Justice, only justice shalt thou pursue...(Deut.XVI:20)

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Whose Europe? After the Constitution: A Goal-Based, Reflexive Citizenship

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Whose Europe? *After the Constitution: a goal-based, reflexive citizenship.*

Prologue

Etsiamsi constitutio non daretur*?*

European Union lives within the contradiction between the relevance of its internal powers to the lives of Member States' citizens and the apparent lack of those citizens' political awareness; between its capacity to heavily affect or determine major policies and the lack of interest and involvement of those who are subject to them. The contradiction might perhaps be best explained making reference to the intermediating role played by Member States' institutions and intergovernamentalist decision-making processes. But the will of enacting an European Constitution introduces a new factor within the given *scenario*: *i.e.* were the Constitution to be taken seriously, its normative significance would ask for the acknowledgment of European Union as a complex and even politically autonomous "institution" itself, within which Member States' governmental actors are just part of the cast and, among other consequences, the *European* citizen emerges as a conceptual pillar of the constitutional framework.

The need for a new concept of citizenship is nonetheless to be consistent with the preservation of a multiple *demoi* constitution, and its content is to be shaped considering the character of Europe as it is: a "civilian power"[1] whose internal well known aims are connected to the building of a coherent external role in the world, based on multilateralism, peace, tolerance and solidarity priorities.

As a starting point, it is to be acknowledged that the debate on a European constitution arose long before any actual proposals for this draft of a charter. For each of the fundamental problems of the Union, such as citizenship, the division of powers, the nature of the state, sovereignty, the *Kompetenz-Kompetenz*, or the "democratic deficit", it was felt that a de facto constitution already existed, but also that it did not exist, that it was desirable but also that it was undesirable and harmful. The insidious argument, now that a (proposed) constitutional charter has been put forward, springs from fear that the juridical value of the charter is rather weak in comparison to that of the Treatises, and that it is virtually devoid of political value given the persisting lack of the conditions of democracy and of a European communicative society.

[1] F. Duchene, The European Community and the Uncertainties of Interdependence, in M. Kohnstamm, W. Hager (eds.), A Nation Writ Large? Foreign Policy Problems before European Community, London 1973.

However, if we were to hypothesize that there exists no constitution, would the legal system and political life of the Union be the same? In many respects, the Europe of the Union would seem to be able to survive "etiamsi daremus non esse constitutionem"[2].

The relevant question we need to address here is whether the European order can be considered independently of this new element that is increasingly placing conditions on the situation, namely the European Constitution (now *in itinere*). Many are wondering whether the existence of a Constitution is likely in any way to affect the order the Constitution itself regulates, or whether it is a matter of no relevance at all.

Today it is the *will* to move towards the Constitutional enactment that is the *quid novi:* first and foremost in comparison to the method of small steps and juridical incrementalism, and in comparison to the well-tested and prior "understatement" towards any *overall* political project. And since it is a question of "will", the negations are a sort of *self-fulfilling prophecies*. Thus if we denied that a Constitutional Charter exists, the legal and political order that is supposed to descend from such a charter would itself not exist. Further, one could not fail to fear that this denial of "recognition" would lead to unpredictable consequences, possibly affecting even the pre-existing Community order, even though the latter is by now perceived as an intangible "acquis". Therefore, if indeed we were to deny that there is a constitution, we would probably be performing a *summum scelus:* we would thus transform the convention on the constitution – and subsequently the not yet concluded Constitutional Treaty – into an "act" ironically left without even "functional" consequences.

In contrast, what the constitution genuinely demands from us, according to its own significance, is precisely engaging in debate *as if there were a European Constitution*.

1. A summary.

One of the ideas hovering in the background should be, therefore, that the Constitution is not a mere source of cognition, as human reason was for Grotius (cognition of the natural order produced by God), but is instead a source that is *formally* connected to the *production* of what it regulates. This is held to be so at least in the weak but generally recognized meaning that the repeal of a constitution would coincide with the overthrowing or abolition of the order expressed therein.

This article is composed of two parts, each closely interacting with the other. In the second part I will propose what I believe to be the distinctive features of European constitutional citizenship, and I will offer some answers to the questions on citizenship. In the first part (§ 1-4) I will build the interpretive premises, offering a version - one I consider to be suitable - of the "European" inflexion of fundamental categories, *in primis* sovereignty, demos, constitution. In the course of the discussion I will outline and re-elaborate the theoretical background against which more recent debate on political Europe has unfolded.

I will thus propose, in the first part of this work, a preliminary overview of some well-known and perennially unresolved questions. Firstly, the *demos*, which many conceive as a crucial *absence* that can explain why a European society and a European constitution is

[2] In his formula taken from the *Prolegomeni* of the *De iure belli ac pacis* (1625)- "etiamsi daremus (…) non esse Deum, aut non curari ab eo negotia humana" Hugo Grotius certainly by no means sought to deny the existence of God - "quod sine summo scelere dari nequit"- ; rather, he ultimately upheld the moral objectivity of natural-rational law. The emphasis was on upstanding *reason* and its cognitive autonomy.

inconceivable. If a constitution depends on a *demos*, does it presuppose one as an original, pre-political premise? As a matter of fact, not only does a monocultural and compact "demos" not exist in Europe, but such a state of affairs is not even desired.

The doubts about the *demos* are compounded by those on sovereignty. If we hope to overcome the dilemma between a new "sovereign" macro-State and the current "undecided" European order, we should separate the concept of sovereignty from that of the Nation-State.

"Sovereignty"- if any- would have to refer not so much to some "State" or other, but instead to a different form of subjecthood – real and not simply juridical, popular and not statal, democratic and not monocratic. Once ethnic idealisms and organicistic ideas have been swept aside, the People we would like to endow with some kind of "sovereignty" should be something different from a new abstraction. Rather, it should embody a unity built up socially over time, through the continuity of a political and institutional artifice. In other words, it would be something radically different from unity on the biological plane: to use a Harbermasian perspective, its unity would be "constitutional"[3].

Yet demos and sovereignty are still felt to be extremely delicate, debatable and risky concepts. The very concept of "European" sovereignty is challenged not so much (or not only) because of the absence of a legitimate "holder of the sovereignty", but rather on account of the difficulty encountered in seeking to endow this concept with a coherent *content*, in terms of connotation and extension of the power it expresses. What we are facing, then, is the more general crisis affecting the concept of sovereignty within constitutional systems (limitation) and in the "global" world (material obsolescence of sovereign power).

It is against this background that the question of European citizenship must be addressed. If the destiny of the European citizen is not that of the beneficiary of a complex system of freedoms/economic opportunities, or a client/contracting party in a neo-feudal society, then terms such as *demos (demoi)* and sovereignty retain a link with the concept of citizenship. But the link is itself controversial.

I will explain why citizenship should still be linked to Aristotelian, collective *self-rule*, rather than simply allowing it to coincide with (and exhaust) entitlement to and enjoyment of individual rights. Certainly, in the latter case, this "reduction" could give rise to certain advantages. It would result in a realistic and non rhetorical citizenship, compatible with a "minimal", under-determined political order, devoid of the classical constitutional structures (in particular, it would have no *canonical* and reassuring division of powers). Moreover, it would exhibit no embarrassing aspirations to "sovereignty", and it would have an order whose legitimacy would rest primarily on international law and on the democratic mediation of the States – an order which, above all, would administer only *defined and circumscribed* objectives, in accordance with the logic of the old communities. Finally, such an order would seek to be "recognized" on the basis of the functioning of its *outputs*, that is to say on the basis of appreciation for its efficient results. And it hardly need be added that seen in these terms, citizenship would be fully compatible with the realism of the *no-demos thesis.*

[3] Finally, a politically cohesive unity should display cohesion only to the extent that this is genuinely required, i.e. by virtue of solid links which are nevertheless "thin" enough to avoid supplanting the social and ethical bonds that form the internal "bonding glue" of each of the European "demoi".

My opinion is that the European citizenship which emerges from the Constitution calls for these skepticisms to be overcome. Or at least, I believe this is the meaning of a constitutional project. The European constitutional traditions are the starting point, an inevitable departure point. They do not contain within themselves the *virus* of legitimacy without democracy, citizenship without politics, or a constitution without *demos* and without a form of recognition stemming from those who intend at least to have sovereignty over themselves. And although anything is possible in the case of a *governance* that has sprung up through the "facts" rather than through decisions, a fundamental legal document, as a European constitution undeniably is, must have some coherence with the constitutional traditions of the European states if it is to be "approved" by the member countries.

Therefore even the *European citizen*, as far as the juridical documents are concerned, cannot have a genetic endowment incompatible with the constitutional framework of the member countries. How could such a citizen recognize that the legitimacy of her *gubernaculum* is completely independent of any form of *self-determination*? And how could our putative citizen accept a *governance without government(s)*?[4] In this historical phase, it is *European* citizenship that assumes a constitutional function that must be analyzed, and this function goes far beyond the confines of the articles explicitly dedicated to the European citizen by the constitution. In my opinion, there is no need to create new formal participative channels within the institutional framework. It is necessary, instead, to deep and wide the *social legitimacy* of the Union giving weight to European Parliament and making European issues both relevant to the popular judgment on the domestic majorities and a true subject of public opinion: so to balance the intergovernativist delegation with the sovranational movement of ideas and the visible action of transnational political parties.

This brings me to the main argument of this work, which will be addressed in depth above all in the second half of the paper. Briefly, it would seem to me that Europe is a political entity, arising in opposition to any purely cosmopolitan conception of citizenship. It rightly appeals to universal values such as human rights, democracy, the rule of law, which form its common heritage. But Europe intends to assume a more sharply defined role in the world, rather than entrust such a role to great universal cosmopolitan institutions.

This having been said, a constitutional Europe reiterates the reflexivity of citizenship, even in the organisation of powers; that is to say, Europe re-emphasises the political and not purely administrative or judicial character of the privilege of *citizenship*. This is only what the European constitution imposes.

Moreover, there are three great distinctive planes of European constitutionalism at this "moment" (in the sense of Bruce Ackerman's "constitutional moment"), which distance it from the overall approach of modern constitutionalism. The first is represented, as I will explain in greater detail further on, by the "secondary" existence of the individual. Quite apart from the provocative slant of this conception, what is important to state is that not only is today's common European constitutionalism not ideologically "individualist", but more generally it is in no way concentrated on the individual, whereas the latter used to be the real centre of gravity of "received" constitutionalism. It is also worth pointing out that this appears in tune with some historical constants of Europeanism, which are not pre-eminently shaped around the liberal archetype of the individual and moreover do not tend towards the union of individuals beyond State borders, but simply towards the union of peoples.

[4] These questions, along with many others that have become familiar in the literature of the last few years, did not perhaps strictly need to be addressed in "functionalist" Europe, but they have become increasingly necessary more recently. And they can no longer be skirted, in the face of a constitutional act that would gather together and also explicitly reshape in a single founding act the set of democratic-constitutional elements that form part of the political traditions of Europe.

This by no means implies that Europe is following any communitarian ideal, just as it is not striving to follow that of the priority of the individual. As I will attempt to show, in a certain sense the Union is neither *liberal* nor *communitarian*.

A second plane of European constitutional citizenship, likewise conflicting with a cosmopolitanism of rights (or with the eschatological idea of a world constitutionalism), is represented by attention to the whole view, i.e. consideration of matters from the point of view of the system (or of the Union). Its object, on the plane of the geographic reflex, is obviously not the whole planet but Europe, which appears as a "possible totality". Besides, in any case Europe does not exist outside the framework of this perspective, *of the point of view* of the totality: this is a point of view the "European" peoples and citizens are called upon to assume as an additional code, as a new rational design in which they can inscribe –rather than alter – their own identity. The European "whole" is certainly conceivable, indeed visible in many perspectives, as the set of essential constitutional elements limited to "political justice" (*à la* Rawls), which builds a frame for an active co-existence among different ethical-cultural positions, or as a place for elevation beyond the unilateralness of state visions, or again, as fair procedural control over a common space that would otherwise risk being exposed to arbitrary power or conflict. In all cases, the constitutional thrust requires that it be the European and *not the national citizen* who should become the protagonist of this enterprise. The political recognition that can spring from the citizen (of the European "totality") depends on the strength of the "juridical" document drawn up by the Convention.

Finally, the third plane of European citizenship is certainly the setting up or the establishment of power, rather than liberation from a pre-existing higher sovereignty. But the power that is thereby "established" receives a role which I believe to be strikingly innovative if it is viewed from the perspective of modern constitutionalism. It is a power that is certainly not conceived as the necessary evil against which rights constitute a bulwark ("Society in every state is a blessing, but government even in its best state is but a necessary evil (…). Government like dress is the badge of lost innocence; the palaces of kings are built on the ruins of the bowers of paradise"[5]). The European Constitution in which the various "necessary" constitutions (those of the member States) converge in a single project sets itself the ambitious aim of dissolving the opposition between power and rights, as if one were to start out on a journey in reverse back to the beginning point, and – invoking the metaphor - shorten the distance between *paradise* and *government*. But this is far from being a Europe that is built on purely Kantianizing ideals, as if we were ignoring the artificial character and the coefficient of power Europe will be called upon to embody[6].

In any case, it is equally difficult for States that have undersigned every single point contained in the civilization of rights to conceive of the rights of the European citizen and the rights of Nice as no more than a redundant affirmation of their indisputable, self-evident, universal and deontological nature. Rather, the plane on which rights exert their effects is a

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[5] Th. Paine, *Common Sense* (1776), Mineola 1997, p. 3.

[6] Certainly, the external aspect and that of international relations must not be neglected. Europe is a civil power rather than a military power. This leads Robert Kagan, with a not particularly farsighted realism, to claim that on the international plane his Kantian model, "paradise", seems to be indebted to (and seems possible only thanks to) the Hobbesian model, "power", expressed in United States policy See R. Kagan, *Paradise and Power: America and Europe in the New Wold Order*, London- New York 2003.

further plane, which I believe to be political and teleological: rights belong to ends, and they are intrinsic to the development of common policies. This provides an explanatory account of why a new overarching "European" public power needs to be set up, for otherwise it might easily be considered as superfluous or contradictory, as little more than a new "evil" that perhaps might not even be necessary.

Thus the European citizen is the subjective moment of what I would define as an institutional vision of her rights. Once again, a simple "private" conception of the individual could hardly underlie this institutional rationale of rights.

Europe has, as it were, assimilated and closed the door on the *countermajority difficulty*, i.e. on the fear of infringing the democratic principle and popular sovereignty, arguing for the need that individual rights should be defended, possibly by the Courts, even if this leads to conflict with the majority. But Europe must, in addition, avoid surrendering to what I will call the "liberal difficulty", i.e. the idea that rights have a meaning above all in a zero sum game, as it were a question of diametrically opposed positions, vis-à-vis public policy and majority deliberations. Quite the contrary: the Europe that promotes the indivisibility of *negative and positive rights* is a credible government, and has a credible constitution only if it assumes fundamental "rights", on this highest Community level, as a task of the European citizen – not, that is to say, as a judicial guarantee of the Court of Justice, nor as a new product on the *self-service* shelves of the privileges available to the European citizen. In other words, rights as goals, according to a project which traces its roots back to a continent-wide community inspiration and challenges (defies) the fear that rights may give way to the utilitarian logic of the common weal.

2. A brief review: the conflicting premises.

A new constitution suggests looking at Europe[7] in terms of a radically new constitutional pluralism, in which many routes appear to be open: cooperation and conflicts; *horizontal* coordination between many exclusive legal systems and many "fundamental" norms, and a collaboration between the constitutional Courts and the European Court of Justice; finally, a juspositivist "monism" vertically ordered to a new fundamental unitary norm, embodying closure. The latter route is an option that appears to contrast with various symptoms, among which the failure to make provision for the figure of the judge in conflicts of attribution between national courts or powers and those of the Union[8]. The extension of the problem of the many "fundamental norms" is analogous to that of European *citizenship* and the national citizenships. The physiognomy of citizenship may act as a litmus paper, a point of view that is also productive for the query on the plurality of legal systems. And viceversa. But it cannot

[7] As to the multilevel environment of European Union, see I. Pernice, *Multilevel Constitutionalism in the European Union,* in "European Union Law Review", 2002, 511. As Pernice and Kanitz write, in "the light of a 'post-national' concept of the Constitution, the debate on the European Constitution is an important step in the dynamic process of 'multilevel constitutionalism' in Europe" (I. Pernice, R. Kanitz, *Fundamental Rights and Multilevel Constitutionalism in Europe,* in Walter Hallstein Institut, Paper 7/04, March 2004, p. 5).

[8] On this for example, E. Scoditti, *Il sistema multi-livello di responsabilità dello Stato per mancata attuazione di direttiva comunitaria,* in "Danno e responsabilità", 7, 2003, pp. 1 ff.; N. Walker, *The Idea of Constitutional Pluralism* in "Modern Law Review" (2002) 65. (EUI Working Paper, LAW, n. 2002/1).

be addressed other than by starting from the relation between *constitution and demos*, as indeed has been the case[9].

The two opposing strategies are well known: either to dissociate, definitively, constitution and peoples or, on the contrary, to reiterate the implication between the two terms. The positions adopted in Germany by the constitutional court and also by a legal thinker such as Dieter Grimm highlight the necessary link between popular sovereignty, State and Constitution. Therefore a constitution without people, without "demos", would lack its fundamental founding element, i.e. subject-s. This element cannot easily be "constructed", or produced – assuming it might be desirable – partly on account of the lack of a European public space. In exactly the same way that a European civil society[10] is certainly not pre-existent to the European Union itself, so also a European public space cannot antedate the Union, and is unlikely to be built up within a relatively short period of time. The conditions for a sort of minimum common cultural denominator, which is at one and the same time symbolic, communicative and linguistic, according to many theorists are still very far off: but it is sometimes unclear why a European civil society would need so much, and we should ask what is meant by common "cultural" denominator.

The opposite opinion, championed among others by Habermas[11], is based on the idea that construction of the *demos* is the possible result of a common effort to build it up. A process is called for, it is argued, which will act similarly to the effort made at an earlier stage of history when there was a thrust towards unification, partly under the impulse of the modern constitutions, and partly also as a result of the new political units, above all the nineteenth-century States, whose rulers sought to unify their countries culturally and politically. To cite just one classic example, it was the period when, as Massimo D'Azeglio put it, what was required was to "make the Italians", after having made Italy[12]. And I don't find deep reasons to disagree with this hypothesis, if its end is "thin" and political. Others, however, make remarkable points, and believe it is impossible to embark on an attempt to construct and unify Europe by extending the analogy of the national states to the European Union, because such an endeavor cannot start from founding the new Europe on the break-up

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[9] On the connection, cf. two excellent Italian works, E. Scoditti, *La costituzione senza popolo. Unione europea e nazioni,* Bari 2001; S. Dellavalle, *Una costituzione senza popolo? La Costituzione europea alla luce delle concezioni del popolo come potere costituente*, Milan 2002.

[10] According to the words of C. Offe, *Esiste, o può esistere, una "società europea"?*, translation by A. Gialdroni, in AA.VV., *Sfera pubblica e costituzione europea*, Annali Fondazione Basso-Issoco, Rome 2002, pp. 198 ff.

[11] J. Habermas, *Staatsbuergerschaft und nationale Identitaet. Ueberlegungen zur europaeischen Zukunft,* Erker Verlag, St. Gallen (Switzerland) 1991; or in Italy by jurists such as Rodotà and Ferrajoli (cf. the comment by S. Rodotà in the discussion on, *La Carta dei diritti dopo Nizza*, in *Sfera pubblica e costituzione europea* cit., pp. 197-204; L. Ferrajoli, *Dalla Carta dei diritti alla formazione di una sfera pubblica europea*, ivi, pp. 81-93).

[12] It would be precisely the state political organizations, the "institutions", that would produce symbols, means of communication, languages, history and unified traditions, which would subsequently be capable of transforming the peasants into Frenchmen and thus also of making the transition, as in the United States, after Lincoln's speech in Gettysburg, *e pluribus*, (*ad) unum*. Consequently, why should we require the pre-existence of a people, of a unified political subject, precisely for the European Constitution, even when we know that such a subject is not pre-political but on the contrary is the product of the constitutional institutions and not the necessary premise?

of a pre-existing Empire, of a pre-existing domination, nor can Europe be founded as a conquest*:* it would be incapable of replicating the constitutional movement of modern states as the assertion of freedom. In any case, European citizens *already* possess freedom and the Union attributes no added value to it[13]. Finally, it is above all unacceptable as the homogenization of multiple and traditional suitable elements into a single *demos*.

Joseph Weiler, who emphasised the *multiple demoi* and *constitutional tolerance,* and likewise Neil MacCormick[14], proposed accepting the unicity and the novelty of a union above all as a political concept[15], which unifies on the plane of institutional action but does not lead to the cultural and ethical-organic dimension[16].

To be sure, demos will have no source in ethnos or in foundation myths. It will be a "procedural" demos, if we may be allowed to project the expression used by Habermas for sovereignty[17], although in using this expression I by no means intend to attribute a sort of ultimate, legitimizing value to the morality of "correct" procedures. Instead, I wish to use "demos" in the sense of the collective, historical result of such "practices" and such "opportunities". It is a result that consists in a sensitivity to "political" questions, built up by small steps, in an endeavor to engage in intermediations and translations, in the frequenting of pre-regulated institutional places, in the citizen's indirect participation (from the "European" point of view), just as occurs in elections of "heads of States and governments", besides the political participation in the European Parliament elections . That is to say, the *demos* is the place wherein is embodied the common existence of the diverse national cultures of the peoples of the Union.

3. *Demos, European society and constitution*.

Any point of view on the European *demos* is also a point of view on European citizenship. Dealing with the question of demos in terms connected to citizenship is tantamount to raising the problem of a Constitution. That is to say, it is equivalent to stating that Europe is not only an organization designed for technocratic services, or a "juridical"

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[13] Offe, *Esiste, o può esistere, una "società europea"* cit., p. 102.

[14] N. MacCormick, *Beyond the Sovereign State*, in "Modern Law Review", 56, 1993, 1; Id., *The Maastricht - Urteil: Sovereignty Now*, in "European Law Journal", 1, 1995, 259; Id., *Democracy, Subsidiarity, and Citizenship in the "European Commonwealth"*, in "Law and Philosophy", 1997, 16, 331; Id., *Liberalism, Nationalism and the Post-sovereign State*, in R. Bellamy- D. Castiglione (ed.), *Constitutionalism in Transformation: European and Theoretical Perspectives*, Oxford 1996, pp. 141 e ff.; and the collection in Id., *Questioning Sovereignty*, Oxford 1999.

[15] The political character of identity was emphasized rigorously by F. Cerutti, *Towards the Political Identity of the Europeans. An Introduction*, in *A Soul for Europe. On the Political and Cultural Identity of the Europeans*, Peeters, Leuven - Sterling, Virginia, 2001, vol. I *A Reader*, pp. 1-31.

[16] This theme is in any case extensively and brilliantly analyzed in the work by E. Scoditti, *La Costituzione senza popolo*, Bari 2002; my observations on this issue are in the essay accompanying that work, *Tradizioni, politica e innovazione nel nuovo ordine europeo*, ivi, pp. 5-44.

[17] J. Habermas, *Vokssouveraenitaet als Verfahren. Ein normativer Begriff von Oeffentlichkeit,* in "Merkur", XLIII (1989), n. 484, pp. 456-77.

mechanism, and that the purely regulatory post-democratic state[18], and the very idea of legitimation through the output[19], are components that are indeed present, and have current relevance, in contemporary polities but they are not exhaustive, they are not exclusive. The complexity of contemporary citizenship in Europe lies in the fact that the political element remains a singularly recurrent - and therefore compelling - demand, despite existing *alongside* the growth in demand for technical-administrative control and efficiency. I do not believe that either of the two paradigms can claim to be absolute.

As far as the Constitution is concerned, it can "constitute" the conditions for the formation and unification[20] of a *polity*. From the conceptual point of view, a Constitution can be associated with the idea of a "constitutive" rule (in the sense of Searle or Rawls[21]) whose logical priority with respect to the social practice it sets up[22] allows its actual conditions of conceivability and thinkability to be defined, and produces its essential identity. There is no obligation to conceive of constitutions in an anti-enlightenment sense, à la Schmitt[23], as the expression of a pre-political, organic order, rather than as a founding artifice.

The Constitution as a constitutive rule *institutes* a social practice like that of the Union, and from this point of view it must be taken seriously *ex novo*, independently of the historical substrate on which it is hinged (and therefore without the need to negate the weight the historical substrate has exerted on the Constitution and the value it has had in making the Constitution possible). But if this is the state of affairs, then the "normative" presence of the Constitution does not represent a mere "regulatory" moment of the history of the Community's legal system, but rather the reference point *ex novo* of the life of the Union[24].

At the same time, - and this works against the many potential critics of the purely top-down hierarchical and voluntaristic character of the constitutional act – it is worth recalling that this is *not* a case of a constitution that "invents" and simply draws up on paper a

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[18] Vd. C. Crouch, *Postdemocracy,* Polity, London 2004.

[19] *G. Majone (ed.), Regulating Europe, London 1996; F.W. Scharpf, Governing in Europe: Effective and Democratic?* , Oxford- New York 1999, pp. 7-13.

[20] For these and other meanings of constitutions I refer the reader here to M. Dogliani, *Introduzione al diritto costituzionale*, Bologna 1994; and Id*., Può la Costituzione europea non essere una Costituzione in senso moderno?* Paper read to the conference on the European Union organized by the "Centro studi sul federalismo" and held in Turin on 22 and 23 November 2002; G. Rebuffa, *Costituzioni e costituzionalismi,* Turin 1990.

[21] J. Searle, *Speech Acts*, Cambridge 1969, pp. 33 and ff. ; J. Rawls, *Two Concepts of Rules*, in "The Philosophical Review", 64, 1955, pp. 3-32 .

[22] On this, some critical variants in N. MacCormick, O. Weinberger, *An Institutional Theory of Law. New Approaches in Legal Positivism,* Dordrecht 1986, pp. 23; cf. also my article *L'istituzione del diritto*, in "Materiali per la storia della cultura giuridica", 2, 1990, pp. 367-401.

[23] C. Schmitt, [1931], Der Huter der Verfassung, Berlin 1969 (Duncker & Humblot).

[24] G. De Burca, *The Role of Law in European Integration*, in "Preparatory Material: Hauser Seminar: Theorising the New Europe", session 11, NYU School of Law, 2003/4, has mentioned three strands which present law's role in the integration process "respectively as instrumental, autonomous or constitutive" (p. 1). De Burca considers the third role assigned to the new Constitution, but she warns that at present " the constitutive claims of law, even if attractive to a political leadership seeking to shortcircuit the inevitably slow and complex process of genuine constitution-building, are likely only to undermine both the legitimacy of the polity it purports to constitute, as well as the legitimacy of constitutional document and of law itself" (p. 15).

hypothesis that has never been tested before, imposing a new order that the Europeans would never have expected[25]. The fifty years that have elapsed so far, the Treatises, especially after Maastricht, Amsterdam and Nice, the historic decisions by the Court of Justice, the real conditions of Europe, subjected to a single currency and highly incisive and timely Community legislation, all make it impossible to argue that the European "constituting" process is non-existent. It can no longer be argued that the effort towards a constitution is arbitrary and devoid of roots in the concrete institutional life of Europe. On the contrary, partly also on account of the absence of an excessive number of qualitative variations as compared to the *status quo* of Community organization, the production of a constitution does benefit from genuine *historical presuppositions* and does rest on prior *consolidated institutional practices*, and it is partly through these that it *legitimates its own "constitutive" force*.

On the sociological plane, however, visible European *society* prior to the Constitution has its reference in the operational framework of the "communities". It is therefore a society that can be perceived only through its economic, monetary and technocratic aspects. This side of European society does not necessarily coincide with all the possible implications and with the political hopes for the Union, but it nevertheless constitutes a small and definite result. However, it presupposes a fundamentally "passive" citizen, whose belonging to the Union is not called into question, as the "beneficiary" of "policies"; but this belonging is an abstract bond, a *petitio principii*, and it remains rather colourless. For this kind of European society, it is sufficient to have the series of citizenship rights that are connected to economic activity and to freedom, rights of residence, labour rights, freedom of circulation of people in general, and of goods, capital and services. In this perspective, European society is a society of *individuals* who are not yet linked by any specifically European social *bond*. They appear simply as the *Marketbuerger*, mere citizens of a supranational public place perceived as an extension of the private spheres. The common space of the existing European society restricts itself to representing the Hegelian place of the "system of needs"[26], in which the individual is considered abstractly, as an indifferent element of technical-juridical coordination and regulatory practices.

In contrast, society understood as the public sphere, in which consensus and dissent take shape and in which the conditions for deliberative democracy take root, must address the controversial question of *public good.*.

The *ratio* of the public sphere, unlike the "system of needs", consists in precluding the possibility that private negotiation can deal with questions that potentially concern all of us (never affect just each one of us considered singly). These are questions with regard to which there is certainly no aim of reaching "unanimous consensus": quite the opposite, as there must be every expectation that dissent will be voiced, and in fact safeguards for the

[25] Conflicting opinions are found in Italy too. For example L. Ferrajoli, at the time of the Nice Charter, spoke of a "constituting process started by this Charter" (Id, *Dalla Carta dei diritti alla formazione di una sfera pubblica europea* cit., p.92). M. Fioravanti sees things differently, with regard to the Constitutional Charter (*Il processo costituente europeo*, in "Quaderni fiorentini per la storia del pensiero giuridico moderno", n. 31, 2002, pp. 273-97).

[26] G. W. F. Hegel, *Elements of the Philosophy of Right,* ed. by Allen W. Wood, Cambridge-New York 1991, §§ 189-208.

expression of dissent must be built into the system[27]. It is only thanks to the existence of a public sphere that dissent and consensus are possible. Therefore, by definition, in the case of institutional Europe too the public sphere should act as a counterweight to what might otherwise become the predominance of mere administration, mere technocratic regulation of the interests both of individual citizens and of individual populations. The problem of the European public sphere is therefore linked to the material and formal possibility of "dissent", which, as should be clear by now, can certainly not be compensated or replaced by a constitutional provision of the right to *exit*.

The *Constitution* is, on the one hand, a norm and a project, and on the other, a "fact". But even simply as a "fact", a Constitution cannot forgo "European" citizenship, because only European citizenship, and *not national citizenship*, can be linked to European society as the locus of *political* communication on united Europe. European citizenship, if understood as the opportunity to enjoy privileges of settlement, and other civil and economic liberties, could justifiably be regarded as pleonastic: it would have been sufficient to make reference to possession of the citizenship of one of the member States of the Union. But *a given Constitution*, in Europe, cannot do without *European* citizenship because the connection between a constitution and a people (or peoples) is in any case *already included* in European political culture. This remains true even if one still nurtures a certain skepticism concerning the very notions of people and democracy, a skepticism that does *not* carry any greater weight than the countervailing Euro-optimism.

3. Sovereignty and citizenship

It must be pointed out, however, that the issue of the connection between constitution and peoples is in many ways linked to the tricky question of *sovereignty*. Sovereignty is a *trait d'union* between a people and the constitution. It has been given various interpretations over time, in revolutionary France, in Dicey's England, in the nineteenth century Europe of figures such as Mayer, Gerber, Laband, Jellinek (where it decidedly became the sovereignty "of the State" and sovereignty of the legislative order), in the Italy of "parliamentary" constitutionalism[28], and in the postwar Germany of the federal Constitution.

Political sovereignty merged with the problem of citizenship *after* Rousseau, since it was Rousseau who accepted Bodin's dogma of the *summa potestas* and *unicity* of the

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[27] J. Waldron, *Law and Disagreement*, Oxford 1999, believes that the proper place for this decision among discordant opinions is Parliament, i.e. a decision by means of the legislation. But the "difficult" decisions are by no means at the mercy of the majority *diktat*; rather, they are resolved through institutional mediations that involve constitutional interpretation, public debate, and the "elected politicians" jointly (and often conflictually): they are given complex attention, more complex than that which a parliamentary decision *alone* would express. Ever since Dewey, the objective of liberaldemocracies has been higher and less monodirectional: allowing the best conditions for equal and free participation for a broader and more correct *formation* of opinion, which underlies electoral action. This again places the "public sphere" at the centre of our attention, as a necessary premise.

[28] On this I refer the reader to my *Costituzione e sovranità. Il senso della democrazia costituzionale*, Bari 1997; For a reconstruction in Italy, M. Fioravanti, *Costituzione e popolo sovrano. La Costituzione italiana nella storia del costituzionalismo moderno*, Bologna 1998 (see in particular p. 14 ff.).

sovereign, inverting it into the political autonomy of the subject[29]: here we have the idea of self-legislation as the criterion (*volenti non fit iniuria*) of the Rousseauian social contract and of the Kantian republic. *Citizenship, sovereignty, democracy form a conceptual chain* and are the foundation of the *existing* European constitutional traditions.

Numerous critical analyses have voiced objections against sovereignty: they reveal its decline, as the *summa potestas legibus soluta,* and *superiorem non recognoscens*. The critical point of the concept of sovereignty is represented by its connection with the uniqueness, exclusiveness, absoluteness and territorial nature of power in the modern State. What is often claimed to be appropriate for the European Union today is a different paradigm, used for global and international order by theorists such as Hedley Bull[30], who defined "neo-medievalism" a complex phenomenon in which, among other things, one of the salient features was the overlapping and concurrence of multiple legitimate authorities in one and the same decision-making framework. The obsolescence of the State-sovereignty relation, and therefore both of the *potestas summa* and of its uniqueness, seems to be reflected in the competitive and rival organisation of various centres to which power is ascribed and of the multiple allegiances in the European framework. Furthermore, it is precisely in the organization of the Union that the member States' commitment to relinquish totally autonomous exercise of choices in Community spheres is not compensated by the creation of a new sovereign (European) State. This gives the impression that, in principle, the uniqueness, exclusiveness and absoluteness that have been lost on the national level are not transferred to the higher plane of European institutions. It thus appears as if sovereignty has in part "evaporated". In many respects, these observations reflect a genuine state of affairs[31]. Thus the modern idea of sovereignty should be acknowledged to be outdated[32].

However, taken on its own, the "medieval" metaphor, in which the overall balance seems to beyond the control of the political will, ends up concealing many of the persisting economic and political problems to be faced within the global order, and with reference to its implications for the EU, it devalues and hides the fact that the institutions and the "authorities" do not have an original and final-instance legitimation, but a derived legitimation which is delegated on the basis of the principle of self-legislation by those who are governed.

For the gift of constitutionalism has been twofold: on the one hand the *absoluteness* of power is overcome, through the effect of its *subordination to the "juridical" force of the*

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[29] J.J. Rousseau, [1762], *The Social Contract*, Penguin, USA 1968 p. 25, which refers to a political association in which each person, while joining forces with others, nevertheless obeys only herself and thus maintains her own autonomy. Cf. also Habermas, *Volkssouveraenitaet als Verfahren,* cit.*;* and the valuable work by V. Mura, *Sulla nozione di cittadinanza*, in Id. (ed.), *Il cittadino e lo Stato*, Milan 2002, pp. 25 ff.

[30] H. Bull, *The Anarchical Society. A Study of Order in World Politics*, London 1977, sp. pp. 248-71, extended the expression "new medievalism" that appeared in a work by A. Wolfers, *Discord and Collaboration: Essays on International Politics*, Baltimore 1962, pp. 241-2. It is to be mentioned, A. Tanaka, *A new Medievalism*, Tokyo 1996.

[31] There is an interesting critical reconstruction in an Italian work by D. D'Andrea, *Oltre la Sovranità. Lo spazio politico europeo tra post-modernità e nuovo medioevo,* in "Quaderni fiorentini", 31, 2002, pp. 77-108.

[32] Of course this outcome is predicted also under different perspectives, related to the world politics: see e.g., among others, K. Ohmae, *The End of the Nation State: the Rise of Regional Economies,* London 1995.

constitutions; on the other, *the distinction between (democratic) sovereignty and established powers, with the negation of the final-instance character of such powers*.

The first point is expressed, on the juridical plane, as the limitation of sovereignty, since constitutions divest of any foundation a putative *limitless* holder of political decisions , at least in the sense that they deprive the sovereign of decision-making power over vast spheres, starting from the sphere of fundamental rights. The second point is expressed both in the founding and constitutive value of consensus by those who are governed[33], and also in the reluctance to allow the legal order to have the last word. The main root of this topic is expressed in the *countermajority difficulty*[34], and in the allied defense of the reasons of democracy, and thus of the very possibility to "decide".

I think that what is necessary, especially within the European context, is to make a distinction between popular sovereignty, or better the sovereignty of the citizens, and the sovereignty of the State. It is evident that popular sovereignty *can* withstand the passage of time, as an expression of our trust in democracy, and it can do so independently of the fate of the State as a *form* of the organization of power, of the organization of force according to the realism of the vision contained in Kelsen and Weber.

And my suggestion is that we should not confuse the decline of the "sovereignty *of the State"*, an entirely European concept founded on the reduction of law to the will of the State as an autonomous macro-entity, with the decline of the sovereignty of the citizens[35]. This "decline", namely that of political citizenship, would correspond with relinquishing of "democracy", but such a renunciation does not form part of the constitutional traditions of the member countries. Finally, I think that one should also keep in mind that popular sovereignty has an intrinsic value, that even a new kind of order, like the EU, should hardly abandon, unless it is ready to fail into a non-political order (a pre- or post- political one?). In Europe popular sovereignty is not monolithic but rather is structured according to the (at least) twofold position of the national citizen and the European citizen, and its value resides in precluding the risk that decisions may be swayed by partial and unilateral points of view, or be at the mercy of the particularism of sectorial interests. In this sense, the idea of sovereignty assumes the function of representing the overall point of view, a higher plane that is connected to the superiority of the idea of democratic citizenship as compared to any other idea (for the point of view of the *overall whole,* cf. *infra*, § 7).

That the *constitutional* system of the Union is conceived as a liberaldemocratic order was implicit, because it necessarily had to draw inspiration from the constitutional traditions of the member countries, and in any case set itself the goal of the respect for democracy and rights. It is impossible to abandon the idea of sovereignty because Europe is permeated with "sovereignty", with "people", and Europe proceeds by exploring and reformulating these

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[33] I think that the arguments put forward in this regard by A. Amar are still of particular interest for the purposes of reconstruction: A. Amar, *The Consent of the Governed: Constitutional Amendment outside Article V*, in "Columbia Law Review", vol. 94, 1994, spec. 457 ff, 499 ff.. For in-depth discussion of these aspects, the reader is referred to my *Costituzione e sovranità. Il senso della democrazia costituzionale*, Bari 1997.

[34] A.M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, (Bobbs-Merrill) Indianapolis 1962, pp. 16-23.

[35] Again on this I need refer the reader to G. Palombella*, Costituzione e sovranità. Il senso della democrazia costituzionale,* cit. .

"familiar" concepts. It certainly does not reject the idea of sovereignty as something obsolete: quite the opposite. For today Europe perceives the meaning of this term and its renewed political content. But at the same time, this Europe could not be reduced to a mere expression and prolongation of the *sovereign politics* of the States, an internationalist Europe rather than a constitutional Europe.

For this reason, the Constitution represents an opportunity to go beyond the usually rather inferior role which was ascribed to the "European" citizen until Amsterdam, in the internationalist, inter-statal approach, entrusted to the exercise of the state sovereignty of the Treaties.

But in what sense can we (and must we) appeal to the persistence of popular sovereignty, even in the presence of an institutional model and of an organization of powers that in no way appears to be a new version of a (federal) State?

I will address these features in the next steps. For the moment, I would speak generally about the requisite of citizenship, as a root of reference, a "core" whose fundamental significance emerges from taking a constitutional path. To be sure, it is rather uncontroversial, though, that the European link between constitution, democracy and citizenship will have to be forged, beyond the enhance of its core root, on new standards and certainly on a new pattern of development that is not the one followed in the nation States. Taking account of the multiple *demoi* structure of citizenship will be inevitable, and this should prevent from a "thick" and flat narration of a one *demos* thesis, based on the U.S. "we the People" *ouverture*: Europe doesn't need to abandon *demoi,* in order to make them *e pluribus unum.* This said, it is also inevitable to remind the importance of constitutional citizenship's general root.

Popular sovereignty has undergone intense oscillations, and it has been given a number of different interpretations. For example Jeffersonism or Jacobinism claimed the right to rewrite the constitution at least with each new generation. A later version of constitutionalism adopted a different attitude. It was this later version that succeeded in proclaiming that the constitutional document, *in primis* a political document, was also an enduring statement, a *sovereign juridical document*.

In modern constitutionalism, especially in the United States, popular sovereignty as a constituent force is the root both of the value and *political* legitimacy of the constitution and also of its juridical function as a long-term norm, capable of resisting contingencies and majorities, factions and "ideological" shifts.

In addition to the theoretical construction that was proposed by John Hart Ely[36], which argued that the constitution had the value and the task of constituting a safeguard for the very conservation of democracy[37], I think there is another aspect that can be shared and is useful. This is the aspect which holds that the sovereign popular will expressed in the constitutive power has priority and has a greater weight than the ordinary political action of *normally elected politicians.* But, in principle, it is not legitimate for the juridical document to withstand even the most profound and tenacious manifestations of will that spring forth in the

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[36] J. H. Ely, *Democracy and Distrust, A Theory of Judicial Review,* 1980. But see also: J. H. Ely, *Another Such Victory: Constitution Theory and Practice in a World where Courts Are No different from Legislatures*, in "Virginia L. Rev." 77, 1991.

[37] But on constitution serving democracy, see an authoritative discussion in R. Dahl, *How Democratic is the American Constitution?*, New Haven 2002.

"constitutional moments", in those rare yet decisive processes that arouse a mobilization and a profound exchange between the public sphere and the institutions: that which Ackermann calls "higher law track". This well-known thesis can be here also witness of a necessary relationship between rules and citizens: not only being a polity built through rules, but also rules being connected to one final-instance source, the citizens. Of course, in this sense, the legitimation through law would have to be politically founded; while the reference to the People, according to a certain German tradition, as a sort of naturalistic entity, would be at least inadequate especially to a sovranational polity, to which the formal passage through the limits of law is even more the condition for both polity-making and control over its outcomes.

If such is the state of affairs, then we have a special link between citizenship and constitution, and we expect to have constitutions that express citizenship in its self-founding and self-legislative act. It is possible that Europe may not be a State, it may not be sovereign, it may not be democratic. Europe can be a pluralism of non exclusive multiple orders and a "network" that sets its nodes at various levels[38] that are not interdependent. But the literature on post-democracy and on the regulatory State is more than sufficient to reflect these characteristics. The fact is that the "new European order" is not a product of Silicon Valley, it is not a dot-com, and its real peculiarity lies in the fact that a number of typically post-democratic and techno-regulatory moments are composed together within it, with persistent forms of a pervicacious "political" culture, which is traditional in Europe[39]. It is this kind of culture that has to be tested: through a re-thinking of the European citizenship and the acknowledgment of the concurrent role to be played by Member States as organs of the EU. This should be done outside of the complain about "democratic deficit", given the fact that transparency, efficacy, responsiveness do exist within the EU[40], while the claim of democracy should be revised, on new basis, beyond 19th century ingredients, structures and conceptions.

For this reason, the existence of a "European" constitution does not indicate the decline of the sovereignty of the European peoples, of citizens in Europe. Nor does it indicate the final surrender of *governments:* even as a matter of fact, the EU needs Member States as a constitutional organ in the organization of European powers. This prevents EU from the dispersal of the network, which would render citizenship extraneous.

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[38] Among the works that propose a revision of the traditional structures, an important contribution is that of D.Elazar, a scholar of the Althusian order and of federalism (D. Elazar, Exploring Federalism, University of Alabama Press 1987; for the recent sources of the metaphor of the "network", see A. L. Oliver, M. Ebers, *Networking Network Studies: An Analysis of Conceptual Configurations in the Study of Inter-organizational Relationships, in "Organization Studies*", 19, 4, 1998, pp. 549-83. L. Bobbio, M. Morisi, *Reti infrastrutturali, reti decisionali e rappresentanza nell'Unione europea,* in "Teoria politica", 1/2001, pp. 65 and ff., as well as A. Lippi, *La "rete" come metafora e come unità d'analisi del* policy making*,* ivi, pp. 87 and ff.

[39] I refer the reader to my *Tradizioni, politica e innovazione* cit., and to *Governance*, *"diritti" e parlamenti. Riflessioni per la Convenzione*, in "Quaderni di Filosofia del diritto", SWIF, http://lgxserve.cineca.uniba.it/lei/fildir/papers/palombella2.htm.

[40] See, for example, from different points of views, A. Moracvcsik, *In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union,* in "Journal of the Common Market Studies", vol. 40, n. 4, 2002, p. 605; S. Cassese, *Lo spazio giuridico globale*, Bari-Roma 2003, pp. 86 ff., who considers the democratic problem not relevant given that EU's legitimacy comes from multiple diverse sources.

Certainly, the separation between legitimation and decision, between representation and deliberation, is part of the critical configuration even of the "national" democracies. Moreover, the belonging to micro-groupings, interest lobbying, local participation, and the directly instituted links between needs on the periphery and the central governments, and many similar phenomena, such as the fragmentation and the structuring of new and inter-crossed sub-sets are candidate to replace the old "governments". But this result is clearly contradicted by facts. It is not an inevitable destiny that a purely "regulatory" legal order, shaped according to the "comitology" and the efficiency towards equilibrium goals, will drain the sovereignty of the Germans, the Italians, the French, and naturally also of the British parliament, without providing in exchange any substitutive level of the exercise of political will. This observation springs from the well-known manner of being of the communities which, basing themselves on the Monnet method, have in actual fact produced juridical maximalism and at the same time political minimalism[41]. Against this vision of the state of affairs, there stands the "political" idea, which could perhaps be summarized by using the lapidary words of Robert Dahl: "the legitimacy of the constitution ought to derive solely from its utility as an instrument of democratic government- nothing more, nothing less." [42] Fundamentally, even in Europe, there is still a vivid awareness that constitution and sovereignty grow side by side and determine each other jointly, forging their identity, their meaning and their extension. From this there follow two observations. Firstly, the visibility and the strength of the European constitution will become more intense only once the sovereignty of the European peoples begins to take convergent shape. Secondly, the "juridical" affirmation of a "constitutional" document is not equivalent to the affirmation of any of the other normative texts that have so far been produced for and by the Union, and it should therefore represent the vehicle of its *political* accomplishment.

4. **Citizenship and constitutional itinerary.**

In a certain sense, it can be hypothesized that the history of the European constitution may unfold in the inverse direction compared to that of the American constitutional document. The pre-eminent "political" value of the Constitution of the (one) people of the United States acquired the stringent force of a binding juridical document at the moment when (1803) Justice Marshall elevated it to the status of the criterion of the *judicial review of legislation*. Of course, this was made possible only as a result of historical and political reasons. The juridical force of the constitution as *higher law* was founded not on natural law as the content of the constitution, but rather on popular sovereignty; as Ackerman himself has pointed out, Marshall "asserts that the Constitution has a superior status as higher law by virtue of its enactment by the People . Until a constitutional movement successfully amends our higher law, the Court's task is to preserve the People's judgments against their erosion by normal lawmaking"[43]. By contrast, the European Constitution is endowed with a solemnity

[41] Emphasis is placed on these expressions in A. Cantaro, *Europa sovrana. La Costituzione dell'Unione tra guerra e diritti*, Bari 2003.

[42] R. A. Dahl, *How Democratic is the American Constitution?*, cit., p. 39.

[43] B. Ackerman, *We the People. Foundations*, Cambridge (Mass.) 1991, p. 82.

that does not appear to be supported by a "constitutional" movement, or even by a conscious idea of "people".

The "juridical" document seems, in this case, to *precede* its recognition and its *political* functioning. But this inversion by no means precludes the possibility that the European Constitution will find the political interlocutor to which it is addressed, and will begin genuinely to appear in the political life and in the public opinion of the European citizen. The prescriptive functioning of the Charter of rights will offer an occasion to raise a number of last-instance questions, institutional questions, as well as fundamental moral and political questions. With regard to the fundamental questions, from peace to war, from justice to security, from bioethical and environmental rights to social rights, it is unlikely that the Europeans will fail to perceive the excess of tasks in comparison to the neutral and aseptic juridical administration. Further, it is unlikely that the constitution as a juridical judgment will elude the requirement of a marked *appropriation* in terms of political opinion. The substantial content of constitutional choices will have to be unveiled and recognised, and collectively re-elaborated, in order for the "system" to hold. Awareness that it is not purely a question of neutral juridical regulation – for this would be quite unable to secure its own legitimation and would become overburdened with an avalanche of unsatisfied expectations – is the first seed of European citizenship.

In this perspective, the *juridical* relativisation of country-internal legal systems, which today are a concurrent part of a broader European legal system, is not accompanied by a *political* relativisation of citizenship. On the contrary, it postulates a growth of "European" citizenship. In a certain sense, the existence of the constitution produces a complex effect: thus while European citizenship is notoriously secondary, adjunctive and derived, *the legitimacy of the Union ceases to be derived*. It becomes primary, and no longer depends on the legitimacy of the States, being dependent instead on the "public" autonomy of a "sovereign" that is coextensive with the range of influence of the constitutional text. At this moment, *in Europe, it is still the constitution that legitimates the European citizen, and not viceversa*. But this phase must come to an end if the Constitution is to be historically assimilated. Sooner or later this awareness will surface, especially if a genuine thrust towards implementation of the constitution begins to gather pace, if European parties have a chance to develop, and so forth. The European space will appear as a further framework, held in common by many, from whence the national citizen can "operate" on herself. Joseph Weiler has pointed out that what is required is for us to accept that "others", other peoples and other institutions, will make decisions on "our" behalf as well. One might say, looking at the matter from a slightly different vantage point, that what counts is for us to be able to operate *on ourselves* through the Union and not merely through the national States.

Another important point – one which cannot be over-emphasised - is that the idea itself of toleration, as a set of non conflictual coexistences, is a presupposition but *not the objective of the constitutional process*: for the objective, in contrast, is political and depends on recognition of being *part of a whole*, a whole that has some costs but also offers opportunities and therefore must be "recognised", not merely "tolerated". This recognition depends on the European citizen, while tolerance is an attitude required from the "national" citizen.

The constitution calls for "involvement" by the European citizen rather than simply entrusting the fate of the Union purely to juridical regulation and to the spontaneous, economic and financial processes of the market. But involvement can only be accomplished

by going back to the Aristotelian vision of political rights as the essence of citizenship, for the obvious reason that only political rights can bridge the vertical gap between the bureaucratic-administrative and economic integration of Europe and its political "soul" [44].

If the nexus between a liberaldemocratic Constitution and citizenship cannot be severed, a Europe without a Constitution would have no European citizens at its disposal.

The intensely voluntaristic aspect that is foreshadowed by this conclusion is in tune with a conception of constitutionalism as a project and not merely as a guarantee, as a political document in addition to being a juridical document, as a charter of values and not simply as the organisation of powers.

In other words, the question of the organization of powers is prompted by the spirit of political unity and not simply as the outcome of spontaneous practices. This "institution" of an organisational form - and, moreover, the declaration that it is "unavailable" to the parties – is obviously an even more compelling need if one looks not only at the internal affairs and the member countries, but also at (what used to be) the outside and the widening circle of so-called "enlargement".

This could suggest that the constitutional and quasi-constitutional level of predictions concerning citizenship that came out of Maastricht and Amsterdam would not have produced the same result as could be achieved through a constitution (even though, in effect, they intended to reach such results). At that time too, a considerable effort was made to endow rights with meaning – although in actual fact, as far as rights are concerned all that would have been needed was to make reference to national citizenship of the member countries – and, above all, it was a voluntaristic effort. But only the drafting of a constitution triggers a logical short circuit in citizenship: firstly because it invites us to take the Habermasian notion of "public autonomy" seriously, in a framework, i.e. the European framework, which we feel has a tendency to elude our abilities and habitual modes of communication (on account of its known peculiarities – *in primis the differences* in language). In this respect, it must be acknowledged that hope in the gradual development of the public sphere of European communication over time cannot be abandoned. For this is an aspiration that no theoretician of juridical medievalism and technical efficiency can definitively stifle.

> And yet there is still one pressing question which cries out for an answer: why cannot the European citizen be the individual of the public sphere (the sphere of good intentions) provided for in the Treaties? Why must she be the individual of the public sphere (the sphere of good intentions) provided for in the European Constitution? *For the same reasons*- but addressed towards the opposite direction- *that are at the root of the constitutional skepticism* which has reared its head over the last few years. These are the same reasons that also accounted for the skepticism towards a politically founded legitimation of the communities, based on the Treaties. It was said that "European political power" (I would add, inasmuch as it lacks a constitution of its own), does not derive "from the people" but is "mediated through States. And since the Treaties thus have not an

[44] For the reference to the European "soul": Cerutti, Rudolph (eds.), *A Soul for Europe. On the Political and Cultural Identity of the Europeans*, cit.

internal but an external reference point, they are also not the expression of a society's self-determination as to the form and objectives of its political unity. Insofar as Constitutions are concerned with the legitimation of rule by those subject to it, the Treaties thus fall short."[45]. Furthermore, the Treaties cannot offer "popular legitimation of the legal act constituting the Union and the associated self-determination by the Union citizens as to the form and content of their political unity". But producing this result through a constitution would be tantamount to "altering" the "legitimating basis of the European Union". For "the primacy of community law over national law would no longer be the consequence of the member States' order issued in the Treaties, but of the constitutional precept in the Community constitution"[46].

Throughout the long era of the Treaties, it was perfectly possible to ignore the direct relation between community institutions and the European social sphere. What was valid, instead, was the democratic delegated power that national citizens award to each member State. But this situation made it difficult to highlight the supra-national aspect of the citizen in Europe. Once a constitution were approved, the lords of the pacts would no longer act as such, but rather as a mere "organ of a self-determining union": and it must be recognized that this represents a point of no return. It is a point that is reached because the increase and extension of the "community of law", the already acquired autonomy of the European juridical order[47], have led beyond the limits of the internationalistic container. And all this cannot be sustained without a decisive quality leap towards effective citizenship.

The Treaties bring with them an ineludible sluggishness and a statalist verticalism, in which citizenship appears to be *conceded* – because the European citizen is not the Lord of the Treaties, is not necessary to the Treaties themselves and does not constitute their presupposition: European citizenship is not the source of the treaties. The latter, it must be stressed, are due to the States, and therefore, if anything, refer back to the national *civis*.

This generates an asymmetry, and consequently the self-legislative circularity necessary for *recognition* does not arise. The citizen who stands "behind" the Treaties is the *national* citizen. The European citizen does not come into play unless she is involved in

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[45] D. Grimm *Does Europe need a Constitution?,* in "European Law Journal", vol 1 (3), 1995, p. 291.

[46] Ivi, pp.298-9

[47] The autonomy of the European legal system is traced back to the sentence dated 5 February 1963, case 26/62, *N.V. Algemene Transport en Expeditie Onderneming van Gend & Loos* c. *Nederlandse Tariefcommissie.*

questions that go beyond the Treaties and call for the supra-national dimension, for example when she has to recognize and appropriate herself of a constitutional charter. It matters little, at this point, what procedure and what contingent tool was used to produce and formally ratify the text of the constitution (even a Treaty, in accordance with the form assumed by our Treaty-Constitution). The existence of a constitution becomes independent of the nature of the juridical tool or of the source that actually enacted it.

The reflexive character of European political citizenship, by virtue of which the European but not the national citizen can assert that she decides about herself, is manifested by means of a Constitution. The European Constitution provides a remedy *for a paradoxical aspect*, according to which the great decisions on the future and on the set-up of the communities are always taken by the member States, through the Treaties, and consequently have only the "national" citizen as their reference point. In fact the national citizen (through the international juridical system) was regarded as the last-instance subject to whom the constitutional policy of the Union could be traced back. Now, the existence of the constitution could, if taken seriously, represent the first autonomous political act of recognition of the European citizen.

5. Citizenship as a reflex of the non-unique (multiple) order

If constitutional pluralism has any meaning, in the logic of institutional and political multilevel cooperation, as expressly mentioned in Art. 8, 1 *.[Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship; it shall not replace it],* then this pluralism depends on the fact that the European citizen and the *national* citizen do not exercise a *single identical political autonomy*, *but two* different ones, different by extension and goal. A person can belong to several *demoi*, or to several unions, but according to a principle (which needs to be defined) of *addition*.

In this perspective European citizenship, through the existence of the Constitution, effectively denies the hierarchical character of the "closed" legal order. Europe is not a normative system with one single, simple fundamental norm that prevails over (and replaces) that of each national system. Rather, what is produced is, if anything, a "cooperative" structure of the order, as per Art. 5, co. 2 *["Following the principle of loyal cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Constitution "]*. This aspect is certainly delicate and controversial. Two different circumstances appear to be relevant here. The first is the absence of an explicit norm of closure and of an organ officially endowed with *Kompetenz-Kompetenz*. This organ may implicitly prove to be the Court of Justice; furthermore, precisely the existence of a Constitution may, per se, turn out to attribute this position and this task to the aforesaid court without further ado or doubts. Indeed, it is hardly a random coincidence that the transfer of decision-making power to the Union, to new supra-national sources and powers, had been said to require a European Constitution for the very task of "subordinating these new sources and new powers to constitutional constraints" in order to "avoid insoluble conflicts between state constitutions and legal systems versus the community legal system" [48].

[48] Ferrajoli, *Dalla Carta dei diritti alla formazione di una sfera pubblica europea* cit., pp. 92-3.

The second circumstance is, historically speaking, the prevailing tendency to engage in coordination on the substantial plane of the activities of the Courts. In this respect, the conventional tradition of *fair play* has in most cases made it possible to avoid conflicts. Personally, I share the viewpoint put forward at the time of the Treaty of Nice, according to which the "logic" of these "issues" with regard to the relation between legal systems and between constitutional courts is such that "the higher legitimacy, which involves more than one statal subject, prevails over the legitimacy of the single subject, unless there be a generalised revolt, which, however, is unimaginable" [49]. But it is unlikely that this "deference" will be considered as anything genuinely different from a gesture of *elevation*: for once respect of fundamental values has been guaranteed, deference can certainly not be interpreted as bowing to the sovereignty of another party. On the contrary, it is an act of acquiescing in the broader reasons and ideals of justice, which are proper of an order that has been "deliberately" produced in accordance with one's own will and desires. Indeed, this order too appears as a coherent development of that which is proper to us, and it is endowed with a priority value. This is the meaning of "cooperation" among individual juridical orders, which should not need to defend themselves against the European constitution: rather, they should be concerned with defending the European constitution against partial and unilateral interpretations. The enlargement of the number of member states to include countries in the more eastern area will introduce an obvious imbalance of specific weight; moreover, it will bring about the acquisition of countries which, in some cases, may be economically and politically weak, but the wager for the future is to build on their as yet unexpressed potential strength. The internal multiplicity within the Union is capable of standing as a solid edifice only on condition that the constitution be defended against any attempt to divert political action unilaterally and in an unbalanced manner.

Therefore, the great democratic objective of the European constitution is not so much, or not only, that of overcoming the deficit of *accountability* inherent in the legislative institutions as, rather, that of succeeding in placing the European citizen at the forefront of the scenario, i.e. ensuring that the European citizen is the true beneficiary of the common action. Stated more clearly, what makes the difference is the idea that the subject "governed" by the European institutions is the European citizen and not the individual national citizen.

Therefore, given the current "prevalence" of the community order, this institutional system of cooperation leads to a *pendant* in citizenship. In this sense, the European citizen must not replace the state citizen, and viceversa: art. 45, co. 2: [2. *Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council and in the Council of Ministers by their governments, themselves accountable to national parliaments, elected by their citizens*"].

From the foregoing reflections it can be inferred that Europe is an institutional model which corresponds to a *proper* model of citizenship. The chosen institutional model is not the "exclusive" model of the European citizen but one that is more coherent with maintenance of identities. The institutional scene does not restrict itself to enhancing the European citizen, but also preserves the original aim of *gathering the peoples together*, through the direct presence of the member States among the various powers. That is to say, the European constitution by

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[49] G. Zagrebelsky, *Le giurisidizioni europee e la Carta dei diritti*, in *La Carta dei diritti fondamentali. Verso una costituzione europea ?*, in "Quaderni Forum", year XV, n. 2 (edited by B. Henry e A. Loretoni) , p. 98.

no means seeks to utilize the peoples as a mere vehicle for the unification of individuals on a universal scale, according to the post-Kantian variant of the project for perpetual peace proposed by Jürgen Habermas[50].

Looking at the question from the point of view of the legal order, the European order can avail itself of a fundamental *inclusive* norm: this is due to the fact that it does not express itself against the States but through the States and, likewise, not against the "European" people and its "parliament" but through it. If we wish to speak of a mixed sovereignty, it must be taken into account that this is no replication of the "King in Parliament" model, which imputes sovereignty jointly to two simple elements, both internal to the same social structure. Instead*, this is a division into two differently organized systems, each with its own distinct structure, one in the form of political society (future), the other in the form of State*s.

And the *primum movens* of the Union is none other than recognition of the juridical and political *difference* between the European citizen and the member States. The essence of this difference lies in the question of what it means to belong to the Union. The fact of belonging must always be the conscious result of a prior judgment of *compatibility* between the fundamental norm of the Union and the fundamental norm of the individual national juridical-political systems.

Seen in these terms, the fundamental norm of the Union will be an adequately reliable custodian of a project which each member state can by now recognise as a development of a coherent constitutional pattern (i.e. as a coherent development of its own constitutional aims). For this reason, even the building up of a European civil and political society can only be an *additional* space. It cannot be produced, even in a long term perspective, in such a manner as to replace (or prevail over) the national political societies. This would be certainly an illusion, but even more significantly, it would be a mistake.

On this matter too, the earlier ambiguity due to the internationalistic logic of the Treaties has been clarified. Whether one shares or disagrees with the concept, the logic of *dual citizenship*[51] is no longer a consequence of the facts, but is instead a consequence of a choice. Today, *dual citizenship* depends on the overall project of choosing the Union as a *single body but one having two heads*, which binds together in *a single multilevel order* the strategy *of the States* and that *of the (soon to be)* European *society*.

The idea of calling on all European citizens and States/peoples to take part jointly in the determination of the common policy line creates a pattern of reflected approaches (the Union maintains its character as a union of peoples and therefore asks the States and the nations to express themselves as macro-individual-subject in the intergovernmental space; at the same time it constructs the European space with reference to the citizens, as a European people, inasmuch as they are subjects and beneficiaries of the provisions, rules, and activities of the Union). Thus the system of *addition* opens up a dynamic pattern of competition and cooperation, which has nothing to do with the mere *opening up of the borders*. *And it is partly for this reason* that it cannot be associated with the rationalistic endeavours which, surmounting the obstacle of the individual "sovereignties", project their viewpoint towards a European constitutionalism, considering the latter as a homogenising stage, on the model of a

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[50] J. Habermas, *The Postnational Constellation: Political Essays*, ed. by Max Pensky, Cambridge Mass. 2001..

[51] The difference between ordinary second citizenship and European dual citizenship is mentioned in V. Lippolis, *La cittadinanza europea*, Bologna 1994, p. 61.

global society of rights. These arguments start out from a purely juridical, non-political constitutionalism, and move towards a universalism of citizens and rights. But Europe cannot be used to achieve this theoretical goal, nor can it be invoked as a preliminary image, as an antecedent of this movement or of this final accomplishment. In no way are we dealing with a pure universalism of individuals, allowed to flow from the national spaces on the European territory.

Cosmopolitanism, in its many variants, starts out from the presuppositions of individualism, universality and generality, which show, respectively, that the citizen of the world is a human being without any consideration of her community identity (family, society, state, nation, religion), or without consideration of the status she is awarded in society, and finally, she is a human being according to qualities (such as being a person) that call for recognition by everyone, by each and any of us[52]. This conception of placing the world at the centre of our horizon as the object of global regulation is a cosmopolitan idea. In this context, one frequently also finds suggested tools for the enactment of a "cosmopolitan democracy" and a world legal order that would be served by a parliament, judges, including a criminal court, and an "internal" police force[53]. The roots of these insistent proposals lie in the observation that the international order appears to be more regulated than it was in the past, and has a lesser tendency to fall prey to the anarchic autonomy of state sovereignties. Furthermore, the very principle of sovereignty is conceived as a hindrance to international control of the domestic affairs of the states because, so the argument runs, it would preclude individual rights and cultural rights from being protected (in their universal character) through the action of norms that rise above the powers and prerogatives of exclusiveness and independence of the states themselves. It is argued that sovereignty incorporates "a principle of non-intervention", so that the sovereign state possesses "final authority" over the "territory and people, and no outside state or agent has any legitimate claim to interfere with the decisions and actions of that authority."[54]. The aim to be pursued, in this perspective, is held to be universal self-determination in a global democratic state.

Europe is moving in exactly the opposite direction, in contrast to a widespread belief. The reason is precisely the persistence of sovereignty that can be traced back to the member States, and the mixed logic according to which Europe is structured: Europe does not believe in a universal citizenship, and not even in an "original" European citizenship. Yet at the same

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[52] Th. W. Pogge, *Cosmopolitanism and Sovereignty*, 103 "Ethics", 48, 57 (1992), pp. 48-9, points out that: "individualism: the ultimate units of concern are human beings, or persons - rather than, say, family lines, tribes, ethnic, cultural, or religious communities, nations or states. ... Second, universality: the status of ultimate unit of concern attaches to every living human being equally - not merely to some subset, such as men, aristocrats, Aryans, whites, or Muslims. Third, generality: this special status has global force. Persons are ultimate units of concern for everyone - not only for their compatriots, fellow religionists, or such like".

[53] D. Held, *Democracy and the Global Order. From the Modern State to Cosmopolitan Governance*, Cambridge 1995, p. 279; but among the others J. Habermas, *The Inclusion of the Other. Studies in Political Theory*, Ciaran Cronin & Pablo De Greiff eds., Cambridge 1998.

[54] I.M. Young, *Inclusion and Democracy*, Oxford University Press, 2000; R. Post, *Between Philosophy and Law: Sovereignty and the Design of Democratic Institution*, *Working Papers,* published by the Institute of Governmental Studies, at the web address: http://www.igs.berkeley.edu/publications/workingpapers/WP2000-12.pdf

time, it is being constructed as a system in which sovereignty is shared, and is exercised in a form that is not purely "liberistic"(anarchical).

This argument can be divided into three fundamental reasons, linked to the content of citizenship. A) The first is that Europe does not place the individual at the centre; B) the second is that Europe is aiming towards a special form of government of the whole; C) the third is that Europe does not interpret rights in terms of guarantees, but in institutional terms, and thus as "objectives".

6. Individuals and citizens.

A) Like cosmopolitanism, which in some cases can be quite strongly radical, even modern contractualist constitutionalism and veil of ignorance neocontractualism (cf. Rawls in *A Theory of Justice*) , presuppose methodologically or substantially that the argument starts out from individuals. The aim, so the argument runs, must be to search for solutions to the destiny of individuals in society, and such solutions must be rational in terms of justice and fairness. However, Europe not only does not start out from a mental or rationalistic experiment: it does not even proceed from the vantage point of individuals. Naturally, the fact that the constitutional Preamble acknowledges "reason" and enlightenment values as well as humanist concerns is not linked to the French (revolutionary) rejection of "social polities" intermediate between national unity and the individual (a rejection also of their allied privileges). Europe does not conceive of the single individual as the *cognitive premise* that enables the Union to be comprehended. And the "spirit" of the Union is not that of individuals: the value of individual autonomy cannot be called into question[55], but it is neither the "paradigm" nor the driving force, in contrast to its role in modern constitutionalism. Besides, even contemporary European constitutionalism is inspired by the social or solidaristic temperaments of liberal individualism. But in the case of the European union it is not just a matter of a change in ideology. Rather, it is truly a case of a project that has been "thought of" from the point of view of the political structures, and once again from the point of view of the peoples.

Moreover, and coherently, unity in Europe does not refer to individuals, and does not even require that they should be absorbed into the "community". It does not call upon them to consider their "Europeanness" as more "essential" than any other prior bond, nor that they should think of themselves as being, first and foremost, "Europeans". It does not require that their vision of themselves as "European" should assume priority as compared to many other representations of themselves. And it is partly for this reason that Europe lacks the driving force a movement towards community republicanism: Europe does not rest on the virtues of single, ideal statesmen projected directly into the *res pubblica* and into its ethic of the common weal. More realistically, the multiple character of the loyalties and allegiances is compatible only with a fluid and open interpretation of the European world. Europe is not and

[55] Of course, it is not in question, for example, that- as such- rights included in the Charter (part II, Constitutional Treaty) "are also a signal to the outside world of the central place that the individual takes in our political system" (I. Pernice, R. Kanitz, *Fundamental Rights and Multilevel Constitutionalism in Europe,* in Walter Hallstein Institut, Paper 7/04, March 2004, p.7). But this would be too poor an added value of the European building, were it just the confirmation of a traditional guarantee of individuals and of individual rights, already given in the legal life and culture of the Member States.

cannot be a community, in the sense of a community that cultivates ethics of identity, or gives rise to a common and unifying culture, or precedes, shapes, structures and connotes the individual[56].

Europe does not depend on a metaphysical destiny and is not the fruit of biological-geographic determinism. For this reason it needs to be constituted. But it does not start out from the individual, and from the idea of reinforcing her "private" protection even further, nor even is it prompted by the mirage of the ethical-cultural priority of the community.

Europe appears as a second-degree association, a union of societies, even if it does not merely require simply a choice of state, proposing instead a criterion of citizenship for its members. And this is another reason why it is not a question of individuals[57].

This fact of being neither *liberal* nor *communitarian* is the only realistic manner in which Europe can propose to exist. It provides an indication that on the hand Europe does not place itself in the perspective of the individual, while on the other, there is no intention of falling into the closed ethical and identity-oriented essentialism of a "community".

This sheds further light on citizenship. The reason why citizenship acquires a new and further meaning is that within the Union it offers a different way of defining a relation among peoples, rather than a relation between individuals, both included and not included. To define the Europe that is being set up, not only has it been essential to regulate the *access* of individuals, as is the case for the national States, for the member States. Here the situation is different: for here we are dealing with other communities, according to the dynamics of enlargements and extensions. In a certain sense, citizenship is an incorporating movement, which is advancing towards other borders, rather than having a merely excluding definition. Europe is not so much viewed in terms of a stationary geopolitical place that opens or closes its gates as, rather, a *moving political* geography: one that over the last fifty years has gone towards new member countries and has even advanced inside their borders. And given these circumstances, if individuals are not the premise, then in effect they are not even the goal. The institutional goal is still the union among peoples. Such a union is extraneous to modern constitutionalism, even if it is present in universal peace projects *à la* Kant. But equally extraneous to the cosmopolitan orientation: it is for this reason, I believe, that it can more credibly be proposed in a "constitutional" guise.

By overcoming the individualistic premise, Europe can thus respond in an original manner both to the normative demands of a universalistic cosmopolitanism and to those of a community republicanism. Europe can reply to the *former* by arguing that it is necessary to go beyond the abstractness of the rights of human beings, independent of citizenship and borders. This abstractness must be given an *institutional* elaboration, seeking a connection with the political will and the support of the single "polities". Moreover, Europe can reply to the *latter*

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[56] I would mention, first of all, F. Toennies, *Gemeinschaft und Geselleschaft*, *Grundbegriffe der reinen Soziologie* (1887) Darmstadt 1988), but mention should also be made of contemporary "communitarist" theorists such as Ch. Taylor, *Sources of the Self*, *The Making of Modern Identity,* Cambridge 1989; Id., *Multiculturalism and the Politics of Recognition*, Princeton 1992; or such as M. Walzer, *Thick and Thin*: *Moral Argument at Home and Abroad,* Notre Dame- London, 1994 or Id., *Spheres of Justice : A Defence of Pluralism and Equality,* Oxford 1983.

[57] This is not exactly the same as saying that we are dealing with a federal constitution: it is rather evident that even a federal constitution like that of the United States is a constitution that has individuals as its premise, although the political-juridical organizational model that it chooses on the plane of powers is that of the federation of States.

precisely because it does not view the situation in terms of individuals. Europe's reply is that it holds the *national acquis* to be the premise for the community perspective, that it seeks to boost common "political" values in the Rawlsian sense that is compatible with different ethical-cultural values. Europe states its awareness, in other words, that this objective is, if anything, glo-cal and requires realism; furthermore, Europe cultivates national peculiarities but as places of external interaction, places that are permeable and porous.

7. Attention to the whole.

B) The *constitutional* definition of European citizenship can be understood as a response not to the decline of states – a decline it is difficult to ascertain in a non-controversial manner – but to the demise of the illusion of the "free-market" as a criterion of *relations* among states. If anything, the European constitution concerns new relations among states, rather than representing the ontologic negation of the old statal political units.

The European constitution withstands, adequately perhaps, the rise of a single, monolithic ideology of planetary *governance*[58]. Constituting Europe means refraining from the global syndrome inspired by the indomitable nature of spaces all of which appear to be adespotic and acephalous. Swimming against the current, Europe responds to the globalistic paradigm of the abstract universe, devoid of ideologies, walls and borders. Today, united Europe means a sort of "non-current" and constraining countermeasure against the total loss of the centre: it reconstitutes a centre of gravity. This does not mean that the result has already been achieved. But the European Constitution in effect expresses this normative accent, and this "historical" function.

These premises also explain in what sense Europe proposes something like a European citizenship, even though it is not driven by any methodological or substantial individualism, either with regard to the unity of individuals or to that of the States.

European citizenship represents a resistance, first and foremost, that is to say a countervailing element, against *universal citizenship*. The latter is the enlightenment-inspired, cosmopolitan effect of reducing the inhabitants of the world to citizens of the world, of nationals to human beings. In contrast, the quest for a soul for Europe follows a different path. Thus on the one hand it accepts the Kantian invitation, to think of universality as an essential guiding idea of our pure reason, but at the same time acknowledges that a concrete universality needs to be to day more structured, not flat: a "complex" form of the world, i.e. a

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[58] An important reference is still J. Rosenau, E.-O. Czempiel (eds.), *Governance without Government: Order and Change in World Politics*, Cambridge- New York 1992. The idea of a "planetary governance" appears to be sometimes an abstraction, or a justifying ideology, which tries, though, to explain the reality: in which it is already clear the illusoriness of a world project, of a dominion over the territory, over the planetary economy or the culture, that can be attributed to identifiable actors and institutes, as and in the sense in which the States are institutions. For an analysis of the status of governance and of its future, also in relation to the "political" strength of the national States, see F. Andreatta, *La politica internazionale nell'era della globalizzazione*, in "Rivista italiana di scienza politica", 2003/1, pp. 3-30, who appropriately underlines the "non globality of globalisation", and the ensuing problems of coexistence between areas that are internal and external to the "global world". Cf. also R.O.Keohane, *Governance in a partially Globalized World*, in D.Held and A.McGrew (eds.), *Governing Globalization. Power Authority and Global Governance,* Cambridge, 2002. However, for the purposes of the role of Europe in relation to global developments and the different regional relations, M.Telò (ed.), *Europe, New Regionalism. Regional Actors and Global Governance in a Post-hegemonic Era*, Aldershot, 2001.

form embodying supra-nationality. Still Europe rejects the extreme idea of a "single" world order which would in reality conceal a fairly explicit unilateral, imperial dominion, culminating sooner or later in what Kant feared as a "soul-less despotism" [59].

EU proposes itself as a player in the global scenario: a different player compared to the sovereign State in an anarchical world[60]. Moreover, if globalization phenomena are phenomena of the de-territorialisation of politics, law and governance[61], then Europe is a phenomenon of re-territorialisation. It is a means of restoring the centre of gravity and therefore a new operation of artificial order. European citizenship is inconceivable either in a only "Westphalian" world[62] or in a world that is merely a prey to "globalization" effects.

As I mentioned earlier, it is evident that those who constitutionalize Europe do *not* believe in a universal *civil* society, and therefore do not believe that *individuals* are final-instance socially disembodied entities. And as I showed in the concluding remarks of the previous point, they do not believe in the destruction of the "fatherlands" and of the "peoples", i.e. they do not aim to substitute and supplant the old with the new that does not exist. Rather, they are building an *Aufhebung*, and therefore they also intend to conserve.

On the plane of rights, the fragmentation of citizenship in a global world consists in reducing the fact of being a citizen to planetary acquisition of the greatest possible number of emancipations, faculties, powers. As should be clear, in this perspective citizenship is totally emptied of its meaning, and it becomes a wholly useless category: *a category that is undergoing an identity crisis, rather than the tool or the reflection of any identity[63]. The*

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[59] The bond between peoples aims in Kant at a "Weltrepublik", conceived of as the good universality, an ideal end that must not be confused with a universal monarchy. However, it is relevant that many times, and even in his *Zum ewigen Frieden,* Kant did acknowledge the risk that, as a matter of fact, concrete cosmopolitism could turn in a risky and undesirable result: the "fusion" of all States "by one power overgrowing the rest and passing into a universal monarchy, since as the range of government expands laws progressively loose their vigor, and a soulless despotism, after it has destroyed the seed of good, finally deteriorates into anarchy". And, Kant continues, "*nature wills* it otherwise. It makes use of two means to prevent peoples from intermingling and to separate them: differences of *language* and of *religion,* which do bring with them the propensity to mutual hatred and pretexts for war but yet, with increasing culture and the gradual approach of human beings to greater agreement in principles, leads to understanding in a peace that is produced and secured, not as in such a despotism (in the graveyard of freedom), by means of a weakening of all forces, but by means of their equilibrium in liveliest competition" (I. Kant, *Toward Perpetual Peace,* in *The Cambridge Edition of the Works of Immanuel Kant. Practical Philosophy*, transl. and ed. by M. J. Gregor, Cambridge 1996, p. 336). We have a complete and persuading explanation of kantian cosmopolitanism in G. Marini, *Tre studi sul cosmopolitismo kantiano*, Pisa- Roma 1998.

[60] See R.O. Keohane, *Ironies of Sovereignty: The European Union and World Order*, in «Journal of Common Market Studies», 40, 4, 2002. Also cf. R.O. Keohane, *Ironies of Sovereignty: The EU and the US*, in J.H.H. Weiler, I. Begg, J. Peterson (eds.), *Integration in an Expanding European Union. Reassessing the Fundamentals*, Malden (Mass.) 2003, pp. 307-30.

[61] See generally the contributions in D. Held, A. McGrew, D. Goldblatt, J. Perraton, *Global Transformations*, Stanford (Cal.) 1999.

[62] The changing of the world also given the role of supranational or international institutions is discussed, for example, in G.M. Lyons, M. Mastanduno (a cura di), *Beyond Westphalia? State Sovereignty and International Intervention*, Baltimore 2000.

[63] The global village of a population enjoying abstract *possibilities* does not have an external aspect, does not have an other than itself; it occupies the entire space available for the human race, ever possible ethical-political distinction, it grows thinner and faces the enormous offer of opportunities: an offer that seems to render vain the quest for a world "of one's own". In the global world one can obtain "everything", and ever project is contained; therefore every choice is possible, nothing is excluded,

obsolescence of citizenship resides precisely in this point. Not so much in the fact – itself indisputable, albeit trivial - that the global space is given no *external* place, but above all in the fact that in the "entelechy" of universal citizenship one cannot even discern any *internal* place that is protected to the point that it can be thought of as "one's own", shaped and safeguarded as the fruit of our (albeit mobile, stratified and open) participation.

The old world of sovereign states, from the horrors of which the Europeanist adventure started out, and the global world, both declare their abstention and their impotence with regard to the governance of the "whole" [64]. European totalitarianisms were the demonstration of the inadequateness of a liberalism that entrusted *prosperity* to an individual and national dimension, forgetting about the *common space*. For this reason that kind of liberalism is constantly exposed to the risk of the whole being occupied by a part that arbitrarily transfigures itself into an emissary of totality[65].

But through the "constitution" the *whole* appears only as a "perspective", not as a sort of higher reality; it does not indicate an empty space but a regulated space and a framework of common interest, which the parts are conscious of contributing and belonging to. Above all, its meaning cannot be appropriated unilaterally by anyone in particular. In this manner, the whole ceases to be conceived as a *res nullius*.

European citizenship thus declines a particular profile of inclusion: in actual fact it does not make "individuals" into "citizens", which would chart a new border-line to mark out the distinction versus the foreigner or the stateless person, or would endow individuals with some sort of allegiance. On the contrary, it confirms the prior and priority national allegiances, and it refers to a geographic, political and economic framework that in overall terms is already drawn up by "sovereignties", is occupied by inclusions/exclusions, and is

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everything is included. This is naturally far from being true, but it forms part of the *humus* the global citizen hopes to find himself living in.

[64] The respective ideologies display a surprising continuity. The global world is a sort of anarchical world by necessity -hardly by choice-, because in such a world it is impossible to govern the whole, the entire planet. The Westphalia world does not intend to govern everything, and starts out from individual-statal actors that do not once again propose to be the guide of the world but rather the satisfaction of one's own *self-interest*, elevated to legal personality on the scene of crumbling international public law. Seen from a certain vantage point, there is no-one who can see the global world from the outside, from an outside that does not exist, and in the Westphalia world no-one can claim the right - nor even does anyone even aspire – to assume the perspective of the common whole. Common to whom? Globalization leaves individuals horizontally "free" on a planetary market of expectations, needs and interests, in the same way that the statal actors of the previous "westphalian" world were free individual and non-aggregatable actors on the scene of the planet. European citizenship would be totally contradictory in both worlds.

[65] In mentioning attention to the whole, I by no means intend to evoke the Hegelian concept of totality which, by contrast, is an ambiguous, metaphysical and hard-to-define concept. It has been used in various divergent ways and was at the centre of debate during the early decades of the twentieth century in thinkers such as Theodor Adorno, Max Horkheimer, Herbert Marcuse (but also in Karl Korsch or in Georgy Lukacs). For the critical theory developed in Frankfurt, the Hegelian notion of totality was a means to "see" the relations between culture and civilization, between reason and politics, between classes and power, against the absolute and organicistic unity of blood-and-land declined by totalitarianism. And in any case its use had a critical function in such diverse thinkers as Karl Mannheim on the one hand and Lukacs and Korsch on the other. On this theme, allow me to refer the reader to G. Palombella, *Ragione e immaginazione. Herbert Marcuse 1928-55*, Bari 1982, sp. pp. 182 ff. And see, for Karl Mannheim, *Ideology and Utopia*, New York-London 1936; G. Lukacs, *History and Class Consciousness*, transl. by R. Livinsgstone, Cambridge Mass. 2003.

already inhabited in every corner of the territory by citizens who enjoy exclusive borders. Thus with respect to this overarching whole, the result of European "citizenship" is not exclusion, for this had already been acquired, it was already the prerogative of each member State. Rather, European citizenship calls on the "citizens" of each of the "demoi" to consider the "external" as a place of common political regulation.

Admittedly the presence of individual *demoi* and of national orders endowed with originality and exclusiveness, as well as constitutions of their own, implies that "constitutional tolerance" and everyday choice should be the hallmark or the presupposition of the Union. To this one may add that since the paired terms constitution-citizenship start out from the assumption that the "whole" is not an "absent" space, a *res nullius* or an unthinkable "res", they enrich mere *tolerance* as a "modus vivendi" among constitutional "individuals" (i.e. among states-nations) by supplementing it with the *Union*, as the vantage point from which to conceive of the position, life and prosperity of the individual parts. Seen from this angle, the Union appears as something more than a perspective: it also appears as a method of coexistence.

Besides, this appears inevitable if we desire that the application and interpretation of the Charter of Rights, which is so central for European citizenship, are given a common meaning. The lines along which this "common" meaning should be shaped are a challenging commitment for each of the "peoples": for instance, if it is true that the British must fit their image of values to a presupposed conception of dignity that seems to have been drawn from the German charter (or even from the 1948 universal charter), it is equally true that many national citizens have had to become accustomed to undergoing regulations produced partly by "other" people, as Weiler has pointed out. Succeeding in assuming a *point of view internal* to the whole and not merely to one's own national system is essential in order to "see" the positioning of one's Self on a map that contemplates common advantages and burdens.

From this it follows that the European citizen is the *elevation* of the national citizen to the position of being a holder of the "European" point of view, which is not "her own", nor should it be, but it is a point of view she cannot reach unless she starts out from "her own".

It is hard to deny that Europe does *not* want to dictate – nor could it dictate – a new unitary comprehensive doctrine that would be valid as the underlying ethic for all the aspects of the life of each people and each individual. But, by the same token, one could hardly deny that Europe proposes a charter of commitments that identify an area of *political overlapping* which does not invade or absorb the different ethical-cultural identities; therefore Europe demands that each person be able to reach it by journeying along her own route, that each person can individually and by herself elaborate and "see" the substantial possibility of sharing this "political" obligation.

If we really wanted to represent the new condition that expresses the development of European citizenship, one could think of the fact that the European citizen simply acquires the ability to see her own "aquarium" from the outside, her own form of life, recognising it as set in a new positive relation regulated together with the other forms.

This can be done by trusting in an *affinity* among European peoples, although this affinity is a somewhat vague concept, purely a prospect, a relative concept. At the same time, what we are dealing with here is an argument that can just as easily be upheld as it can be contested and radically refuted, as soon as one assumes other and legitimate vantage points. In effect, affinity is not a mere un-problematic and pre-constituted 'given': instead, it is the product of *knowledge* intentionally *oriented* towards the quest for bonds and continuity. This

is an "interpretive" concept, which is none other than the projection of a gaze capable not simply of *finding* the whole but indeed of *weaving its very fabric.* On the issue of the constitutional legal order, Ronald Dworkin has indicated that this is actually the true key of the legal system, and of the complex "integrity" of the order. *Integrity*[66] is to be regarded as an interpretive *product*, not a static historical datum devoid of any evolution. This much can, I believe, be said of the hotly debated affinity of European peoples. Since the historical premises make sense only if they are conceived in relation to their future development, the role of the culture of European citizenship will thus be as important as the constitutional text.

Accordingly, we are dealing with an "interpretive" fact if, in contrast to the "national" citizen, the European citizen can assume the position of political affinity (it nothing else, at least with reference to an area of essential overlapping of constitutional elements).

This elevation to the point of view of the whole would certainly not be easy, or perhaps would be quite impossible, if it were not for the presence of the freedoms and faculties of European citizens, proposed as citizenship rights, in the strict sense, as early as the Treaty of Maastricht and effectively already available. Such rights are fundamentally "optical" and concrete "interpretive" presuppositions, infrastructures of citizenship, means to render it possible, i.e. means for the conceivability of the whole, rather than being individualistic claims with little added value. Otherwise put, rather than being guarantees of the abstract spheres of freedom or of an individual existence free from domination and interference, the strictly "European" rights that are intended to be citizenship rights are "commodities" that allow Europe to be "frequented", instead of simply increasing the bread-basket of individual powers. The enable each one of us to re-conceive the horizon of our real capabilities (to use the well-known expression introduced by Amartya Sen)[67], on a scale that extends beyond the limits of national citizenship. Rights must be linked to the existence of a real "opportunity" for them to be exercised, and accompanied by possession of the individual resources necessary to draw advantage from such opportunity[68]. This transition from rights as simple freedoms to rights as effective resources for "acquiring" Europe cannot come about without the political elevation of European citizenship[69].

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[66] R. Dworkin, *Law's Empire*, Cambridge (Mass.) 1986, chap. II (devoted to *interpretive concepts)*, and chaps. VI andVII (devoted respectively to *integrity*, and *the integrity of law*).

[67] ***I refer to the fact that what is at stake is not a question of whether a "formal" individual right is available or not, but rather of whether, in the actual present-day conditions of citizens, what the latter "can do", become, want, or produce is more in the new overall situation than that which they were capable of doing previously; whether, that is to say, the overall resulting world is an increase in the citizens' opportunities for achievement (Among the works by A. Sen, for example,*** **Development as Freedom: An Approach*****, New York 1999.***

[68] R. Dahl has added opportunities and resources as a *pendant* of rights, in addition to the question of duties, in his *How Democratic is the American Constitution?* cit., pp.150 ff.

[69] Although the appearance of this elevation can be roughly traced back to the plane of every traditional constitutional adventure (at least insofar as it is the creator of a "res publica" as a common result), the difference is, however, profound and significant. And neither the *civis romanus* with the concessions of the *Constitutio antoniniana*, nor the United States citizen, can be viewed in this same light.

8. Rights as goals.

C) The European constitutional innovation undeniably also contains the classical project of the limitation of power. As stated by Weiler: "Essential plank of the project ofd European integration may be seen, then, as an attempt to control the excesses of the modern nation-State in Europe, especially, but not only, its propensity to violent conflict and the inability of the international system to constrain that propensity" [70]. This vision of Europe is opposed to that of Europe as a macro-State. It is a question of the supra-national and community vision. On the overall plane, "supranationalism" replaces the "anarchical" vision of international balance, once more proposing constitutionalism as a form of limitation. Thus "the challenge is to control at the societal level, the uncontrolled reflexes of national interests in the international sphere" [71].

What I would like to underline is the importance of the other "forgotten" aspect, that of the *constitution of power*. We can define it as the positive aspect of the Union and of supranationalism; it is the aspect that is associated with the pursuit of the founding ideals, and above all with a particular manner of pursuing such ideals.

The traditional narration of liberal constitutionalism would be unable to explain this feature of contemporary Europe. To some extent, this would be impossible because the Union cannot be understood as a useful watershed between a past of subjugation and a future of emancipation. Nor would it be worthwhile defending rights that are already adequately safeguarded within the member states.

Rather, the spirit of the European constitution is that of a veritable act of re-proposing power, but on new bases, championing a strengthening of its structures and an enhancement of the line of horizon of its authority.

Consequently, what is needed is a more advanced perspective. Firstly, through the Union, Europe should resume control over its own objectives, which it would risk losing in the new "global" conditions of the economy and the market. Secondly, Europe should set up a constitutional link between individual rights and objectives of the government. Once the conditions of non-interference in the independence of individuals are assured, it can then no longer be held that the traditional rights of liberal-democratic constitutionalism are a sort of *self-executing* heritage. For example, freedom of speech cannot realistically be regarded as a sort of freedom from censorship, simply a situation whereby government officials abstain from pronouncing a ban against any satanic verses, or refrain from taking action against a *street corner speaker*[72]. Nor can individual property be considered any longer as an individual Lockean resource depending on nothing but the "work" of the single individual. Each of these rights can be maintained only in a regulated society that shoulders both the burden of the

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[70] J. H. H. Weiler, *The Constitution of Europe: "Do the New Clothes have an Emperor?" and other Essays on European Integration,* Cambridge 1999, p. 250.

[71] Ivi, p. 251.

[72] On this I refer gain the reader to my *Costituzione e sovranità. Il senso della democrazia costituzionale*, cit. . And O. Fiss, *Liberalism Divided. Freedom of Speech and the many Uses of State Power,* Boulder- Oxford 1996.

costs[73] and the actualization of their contextual significance, as an explicitly pursued *collective end*. It is significant that this system-based horizon of "rights", in contemporary democracies, casts an *out-of-date* feel on the most original of the intuitions inspiring the makers of the constitution (in this case, the American founding fathers), namely the idea that one of the important features of constitutional rights is that "they are guaranteed almost entirely by imposing constitutional *limits* on the government. The Constitution tacitly assumes that citizens themselves will somehow possess the opportunities and resources necessary in order for them to act on their rights"[74].

The change of perspective resides in the entirely *artificial* character assumed by rights in contemporary societies. For these societies, *it is not sufficient for rights to be awarded deontologic protection, or to be elevated to an uncontroversial juridical document*.

Surprising, however, European democratic juridical theory has often shown itself to be almost insensitive to this change, and has instead interpreted the value of the Charter of Rights, through the lens of a "legalistic", rationalistic vision, one that emphasizes the fact that the Charter "introduces limits and constraints on the European decision-making organs from which a large part of our law now derives" and that "it contains rights and guarantees that risk falling into abeyance if our [Italian] Constitution is tampered with" – i.e. if the constitutions of the individual member states are tampered with[75].

Naturally, it is not our intention here to ignore the value of guarantee-limitation included in the constitutional norms. It is important for the function of a Charter to include the protection of rights even against the power itself constitutes: it is true that fundamental rights, therefore, can be seen also as "negative Kompetenznormen" referred to the EU institutions.

But if it was simply a question of addressing this problem, then the Union would sound rather incomprehensible. Seen from outside, Europe already appears to by hyper-protected by its "long" constitutions, and its democratic States prove to be among the most advanced places in the world as regards protection of the citizen.

Equally disputable, or at least not sufficient, is the idea that the values and rights enshrined in Part II of the proposed European Constitution can truly be regarded as "minimal parameters – from prohibition of the death penalty to social and labor rights – for countries that seek to join the Union"[76].

Rather, the European Constitution sets particularly elevated parameters, not only by virtue of providing for "new" rights, for example in the sphere of bioethics and biotechnology, or the environment, but also in the sphere of social rights. Social rights occupy a rather broad and well defined position, imposing duties of solidarity, and commitments that are partly a question of principle and partly specific, from the battle against social exclusion and poverty to the duty to guarantee social services and social housing (Art 34 charter), as well as labour legislation protecting against unfair dismissal (Art. 30 charter), and so forth . It

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[73] On the issue of the public costs necessary for the safeguarding of "negative" rights, S. Holmes, C. R. Sunstein, *The Cost of Rights*. *Why Liberty depends on Taxes*, New York - London 1999 .

[74] Dahl, *How Democratic* cit., p. 143.

[75] Ferrajoli, *Dalla Carta dei diritti alla formazione di una sfera pubblica europea* cit., p.93.

[76] *Ibid*.

can be said that they are "expression of common values" that "will give the policies of the European Union orientation and legitimacy", confirming that the Charter "largely exceed the defense of the individuals' 'space of liberty'. The right to education (art UU- 14 CT) and the rights regarding solidarity (Title IV of the Charter) show that fundamental rights also compel public authorities" to positive action[77].

I think we need a "contemporary" manner of looking at rights, which becomes welded with the spirit of European constitutional citizenship. It is impossible to think that we are dealing here essentially with the juridical limits on policies enacted by the states (partly also because, as I mentioned earlier, it is impossible to consider European citizenship as a process of liberation).

Part II of the Constitution, therefore, is not only a protected area, a countermajority area, supranational, and embodying an undecidable and uncontestable political content. To be sure, even in European order constitutional rights are the separate and co-original quest for justice that affects sovereignty and power. But they are also something more. They are internal objectives of common power, not simply juridical guarantees of the citizen *against* it. This means that the Union is established as a divided "power", that is set up with its own internal structure created with a view to those objectives, which are not a mere question of arbitrage of the safeguarding of individual freedoms.

I must rapidly reconstruct the premises of my conclusion[78]. Modern and enlightenment thought, working partly through the constitutions, addressed the issue of subjective, individual rights, in opposition to "political" law: and thus disrupted the original balance of the medieval community between *ordo iuris* and *gubernaculum*, between the objective and unalterable fundamental law of the land and the sovereign law, the latter being a tool reserved to the "power". Individual rights were conceived as a sort of premise for the revolutionary upheaval and overturning of the situation, as a critique of power, as it were, and naturally as a constraint. This tension was the node of western juridical civilization from the modern age onwards. In continental Europe, in the *Civil Law* countries, this tension was resolved into the continental European State based on Law, in favor of the law as a sovereign product. This made subjective rights the weak side of that contraposition especially on the juridical plane: the legislation became the foundation and the ultimate source of positive law, and thus eventually of individual rights as well. The autonomy of the source of rights (their co-originality with respect to the legislation) did not emerge again until after the decline of the legislative-parliamentary State, and with the appearance of the twentieth-century contemporary constitutions. It was the Constitutions that restored the original tension, attributing reciprocal independence to the legislation and to rights, a status quo of equi-

[77] See I. Pernice, R. Kanitz, *Fundamental Rights and Multilevel Constitutionalism in Europe,* in Walter Hallstein Institut, Paper 7/04, March 2004, p. 8, where the authors also note that "a few provisions of Part II (…) guarantee rights only in the cases and under the conditions provided for by Community Law and/or national law and practice" (artt. 9-10, 14, 27-28, 30, 34). These provisions according to the authors make clear "that the objective character of these rights as values prevails over their function as subjective claims in individual cases" (*Ibidem*, p. 9). In my opinion, however, also the general system and function of the rights in the Constitutional Treaty imply rights be meant eminently as goals rather than as claims.

[78] I have addressed this point in greater detail, and built up a structured general theoretical account of rights as *goals*, in my *L'autorità dei diritti. I diritti fondamentali tra istituzioni e norme*, Rome-Bari 2002 (G. Palombella, *The Authority of rights. Fundamental Rights between Facts and Norms,* forthcoming).

ordering and equipollence, a reciprocal and equal juridical force. Since rights have enjoyed the same constitutional source as the legislation, they can oppose the latter, and seek to act against it[79]. And in my opinion, this is not yet the end of the affair.

Normative competition (between democracy and individual claims-guarantees) has been interpreted in the style of pairs of opposites, so that the force (and the meaning) of rights emerges only as the *negation* of the powers of the majorities and of what are by definition the "contingent" aims of the collectivity. In effect, as Dworkin argued first and foremost, by influencing the intelligentsia of the European left (including Habermas), rights do not actually have a teleological impact (they do not point to common ends) so much as a deontologic force (they indicate only the imperatives of justice vis-à-vis the individuals). They are not themselves a goal, but a protection designed to act as a breakwater against the action of the government and the established powers.

When speaking of fundamental rights this vision of things appears to be somewhat old-fashioned and therefore insufficient. The fundamental character of rights such as those provided for in the European Constitutional charter cannot simply signify a relation of balanced antithesis set in opposition to the *gubernaculum,* an action of justice, the premise of a judicial action against the invading utilitarianism of the common good, or the paternalism of parliaments.

In this matter, European citizenship displays an explicit historical role and a tone that is absolutely unique: the *political* matrix of this citizenship is indivisibly entwined with the dignity and the quality of life and with the principle of solidarity. Europe establishes that political citizenship rests on a constitutional source, but depends on social citizenship: just as democracy is a function of the preliminary resources of freedom and of enjoyment of fundamental commodities and means of subsistence, from education to labor to health. And this is precisely the test bench of the European "gubernaculum": it all depends on the extent to which Europe succeeds in effecting a juridical and political thrust towards *common objectives which, however, are rooted directly in the social-political area of the member countries and for which the potentially available resources are not, for the moment, resources on a European scale, but rather on a national scale*.

The European constitution, through its Charter of rights, aims first and foremost to exert an influence in the sphere of ideals, of harmonisation, although strictly speaking the Union cannot lead to any kind of intervention in non-community matters. But the II part of the constitution effectively introduces the aims of power, demanding that the agenda of the institutions be largely absorbed also by policies regarding those "goods" that are linked to individuals in the form of "rights".

The purely juridical-jurisdictional idea of rights (as claims) would not have needed European Constitution: what makes the latter valuable is that rights are seen as part of the common values, as a matter of the whole, which exceeds the single territories of Member States, and is not just a problem for each State taken in isolation: this is true also because no State authority can, on its own, control important causes, effects and events, which, although relevant, are nonetheless beyond its spectrum of action. And more, rights are directly an institutional concern, which as such has to be addressed by the political-economic decisions of the States. If it is true that in some cases the constitution appears to be a representation of the achievements that are already established in the European juridical civilization, the

[79] For a partly coincident picture, cf. G. Zagrebelsky, *Il diritto mite*, Turin 1992.

meaning of their Europeanization, as a first step, and then of their constitutionalization as a subsequent step, lies in the creation of a new *political commitment* regarding such achievements, i.e. the creation of a support and a guarantee by all European peoples.

One can point to a proof of the plausibility of this argument. What would happen if we were dealing, instead, with the constitutionalism of rights-claims, understood not as *goals* but as *side-constraints* of public policy? The definition of a very elevated number of fundamental rights by means of a constitutional order would place us in the paradoxical situation of reducing citizenship to a passive, non reflexive and non deliberative condition: the greater the number of rights considered as fundamental and universal conditions of the quality of human life, the less would be the deliberative power and the area on which the latter could be exerted. The notable and extensive series of rights in the Union would risk being translated into a classic *marginality* of political rights in the European idea of citizenship. The European civil society that could be built up would be based on a Europe composed only of *technocracy* and *rights*. Thus on the one hand an administrative regulation of efficiency, and on the other a guarantee of "justice", administered by the Court.

In this hypothetical scenario, after the Charter of fundamental rights and after the constitution, the substantially legislative role and the priority of the Court of Justice would be at risk of elephantiasis. This would produce a "perverse" effect, the real blockade of the reflexiveness of political rights within European citizenship and, finally, it might produce a significant friction between justice and politics, including in relations between the Union and the member States. Looking at rights just as this pre-fixed individual guarantee against public institutions, even the concept of "belonging" would loose the sense of supporting ends. Even the disputed democratic deficit would no longer be a problem of institutional organization. Instead, it would be a *deficit induced by rights*.

In a certain sense, "more rights and less democracy" could, in the eyes of some, have been the slogan of the new European world, a slogan whereby a necessary evil is transformed into a virtue, solving the problem of democracy with what amounts to renunciation. Instead of democracy, it would in fact be sufficient to have some form of the legitimation of power: and this can have as many reasons as there are possible reasons for obedience. It is evident that the results of efficient administration and the judicial safeguarding of rights would be capable of translating into sufficient reasons for obedience. This would result in a sort of virtuous and moralistic Europe, capable of justifiably stirring up deep concern in those who perceive the sense of a "*countermajoritarian difficulty"*.

The "blocked" areas of fundamental rights, let me reiterate this, also block the reflexiveness of political rights in citizenship, through the juridical-judicial immunization of areas protected from political decision. But this would by no means imply that rights would be better or more safeguarded, if Europe really had nothing else left than the last resort of the judicial order.

The new constitution, on the other hand, will help to throw light on and revisit a few key questions. For example, it will be possible to re-examine what I have called the "liberal difficulty", which in a certain sense seems to me to be opposite to the famous counter-majoritarian difficulty. By liberal difficulty I mean the claim that rights are fundamental because they are protected against/from the "people", which makes them the passive content of citizenship and allows them to be considered as fundamental inasmuch as they are intrinsic to human beings in general, rather than being the objectives of a social system and a juridical system. *Mutatis mutandis*, this would mean, for instance, that within the Union, rights would

be guaranteed by the Union against the States, by the Court of Justice against the "people" (albeit under the "minor" guise of their political majorities): and to this would be reduced the whole story.

That this fear existed is testified by the corresponding, but not really well founded, fear that once the Nice Charter of fundamental rights was inserted into the Treaties, this would be a first step towards altering the *balance* of power in favor of the Union at the expense of the States. The underlying reason for this fear lies in the circumstance that "the chapters of the Treaties devoted to social questions and labour have clarified, and indeed made perfectly explicit, the powers given to the Union to act on the European level. This also makes clear exactly what spheres are excluded from UE legislative competence: in particular, questions such as pay levels, the right of association, the right to strike or lockout are excluded. The incorporation of such rights in a legally binding Charter would expand the competence of the EU in these spheres"[80]. We have now the confirmation of the principle of the limited competencies of European Union, in art. 9 (part II). However, these possible developments are mentioned considering that the degree of realization of social rights (eg. "healthy, safe and dignified" working conditions, ex art. 31 of the Charter) is, in principle, modifiable by greater or lesser regulation: "Community intervention is justified precisely insofar as the need is felt to act as a bulwark against competitive deregulation by the member States, who might be tempted to reduce the guarantees granted to the workers (…)[81]. This is a crucial point in that the constitutional value of the Charter cannot, in actual fact, be understood simply as a sort of game of *limits* between state powers and the powers of the Union, between European constitution and choices made by the peoples, between rights and governments. Fundamental rights are, in the first place, an integral part of the "project" of the Union, but they also involve the member states both when the latter apply community law and when they define measures that can be evaluated in terms of community law. And above all, the states might oppose measures enacted by community law, motivating their opposition by appealing to the "need to protect the social rights whose 'exceptional importance' has been asserted by the Charter itself (…)"[82]. Naturally, implementation of the series of commitments linked to protection of the values enshrined in the second part of the constitutional project cannot be brought about by virtue of prohibitions and cross-references. Rather, it should be the outcome of convergent policies: indeed, it requires a coherent propositive impetus within the member States, as well as momentum coming from within the Union itself; it requires a general role of appraising and arbitrage among concurrent aspirations- but only as a background framework – played above all by the Court of Justice. But it should be a form of arbitrage among *policies* solely on the basis of their coherence with the constitutional framework.

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[80] "Confederation of British Industry Second Submission to the EU Charter of Fundamental Rights Drafting Convention", May 2000, point 9.

[81] O. De Schutter, *La garanzia dei diritti e principi sociali nella "Carta dei diritti fondamentali"*, in G. Zagrebelsky (edited by), *Diritti e costituzione nell'Unione europea,* Rome-Bari 2003, p. 195.

[82] Ivi, p. 198.

With this statement, I intend to underline that the primary relation on which the overall structure rests is *not* that between, on one hand, the states, as a mass of factions, ethically and politically uncommitted to the Union; and, on the other, the Court and its *judicial activism,* designed to produce an imposed *pax*, through the *diktat* of a substantially "judge-made" law.

The Court of Justice, which is in itself far from possessing the social legitimacy of the national courts, cannot be a place from whence derive either the "fundamental policy lines" or the basic indications of "content". These must be produced through the legislative policy of the Union and depend on the state articulations of "European" values. Thus rights should be conceived as being one of the aims of such policies, not as a safety valve against them[83].

This being said, and returning to the theoretical question, what is shown to be extremely important for European constitutionalism is the need to achieve a balance between the two "difficulties" I mentioned earlier. That is to say, the "countermajoritarian difficulty" calls for constitutional rights to be perceived in coherence with the will of the people, and are not simply seen as decisions by the Courts; but the "liberal difficulty" insists that fundamental rights not be conceived as common ends, rooted in the social rationality of a system and in the providential tension between institutions and the public sphere.

Certainly the countermajoritarian difficulty represents a *caveat*, but it will not be directed against the judicial decisions that protect procedural guarantees and the essential freedoms that are *internal to- and ensure- the democratic process*[84]. Nor can the countermajoritarian difficulty justify the attempt by parliamentary majorities to wipe out the achievements enshrined in constitutions, in defense of individuals and minorities. Rather, the liberal difficulty is an ideology that conceals and cancels the ethical and deliberative content of rights: without such content, neither independent agencies nor judicial organs would have anything to protect. Above and beyond both of these "difficulties", rights – whether we like it or not – are choices teleologically directed towards goods that do not have an exactly neutral impact. These goods can be protected only through a profound awareness of all the institutions, and through constant self-understanding by the European citizen, in reference to the essential elements of the common European "political justice". *The "fundamental" character of such rights is not the fruit of logical-abstract reasoning, but rather of common convergence, which places them at the centre of the "system" to which they belong*. Therefore it would be contradictory for a system to declare some rights (insofar as they are goals) to be *fundamental* if they are not pursued by those who hold the reins of government, or are

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[83] This consideration is further confirmed in reflections by Armin von Bogdandy, *L'Europeizzazione del consenso giuridico come minaccia per il consenso sociale*, in Zagrebelsky (ed.), *Diritti e costituzione nell'Unione europea*, cit. , pp. 286 ff., according to whom the Court of Justice has never been able to play as strong a role as the United States Supreme Court in shaping substantial policies. Rather, the Court of Justice has always aimed merely at safeguarding the objectives of the treaties. A plausible model of its role would inevitably have to be more limited as compared to the weightier influence the national Constitutional Courts can exert in their own countries, because these countries can count on more cohesive social consensus than can the Court of Justice, the latter being (at the moment) devoid of any comparable social acceptance.

[84] Cfr. R. Dahl, *Democracy and Its Critics,* New Haven 1989, pp. 135-209, and esp. pp. 182-3.

not the *accepted* parameter for a judgment on the validity of all normative behavior[85]. Neither independent agencies nor the judicial order decide political goals in the strict sense of the word, as the former receive them from the outside, while the latter must *serve* only for the aim of the application-interpretation of the law.

Since fundamental rights are by no means an exclusive matter of the Court of Justice, they would not be understandable if they were explained, for instance, only as a common defense of European justice "against" the policies of the member States. This typically "constitutionalist" vision (*à la* Dworkin, and *à la* Habermas) would aim to protect them from the risk of *subordination* to the policies of the common weal and the corresponding consequentialist arguments. But it is precisely this vision that is incongruous. If citizenship presupposes a sharing of the fundamental character of some of the principles that form the mainstay of the Union, then such principles include those embodied in the II part of the constitution: these are a breviary of political action and not merely a potential judicial resource.

Epilogue.

If the prologue did not so much offer a preview of the content of these pages but instead simply recommended a mental attitude towards the "constitution", the same holds true for this conclusion. Europe is a framework of belonging. But this "belonging" of ours naturally is membership in a club that does not require greater allegiance than that which is required for *this* Constitution. The common enterprise is such that rhetorical abstractions are quite inappropriate. The Union will continue to function as long as it does not become a militant religion, and does not postulate a veritable spirit of faith. This non dogmatic, open, liberal belonging springs from heterogeneous motivations and admits diverse visions of Europe itself. Therefore a European citizenship must remain a *status* that is not suited to suffocating bonds, a belonging which, let us not forget, is to be understood as a "second degree" bond, peculiar to a community of communities. But it is far more difficult to preserve an open belonging than to declare an allegiance by faith: it requires a critical spirit, information, participation, the rejection of dogmas, and the strength to abandon, if necessary, the garb of a "private" citizenship[86] that discovers its problems only when they are brought before the Tribunals. On the other hand, European citizenship is not only a question of "freedom, security and justice", but rather an eminently political and social question, which will require decisions designed to safeguard Welfare and measures to provide guarantees, partly through the solidarity of the richer and stronger member countries towards those that are experiencing greater difficulty. In this framework, being a European citizen will produce

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[85] On the basis of an extension of the notion of "rule of recognition" proposed by Herbert Hart (also in the elaboration added in the *Postscript* to *The Concept of Law*, ed. by P. A. Bulloch and J. Raz, Oxford 1997^2), I argued that unlike human rights, rights should be understood as "fundamental" if they are designed to function as substantial criteria included in the "rule of recognition" of a legal order (G. Palombella, *L'autorità dei diritti*, cit., *passim: The Authority of Rights,* forthcoming).

[86] Worthy of mention here is the fine distinction made by Ackerman between *private* and *public citizen (We the People. Foundations*, cit., pp. 297 ff.).

further advantages and responsibilities, rights and duties. To avert the risk that even these political decisions may be translated into matters of mere economic efficiency, there is only one way, if one excludes *exit*. It is to be hoped that over time we will see the development of dissenting participations, in other words *votes and not vetoes*, that there will be majorities and minorities, that it will be worthwhile producing movements of opinion and "European" political parties. Prior to all this, citizenship today still is to be perceived as incomplete. The logic of citizenship brings with it the presumption that many prefer to be an intemperate political minority rather than a unanimous apolitical "society" of private parties and clients.