LIBERTY AND CITIZENSHIP IN EUROPE

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Philosophical Approach to European Citizenship

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ABSTRACT

The notion of European citizenship is vague. On the axiological level, it is based both on a group of values and on a constitutional treaty. On the legal level, the constitutional treaty confers the status of European citizen on the inhabitants of European nation states only insofar as they are already citizens of their respective states. This article will explore the resulting democratic and legitimacy deficits, as well as the conditions needed for the actual fulfillment of a trans- or supranational citizenship.

"Here we take pride in the title of citizen." Example of a sign, dated 1799, which was displayed in public spaces during the French Revolution. Manufacture Berthelot.

The fundamental values declared by the European Union are human dignity, liberty, democracy, equality, solidarity, rule of law, and respect for human rights. Since the signing of the Treaty of Lisbon in 2007, all of these rights have been gathered in the EU Charter of Fundamental Rights solemnly proclaimed during the Nice European Council in December 2000. Part II of the constitutional treaty includes this Charter. The European Union thus provides itself with a list of legally binding fundamental rights for the EU, its institutions, agencies, and organs, as well as for its member states as regards the implementation of EU law. European institutions, as well as member

states, have the contractual obligation to respect them whenever they apply European legislation.

What is as Stake: Rule of Law, Guarantee of Liberty

The order in which these fundamental values are presented calls for interpretation. The Charter's logic is that of human rights, which explains why it begins with dignity and broaches the concrete aspects of citizenship and the exercise of justice last, in chapters V and VI. Nevertheless, respect for the rule of law is a prerequisite for the protection of all fundamental values. Since 2009, the European Commission has faced crises on a number of occasions, which revealed specific problems linked to the rule of law in certain member states. In response to questionable measures taken in 2013 by the Hungarian Prime Minister Viktor Orban, the European Commission adopted a new framework in March 2014 to contend with systemic threats that could burden the rule of law in any of the 28 EU member states.

What the Commission means by the rule of law is respect for the human rights defined by the Charter, as well as respect for treaties. It thus acts as though these treaties establish the rule of law on an EU-level. “The European Commission is the guardian of the Treaties—so too, we must be one of the guardians of the rule of law,” declared Viviane Reding, Vice-President and EU Justice Commissioner. Conversely, we are entitled to demand, whatever the primacy of EU law may be in relation to that of member states, that the construction of the transnational community take place without regression with respect to the level of legitimation on which national sovereignty is based: a “transnationalization of popular sovereignty without lowering the level of legitimation,” observes Jürgen Habermas. It is “the constitutional state [that] transforms private citizens into democratic national citizens.” This is the reason why “today we must try to carry further the legacy of the nation-state on a European level” (Habermas, 2005).

The Notion of European Citizenship

This demand in no way constitutes a retreat to the nation state, whose weakening on the contrary Habermas has noted. “A nation of citizens must not be confused with a community of fate shaped by common descent, language and history. […] democratic citizenship establishes an abstract, legally mediated solidarity between strangers” (Habermas, 2001, 15-16). Habermas reminds us in the same text that this also holds for religious interpretations of the world, and that any search for European identity by way of religious identity would cast doubt on the “intellectual appropriation of a rich Jewish and Greek, Roman and Christian heritage.” It would at the same time weaken the capacity to constructively face a new wave of immigration resulting from globalization, when European political culture has precisely learned to make “a comprehensive spectrum of competing […] interpretations” coexist.

If we take seriously the definition of citizenship as participation in sovereignty, it does not exist before the constitutional act that simultaneously constitutes the state and raises the citizen to the exercise of his potential citizenship by making him the constituent subject. Consequently, the question of whether citizens of the Union become citizens only by concluding the Union, or whether they are originally so, is not insignificant.

It should be noted in this regard that in the successive texts intended to determine the functioning of Europe, the notion of European citizenship is vague. In the Treaty of Maastricht, it includes heterogeneous rights that for some fall under international law, and for others under either public or private law: right to reside and move freely within EU territory (art. 18), right of European citizens to vote in and stand as a candidate for local and European elections in the member state of residence (art. 19.), right of protection by diplomatic and consular authorities of third countries (art. 20), right to petition the European Parliament (art. 21), right to apply to the European Ombudsperson (art. 22).

Yet the “European citizen” is nothing if not already a citizen of France, Germany, Greece, etc. He enjoys solely

what is called the “special status” in the protocol on the right of asylum annexed to the Treaty of Amsterdam from October 2, 1997. Of course article I-6 of the “Treaty Establishing a Constitution for Europe” from 2004 declares that the Constitution goes further than all preceding treaties because the EU has primacy over the law of member states. However, article I-10 on the contrary concedes that “citizenship of the Union shall be additional to national citizenship and shall not replace it.” We are therefore dealing with a “constitutional” construction that is freed from popular sovereignty, in contradiction to the democratic principle declared in the European Union Charter of Fundamental Rights on December 7, 2000 (Preamble), and repeated in part II of the Constitutional Treaty.

The Union does not have competence to grant European citizenship, as the attribution of citizenship remains within the jurisdiction of national governments. The “Treaty Establishing a Constitution for Europe” does not go beyond the decision of the French Constitutional Council dated May 20, 1998: European citizenship is “authorized,” but hardly *founded* by the French Constitution. There is therefore no “European citizenship” in the full constitutional sense of the term. EU nationals make up a particular type of category of citizens, enjoying a “special status.” In France as in Germany, EU foreigners are excluded from full enjoyment of political rights. In the current state of both internal and EU texts, as well as with regard to the decisions of constitutional judges, “European citizenship” remains a speculative extension, and in no way appears to be a prelude to a shared European nationality, or to something of a “European people,” unless we understand “people” as a natural fact.

Certain legal scholars also believe that a supranational European constitution would be superfluous, and even undesirable. It is sufficient to think of Europe as a “*Verfassungsverbund*,” a constitutional grouping. This position nevertheless has a disadvantage. Owing to the weakening of the nation state, the absence of supranational citizenship cannot counter the risk of a regression to nationality as the primary element, synonymous with the people in the narrow sense of “*völkisch*,” or at least of a closed national community.

Democratic Deficits

In the strict sense, citizens of different states participate in European sovereignty as “EU citizens” only through the intervention of national citizenship. What has imposed itself—with dire consequences for the constitution of a European public space—is an intergovernmental Europe, a Europe of states, a Europe that one could call neo-*Ancien Régime*, since it is based on arrangements between powers that certainly fall within the international law, but that in no way stem from constitutional law. Despite the narrow result of the French referendum on Maastricht, the way in which the Danes were treated after Maastricht, when they were requested to revote in the “right” way, established the separation between intergovernmental logic and popular sovereignty.

According to the first article of the “Treaty Establishing a Constitution for Europe,” this treaty-constitution was developed “reflecting the will of the citizens and States of Europe.” But what does state mean in this phrase, known as the “dual majority of states and citizens” (Habermas, 2006)? The confusion it causes, between a sovereign state and the rule of law consisting of citizens exercising their right of self-determination, passes intergovernmentality off as the expression of citizens, whereas it “ignores public deliberations and proceeds only through negotiations behind closed doors.”

Despite the recent extension of its powers, the role of the European Parliament in the Union’s institutional framework does not rectify this absence of democratic legitimacy. It is the Commission that holds the power of initiative in matters of legislation: not only does it perform the function of the executive, this unelected body is nevertheless also the only one, according to article II-26-2, that can propose legislation. The Council of Ministers decides, and the Parliament applies its decision, insofar as it is consulted. The Council and the Commission act like “independent organs” in the interest of the community, and the ministers are relieved of any responsibility before the European Parliament. The latter is *juxtaposed* with national parliaments, rather than there being a form of integration from the “bottom” toward the “top,” from the base of national parliamentary democracies toward

supranational parliamentary representation.

Economic Conditions

The deficits in legitimacy grow in step with economic deficits. The history of citizenship is not the history of disembodied civil rights, but one involving a recognition that is *simultaneously civil, political, and social.* Yet it suffices to consult part II of the Treaty to observe that social questions are not part of fundamental rights (claim rights are reduced to "rights of access," for instance to social security; the "right to work" takes the place of the right to have a job which is nonetheless found in the French constitution). Worse yet, article III-210-2 forbids member states from taking measures leading toward a social harmonization.

The fundamental problem is the incompatibility of a project of citizenship with a harmonization from below, according to the criterion of the lowest bidder. Yet that is clearly the line encouraged by the liberal policy of the European Commission, which was worsened by the nature of the "solutions" applied to the crisis, themselves based on a lack of social goods for redistribution and on a reliance on austerity.

The foundation of the Fordist social state, which was a kind of private individualism combined with a public collectivism, has increasingly been undermined by the systematic destruction of public services, which is accompanied by a *de facto* growth in distributive injustice. As a result, the more Europe becomes neo-liberal, the less there is an axiological foundation assuring a European public space, and the more its capacity to produce the *political* liberalism it calls for becomes problematic.

The Optimistic Scenarios, the Teleological Argument

The technocratic process (open method of coordination, path dependence) is based on the inevitability of functional limitations. This can be illustrated by looking at the evolution of the law. On the one hand, EU law prevails over national law, but on the other, national courts must be conceived as the legitimate protectors of the legal order established by the constitutions of the member states, which is to say protectors of the very principle of the rule of law. From the rational point of view, everything takes place as though the European judiciary power resulted from two contracting parties agreeing on the creation of a common authority distinct from those they represent. Habermas speaks of a "constitutional community" (*Verfassungsgemeinschaft*).

The many conflicts that have marked European history also provide the necessary motivation to keep biases at a distance, and to overcome particularism. In short, like war's civilizing role for Kant, this common past created forms of social integration that have left their mark on modernity in Europe.

This teleological optimism is not without its ambiguity. Habermas notes that "the functionalists see it as the confirmation of their theory that the political will to create a single economic and monetary space produced functional limitations which, to be overcome, have mobilized great intelligence and ingenuity, and have at the same time generated an ever denser network of interdependence." In virtue of the same logic, the activities of political parties, and even those of lobbies, are increasingly moving toward the European "centre" (Brussels or Strasbourg). In this optimistic hypothesis, civil society once again becomes the driving force. Yet Habermas wonders what becomes of liberty in networks: "In a world where all relations pass through anonymous networks […] the processes of global society are nonetheless spontaneously regulated, one way or another, by the 'logic of the network,' in such a way so that citizens that are exposed to it immediately see their autonomy curtailed of its components of civic and political self-determination, and thus reduced to private independence."

Interaction Between Member States and European Citizenship

The problem raised by "globalization" resides in the potentially complete substitution of networks for identification with a common culture, whether it be in the early modern, modern (language, culture), or contemporary (nation

state, citizenship) historical sense. Belonging to a nation, on the condition that it takes on a "post-traditional" and republican form, can respond to this challenge, while replacing community-based and racial conformity. In *Zur Verfassung Europas*, Habermas insists on the continuity between the birth of the modern state, the simultaneously nationalist and democratic identifications of the nineteenth century that made citizens show solidarity, and the project for a trans- or supranational solidarity. Like equality, *solidarity* serves as a foundation for a "European social contract." Through it citizenship can once again find a shared destiny, but in a post-traditional and republican form.

The simultaneously empty and heavy concept of "shared destiny" serves within European constitutional construction as a linchpin between the fatality of unavoidable *fait accompli* and a cultural or civilizational legitimacy, between facts and values, and by the same token between facts and the law. For this reason, from the viewpoint of political philosophy, it is one of the weaknesses—and perhaps the greatest one, given its essential role as linchpin—of the project of constitution as a *constitutional* project.

During the course of his reflections and interventions on European citizenship, Habermas has become convinced that it was the historic form of the *republican* nation state that ensured social integration, despite the growing differentiation of modern societies. Habermas does not at all call for completely renouncing the nation state framework of integration. The question is more one of imagining European structures that can take over while potentially relying on it, in such a way that "the citizens of a given state have a part in the supranational legislative work in cooperation with the citizens of the other states concerned, and this *on the basis of democratic procedures.*"

If we do not want to be bogged down in the alternative between a federation of states and a federal state, it is recommended to include the same people (or their representatives) as constituent subjects in two different roles, that of (future) citizens of the Union as well as citizens of member states. The *same* people, for there cannot be multiple constituent subjects. What is at stake in the legal and technical connection of competence within European governance are the control and *exercise* of sovereignty, in other terms of citizenship. The questions of "reserve" in the abandonment of competence of sovereignty, or of "competence of competence" only have meaning in this context and technical register. Unless there exists—or could exist straightaway—*a* citizenship and therefore *a* European constitution, the question is not knowing who has the magic formula, but rather how we can ensure *a transition or a continual translation* between national citizenship and European citizenship, instead of *a transfer or an abandonment*.

BIBLIOGRAPHY

Dupeyrix, Alexandre, Raulet, Gérard, eds., *European Constitutionalism. Historical and Contemporary Perspectives* (Brussels: e. a., Peter Lang, coll. "Euroclio," 2014).

Grimm, Dieter, "Does Europe Need a Constitution?" *European Law Journal* (1995): 1.

Habermas, Jürgen, "Remarks on Dieter Grimm's 'Does Europe Need a Constitution?'" *European Law Journal* (1995): 1.

Habermas, Jürgen, "1989 in the Shadow of 1945: On the Normality of a Future Berlin Republic," in *A Berlin Republic: Writings on Germany*, trans. Steven Rendall, introduction by Peter Uwe Hohendahl (Lincoln: University of Nebraska Press, 1997) (German: *Die Normalität einer Berliner Republik*, Frankfurt/M.: Suhrkamp, 1995).

Habermas, Jürgen, "Why Europe Needs a Constitution," *The New Left Review* 11 (2001): 5-26 (German: "Braucht Europa eine Verfassung?" in *Zeit der Übergänge*, Frankfurt/Main, Suhrkamp, 2001).

HABERMAS, Jürgen, *Sur l'Europe* (Paris: Bayard, 2006) (German: "Ein Ruck muss durch Europa gehen," in *Die Weltwoche*, No 21, 19 May 2004) [no English translation].

HABERMAS, Jürgen, *The Crisis of the European Union. A Response*, trans. by Ciaran Cronin (Cambridge: Polity, 2012) (German: *Zur Verfassung Europas*, Berlin: Suhrkamp, 2011).

HAQUET, Arnaud, *Le concept de souveraineté en droit constitutionnel français* (Paris: PUF, 2004).

RAULET, Gérard, "La notion de 'communauté de destin' dans les discours européens," *Revue d'histoire diplomatique* 2 (2009): 113-125.

STRUDEL, Sylvie, "Citoyenneté européenne," in Pascal Perrineau and Dominique Reynié, eds., *Dictionnaire du vote* (Paris: PUF, 2001).

ZARKA, Yves-Charles, ed., *Refaire l'Europe. Avec Jürgen Habermas* (Paris: PUF, 2012).
