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Developing European Citizenship or Discarding It? Multicultural Citizenship Theory in Light of the *Carpenter* Judgment of the European Court of Justice

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The current discussion on citizenship of the European Union in political science focuses heavily on multiculturalism and identity politics as the essential analytical tools to understanding the developments, particularly since the Amsterdam Treaty. In the context of the European Union when identity rights become the field of negotiation, the framework for the definition of those rights is the economic capacity of the individual, in contrast to national constitutional regimes. In this article I want to examine this bifurcation taking the recent judgment of the European Court of Justice in *Carpenter*[1] as the starting place. The central point is the degree to which the inability of citizenship rights to embrace identity at the national level becomes the field of struggle at the European level between the state and the individual. The power of mediator then exceeds the national level, even where the national identity settlement was the result of a high degree of consensus in the national political scene. But the venue in which the struggle takes place, notwithstanding its fundamental nature as one of identity, is not citizenship or human rights but economic activity.

The central point is the degree to which the inability of citizenship rights to embrace identity at the national level becomes the field of struggle at the European level between the state and the individual. The power of mediator then exceeds the national level, even where the national identity settlement was the result of a high degree of consensus in the national political scene.

In political science there has recently been renewed interest in analysing citizenship of the European Union through the lens of multicultural citizenship.[2] The analytical tools of cultural citizenship and identity creation in the European Union are deployed to examine the extent to which borders remain central in the EU framework of citizenship and identity but often with a normative plea for new identity formation. "The nightmarish dream of a common identity [of EU citizenship] ought to be replaced with reliance on citizenship, human and cultural rights and constitutional principles." (Delgado-Moreira 2000: 153). Others take a colder view of the EU in light of the apparently intractable problems of feeble democratic accountability and legitimacy and suggest that citizenship as a core sovereignty question properly remain at the national level (d'Oliveira in O'Keeffe & Twomey: 1999: 410).

Following a different path but still founded in identity politics are claims of a supra national identity or a postmodern identity which replace or supersede the national one (Soysal: 1994). The mechanisms for development of new forms of identity or citizenship practices then depend on the institutions and actors acting on the concept (Weiner:1998). This is not to dismiss the importance of recent work challenging the perspective that in this field the European construction is "eroding historically constructed national collective identities" using constructivist tools which permits a deeper understanding of the inconsistencies at the heart of the concepts (Checkel: 2001). What is surprising in all this work is either the silence or the rejection of the link of economic activity to the development of identity rights in the Union. In law, however, the insertion of citizenship rights from the Union level into the national level is founded on economic criteria and justifications. The recent judgment in *Carpenter* is paradigmatic of this development and enlightening about the lack of legal legitimacy being given to the multicultural approach to Union citizenship.

Mr. Carpenter, from the account in the ECJ's judgment, appears to have been quite an ordinary Englishman, living in the UK. He was a self-employed businessman selling advertising space in medical and scientific journals. Mr. Carpenter had responsibility for his young children by a previous marriage. Mr. Carpenter married Mrs. Carpenter, a Philippine national who was irregularly in the UK having overstayed her permitted visit. Here the first step of the identity trail begins unwinding. The UK authorities refused, as is consistent with national law, to allow Mrs. Carpenter to remain in the UK with her husband.

Part of UK identity rights and duties is either not to marry a foreign national irregularly in the UK or if this is irresistible, not to seek to have the spouse live with the national in the UK. Where a UK national marries another UK national or a national of another EU Member State no obstacles to cohabitation are placed in their way. However, if the UK national deviates from these legally privileged choices and marries a foreign national a series of obstacles of varying weights are placed in the way of the cou-

ple's residence in the UK. If the foreign national is illegally present in the UK then he or she will be required to leave or deported. Only after departure can the couple seek a visa to come back to live in the UK together. If the individual was deported this will normally not be granted for a minimum of five years unless there are exceptional compassionate circumstances. If the foreign national is legally present in the UK then the couple still have a number of obstacles to negotiate: first they must prove they have enough income and sufficient housing so that there is no likelihood that they or their dependents will need public funds or assistance. Secondly, they must prove that the marriage is genuine, a requirement which can easily be used by officials to create difficulties for couples which do not meet some ideal norm understood fully only by the officials themselves. Indicators of suspicion used by officials, according to UK legal practitioners, include substantial age discrepancies, and even, in an extreme case the "fact" that persons of certain ethnic origins do not marry persons of other ethnic origins.[3] Thus at national level, immigration law is used to privilege certain identity choices of nationals in marriage and to penalise others. Mechanisms in law at the national level fulfilling this function are to be found in the legal regimes of all EU Member States.

The strategic settlement between the supra national and the national within the EU as regards citizenship rests on one fundamental principle: so long as a national stays at home and does not exercise a free movement right to go and live and work in another Member State he or she cannot access EU citizenship rights to family life.

In the face of the rejection of Mr. Carpenter's identity choice to live in the UK with his Philippino wife who was centrally engaged in the upbringing of his children by his previous marriage, Mr. Carpenter sought to establish this right of residence as a citizenship right at the level of European Union law. The strategic settlement between the supra national and the national within the EU as regards citizenship rests on one fundamental principle: so long as a national stays at home and does not exercise a free movement right to go and live and work in another Member State he or she cannot access EU citizenship rights to family life. Thus only when the citizen of the Union is a migrant in another Member State can he or she access EU identity rights attached to citizenship of the Union in law. The UK Government argued this explicitly in the case: since Mr. Carpenter has not exercised his right of free movement his spouse cannot rely on an entitlement to residence in EU law. National law rules supreme. This "wholly internal" rule is central to the balance between the EU and the Member States as regards citizens.

So long as a matter remains wholly internal to one Member State the EU rules giving rights on the grounds of a free movement exercise are inapplicable. But it is these rights related to free movement which give citizens of the Union much wider rights of family reunification than are incorporated in the national law of any Member State. The identity of a citizen of the Union as migrant includes the right to have a spouse, children up to 21 or of any age beyond that if dependent on the worker or his spouses, and all dependent relatives in the ascending or descending line in the host Member State. The nationality of the family members is irrelevant for the purposes of this right. No support requirement can be applied to the family and only a very light housing requirement can be placed on the family and that at the moment of installation.

Thus for people like Mr. Carpenter, despite the fact that his national law encourages him to marry only fellow nationals (or those of other EU states), a potential benefit in EU identity exists but can only be accessed if he makes himself a migrant, or at least so was the situation before the judgment. The ECJ gave an interpretation of the Treaty which gave Mr. Carpenter the right to live with his wife in the UK. In so doing however, it avoided any mention of his capacity as a citizen of the Union. Instead it relied entirely on his identity as an economic actor. His right to escape the identity pressed upon him in national law and to enjoy family life with his Philippino wife in the UK comes, according to the Court, exclusively from the fact that he is self-employed selling advertising space, a significant proportion of which is to advertisers in other Member States. Thus the whereabouts of Mr. Carpenter's customers are central to his right to live with his wife in the UK. Had all his customers been in the UK he would not have succeeded according to the Court's reasoning.

Once the Court has allowed Mr. Carpenter to escape the national law regime on the basis of his economic activities, it permits itself some fine statements regarding the importance of fundamental human rights and the need to protect family life. It most helpfully notes "It is clear that the separation of Mr. and Mrs. Carpenter would be detrimental to their family life. . ." Of course it is exactly this detriment which national law requires. The state, up until the *Carpenter* judgment could in effect make family life so impossible for its nationals that they chose to leave to go to another Member State as workers to enjoy the right. This in fact became quite normal for quite a number of UK nationals who upon being refused permission to have their spouses live with them in the UK went to work in Ireland. Following a 1991 ECJ ruling[4] after a reasonable period of time these persons could return to the UK with their foreign family members relying on EU law. In practice the UK authorities accepted that 6 months of genuine economic activity in Ireland was sufficient for these naughty Britons to be allowed to come back to the UK with their

foreign spouses. This informal banishment of the identity offenders could not, however, be applied to those lucky Britons who were dual nationals holding also the citizenship of another Member State (most commonly of Ireland) as they were already entitled to rely on this other identity to enjoy family life under EU rules within the Member States without having to migrate.

It is clear in this case that the control of identity and citizenship is a highly disputed territory between the national level and the EU. The right to privilege some family life choices against others so as to place obstacles in the way of any marriage or relationship with a foreigner expresses a very strong concept of identity and correct identity behaviour. The national perception of the central role of family in the maintenance of traditions and values is found most palpably here. Only marriages which involve two nationals of the State (and because of the high level of rights of citizens of other EU countries they are included here too) are to be privileged in law. It is the right of the Member States individually to chose to what extent obstacles to foreign nationals as family members should be placed in the paths of their citizens.

At the EU level, as a result of EU law adopted in the 1960s and 1970s, a much wider and more generous approach to the rights of families to live together is taken, even where the family members are foreigners. However, these rights are unrelated to the legal framework of citizenship of the Union. The individual's status as such does not give him these rights. These family rights can only be accessed through economic activity. As such, the module through which EU rights formation takes place is much more Marxist than human rights oriented. Citizenship, human and cultural rights and constitutional principles will not get Mr Carpenter home in his claim to live with his wife in his country of nationality. Only his capacity as an economic actor can give him the result he wants.

In light of this, the struggle regarding identity takes place in two rather different fields when one compares the national and the supra national. The national level embraces, like a vice, its citizens gripping them tightly to minimise foreign influence in private life. A normative value of family life is imposed: not only are fellow nationals privileged as marriage partners, but only a very limited truncated vision of the family is permitted where the members of the family are foreigners.[5] At the EU level, citizenship of the Union gives no apparent family rights but the act of migration for an economic purpose (or at the very least as an economically inactive but self supporting person) between Member States accesses a very wide definition of family members for family life and a very limited array of restrictions. The mechanism, however, is not citizenship and identity rights as such but economic activity—the fact of being part of the means of production. While in theory these two fields do not intersect, in practice Mr. Carpenter succeeds and the UK Government loses. In these two different visions of identity and rights, the arbiter is no longer the state.

The recent judgment, even though not given on the grounds of identity, allows EU identity rules to reach into the Member State and makes its claim to the hearts and minds of the citizens at home. Individuals enjoy numerous identities at any given time. The value of any particular identity depends on the extent to which it permits the individual to live as he or she wishes and to access benefits. The control at state level of access to benefits creates a strong incentive for individuals to claim these citizenship rights. However, as this national control becomes weakened not least through the intermediary of the ECJ the benefits of relying on multiple identities to gain access to rights excluded at the national level are enhanced. The starting place is not national or EU identity and citizenship but the individual who as an economic actor is entitled to access different identities simultaneously, the articulation of which is supra-nationally controlled.

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Endnotes

1. C-60/00 11 July 2002.
2. Delgado-Morieira, *Multicultural Citizenship of the European Union* (Ashgate: Aldershot: 2000).
3. This reason was given orally to a solicitor by an Immigration and Nationality Directorate official in London in 1999 to explain why the couple, clients of the solicitor, was being required to attend a further interview with the official.
4. C-370/90 *Singh* [1992] ECR I-4265.
5. For instance, in UK immigration law, children under 12 are considered to belong with their mothers, and children over 12 are only admissible if the family can show that they have had sole responsibility for the child's upbringing. This means that if another family member, for instance a grandparent, in the country of origin took decisions about the child's schooling before the family sought

family reunion in the UK with the child, the chances are that the child would not be permitted to join the other family members in the UK. The recent judgment of the European Court of Human Rights in *Sen v Netherlands* 21 December 2001 revolves around a very similar provision of Dutch law which excluded a child.