Who's Afraid of Union Citizenship?

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Christoph Schönberger, *Unionsbürger; Europas föderales Bürgerrecht in vergleichender Sicht* (Tübingen, Mohr Siebeck 2005) 597 p., ISBN 3-16-148837-7.

Unionsbürger, Christoph Schönberger's professorial thesis in two parts, is no longer a recent publication; but its brief mention by the German Constitutional Court in the latter's decision on the Lisbon treaty[1] makes it a very relevant and topical subject of review. Part I of the book first strictly defines the terms to be used while conducting a comparative analysis of citizenship in federal orders; Part II then applies the lessons learned to an analysis of Union citizenship. On the one hand, it is worth examining whether the terms chosen do not render the author's analysis untranslatable into other European languages. On the other hand, if we complete the dialogue between the author and the Court, which is ostensibly taking place in the 'same' German language, we can also reveal one manifestation of the discursive chasm between national constitutional law and certain conceptions of Union law.

Book summary

The ambitious goal that the author has set for himself is to go beyond previous analyses of Union citizenship. Some of these define Union citizenship either negatively, as a 'non-nationality', or as a post-national form of belonging, perhaps a first step toward 'global citizenship' and the abolition of nationality altogether. The problem with both of these analyses is that they both assume that nationality is the essential standard by which Union citizenship is to be measured. Furthermore, by concentrating on the exclusivity of nationality (i.e., of sovereign states), these analyses fail to appreciate the shared forms of belonging that exist in *federal*

[1] Decision of 30 June 2009 of the *Bundesverfassungsgericht* (Second Senate), Cases 2 BvE 2/08; 2 BvE 5/08; 2 BvR 1010/08; 2 BvR 1022/08; 2 BvR 1259/08; 2 BvR 182/09: English translation published by the court: <http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html> (last visited 1 Nov. 2009). Para. 347.

European Constitutional Law Review, 5: 517–527, 2009

doi:10.1017/S1574019609005173

orders, in which citizenship is inherently dual: a citizen is at once a citizen of both a constituent state and the federation. The author equally rejects fuzzy characterisations of Union citizenship as a *sui generis* concept that resists comparison; to understand Union citizenship, according to the author, one must analyse the European Union as a federal order and compare it to other federal orders.

And in so doing, the author must strictly define what he means by 'federalism'. On the scale of associative relationships among states, the loosest are those based on, e.g. bilateral treaties that cannot by any account be described as federal, or those that are inherently unequal, defined by a relationship to a former colonial power (e.g. the Commonwealth). At the opposite end of the scale is the closest form of association: the federal state. However, the author also includes many in-between forms under his umbrella of 'federalism', including some 'confederations' that traditionally have not been viewed as forms of federalism (e.g. the United States under the Articles of Confederation). At the same time, the author excludes from his definition forms of 'federalism' that are really just movements toward decentralisation of a unitary state (e.g. Belgium and Spain). Nor, for purposes of comparison to the European Union, does the author wish to devote any attention to federal systems that emerged from decolonisation and do not have a concept of constituent state citizenship (e.g. Canada, Australia and India). So the author chooses three federal orders in particular – the United States, Switzerland and Germany – and goes into depth analysing the development of federal citizenship in each of them. All three of those orders started out as voluntary leagues of at least formally independent and equal states. Moreover, all three of them operate on the principle of shared citizenship, and thus lend themselves readily to comparison with the European Union.

The next terms to be approached are 'citizenship' and 'nationality'. The author goes beyond merely strictly defining these in order to get at what Union 'citizenship' is: he first dissects the (German) terms so as to strip them of the baggage of traditional state-oriented descriptions. He isolates the 'belongingness' (*Angehörigkeit*) and citizenship-as-such (*Bürgerschaft*) that lie at the root of the German terms for nationality (*Staatsangehörigkeit*) and citizenship (*Staatsbürgerschaft*), and repackages them for a more federalism-oriented analysis (*Bundesangehörigkeit, Landesangehörigheit, Bundesbürgerschaft*, etc.). Union citizenship, in particular, can best be approached as a *Bundesangehörigkeit*, literally a 'federal belongingness' or 'citizenship' free of any inherent association with an overarching state. (*NB:* henceforth, I shall simply render this term with 'federal citizenship' in English.)

To describe the primary effects of the type of federal citizenship Union citizenship is, the author leans heavily on an even more untranslatable term, *Indigenat*.[2]

[2] This term must, of course, be kept at arm's length from the very negative associations of its French cognate *Indigénat*.

https://doi.org/10.1017/S1574019609005173 Published online by Cambridge University Press

This is a somewhat disused term for 'citizenship' whose history is bound up with that of the North German Confederation of 1867. For a canonical definition of *Indigenat,* the author cites Article 3(1) of the North German Constitution, which stipulates:

> In the entire extent of the federal area there exists a common *Indigenat* with the effect that the national (subject, state-citizen) of any constituent state must be treated as a non-alien in any other constituent state, and accordingly must be admitted under the same conditions as an indigenous person for the purposes of settled residence, economic activity, public offices, acquisition of land, acquisition of the right of state-citizenship and the enjoyment of all other civil rights, also that he or she is to be treated equally with regard to prosecution and legal protection.[3]

Indigenat can be described as the status that encompasses the *horizontal effects* of federal citizenship. In all of the systems the author reviews, the most important of these effects are invariably the freedom of movement and residence and the right to treatment as a non-alien; rights of political participation in the host state may come later. These horizontal effects of federal citizenship derive not from a hub-and-spoke relationship of the citizen to the centre, but from the relationship of reciprocity between any two of the constituent states. The one state is always bound to grant the other state's citizens rights of residence and equal treatment, and *vice versa*.

The horizontal effects of federal citizenship are prominent in orders where federal citizenship is still derived from constituent state nationality (the EU) or even, ultimately, from municipal citizenship (Switzerland). If the *conferral* of federal citizenship is 'mediated' by the component states (i.e., if it is granted 'horizontally' as an expression of a reciprocal relationship among the component states), then the horizontal *effects* of citizenship will also be more prominent. In 'unitary' federal systems, on the other hand, such as the contemporary United States and Germany, federal citizenship is conferred *immediately*, as a primary status. State citizenship is automatically granted to a federal citizen who takes up residence in a constituent state; the position of the citizen in a destination component state is thus primarily derived from the 'vertical' relationship between the component state and the federation, and not from the relationship between the destination state

[3] Online at <http://www.documentarchiv.de/nzjh/ndbd/verfndbd.html>, last visited 27 Oct. 2009; my translation of: '*Für den ganzen Umfang des Bundesgebietes besteht ein gemeinsames Indigenat mit der Wirkung, daß der Angehörige (Unterthan, Staatsbürger) eines jeden Bundesstaates in jedem andern Bundesstaate als Inländer zu behandeln und demgemäß zum festen Wohnsitz, zum Gewerbebetriebe, zu öffentlichen Ämtern, zur Erwerbung von Grundstücken, zur Erlangung des Staatsbürgerrechts und zum Genusse aller sonstigen bürgerlichen Rechte unter denselben Voraussetzungen wie der Einheimische zuzulassen, auch in Betreff der Rechtsverfolgung und des Rechtsschutzes demselben gleich zu behandeln ist.*'

https://doi.org/10.1017/S1574019609005173 Published online by Cambridge University Press

and the home state. In the unitary federal systems, the horizontal effects of state citizenship are less salient. That is because the automatic acquisition of constituent state citizenship by definition means that the migrant to the destination state *becomes* a non-alien with a right of residence, rendering equal treatment irrelevant: the horizontal effects remain only relevant for citizens of one constituent state who travel to another constituent state for purposes other than residence.

The author does note that almost all federal orders start out with a federal citizenship that is mediated by component state nationality, in which the connection between component state nationality and federal citizenship can be described as a *dédoublement fonctionnel*: federal law 'reuses' a legal status in the internal law of the component state for its own purposes. And indeed, so did the United States and Germany begin: in the United States under the Articles of Confederation after independence, and then under the early Constitution as well. However, this system became particularly untenable in the United States due to a fundamental difference in conceptions of citizenship rights between the Southern states, which allowed slavery, and the Northern states, which banned it.

Dred Scott was born a slave, but brought a claim in federal court that by moving with his master to states and territories where slavery was prohibited (the free states), then returning to Missouri (a slave state), he had acquired the citizenship of Missouri and thereby the federal citizenship of the United States. Even though the Constitution had never clearly regulated it, up until that point there had been something of an accepted consensus that federal citizenship was necessarily derived from state citizenship. However, Scott's claim threatened the uneasy political balance between the slave states, the free states, and the Western territories in which the final status of slavery was far from settled. The United States Supreme Court, infamously, denied Scott's claim in 1857. The logic behind the ruling was that federal citizenship of the United States was really only reserved to whites. States were free to grant citizenship to whomever they liked, but state citizenship did not necessarily imply rights on a federal level. Thus it was only more or less by chance that some people happened to be holders of both federal citizenship and state citizenship; as such, the rights enjoyed by a state citizen moving to another state were not necessarily on the basis of reciprocity, but rather solely on the basis of federal citizenship. To conclude otherwise would mean that free states could impose their notion of citizenship on slave states.

The disconnect between state and federal citizenship introduced by the *Dred Scott* ruling, letting go of *dédoublement fonctionnel,* dealt a heavy blow to the structure of American federalism that ultimately culminated in the civil war between the slave and free states. The interdependence of state and federal citizenship was not restored until after the war, with the enactment of the Fourteenth Amendment to the Constitution in 1869. This largely circumvented the nettlesome question of

reciprocity in the same way as it granted citizenship to the former slaves, by introducing a federal citizenship granted 'vertically' and immediately to all persons born on United States soil.

The author's history of the archetypal *Indigenat* of the North German Confederation and its successors also deserves a summary here, since this is the part of the book that the *Bundesverfassungsgericht* refers to in its judgment. In the Confederation, of course, nationality of one of the member states was the primary status from which federal citizenship was derived, and so it can be said that federal citizenship was conferred mediately. However, the Confederation was *de facto* dominated by Prussia, and the conditions for acquisition and loss of member state nationality were governed by a federal statute that was effectively a copy of the Prussian nationality statute. Thus the competence to determine nationality, and thereby federal citizenship, was already 'unitarised', in the author's analysis; but substantively the conferral of citizenship was still 'federative', or as we could say to make it very clear, 'horizontal'. Member states even continued to maintain the trappings of statehood (in the sense of international law), issuing their own passports, for instance, of which the only common feature was the inscription 'Deutsches Reich' on the cover.

During the Weimar Republic, there were calls to render member state citizenship subsidiary to federal citizenship; these went unheeded, however. It was actually the Nazi dictatorship that first established a vertically conferred German nationality, at the same time as it abolished the member states in 1934. In effect, Germany gained its unambiguous unitary statehood, abolishing any hint of statehood on a lower level, precisely when it abolished federalism.

During the drafting of the Basic Law of the Federal Republic of Germany after the war, it was taken into consideration to re-establish state citizenship as the primary status. However, the new *Bundesländer* largely lacked historical continuity with any of the old member states, not to mention congruent populations, since the war and its end had brought massive population shifts with it. But perhaps most decisively, since a German nationality had already been established as a unitary status, the re-federalisation of Germany required that the established set of all German nationals be taken as the starting point. The Federal Republic thus followed the lead of the United States in granting state citizenship automatically to federal citizens taking up residence in a state.

It is the author's *tour de force* analysis of the horizontal effects of Union citizenship that makes up the lion's share of Part II, in which he convincingly applies the lessons drawn from the historical-legal analysis of Part I. The author mainly concentrates on the development in the Union of the most significant of the horizontal effects: freedom of movement and non-discrimination. And it is impossible

https://doi.org/10.1017/S1574019609005173 Published online by Cambridge University Press

to analyse these two freedoms and their implementation from the sole perspective of non-interference by a host state, as both of them engender significant responsibilities of solidarity on the part of the member states.

The primary limitation to the freedom of movement, just as in all of the other federal systems examined in Part I, can be found in the case of the needy Union citizen claiming social assistance in a host state. The foreign Union citizen may have his or her right of residence revoked as a result of the claim to social assistance, and thereby be 'sent back' to the home state that is considered to be primarily responsible for the citizen's welfare. As long as freedom of movement and residence was strictly tied to the 'four freedoms' of the EC treaty (when the rights of Community nationals primarily constituted a 'market citizenship'), this problem was not so prominent. However, the introduction of rights of residence for economically inactive Union citizens (either by secondary legislation, or by interpretation of the primary legislation on the exercise of the fundamental freedoms and the rights of movement and residence as in e.g. *Grzelczyk*[4]) has been particularly problematic, because these bring to the foreground the question of how much solidarity a host state must demonstrate with a (potentially) needy foreign Union citizen. The non-discrimination principle is likewise bounded by the issue of solidarity. When can a foreign Union citizen be denied social assistance and thereby be treated differently from a national of the host state? The author finds this question to so far have been treated with insufficient nuance in the case-law of the European Court of Justice and to have been largely ignored in the legislative process. He pleads for the introduction of a graduated system of non-discrimination based on e.g. length of residence, arguing that this is by no means antithetical to the intended functioning of a federal citizenship.

The author identifies the need for a discussion on the part of the member states about how to financially share or otherwise compensate the costs of social assistance to migrating Union citizens amongst themselves. This is a discussion that the component states of other federal orders, particularly Switzerland and to a lesser extent the United States, ultimately could not avoid. Thus, the two main horizontal effects of federal citizenship are revealed to exert a pressure on the component states to increase their solidarity with each other, which in turn leads to a lessening of the restrictions placed on freedom of movement and non-discrimination; and so can it be expected to work as well with Union citizenship.

It should come as no surprise that the vertical effects of Union citizenship, or the relationship of the citizen to the centre, receive only a cursory treatment at the end of Part II. And this treatment is restricted to the only real manifestation of the vertical effects: active and passive suffrage of Union citizens for the European Parliament. Quite admittedly, being a source of legitimacy for the European Union

[4] ECJ 20 Sept. 2001, *Rudy Grzelczyk* v. *Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve,* C-184/99.

is not the Union citizen's most prominent role. But the right to vote for and be elected to the European Parliament is the only right of the Union citizen that is not purely a function of nationality and reciprocity among the member states: it comes close to being a right granted automatically based solely on federal citizenship and place of residence. As such, since the constituencies represented by the national delegations in the European Parliament are determined by the place of residence of Union citizens and not their nationality, this points to a mode of legitimation of the Union that does not purely rest on the separate pillars of the national populations of the member states.

The dialogue between the Court and the book

The German Constitutional Court approaches Union citizenship from a rather different perspective than the author: does Union citizenship imply that the European Union, after the ratification of the Lisbon Treaty, is a *state*? In particular, the Court is obliged to respond to the assertions of complainant III that this follows from the facts that Union citizens as a whole, and not the peoples of the member states are a subject of legitimation of the European parliament[5] and that 'the European Union possesses a state territory [*Staatsgebiet*] […] and a state people [*Staatsvolk*].'[6] The Court denies these assertions, *inter alia* with a reference to the author's book:

> In particular, the introduction of the citizenship of the Union does not permit the conclusion that a federal [state][7] has been founded. Historical comparisons, for instance with the German foundation of a federal state via the North German Confederation of 1867 (*see* for instance Schönberger, *Unionsbürger* (2005) p. 100 et seq.), do not help very much in this context. After the realisation of the principle of the sovereignty of the people in Europe, only the peoples of the Member States can dispose of their respective constituent powers and of the sovereignty of the state. Without the expressly declared will of the peoples, the elected bodies are not competent to create a new subject of legitimisation, or to delegitimise the existing ones, in the constitutional areas of their states.[8]

It is extremely unclear what position the Court is taking on the author's book here. If the Court is citing the author's work to support the statement that the introduc-

[5] *See supra* n. 1, para. 102.

[6] *See supra* n. 1, para. 113.

[7] The original translation rendered the Court's somewhat curious construction '*bundesstaatlicher Föderalität*' with 'a federal system'; however, in the context of the complaint and the point that the Court is trying to make, 'a federal *state*' (i.e., the EU itself as a state) is a more adequate translation of this (lit.) 'federal-state federality'.

[8] *See supra* n. 1, para. 347.

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tion of a federal citizenship does not necessarily imply that there is a federal state, then it has understood that much. On the other hand, if the Court believes the author to be implying that the introduction of a federal citizenship, as with the *Indigenat* of the North German Confederation, necessarily leads to the foundation of a federal state, then it did not read the book very well at all. In any case, the Court is talking at cross-purposes with the author. The author, after all, is not particularly interested in the question of whether or not the institution of Union citizenship means that the European Union is a state; his entire analysis of federal citizenship is intended to establish a new frame of reference that is indifferent to the existence of a federal state.

Furthermore, the author is not inclined to seriously entertain the question that the Court has asked as a prerequisite for legitimation: is there such a thing as a European people, comparable to, say, the German people, that can cover the gaps in the segmentation of elections to the European Parliament? The author can be found to deliver a prescient retort to the Court's similarly worded reference to his book: 'Pithy argumentation using the concept of a people does not help any further in clarifying the […] federative legitimacy relationship [involved when elections to the federal parliament are oriented toward the territories of the constituent states and when the latter also have their own competences for regulating suffrage and elections]' (p. 507).[9] And in fact, the author does directly criticise the Court's blindness to federalism, even in Germany's own federal system, in a publication subsequent to the *Lisbon* decision.[10]

As to the book at hand, however, an analysis of the vertical legitimacy relationship between the Union citizen and the EU is admittedly not its major accomplishment. In fact, one could best respond to complainant III's assertions of the existence of a 'Union territory' and 'Union people' by citing the author's horizontal analysis of Union citizenship as an *Indigenat* mediated through the member states. After all, Union citizenship, by contrast to US or German nationality, is precisely *not* conferred 'vertically' and immediately over the territory of the Union as a whole. The fact that Union citizenship has some (limited) vertical *effects* must not be confused with the mode of *conferral* of Union citizenship, which remains mediate and horizontal.[11]

[9] '*Diese situation besteht in föderalen Systemen stets dann, wenn die Wahlen zum Bundesparlament sich am Gebiet der Gliedstaaten orientieren und die Gliedstaaten überdies eigenständige Regelungskompetenzen bei der Ausgestaltung von Wahlrecht und Wahlverfahren haben. Ein plakatives Argumentieren mit dem Volksbegriff hilft zur Klärung des entsprechenden föderativen Legitimationszusammenhangs nicht weiter.*'

[10] C. Schönberger, '*Lisbon* in Karlsruhe: *Maastricht's* Epigones at Sea', 10 *German Law Journal* (2009).

[11] The member states' control over the conferral of Union citizenship goes so far, in fact, that member states can and do restrict applicability of Union law for some of their nationals. However, since the time of publication of the book, the European Court of Justice has in fact set limits to

In that regard, a citation of this book might have been more *à propos* to the immediately subsequent paragraph of the Court's decision;[12] yet even here there is room for debate between the Court and the author. The Court uses its observation that Union citizenship is merely derivative of and in addition to member state nationality to deny any real heft to Union citizenship. The author, on the other hand, would emphasise the inseparable, mutual relationship between member state citizenship and Union citizenship: it is impossible to grant Union citizenship independent of the nationality of a member state, and it is (virtually) impossible to grant the nationality of a member state without granting Union citizenship. To do otherwise would be alien to the relationship implied by federalism.

The author's comparison with the North German Confederation reveals no causal relationship between the introduction of a federal citizenship with wide-reaching horizontal effects and the establishment of a federal (i.e., unitary) state. If the Court failed to understand this, then it should quite frankly be embarrassed by any conclusions it would be drawing about Union citizenship from a comparison to German history. Of course, the author grants, a system based on *Indigenat* does happen to point in the same direction of development as a federal state. If the former type of system, where federal citizenship primarily works horizontally, proves to work sub-optimally (as in the United States of *Dred Scott*, where the relationship of reciprocity had broken down), then one obvious solution is to introduce the latter type of system, a primarily 'vertical' one. But the leap to the foundation of a federal state, or the institution of federal citizenship as the primary status, is generally the direct result of other legal or historical developments and is by no means a direct consequence of the introduction of a horizontally effective federal citizenship. Switzerland, in fact, has to this day refrained from vertically conferring federal citizenship over its territory as a whole; even though it has *de facto* been more a federal state than a true confederation ever since the promulgation of its Constitution of 1848. (What's more, it has developed an extensive federal competence to determine the substance of cantonal citizenship law, in a way somewhat comparable to the North German Confederation.)

Likewise, the existence of a federal citizenship by no means implies the existence of a 'people': but through the enjoyment of freedom of movement and residence, the citizens of the constituent states can get to know each other, intermingle and develop a common political discourse. The author has no illusions about this being a rapid development in the European Union, however: it will take

this, specifically where the right to political participation and the equal treatment principle are at stake. ECJ decisions of 12 Sept. 2006, Case C-145/04, *Spain* v. *United Kingdom*, and Case C-300/04, *Eman and Sevinger*. *See* the case note by J. Shaw, 'The Political Representation of Europe's Citizens: Developments' in 4 *EuConst* (2008) p. 162-186.

[12] *Supra* n. 1, para. 348.

some time before Union citizens, through the exercise of their freedoms, develop a sense of European citizenship that does not feel like an artifice.

Translatability

We return, finally, to the question of translatability. The author's definition of a clear terminology is an admirable undertaking, especially for an analysis that aims to put multiple extant federal orders, all with divergent legal traditions, on a level with one another. However, if the analysis is approached conceptually, the terminological exertions come across as a kind of dogmatism that is not truly necessary to get the point across of the necessity of breaking with traditional descriptions.

The author even asserts that German legal terminology has a unique advantage in this regard, for instance in the way that the term *Staatsangehörigkeit* is free from the ethnic connotations borne by *nationality*, *nationalité*, etc. Perhaps; but other languages have their own advantages. Keeping the author's approach in mind, in which he aims to divest the notion of federalism from the notion of an overarching state, one could make the pointed observation that there is no need to strip the 'state' out of the words *citizenship, citoyennité*, etc., before they can be repurposed for discussions of federal or Union citizenship.

It is a pity that the legal traditions of other languages lack a term like *Indigenat* to describe the specific dimension of federal citizenship working through reciprocity – although the author does also cite the term *intercitoyennité*, once coined by a French legal scholar to refer to a nearly coextensive phenomenon from a slightly different perspective. And in this essay, I have made an attempt to consistently render *Indigenat* with some paraphrase involving 'horizontal', and it is to be hoped that little if any of the author's argumentation was lost in that translation.

The challenge in any language is to disassociate terms such as 'federal' or '*Bundes-*' from the unitary federal state. Indeed, these terms have an unshakable association with a centralised, exclusive power.[13] If one were to sum up the author's position on federalism, it relates above all to the multi-layered and non-exclusive attachments of the federal citizen. In fact, it must be said that there is something circular to the author's argument: one of the key features of his form of federalism, as evidenced by his choices of study, is the existence of a federal citizenship that coexists with and mutually depends on constituent state citizenship.

It is this 'civic' federalism that is the author's main contribution: defining a concept that can be used to analyse the European Union and compare it to federal states without necessarily equating it with a state. Only through comparing the

[13] One need only think of the associations summoned by the American Federal Bureau of Investigation (FBI), or by the FSB (Federal Security Service) of the Russian Federation, the successor to the Soviet KGB.

European Union to existing federal orders, the author argues, can we understand its further development. However, one must not expect from a national constitutional court like the *Bundesverfassungsgericht* that it will change its primary, 'statist' definition of 'federalism' anytime soon: the word 'federal' as applied to the European Union shall remain a hot button for some time. At any rate, the German Court has proved the value of this book by mentioning it; but the Court has manifestly failed to give it the consideration it deserves.

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