

THE COMMON BACKGROUND OF CITIZENSHIP
AS THE «CORE» OF EUROPEAN FEDERALIZING
PROCESS.

A COMPARISON WITH THE AMERICAN
EXPERIENCE.

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I. INTRODUCTION

The purpose of the following notes is to make some brief remarks on the main cultural and philosophical elements that differentiate European and American background on citizenship. Neither European citizenship as a legal structure, nor the current great cultural debate on European Citizenship: I just want to point out some historical and cultural circumstances that, in my view, make different citizenship in USA in comparison with the citizenships of the Old Continent.

Since the first three European Communities were created¹, European public opinion² has been accustomed to thinking that our Union represented nothing but an economic and commercial agreement, quite far from embodying a political shared identity.

And this was due to several reasonable causes such as different languages, traditions and historical paths.

Conversely, the uniform convergence of economic interests could represent – this was the dominant idea - the unique field (as well as the more effective) of a shared future for European people.

Today I think this issue should be updated.

There are no more questions, indeed, about the fact that over the last five years (at least) several conflicting national interests have been emerging in the “economic Europe”. Monetary policies, in particular, are today the “pivotal” issues on which European “northern” countries and “southern” ones are facing each other.

Even more, overwhelming differences in European countries economic

¹ It is not necessary to recall that the birth of the first European communities date back to the Fifties of the last Century. The first European Community was the CECA, created in 1951. After that, in 1957, CEE and Euratom have been established.

² In this regard, are helpful the remarks made by B. CARAVITA, *Lineamenti di diritto costituzionale federale e regionale*, Torino, 2009, 30, according to which the existence of a public opinion is one of the main indexes for measuring the existence of a federal State.

fundamentals make the gap apparently unbridgeable.³

So, what we should wonder is whether there is something more than just economy, on which we can lay the foundations of a common shared understanding of ourselves as Europeans.

In other words, my question is whether or not there is something capable to reverse the point of view: along this way, on the economic profile, actually, we need to make the effort to fill remarkable gaps; but maybe, other aspects make our European countries more homogeneous than they appear.

I think the debate should be focused beginning from *citizenship*.

Citizenship must be meant not only as a juridical figure but, mainly, as a cultural concept. Citizenship as a historical path, as an issue of common identity.

II. WHAT ARE THE COMMON DENOMINATORS OF EUROPEAN CITIZENSHIP EXPERIENCES? DIFFERENCES WITH THE AMERICAN MODEL

In Europe citizenship means, predominantly, *rights*.

Social guarantees and participation are the bases of the typical European structure of citizenship.⁴ Sophisticated models of social intervention in Italy

³ Among the others, the main economic indexes regarding to which the gap between “northern” and “southern” European member States seems too large, are represented by the public debt, the Gross domestic product and the differences on economic growth, the unemployment rates, public expenditure, general fiscal income, etc.

⁴ This ends, historically pursued by each European single State, is today transfused into the values of the Union itself. In this regard, I agree with the opinion of P. MENGOZZI, *Cittadinanza comune e identità nazionali e culturali*, in L. Leuzzi – C. Mirabelli (edited by), *Verso una nuova Costituzione europea*, Lungro di Cosenza, 2003, 481, according to which next to the values identified by art. 6 of the Treaty on European Union, there is a value that results from the entire system and that is also the inspiring element of European policy as a whole. This value, which certainly gives to European society a different identity from the one of another society of the West, the American one, is the idea of “welfare state”, meant as a legal-political organization oriented by social relations and subsidiarity.

as in Britain, in Germany as in France, describe an homogeneous frame with regard to a delicate balance: the one that measures the weight of individual spaces and public sphere.

In Europe, solidarity seems to be the main aspiration towards which relationships between people and States are oriented.⁵

This *social dimension of citizenship* in Europe - in an attempt to reconnect the *ancient* to the *modern* liberties⁶- shows an approach in some ways more sophisticated, and even more problematic, than the overseas experience.

The American idea of citizenship is undoubtedly more inclined to favour the border of *individual freedom*: citizenship is not guaranteed *into* the State but, instead, "against" the State.

Historically and culturally American citizenship has strong bases on its "contractual" origin.⁷ From this starting point, it has been developing itself throughout the desire of freedom from communitarian bonds. Those bonds that, in other periods, pushed many peoples to flee from Europe. To flee, in

⁵ At least, this one seems the historical frame experienced after the second world war. Today, it seems to re-emerge a kind of national economic interests making more "uncomfortable" relations between European member States.

⁶ It is not necessary to recall that the reference is to the famous political essay of Henri-Benjamin Constant de Rebecque (1767-1830), delivered at the Royal University of Paris in 1819, and entitled *De la liberté des Anciens comparée celle à des Modernes*. In ancient societies the concept of freedom essentially coincided with *political* freedom and have been manifested through the active participation in the life of the *polis*. The "liberty of the moderns" would be aimed, instead, to delineate a sphere of individual autonomy around the individual, in which the same the enjoyment and exercise of civil liberties should be ensured.

⁷ However, different opinion are available in American doctrine. For example R. C. SINOPOLI, *The Foundations of American Citizenship: Liberalism, the Constitution, and Civic virtue*, New York, 1992, p. 4 observes that «it can no longer to be taken for granted, however, that the American constitutional founder – even the Authors of The Federalist – can be described as Lockean liberals. A body of interpretation has emerged that places civic concerns at the forefront of founders' understanding of politics. "Republican-revisionist" readings of the founding have focused on the founders' debt to classical republican political thought, which stresses the importance of promoting "civic virtue" among citizens who deliberate on political issues based on their conceptions of the common good. The fullest realization of the self, in the classical republican tradition beginning with Aristotle, results form actively participating as a member of a political community, taking part in ruling and being ruled».

other words, from those Countries in which, for centuries, the individual has been crushed by corporations, feudal and theocratic subjections, absolutist powers and religious hatreds.⁸

Then, citizenship is not realized *having the State as the only or main "counter-party"*. American Citizenship seems, nowadays, to find more channels of practice through the active contribution directly offered, for instance, to *trade unions, sporting or cultural associations, social action organizations, religious communities*, etc. Thus, different historical paths have marked - even in apparently homogeneous societies - very different models of identity. Even more, it is possible to observe that - despite a common, "transatlantic" constitutional culture⁹ – citizenship emphasizes the notable differences of a deeper background.

U.S. citizenship seems bent on affirming a *civil* ideal significantly different from the call of *civic* citizenship.¹⁰ The common root of the words just used – 'civil' and 'civic' - lies on the idea of the individual *as part of society*.

⁸ Anyway, in the context of civic engagement, several forms of participation are recovered in the American society through the inclusion of the individual in the vast and pluralistic panorama of intermediate associations widely spread in the United States. The "good citizen", the "virtuous citizen" (recalling, not coincidentally, a vocabulary typical of classical antiquity and, later, of the French Revolution) is the one who devotes most of his time to the community and to various social branches.

⁹ American and European constitutionalism share a "common birth". As it was noted by H. DREIER, *Lo Stato costituzionale moderno*, Napoli, 2011, p. 19, American Revolution – other than through "personal bonds" like those between Jefferson and Lafayette - has been influencing all the events of the French Revolution. Revealing of this link, among others, is the strong affinity that appears between the French Déclaration des droits de l'Homme et du Citoyen of 1789 and the Virginia Bill of Rights of 1776.

¹⁰ As noted by M. SILVERMANN, *The Revenge of Civil Society. State, Nation and Society in France*, in D. CESARANI-M. FULBROOK, *Citizenship, Nationality and Migration in Europe*, New York, 1996, p. 147, «one major aspect of the construction of a uniform national culture and the accompanying abstract construction of the 'citizen' was the conflation of two contradictory principles: the civil and the civic. The first of these, the civil, refers to the private individual and is underscored by the principles of liberalism, the market and the inegalitarianism, the second of these, the civic, refers to the individual who is part of a community of rights and is underscored by the principles of intervention, egalitarianism and solidarity». See also, P. BIRNBAUM-J. LECA, *Sur l'individualisme*, Paris, 1991, p. 324 ss.

But the deeper meaning of the bifurcation appears clearer recalling the Marxian reconstruction – on which bears all the weight of the Aristotelian-Hegelian tradition – of civil society distinct from the political one.¹¹

In this regard, the writings of Norberto Bobbio are helpful. «'Civil society' means the set of relationships among individuals who are outside of (or before the) State, and give the sense of a sphere distinct and separate from the State, the sphere that writers of natural rights, and partly early economists beginning with, called 'state of nature' or 'natural society'». ¹² On a historical perspective, civil powers of individual would arise thanks to the rise of *bourgeois society* and, also, to the emancipation won by bourgeoisie against political authority.¹³

On a philosophical basis, civil rights of individual would find theoretical affirmation through the conception of natural rights, as well as in the Enlightenment's rationalism.

Given this overall background, civilian dimension of the individual seems to evolve in opposition to the State. Even more, the “civilian” sphere of the individual tends to confine the State within specific limits and to assign to the State essentially the task of protecting individual freedom.

So, the civil sphere comes to “reverse” the order of relations between State and individual. Civil liberties of individual, no more crushed by State, end up for identifying their proper purpose.¹⁴ The ideology of natural law -

¹¹ The present use of the expression 'civil society' is derived from Marx and it ultimately replace the term 'natural society'. The specific feature of the Marxian civil society coincides with the specific nature of the Hobbesian state of nature that is, as is well known, the “war of all against all”, N. BOBBIO, *Stato, governo, società. Frammenti di un dizionario politico*, Torino, 1995, 27-28.

¹² N. BOBBIO, *Stato, governo, società. Frammenti di un dizionario politico*, Torino, 1995, 28.

¹³ Recalling the writings of Karl Marx, political emancipation was, at the same time, the emancipation of civil society from politics, from having even the semblance of a universal content. Feudal society was resolved into its basic element – man, but man as he really formed its basis – egoistic man. Se K. MARX, *On the Jewish Question* (1844).

¹⁴ Protection of rights and interests of individuals as the fundamental purpose of the State is the characteristic of contractarian liberalism of John Locke, «the great and main

in its 'contractualist' reconstruction – represents, then, the theoretical ground of an idea of citizenship born to protect a sphere of rights and freedoms that citizens can enforce against the State itself.¹⁵

This is the “core” concept, in my view, from which comes out the well known option for a citizenship as a *relationship*, rather than as a *status*.¹⁶

As a “relational category”, citizenship defines - in liberal traditions - not the status of the person *into* the State - and so assuming that the individual “belongs” to the State, but the relation between the person, as independent individual, and State, as the second part of that relation.¹⁷

end, therefore, of men uniting into commonwealths, and putting themselves under government, is the preservation of their property. To which in the state of nature there are many things wanting» J. LOCKE, *Second Treatise of Government*, ed. 1998, Milan, 228. Doesn't need to recall that for the British philosopher property doesn't derive from the simple consent of men (as in Grotius and Pufendorf): property identifies a natural right arising from the fact that every body own itself, individual freedom represents therefore a precondition.

¹⁵ As noted by F. CERRONE, *La cittadinanza e i diritti*, in R. Nania - P. Ridola (ed.), *I diritti costituzionali*, Torino, 2001, 239, american society recognizes a decisive role to constituent power, a power to which is assigned definition of institutional mechanisms through political power can enforce the disciplines designed to preserve social bond and the identification of the rights and guarantees that citizens will claim against that power itself.

¹⁶ The option between citizenship as a "status" and citizenship as a "relationship" has become traditional in legal doctrine. The idea that citizenship is a “status” is typical of the “organicistic” reconstruction of State. In this context, the contribution of nineteenth century public law studies was crucial and, particularly, among the greatest exponents of German Staatslehre, of Georg Jellinek. In the reconstruction offered by the Author last mentioned (see G. Jellinek, *System der subyektiven öffentlichen Rechte*, 1892, 57), the individual loses autonomy being absorbed into the state: the individual belongs to the State, becomes the "body" of the state and the status of citizenship serves public functions exercised in the interest of the State. Conversely, in the liberal tradition, the Constitution has been created precisely to describe the limits that the State met in relations with the citizen. In this sense, as noted by F. CERRONE, *La cittadinanza e i diritti*, in R. Nania - P. Ridola (ed.), *I diritti costituzionali*, Torino, 2001, 239, American constitutionalism gave new impetus to the theory of constituent power, giving to Constitution the role to set the limits of all manifestations of political power, including the legislative. The citizen thus lives "outside" of the state and citizenship develops a relational horizon: it describes precisely the order of relations between state and citizen and between citizen and citizen.

¹⁷ On theoretical approach, prevailing in Italian legal doctrine, about the option between citizenship as a status or citizenship as a relationship, see S. STAIANO, *Migrazioni e paradigmi della cittadinanza: alcune questioni di metodo*, in *www.federalismi.it*, 5.11.2008

On a philosophical perspective, this theory shows a sort of reversal of Aristotelian constructions - recalled in recent times, among others, by Hannah Arendt¹⁸ - structured on a “participatory” dimension of the individual to the realm of politics. In this last view, only politics represents indeed the chance of authentic autonomy for human beings.

In the latter perspective, the "civic" dimension of the individual identifies all the socio-political relations that live in a public organization. Even more, the civic element of citizenship suggests the idea of commitments and responsibilities that individual takes within an organized community. In particular, within a community made by rights and duties, and characterized by the principles of egalitarianism and solidarity.

We could say that the civic duty calls the citizen to responsibilities that he has assumed in the framework of a social ethic; on the contrary, civil liberty protects the citizen in his own sphere of individual morality.

III. ANOTHER COMPARISON WITH THE AMERICAN EXPERIENCE

The impression that one draws from the history of American society and constitutional law is, in short, that the *individual* seems to prevail over the *person*.

Also the word 'individualism' identified - at the time when Tocqueville wrote about American democracy¹⁹ - a "new" concept in many ways far from European political traditions.

The colonial history, the revolution, the Constitution and the

¹⁸ The political life, as a dimension that distinguishes man from animal, and that identifies the only possible framework of action, contains visible elements of Aristotle's ethics and anthropology. See H. ARENDT, *The Human Condition*, Chicago, 1958, 18.

¹⁹ «Individualism is a novel expression, to which a novel idea gave birth. Our fathers were only acquainted with egoisme (selfishness). Selfishness is a passionate and exaggerated love of self (...). Individualism is a mature and calm feeling, which disposes each member of a community to sever himself from the mass of his fellows and to draw apart with his family and his friends, so that he has thus formed a little circle of his own, he willingly leaves society at large to itself», A. DE TOCQUEVILLE, *Democracy in America*, London, 1998, 205 (or. tit. *La démocratie en Amérique*, 1835).

American society itself were forging a concept that in Europe, even though shared through the Enlightenment, has later suffered the harsh reaction of the eighteenth century's romanticism. The "contractual statement" contained in the Preamble of the American Constitution²⁰ - as well as offering a "historically proven" example of authentic social contract²¹ -, in a few lines summarizes the liberal thought and jusnaturalistic ideals that characterized the genesis of American society and law and accompanied their growth

In that Preamble there is all the strength of the Anglo-Scottish Enlightenment tradition of the Seventeenth and Eighteenth Centuries. The purpose of legal system is to protect safety and personal freedom. And the origins of legal system are no longer identified by metaphysical and irrational sources, but they seem to be the product of an agreement between men.

Therefore, a society born from the landing of overseas refugees, settlers and victims of political and religious persecution, unchained thanks to a revolution and, moreover, shaped around a Constitution created to protect individuals and territories, could offer nothing but an original version of the very idea of citizenship.²²

²⁰ «We the People of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America».

²¹ About the Locke's idea of a social contract David Hume wrote «a philosophical fiction which never had and never could have any reality» and one «of the most mysterious and incomprehensible operation that can possibly be imagined», D. HUME, *Treatise of Human Nature* (1739-1740), Book III, Part II, sec. 2, New York, 1978.

²² The attention that the American constitutional tradition spends to protect the sphere of individual liberty is highlighted, in particular, by the IV^o Amendment to the Constitution, «the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated». Extremely significant in the context of a theoretical effort towards the melting of citizenship with the sphere of individual freedom are also the provisions contained in Amendment XIV^o, «all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

But there is more.

Further historical reasons seem to have promoted the development in U.S. of a deeply different approach to citizenship from the idea which was preeminent in Europe.

The "bifurcation" between American and European history has been fostered not only during the period of the greatest civil conquests favoured in Europe by the empiricism and Anglo-French Enlightenment, but also in the era immediately "behind" the Industrial Revolution. As it's well known, there have been hard social tensions in Europe since the Eighteenth Century and over the entire course of the Nineteenth. This tensions - accompanied by the birth of the working class called 'proletariat' and the growth of new social interests - created the preconditions of socialism, the subsequent spread of Marxism and, later, of social-democratic trends.

Then, social and political struggles of the time did represent in Europe the "natural habitat" in which the seeds of *social rights*, richly sprouted, have favoured the process of birth and development of the so called *Welfare State*.²³ Overseas, the isolationism of the early decades of the Federal

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws».

²³ See M. FERRARA, *Verso una cittadinanza sociale "aperta". I nuovi confini del welfare nell'Unione europea*, Working Papers of Department of Social and Political Studies, University of Milan, n. 8, 2004, available in www.sociol.unimi.it/ricerca_publicazioni.php, who observes that since the last decades of the nineteenth century, social rights have played a major role in the genesis of European Nation-States. These rights gave birth to "redistributive society", while strengthening cultural identities, loyalty of citizens to public institutions, willingness to use common resources to increase social and political cohesion. The European Nation-State is a typical welfare state, oriented to ensure his citizens' welfare and to draw from this much of its legitimacy. The social components of citizenship have the same importance of civil and political ones, the right to decide on the forms and substance of social citizenship has been traditionally regarded as peculiar of national sovereignty. In this respect, there were significant theoretical contributions about the problem of citizenship in relation to the model of participation and social guarantees. In his famous essay of 1964, *Citizenship and Social Class*, the English sociologist T. H. MARSHALL - postulating the historical evolution of citizenship, along the last three centuries, through stages within which the relationship between individual and community have shown in the first place the affirmation of civil rights, then the

Government, the absence of tensions similar to those experienced by the European proletariat – partly due to the wide availability (until the end of the Nineteenth Century) of slave labour²⁴ - and overall, the race of everybody (not only figuratively) to acquire its "own piece of land" contributed, already at the beginning, to the spread of a completely different mood.

While in Europe people raced towards the achievement of social rights, American citizens' ambitions were those to mark a "boundary" on the ground: a boundary, *physical and ideal*, in which they would be free and masters.²⁵ The boundary of an ideal "sphere of liberty" protected by law and

social and finally the political - called the Citizenship as a status "which is granted to those who are full members of a community" and shifted its attention from the identitarian problem of citizenship to the *social one*. Marshall's contribution, which is largely credited with having provided the theoretical and political reconstruction in the framework of which has gradually evolved both in the UK and in Europe the system of Welfare State, was intended to enhance the egalitarian profiles of citizenship, as a vehicle to create the essential preconditions by which the individual realizes his full participation in the community.

²⁴ Compared to the argument put forward is anything but irrelevant the fact that slavery have been abolished in Europe almost a century earlier than the United States. The slow American abolitionist process began with a legislation of 1794, entitled «An Act to Prohibit the Carrying on the Slave Trade from the United States to any Foreign Place or Country», aimed to introduce restrictions to slave trade. Then, on 2 March 1807 had been approved a new legislation (http://avalon.law.yale.edu/subject_menus/slmenu.asp) even more restrictive that banned the further importation of slaves in the USA, «from and after the first day of January 1808, shall it not be lawful to import or bring into the United States or the Territories thereof from any foreign kingdom, place, or country, any negro, mulatto, or person of color, with intent to hold, sell, or dispose of Such negro, mulatto, or person of color, as a slave, or to be held to service or labor». After the Civil War slavery continued to be allowed only in the states of Delaware, Kentucky, Maryland, Missouri and New Jersey. Slavery was finally and completely abolished with the adoption in 1865 of the thirteenth Amendment to the Constitution which provides that «neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction». In France, the first legal provision to prohibit slavery occurred in 1794 by decree of the National Convention. The first judicial decision to prohibit slavery on British soil dates back to June 22, 1772, when it was affirmed that «as soon as any slave set His foot on English ground, he Becomes free», see C. STUART, *A memoir of Granville Sharp, to which is added Sharp's Law of passive obedience, and an extract from his Law of retribution*, New York, 1836, 20.

²⁵ On regards the idea of a private "boundary" we can recall that, even today, in United States, it is not uncommon to see, near traditional wooden houses with private garden, signs with the warning «if you get into my property I can shoot you». It is also worth

enforceable against anyone else, and within which even the State wouldn't be allowed to interfere.

This is the historical and cultural climate that contributed to a different approach to citizenship in U.S. and Europe.

Even more, while today in Europe 'citizenship' stands for 'rights', overseas this word continues to evoke mainly the idea of 'freedom'.

Opposite to the deeply rooted traditions that the Welfare State has developed in the main European models - listing for the citizen a large number of social rights, as well as duties of civic solidarity and political participation – the United States historically came out with a pure liberal doctrine of *State-citizen* relations.

Moreover, it is quite revealing that the US – rather than the *political* and *participatory* dimension of European citizenship – are experiencing a perpetual dialectic between the *Government* - not only conceived as the expression of political sovereignty of the people but also, quite often, as a mere "provider of services" - and *Taxpayers*, as an expression, this one, that seems to have almost completely replaced the word 'Citizens' also in current use.²⁶ In any case, while the legacy left by the melting of two categories, the

recalling that the II^o Amendment to the U.S. Constitution establishes the principle according to which «a well regulated militia is necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed». The Supreme Court of the United States, in the recent decision of June 26, 2008 with reference to the case "District of Columbia vs. Heller" (available in www.law.cornell.edu/supct/html/07-290.ZS.html), reaffirmed the principle according to which «the Second Amendment Protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home».

²⁶ not only in everyday language, but - just scroll through the pages of the Congressional Records (available on the website of the Federal Government www.gpoaccess.gov/crecord/index.html) to get an idea - even in the political lexicon the term 'taxpayer' seems to have almost entirely replaced the word 'citizen'. The circumstances under which the American political agenda concerns are now addressed primarily to the needs of taxpayers would seem to suggest the idea of a kind restoration of a "census"

State and the citizen, continues to bear on European citizenship, even in the era known as 'post-national',²⁷ American citizenship is definitively much closer to identify the terms of a relationship, fragile and sometimes conflicting, between the *Administration* and *Taxpayers*.²⁸

democracy, where the citizen is actually not represented as himself, but rather, and mainly, he is the one who contributes to the public expenditure.

See also, *Heim v. McCall*, 239 U.S. Supreme Court, 365 (1971), «the basic principle of the decision of the Court of Appeals was that the State is a recognized unit and those who are not citizens of it are not members of it. Thus recognized it is a body corporate and, like any other body corporate, it may enter into contracts and hold and dispose of property. In doing this, it acts through agencies of government. These agencies, when contracting for the State, or spending the State's moneys, are trustees for the people of the State. (...) And it has hence decided that in the control of such agencies and the expenditures of such moneys it could prefer its own citizens to aliens without incurring the condemnation of the National or the state constitution». See also, *Graham v. Richardson*, 403 U.S. Supreme Court, 367 «We agree with the three-judge court in the Pennsylvania case that the justification of limiting expenses is particularly inappropriate and unreasonable when the discriminated class consists of aliens. Aliens like citizens pay taxes and may be called into the armed forces...aliens may live within a state for many years, work in the state and contribute to the economic growth of the state.... There can be no "special public interest" in tax revenues to which aliens have contributed on an equal basis with the residents of the state.... Accordingly, we hold that a state statute that denies welfare benefits to resident aliens and one that denies them to aliens who have not resided in the United States for a specified number of years violate the Equal Protection Clause».

²⁷ The concept coincides with the idea of a gradual denationalization of States, partly thanks to integration of individuals and communities of different cultures and traditions. The exceeding of the state dimension, deprivation of national states power and their loss of control and competences, as well as the desire for a cosmopolitan democracy, are the focus of three essays collected in J. HABERMAS, *The Postnational Constellation*, ed. 1999, Milan.

²⁸ The relationship between citizen and State seems to be replaced by the one between taxpayer and administration. In this regard, is useful to point out that in U.S. the use of the word 'administration' to define the government isn't only a mere "everyday language". Indeed, the word reflects the liberal view in which U.S. Constitution was born, and with reference to which the State is primarily responsible for aggregating and pursue the fellow citizens interests. So, in U.S., the "State" is mainly *administration*: as observed by E. H. HANKS - M. E. HERZ - S. S. NEMERSON, *Elements of Law*, Cincinnati, 1994, 385-386, «the United States Constitution Creates the posts of President, Vice President, Member of Congress, and Supreme Court of Justice», the rest of the structures related to the Government is *administration*. Those same figures that in Europe hold constitutional and political functions of Minister, in United States simply identify «principal executive officers in each of the executive departments» (see U.S. Constitution, Art. 2, sect. II, n. 1) and are also part of the *administration*: «executive agencies are squarely within the executive branch, headed by a single political appointee who serves at the President's pleasure, these include the cabinet departments (State, Defence, Health,

This theoretical effort seems to give, conclusively, a clear distinction between the "civic" concept of citizenship in Europe and the "civil" one of the United States. *Social rights, political participation, welfare state*: these, as noted, are the "strings" that tighten the contents of European citizenship. *Civil liberties, limits to the Government's powers and participation agreement* (mainly conceived as the citizen's checks on the Government), define U.S. Citizenship. By this way, we can emphasize how historical, sociological and political factors mark a common path followed by the peoples of Europe leading to the genesis of what can however be defined as an *identity* based on a "common heritage"²⁹ and additional to other local and national identities.

This last aspect would deserve a deep analysis: there is no doubt, in fact, that the main views expressed in the legal debate about European citizenship, as on the Union's political role, reflect deeper beliefs motivated by different philosophical and cultural options.³⁰ But about this debate I'll

Human services, etc.) "(E. H. HANKS – M. E. HERZ – S. S. NEMERSON, 386). See also B. A. GARNER, *Black's Law Dictionary*, St. Paul, 2006, 17, «Administration», «in public law, (is) the practical management and direction of the executive department and its agencies».

²⁹ See art. 151 Treaty of European Union, «the Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore».

³⁰ The reconstruction of a synthetic picture of the cultural polarities from which the debate on European Union citizenship took life can find an effective reference in the positions expressed by Jürgen Habermas and Ernst-Wolfgang Böckenförde. The Hegelian and organicist derivation of the thought expressed by Böckenförde reflects a position of unconcealed distrust and scepticism about the very idea of an European 'status civitatis'. The essence of the concept of people - that Böckenförde tracks in the elements of cultural homogeneity among citizens - can't be found in the melting pot of languages, traditions, cultures and ways of being of different European nations. Moreover, the democratic structure of States' bodies assumes, according to Böckenförde's thought, essential role with respect to the concept of citizenship. Democracy and citizenship are in fact categories that feed each other in a centuries-old dialogue: there is citizenship only where there is democracy and, at the same time, the political rights of citizenship represent the logical precondition of the democratic

take another chance to dedicate specific investigation.

IV. EUROPEAN FEDERALIZING PROCESS AND EVOLUTIONARY TRENDS OF CITIZENSHIP

Compared with the debate put forward, the regulation of European Union Citizenship – even though “complementary” to national regulations³¹

mechanism. In the light of the above considerations, the “democratic gap” shown by the European institutions, as well as the difficulties to find a substantive nature related to the different coexisting identities, end up to relegate to a residual role the very idea of a European citizenship. The thought of the German jurist seems to embrace the idea that on the European level is not possible to conceive a true citizenship. Moreover, to the European citizenship, rather than a substantive content, should be attributed the descriptive role of a more or less long “list of rights.” Prudence but also a high degree of awareness about the complexity of reasoning on European citizenship are effectively synthesized by Böckenförde when the jurist observed that *«even if the European Parliament's powers have been increased, this Parliament can not represent what is not still there, a European people, or reflect what is not there, a public sphere and European politics, which is formed on the issues of decision-making of European policy, beyond the borders of individual countries. Therefore the European community, to be a form of democracy, necessarily must set out on this road and contain, in the construction of his decision-making will, a very different federal structure»*, E. W. Böckenförde, *Stato, costituzione, democrazia. Studi di teoria della Costituzione e di diritto costituzionale*, Milano, 2006, p. 125. The Republican-Liberal approach of Habermas shows a different belief, even before to legal tool, to the very ideal of European citizenship. The idea indeed - not entirely free of problems and contradictions - that on the European level has historically been stratified a common tissue of values and principles able to fill the gap between peoples identities, seems to animate the whole key of reasoning put forward by Habermas. Democratic pluralism, built to be a fundamental rule of public debate in the EU countries, represents the necessary choice of method to permit the development, on the European level, of true public and “civic” debate. European Citizenship in Habermas represents nothing more than what it is already represented by the ideal of national citizenships. Indeed, the EU citizenship is a concept that, even better than the national ones, is able to support the “kantian” aspirations that pervades the philosopher's thought. Constitutional patriotism, that on the State's level still looks too pale to bypass the dominant type of cultural identity, on the European level, by contrast, plays the role of the only true key for the access to the community. Constitutional patriotism - that in the view of Habermas is also needed to reinforce a nationality, the German one, that is uncomfortable even in pronouncing the word ‘volk’ - becomes a necessity at European level, because of the absence of further “substantial” references, and also identifies the idea of a common, democratic and pluralistic path. EU Citizenship achieves the assigned tasks, therefore, fully, and precisely because of its plural nature.

³¹ The establishment of EU citizenship dates back to the regulations contained in the Maastricht Treaty of 1992. Article 17 of the EU Treaty (now transferred into article n. 20 of TFEU) states that *«every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national*

- plays a symbolic and political role, as well as technical and legal, of very deep importance. The establishment of a European citizenship endorses the need to strengthen European democratic legitimacy no longer on the inter-governmental level but also, increasingly, on the supranational one.

Moreover, by the introduction of European citizenship, the Union has ceased to be the mere result of a “contractual” decision between Member States: the “leading actors” of the Union are no longer just the States, as in traditional dynamics of international law. A new, powerful entity is added to the States: *the citizen*.

In some ways it seems almost possible to affirm that the very path towards a real European Constitution - understood as a unified political body – has already begun with the establishment of EU citizenship.

Sabino Cassese supports the idea that today it is even possible to talk about Constitution in a global way. The existence of public powers gradually developed within the international legal order, as well as a large set of

citizenship». This principle clearly shows a complementary and “derived” nature of EU citizenship. The acquisition of EU citizenship represents, in other words, the automatic consequence of the fact that the individual already holds the status of citizen of a Member State. The European codification does not, therefore, interfere with national regulation on how to acquire citizen status: these arrangements continue to be governed according to the peculiarities variously provided by each national system. Similarly, the events related to any loss of national citizenship entail, in parallel, the loss of European citizenship too. From the description above, it seems possible to share the idea that - given the renunciation made at European level to define specific rules on access to EU citizenship – European Union citizenship has ended up becoming as an “ancillary” status in relation with the Citizenships of Member States. On the other hand - if we share the idea that goals related to the establishment of European citizenship were primarily attributable to the need to encourage a process of political integration between States and peoples of Europe - it is clear that the EU citizenship should have been nothing but a common denominator between different legal and cultural experiences. And this seems to be, actually, what happened. In fact, EU citizenship is not a legal status based on its own peculiar conditions, but a common condition “automatically” granted to every citizens of the Member States characterized by a wide range of diverse legal positions. About European Citizenship, see P. HABERLE, *La cittadinanza come tema di una dottrina europea della costituzione*, in *Riv. dir. costituz.*, Turin, 1997; V. LIPPOLIS, *Cittadinanza dell'Unione europea*, in *Dizionario di diritto pubblico diretto da S. Cassese*, Milano, 2006, p. 927; L. MARINI, *La cittadinanza europea*, in G. Dalla Torre – F. D'Agostino, *La cittadinanza, Problemi e dinamiche in una società pluralistica*, Torino, 2000, p. 43; C. PINELLI, *Cittadinanza europea*, in *Enc. dir.*, annali, Milano, 2007, p. 181;

fundamental principles, tend to define the substance of a body of constitutional rules. This should now lead to talk, even with the absence of a written document (as, indeed, it is the case for some national constitutions such as the one in the United Kingdom), about the “international constitutionalism” as a process going ahead by evolution.³²

Comparing with remarks such as those briefly mentioned, it is possible to observe how European integration process, EU Treaties, declaration of a table of basic principles, the establishment of constitutional bodies (among all, the *Parliament*) and, last but not least, the transfer of shares of sovereignty from nation-States to the Union push EU - even more than it might have been for international legal order – toward the idea of *an essentially constitutionalized political body*. And this conclusion even though with the absence of a single document entitled 'European Constitution'.³³

It is still evident that the lack of a full democratic legitimacy of EU bodies constitutes a critical urgency.³⁴ And it is also evident that, if possible,

³² S. CASSESE, *Oltre lo Stato*, Roma – Bari, 2006.

³³ The debate about citizenship assumes the peculiarities of a “constitutional path”. It seems to emerge, as its title suggests, from the perspectives offered by P. HABERLE, *La cittadinanza come tema di una dottrina europea della costituzione*, in *Riv. dir. costituz.*, Turin, 1997, 19.

³⁴ The issue of a "democratic gap" in the European Union is a traditional arena for the legal doctrine. This democratic deficit would manifest in the fact that «considerable administrative and regulatory powers are exercised by the EU bodies that are not directly elected by European citizens», so R. BIN-G. PITRUZZELLA, *Diritto pubblico*, Turin, 2007, p. 81; it should be noted, however, that «the most recent treaties have increased the participation of the EU Parliament to the Council's powers, thus trying to bridge the so-called "Democratic deficit" due to the Community institutions», A. CERRI, *Istituzioni di Diritto pubblico*, Milan, 2009, p. 73. It was also noted that «to fill this democratic gap the European Parliament is seeking a general co-decision procedure in all those matters of European legislation which, in the Council of Minister, are decided with qualified majority. It is also seeking a general “avis conforme” in all decisions taken with unanimity», S. S. ANDERSEN – K. A. ELISASSEN, *The European Union: How Democratic Is It?*, London, 1996, p. 222. There are those who argued that the democratic deficit in Europe reflects a deeper problem that can be identified by the absence in Europe of a widespread sense of belonging. In this regard, reference should be supported by E.W. BÖCKENFÖRDE, *Diritto e secolarizzazione. Dallo Stato moderno all'Europa unita*, Bari, 2007, p. 194. See also, L. WEISCHER, *Solving the EU's democratic deficit through direct democratic veto rights? A critical assessment of Heindrun Abromeit's concept*, Berlin, 2004, p. 6; L. DOOR, *The*

talking about European constitutionalism, can only be done outside the traditional reconstructions about the relationship between *constitutional order* and *constituent power*.

Therefore, similarly to the above-mentioned international legal order, European constitutionalism cannot be imagined as the product of a “single” founding act, but rather as an overall evolutionary process whose original substance is identified in a *Union of Constitutions*.

So, we can talk about a *citizenship denationalized*, both political and cultural, not only based on European “constitutional” bodies but also on a common historical background.

A new citizenship, probably, a very significant part of its potential is still waiting to be unleashed.

The above brief notes require some conclusive remarks on the current “state of the (European) Union”.

As it is well known, the Old Continent is today facing high difficulties caused by the chronic accumulation of public debt and the crash of tax revenue. In recent months, unfortunately, we have alarm signals about possible States' default in the heart of Europe, specifically related to difficulties of governments in refunding their sovereign debt.

Those emergency conditions are being faced, mainly, through the use of “draconian” measures in public spending cut. But what seems more probable is that the system as a whole, *and in particular the relationship between State and citizen*, should move towards a period of rethinking in order to update itself to the new global economic and political conditions.

The time when social rights will turn to be considered, mainly, as

Democratic Deficit Debate in the European Union, 2008, p. 10; W. JOSEPH – U. HALTERN - F. MAYER, *European Democracy and its Critique*, in Jack Hayward (ed.) *The Crisis of Representation in Europe*, London, 1995; G. MAJONE, *Europe's “Democratic Deficit”: The Question of Standards*, *European Law Journal*, vol. 4, No.1, March 1998, pp.5-28.

rights - or even "expectations" - "financially influenced" seems to be near. And this could mean a historical phase of corresponding limitation of social rights. This trend, of course, will cause concrete repercussions on the concept of *social citizenship* built, over the years, by European systems.

Also in this sense, in the coming years, the need to enhance new theoretical horizons in the development of citizenship in the Old Continent will eventually triumph.

MAIN REFERENCES:

S. S. ANDERSEN – K. A. ELISASSEN, *The European Union: How Democratic Is It?*, London, 1996;

H. ARENDT, *The Human Condition*, Chicago, 1958;

R. BIN-G. PITRUZZELLA, *Diritto pubblico*, Torino, 2007;

N. BOBBIO, *Stato, governo, società. Frammenti di un dizionario politico*, Torino, 1995;

E. W. BÖCKENFÖRDE, *Stato, costituzione, democrazia. Studi di teoria della Costituzione e di diritto costituzionale*, Milano, 2006;

E.W. BÖCKENFÖRDE, *Diritto e secolarizzazione. Dallo Stato moderno all'Europa unita*, Bari, 2007;

B. CARAVITA, *Lineamenti di diritto costituzionale federale e regionale*, Torino, 2009;

S. CASSESE, *Oltre lo Stato*, Roma – Bari, 2006;

A. CERRI, *Istituzioni di Diritto pubblico*, Milano, 2009;

F. CERRONE, *La cittadinanza e i diritti*, in R. Nania - P. Ridola (ed.), *I diritti costituzionali*, Torino, 2001, 239;

H.-B. CONSTANT de Rebecque, *De la liberté des Anciens comparee cells à des Modernes*, Paris, 1819;

A. DE TOCQUEVILLE, *De la démocratie en Amérique*, Paris, 1835;

- H. DREIER, *Lo Stato costituzionale moderno*, Napoli, 2011;
- M. FERRARA, *Verso una cittadinanza sociale “aperta”. I nuovi confini del welfare nell’Unione europea*, Working Papers of Department of Social and Political Studies, University of Milan, n. 8, 2004, available at www.sociol.unimi.it/ricerca_publicazioni.php;
- B. A. GARNER, *Black’s Law Dictionary*, St. Paul, 2006;
- P. HABERLE, *La cittadinanza come tema di una dottrina europea della costituzione*, in *Riv. dir. costituz.*, Turin, 1997;
- J. HABERMAS, *Die postnationale Konstellation*, Frankfurt am Main, 1998;
- E. H. HANKS - M. E. HERZ - S. S. NEMERSON, *Elements of Law*, Cincinnati, 1994;
- D. HUME, *Treasy of Human Nature*, ed. Oxford, 1896;
- W. JOSEPH – U. HALTERN - F. MAYER, *European Democracy and its Critique*, in Jack Hayward (ed.) *The Crisis of Representation in Europe*, London, 1995;
- V. LIPPOLIS, *Cittadinanza dell’Unione europea*, in *Dizionario di diritto pubblico diretto da S. Cassese*, Milano, 2006, 927;
- J. LOCKE, *Second Treatise of Government*, ed. Cambridge, 1980;
- G. MAJONE, *Europe’s “Democratic Deficit”: The Question of Standards*, *European Law Journal*, vol. 4, No.1, March 1998;
- L. MARINI, *La cittadinanza europea*, in G. Dalla Torre – F. D’Agostino, *La cittadinanza, Problemi e dinamiche in una società pluralistica*, Torino, 2000, 43;
- T. H. MARSHALL, *Citizenship and social class*, in Marshall T.H., *Class, Citizenship and Social Development*, The University of Chicago, Chicago, 1964;
- K. MARX, *On the Jewish Question*, ed. Massachusetts University Press, 1991;
- P. MENGOZZI, *Cittadinanza comune e identità nazionali e culturali*, in L. Leuzzi – C. Mirabelli, *Verso una nuova Costituzione europea*, Lungro di

Cosenza, 2003;

C. PINELLI, *Cittadinanza europea*, in *Enc. dir.*, annali, Milano, 2007, 181;

R. C. SINOPOLI, *The Foundations of American Citizenship: Liberalism, the Constitution, and Civic virtue*, New York, 1992;

S. STAIANO, *Migrazioni e paradigmi della cittadinanza: alcune questioni di metodo*, in *www.federalismi.it*, 5.11.2008;

C. STUART, *A memoir of Granville Sharp, to which is added Sharp's Law of passive obedience, and an extract from his Law of retribution*, New York, 1836;

L. WEISCHER, *Solving the EU's democratic deficit through direct democratic veto rights? A critical assessment of Heindrun Abromeit's concept*, Berlin, 2004.