder of social rights, but they give a paradigm-basis for new ideas regarding citizenship and modern European constitutionalism.

1. Three ideas on citizenship.

The case law of the European Court deals with the concept of citizenship selectively, partly and legalistically, as a collection of rights by several legal texts (constitutions, charters and international conventions). On the contrary, living experience proves that citizenship is rather a status of rights and obligations inextricably linked to a political community, either in a national or postnational society. European citizenship is still a fertile ground for the designing of new dimensions of citizenship, but only if one ignores the typical model of the political community. The triple distinction of citizenship {deficient, simple and complete} that follows, describes in substance the stages [historically and in terms of political philosophy] in the evolution of citizenship, while in this way it is shown that the current European citizenship cannot come under a full form of citizenship. In the European case of selection of rights, away from the democratically legitimized political community, like the present European model, citizenship misses guarantees δεδομένες in the political community under the rule of law. In the classification that follows, one can see not only the sense of citizenship, but also the print that leaves in the life of the political community and its institutions1:

a) Citizenship by birth or naturalisation (according to the constitution). The existence of a constitution, a prevalent normative framework that recognizes rights and duties to persons within a certain territory gives a first image of the citizenship, which one can trace already in the definitions that Aristotle gave. There lies the idea that in the real polis what transforms persons into citizens is the Politeia (constitution), in the sense of a prevalent norm that organises the life of the community2. Therefore, one conceives citizenship firstly with a connection to the emplacement of a person in an organized and legally regulated life in a community that it is defined by race (genre) and it is partly homogeneous. However, the basis of genre constitutes an incomplete citizenship that one can find mainly in non representative political systems3.

b) Citizenship through the integration of the other, the stranger4. In modern times, the nation state is constituted by the consociation of small national entities (ethni) and tribes5, and appropriates every diversity under the umbrella of one single state that has the supreme authority6. At this stage, the nation7 as a supreme unifying ideology is the means for creating identity for the state. The citizen is subordinate and enjoys the
liberal protection of his private life, a series of civil rights and freedoms against the sovereign state which monopolizes political authority. The subordinate – citizen is he who mandates and legalizes essentially the sovereign state, and enjoys the typical universal equality against the state. This is what we may call simple, citizenship, which is subordination to the authority.

c) Citizenship as participation in the public sphere: Citizen’s participation in the economical, political and social life of the state and his exit form the liberally protected sphere of privacy, is done with the participation in the public arena, in the public institutions, at the centres of taking decisions and in the public dialogue. This leads us close to the citizen of the polis who is not just a citizen of the state, but also enjoys individual, political, and social autonomy and freedom, ceases to be only the agent who mandates and legitimizes power and becomes a citizen-social partner, a citizen that has an organic part in the political community. Full citizenship is deployed in and beyond civil society, and is completed inside the political community, under the safeguards of democratic participation and collective autonomy.

2. Case study: European citizenship as a derivative and dependent on the national one

At the present stage of its evolution, the European Union is not a state, it doesn’t refer to a European people that could constitute its political community, and there is no common identity. Therefore, for the time being, European citizens enjoy an identity which is derivative, indirect and dependent on the national one. The political system of the European Union is constituted by member states and expresses their will, represents nation states and not individuals or societies. As long as member states are the sovereign subjects in the making of Europe, European citizenship is condemned to be dependent from national citizenship. The conditions for the acquisition or the loss of the national citizenship belong exclusively to the authority of the member state, and in practice this means either the lack of the possibility of a separate recognition of the European citizenship to third country nationals or its deprival from a national of a member state.

II. The European citizenship in the case law of the European Court before and after the Maastricht Treaty.

1. The attachment of the European citizenship to the economic liberties.

A serious step in the evolution of the European citizenship was the recognition of its political and administrative dimension, namely the recognition of rights of participation in the European institutions, like the right to vote for the European parliament, the judicial protection before the European Court and the right to report and refer to the European authorities. Until then, European citizenship was partial, incomplete and not explicitly established, however, one could deduce it from the economic powers of the E.U. and by the representative political system of member states and within the E.U. Until the Maastricht Treaty – when it was for the first time expressively established art 17 EC– European citizenship was strictly connected to national citizenship and mostly to the economic freedoms (free work and circulation). More specifically, only the
actively economic population (workers professionals, and recipients of services) could claim the freedom of free circulation and residence, with the exception for tourists, students, and pensioners(according to directives 90/364-66) Article 18EC law was, before the Maastricht Treaty a general declaration and an institutional guarantee,that just completed hermeneutically the core community liberties of free circulation of workers, of residence and services (ap. 39, 43, 49 EC law) that were applied.

2. An important interpretative “shift” in the case law of the European Court.

During the last few years, the evolution in the case law of the European Court shows a turn in the interpretation and the implementation of article 18 EC law, in a way that this article is now a general and complete right of free circulation and residence that all European citizens enjoy, irrespectively of any economic activity (as long as they have reason to move and reside, financial means and health insurance). In a series of cases the Court (Baumbast, Sala, Bickel, Wigenbeek, Collins, and ’Hoop decisions) expanded the normative field of the implementation of article 18 detaching it from the strict economic activity, using as its interpretative criteria, article 17 EC that establishes European citizenship, article 12EC that establishes the equality principle and also the proportionality principle. In particular, as far as social services are concerned, the Court has expressed a general claim for the equal treatment of all the European citizens that are on the ground of another member state, with this state’s nationals.

Equally, in the same logic of widening the normative content of article 18 EC, it is worth mentioning a series of cases concerning the attribution of social benefits by member states (C–456/02 M. Trojani, C–11/06 & C–12/06, 23.10.2007, Rhiannon Morgan vs Bezirksregierung Koln, and Iris Bucher vs Landrat des Kreises Duren). A common element in all the above cases is that the European Court interprets the freedom to reside within the European Union in light of the European citizenship and a wider interpretation of article 18 EC. In this way, it recognizes and extends the rights to social benefits, irrespectively of the exercise of an economic activity. And this is really important, since social policy is exercised only by the member states and does not fall within the jurisdiction of the European Union.

Moreover, another series of cases confirms the above choice on the interpretation of article 18EC law and attaches it expressively to the European citizenship. Thus, the Court, on the basis of the European citizenship, establishes citizenship rights that not only they are not connected to economic freedom and social policy, but also refer to the dignity, the personality, the name, the freedom of choice, namely to the basic freedoms and rights that are recognized and protected by the internal law of the member states (and not by the EU conventions). At this stage, the Court makes a step further and founds these rights directly in the European citizenship (article 17EC) without any reference to the general right of residence of article 18 EC. Moreover, in two recent decisions (Zhu-Chen C–200/02 και Garcia Avello C–148/02), this connection of European citizenship to rights that are established by the nation states, transcended the field of social benefits as the Court used the concept of the European citizenship, without the argument of equal treatment, to recognise rights that belong in what, according to the French theory, seems to be the “domain reserve” of every sovereign state.
III. Procedural guarantees for the formation of the European citizenship: the dialogue of the national and the European judge on the basis of the Community acquis.

1. The limits of a European citizenship as constructed by the European Court.

As the case law of the European Court deals with cases not only ratione materiae, but also ratione personae, a shift is made in its methodology. The European judges use as a base for their rulings the article 17 EC alone, and not an interpretative combination of articles 18, 12, and 17EC. The aim was an interpretation that will allow the emergence of a European citizenship as a legal status of civil and social rights within the field of the European Union. Certainly, this course is the exact reverse from that of the national citizenship paradigm, since in all the liberal and democratic member states citizenship, as the sign of the inclusion in the political community, is the condition for the recognition of rights and duties (civil, social, political). In the EU however, the inexistence of a political community has led the European Court in a reverse course and in the connection of civil and social rights to European citizenship with a view to create and establish a self-contained European citizenship.

This choice is familiar to the practice of the Court to establish a priori the prevalence of the European law vis a vis the national one. Having the same goal, the European integration, and in the same way, the Court approaches European citizenship pragmatically in an effort to render European citizens agents of the European law order and to dissociate European citizenship from the national one and from the burdens of the many distinct constitutional identities and traditions of member states. Through the enrichment of the European citizenship with a social dimension, the aim of the Court seems to be, during the last decade, the transformation of the European Union from an economic organization to a political union, to a Europe of Citizens, and an establishment of a European citizenship.

However, this tactic is legally and constitutionally problematic, due to the fact that the European Union is equipped with economic powers only, with the member states as its primary agents. More specifically, there is a complete absence of a European people with a territorial, psychological and historical bond with the Union, of a legitimation of the practice of the European union as a political community through democratic participation processes for the citizens in the public sphere, while there is no social politics by the European Union itself, in an autonomous and uniform way for all European citizens.

Besides, there are inherent limits in the dynamic character of the rights of the European citizen and their dilative interpretation and implementation by the European Court. As it was described, the character of the European citizenship is limited and strictly rights based. The rights are established only for those who already have the nationality of a member state (even if they don’t reside within the European Union), while they are not attributed to those that reside within the European Union but are third state nationals. European citizenship, as it is established at the article 17 EC law does not entrench a status of a membership into a certain people-, nor constitutes a separate and complete legal bond with a certain law order, instead it is about a very limited status that has a derivative character. European citizenship is an intermediated bond of the person to a European political society that is under constant formation and evolution.
Even in the rejected plan for a European Constitution, European citizenship was again inspired by the logic of a community of member states and by a perspective of a European integration with new legitimizing bases. At a first level, the establishment of the rights of the citizens still seems really distant, as long as the right to free circulation and residence is dependent on the economic liberties entrenched by the European communities. At a second level, there is the danger that European citizenship will not ever been identified with membership in a European social entity, if it is not conceived and implemented as a direct bond of the citizen with the Union itself, without the mediation of the nation-states. For that purpose, what is needed is the creation of direct bonds of solidarity between all the persons that co-inhabit the territory of Europe in a common and unified public space of dialogue and participation. Europe needs procedures that will ensure participation in the process of collective autonomy, in order for a European political society that will belong to everyone, either national of a member state, or a third country national who lives in a European country and participate in the social life.

2. The community acquis of the case law of the European Court as an interpretative guide for the national judge when implementing national law: the bond of socioeconomic solidarity between European citizens.

Certainly, the aforementioned case law of the European Court does not offer safe and substantial criteria for the construction of a European citizenship; however, it offers some perspectives for the formation of those procedural guarantees that will possibly lead to the enrichment of the concept of the European citizenship, and will deal with the democratic deficit in the function of the E.U. Thus, the need to find new methods that could overcome the democratic deficit becomes really apparent, if one takes into consideration the weaknesses and the limits of the European citizenship, namely the indirect (through the nation state) participation of nationals in the European institutions, the non implementation of the existent participatory procedures, the absence of a public European sphere of dialogue and communication, and the limits and weaknesses of European citizenship as discussed above. The aforementioned case law certainly makes steps towards this direction, by putting in new terms the effect that the European law has on the national one, away from the problematic usual pattern of the jurisdictional conflict. In a few words, the practice of the Court offers a minimum community acquis, which, although it is certainly weak to support the construction of a European political community, it is indeed rich in normative content and expediency.

Moreover, except for the procedural guarantees, one can assume that underneath this case law a bond of socioeconomic solidarity is built among the people of the Union, by using residence as a criterion for the enjoyment of rights and the equal attribution of social benefits. In a way, one can detect the enfeeblement of the nationality criterion for citizenship in favour of the residence criterion which also enhances the promise of equal treatment and recognition of social rights and benefits to third country nationals. This is more obvious in the case law of the European Court on free circulation and residence, which was codified with the 38/2004 directive that set the sufficient financial means and the health insurance as the only conditions for the free movement of the European citizens within the E.U. (art. 7 & 14 par.1). In this way the case-law of the Court was transformed into derivative law and was thus incorporated in a unified way into the national legal orders harmonising the relevant regulations. However, there is
the possibility of a “conflict” with the national legislation on social care and protection, but also with the one that brings into effect traditional rights and freedoms.

In one point of view then, the above case law enhances a European identity of rights and abandons a logic of conflict that does not foster the European Union. This theory on the “genetically modified right” of rights in the European vision that the case law of the European Court supports, suggests the reconciliation of the two law orders through a simultaneous implementation of all the rights’ declarations and the hermeneutical exchange between the national and the European legal order. Such an approach is certainly fruitful in the field of the respect of fundamental rights, where the conflict is almost impossible and charming because it comes close to an idea of «multilevel-constitutionalism28». Of course, it only refers to the respect of rights, without dealing with the classic notion of sovereignty29, but the respect for basic rights that the E.U. recognizes, remains a distinct issue with regard to the one of who has the jurisdiction for bringing these rights into effect. More specifically, the E.U. doesn’t have the power of setting rules in this field, since the member states have not yet transferred to the Union their relevant sovereign powers.

Thus, it is worth examining the way the national judge would react in a case where the aforementioned directive – on the status of the European citizen- conflicted for example with the national rules on the conditions of acquiring the Greek citizenship, or on the social and migration policies. In such a case where the Greek judge finds himself/herself in difficulty to interpret an internal rule in light of the freedom of residence or the equal treatment rule ( directive 2004/38) or he/she is in front of a conflict of these regulations with an internal law (regulations for social insurance, terms of residence, migration law, etc.), he/she could deliberate using the jurisdictional criterion that the Greek Constitution offers in article 28 par. 2 &3 that set the limits in the transfer of the sovereign powers to the E.U. This article gives the power to the Greek judge to act also as European judge and be able to control and decide whether a European regulation can be implemented against a national one. If the case law of the European Court is regarded as not violating the Greek constitution, then one can expect national judgments that will bring about new forms of social solidarity, of a European inspiration and of national implementation.

This perspective must be realised not through using the de facto arguments of the European Court and the European citizenship as a legal notion; instead the national judge and the national legislator should use the case law of the European Court as an interpretative means and as a paradigm, with a view to the enrichment and the expansion of the notion of the national citizenship towards a European perspective. The dialogue between the national and the European judge could create a solid ground for the harmonisation at least of the interpretation by the national judges when dealing with the citizen’s status in the European Union and the relevant European policies. Otherwise, the case law of the European Court, analysed in this paper, could be dangerously expansive and lead Europe to an immature and distorted political Union.
Conclusions

The procedural guarantees and the interpretative means provided by the elaboration of the case law of the European Court regarding article 17EC, have a limited potential; they could be used in order to solve a possible conflict between a European and a national rule, and offer a harmonizing practice with the development of a minimum community acquis on the co-residence of the European citizens and their equal access to social services in member states. Thus, the communication between the courts offers, on the necessary conditions of impartiality and of uniform implementation, these procedural guarantees that can work as an institutional method to compensate for the institutional democratic deficit in the inner of the E.U. They are not adequate though, to counterbalance the democratic deficit of the EU itself. The courts’ decisions are inadequate and incapable of substituting the living political communities of member states that make up the E.U. A procedural guarantee of a judicial character is not capable to give the European citizenship a role in the European integration, if it is not complemented by a substantial guarantee of legitimation. This precondition must be “seek and found” in the democratic will of the member states as political entities, as the ground where the values of participation in the public sphere, of collective autonomy and of equal treatment for all, are being tested.

However, the formation of a European citizenship is a perspective that cannot be dealt with partly and sporadically, without the shaping of a certain stance for the national or the postnational character of the European Union, for its state or federal formation, for the existence of a European people -demos- or multiple peoples, for a concentrative administration system or the enhancement of the peripheral democratic systems. All the above dilemmas were only implied in this paper, while a safe legal and political way for the construction of the European citizenship is of course not a matter of one presentation. However, irrespective of the form, the governance model and the political future of Europe, the process towards the construction of the European citizenship cannot ignore the guarantees of a democratic political society, namely, the rule of law, the principle of equality, the participation rights, and mostly the procedures of social autonomy and control.
Notes


Bibliography