



SCUOLA SUPERIORE S. ANNA
di Studi Universitari e di Perfezionamento

The Emerging European Union

Identity, Citizenship, Rights

edited by
Barbara Henry and Anna Loretoni



Edizioni ETS



www.edizioniets.com

Publicato con un contributo MIUR (cofinanziamento 2001).

© Copyright 2004
EDIZIONI ETS
Piazza Carrara, 16-19, I-56126 Pisa
info@edizioniets.com
www.edizioniets.com

Distribuzione
PDE, Via Tevere 54, I-50019 Sesto Fiorentino [Firenze]

ISBN 88-467-1121-1

Constitution, European Identity, Language of Rights

Barbara Henry

1. For a short period of time, more limited and symbolically intense than several schools of historians of integration lead us to think¹, there was a widespread opinion that an unprecedented phase of European constitutionalism had begun as a result of the political alchemies of the Convention, all to the advantage of the consolidation and visibility of the Union. Several points need to be clarified right away: in the first place, the concept of «constitutionalism» should be understood in a broad sense, to avoid the risk of identifying it with what concerns the history of the western constitutional state (Barbera and Zanetti 1998), i.e. the history of that unitary or federal order, with a national basis, sovereign *yet founded on popular self-determination and limited in the exercise of power by the inalienable rights of the individuals who make up the people*. It is only from this last perspective, which links power to the forms of its limitation by those who are its source and *raison d'être*, that it is possible to 'force' and extend the scope of the concept of constitutionalism to allow it to cross the defining frontiers of the 'state'. In the second place, the meaning adopted here follows a clear-cut descent and tradition (Hobbesian-Kantian), according to which, if it is true that individuals are the legitimising basis of power, it is equally true that they become citizens solely through the constitution that they give themselves: only as individuals constituted institutionally in a body politic can they be defined and act as the ultimate foundations of legitimate power. The fact that citizens (at the same time authors and centres of social interaction) are the real constitutionally significant centres of action can-

¹ According to some, the awareness of the constitutional deficit began in 1992 and consider that such an 'awareness' coincides with the discussion concerning the democratic deficit that opened immediately after Maastricht, while according to others, it began with the constitutional discussion phase of 1993-1994; yet others point to 2000. In this text reference is made to the months between June 2003 and May 2004.

not obscure the awareness that they are so through constitutional *institutions*. What is meant by the term ‘constitutionalism’ is that it describes the condition by which to the state – or to any other form of polity – is given no more power than is conceded by the Constitution (Pernice, Mayer, in Zagrebelsky 2004), the latter meant as much in a formal sense, as a supreme source of legal compulsoriness, as in a material sense, of subdivision, structuring and mutual limitation of the organs of which the order system and its political and social form is composed. The constitutional principle, thus broadened, potentially embraces much more than the limitation and foundation of the state order, which sprang from the revolutions of the modern era².

To this it should be added, in the third place, that the term «constitutionalism» can legitimately indicate not only a framework of principles and institutions for the limitation and the politico-institutional consolidation of a polity, but also the process, the powers and the political energies through which such a framework is assessed and criticised in the most diverse contexts by the citizens. Moreover, in the particular case we are speaking about, the *polity* called «Union» is *sui generis*, neither born historically out of the ashes of the nation-states (Weiler 1999, Loretoni 2000), nor devised to replace them in the form of a federal super-state, but differentiating itself from them in terms of powers, claims to political legitimacy and to prevalence of sources in specific legal and normative contexts. In the literature there are those who consider the direct effect of European law on the citizens of the states of the Union to be an established fact for many matters, and those who also assert – although with a smaller following – the primacy of community law over the constitutional law of the states. If, moreover, we take as true the theory of a return to a content-based and non-formalistic notion of constitution, we must recognize that in the official documents, but also in the political sensibilities of thousands of citizens of the member states, in the last few months an awareness has grown that not only the language of rights but also its codification into a document of constitutional rank – independent of the state jurisdictions – has given birth to a substantive (and legally enforceable) code of «morality and of conformity to principles in pol-

² This allows for a clear analogy with the formula of the ‘federal principle’ (Elazar 1979), principle that must not be mistaken for its specific manifestation in the federal state, since it ‘expresses the search for unity by many institutional actors concomitantly with a genuine respect for the autonomy and the interests of all the entities involved.’ (Weiler, in Zagrebelsky 2004, Loretoni 2000).

itics». This means that informed public opinion has begun to define and recognize a core of principles, values and norms characterizing not only the drafts and the documents, but also the constitutional identity, the quality that creates a 'we' from the point of view of the structure and the fundamental processes of togetherness, and that is prerequisite for the self-definition of the citizens of the Union as forming a *polity*. Our Constitution, or more precisely, our *politía* (polity) is democracy, because «power is not in the hands of the few but of the many». The words of Thucydides were chosen in the preamble as the motto of the Treaty establishing a Constitution for Europe, a document of which the Charter of Fundamental Rights of the European Union is an integral, constitutive part.

This is no longer the same old debate between scholars that has been going on for about thirteen years about the existence of a Constitution of the Union from the point of view of its structure and organisational functionality, according to which, in the opinion of some, the European polity has been in every sense a legal order springing from juridical acts (the Treaties), despite not having as its basis (until very recently) a constitutional text, while in the opinion of others it has had the organization, but not all the prerequisites, of an order that is autonomous and distinct from the member states³. Such a debate preceded and certainly influenced the phase of writing, discussion and drawing up of the Draft Constitutional Treaty carried out by the Convention, a phase that was already concluded on June 20 2003. Yet it has lost much of its relevance to the present as well as its cogency. It could be objected that the stakes are quite different, considering how, immediately after the signing of the Constitutional Treaty, some indignant voices were heard raising a further question, i.e. to question the (substantively) constitutional status of the final document. This was in the end so much less ambitious than the expectations of methodicalness, completeness, innovativeness and institutional functionality that had been reasonably and legitimately raised in

³ According to Grimm and Weiler, it cannot be so, given that the conditions are lacking for the realization of a democracy in a material and not merely formal sense, i.e. the preconditions for an adequate European public sphere, which represents the necessary condition of all constitutional democratic states (Grimm). Let us add the final point of those who have asserted the necessity of preventing the drafting and adoption of a Constitution by the Union: for elevated reasons of constitutional and political tolerance it is well that this unprecedented politico-institutional entity should never become a fully federal structure (Weiler).

scholars and European citizens. Such voices found an immediate echo – inexplicable for many Euro-sceptics – in the consciences of many young Europeans, generating widespread and intense discussion. Nothing can make it clearer to us than this, as it should be already clear from the reference to the Thucydidian motto, that the Constitution issue is a way of dealing with the controversial and unresolved problem of European political identity.

2. This horizon of expectations, highly demanding on a plane of ideal proclamations, is built on the ‘constitutional language of rights’ and on the guidelines of the future European polity, questioning in the end the *grand récit* of the democracies of the Continent. A few words seem necessary in order to clarify what the narrative affirmation of distinctive loyalties is with respect to political identity. The symbolic core, and the structure of the narration that has so far supported the claims to legitimacy of the European democracies, is both for the Union and for any modern political identity, the idea that a community must and can decide effectively its own destiny (Henry 2000). This idea implies an intergenerational link of a certain kind, in which successive generations are in a close relation of continuity, which is, moreover, consciously acknowledged by those who are part of it. The narration of all is judged by individuals as being *characterized by events in which they have taken part with action or memory, and whose legitimising function they do not intend to renounce*. The past and the future are linked in a narration that is both a foundation and a claim, of an elevated symbolic significance, in the following sense: such a narration does not deny or manipulate in any way the actuality and reality of the events that occurred, *it simply establishes that their particular character, considered foundational and binding for the future, is something that must in no way be forgotten* (Assman 1992: 77-78). Such an aspect concerns identity more than modernity or democracy. The distinctively democratic element resides in the fact that the community is of free and equal individuals, an identity-generating feature that has transformed the dimensions of solidarity and belonging in the contemporary state turning them into claims that are universally recognized to the holders of rights. A specific tradition has contributed to the consolidation of the *grand récit* characterizing the European democracies. According to this tradition civil, political and social rights are the internally homogeneous core of citizenship, and as such they are what characterizes the status of

citizen in the societies of the Union and, moreover, of most of Europe. The key to understanding the category is probably out-dated, but is still very influential in the political culture of many Europeans, constituting its mythic-symbolic *récit*, that narrative which, innovating itself after the proclamation of the Charter in Nice, has imparted a strong impulse to the «process of political construction of the Union» (Bourlot and Parsi 2001).

As is well known, the English sociologist Marshall and his school had contributed significantly to consolidating the meaning of citizenship as a unitary 'denominator' of the holders of several categories of rights; it (citizenship) includes civil, political and social rights. In general terms, it is a formula for classifying heterogeneous elements, each of which indicates a set of rights, and makes it possible to identify the category of subjects endowed with them. According to Marshall, the various classes of rights have all sprung from the epochal process that began with the Enlightenment, and consisted in the progressive crumbling of the *ancien régime* and the consequent extension of the spheres of rights acknowledged by the political authority for increasingly broad groups of citizens. The periods of transition occurred within the liberal, first, then democratic, institutional framework, but always within the confines of the nation-state⁴. Those who inaugurated the tradition of Anglo-Saxon studies on citizenship, evidently transfused into it much of the optimism that characterized the phase of expansion, believed then to be irreversible, of the British welfare state. The holders of social rights, in a certain sense guaranteed by the practicability of the path undertaken by the supporters of modernity, found themselves, within such a framework, at the apex of the process of emancipation, at the extremes of which we find, on the one hand, subjects deprived of rights and, on the other, citizens enjoying the broadest range of rights, compatible with the fair and effective distribution of collective resources of an advanced democracy.

Having said this, and at least from the point of view of empirical observation, it can be stated that social rights are mentioned in the constitutional charters of the majority of democratic countries, the European in particular; as such, they have been recognized by the social Charters adopted by the Community and the Council of Europe,

⁴ Note that the description of such a process follows the stages that have marked the transformation in an increasingly abstract, reflexive and formal direction of modern identity, both individual and group.

and also proclaimed as an integral component – of equal status to all the others – of the Charter of Fundamental Rights of the European Union. Furthermore, without wishing to go into the question of their effectiveness, at least the oldest social rights (to health, to social security, to trade union and industrial rights) belong, to use Bobbio's terminology, to the second generation of rights of citizenship (while civil *and* political rights are said to belong to the first); it is the new rights (including bioethical and environmental) that make up the most novel showcases, still in the process of normative and legal consolidation.

It seems however clear that there are two different and incompatible kinds of logic within the notion of citizenship, the competitive logic of economic rights and the cooperative and solidaristic logic of social rights⁵. Among scholars there are those who are in favour of limiting the notion of citizenship to civil and political rights and abandoning the phrase «social rights» in favour of that of «services», in that the presumed social rights consist in conditional opportunities for the effective exercise of other categories of rights⁶. Even the supporters of such a position are not so much concerned with re-assessment of the emancipative role of social rights (or opportunities) in the global political context after 1989 as they are with finding an objective viewpoint with regard to the changing situation, in the attempt to acquire some theoretical basis for recovering an operative dimension for politics in advanced democracies. In the West, these are the institutional arrangements most exposed to the transformations of the legal framework guaranteeing these rights, transformations brought

⁵ This divarication is destined to become more acute, if, as is happening at the level of proclamation of principles in Europe, the so-called third and fourth generation rights (ecological and bioethical, rights to the protection of personal data, of consumers, of children, of the disabled, of the old) are taken up in that number of those demands for protection (of property, or of situations) that are deserving of recognition and legal safeguards.

⁶ There are three reasons adopted by Barbalet and shared by Zolo (1994: 1) social rights are not rights because of their different structure with respect to civil and political rights, entitlement to which involves the an active faculty of exercise on the part of individuals, and *against* the state, while in the case of social rights those entitled are passive beneficiaries of services provided by the state. 2) With respect to civil and political rights, in their universal and formal essence, social rights are demands for concrete actions, and therefore particularistic and selective, a circumstance that gives rise to the subordination of their implementation to binding economic conditions, and to the discretionality of the administrations. 3) Finally, and further proof of the fact that we are not talking about rights, the prejudicing of these would not be judiciable (Rodotà contests however the general character of the assertion). Rodotà in Zolo (1994: 303-304).

about by migratory flows, as well as by capital investments and financial flows. On the one hand, the number of rights holders is on the increase, as are the instances of collisions between different legal orders and principles, even if co-existing in one particular geographical entity. On the other, the progressive erosion of national sovereignty (not only fiscal), facilitated by the new centres of influence that are active both at regional level and at a supranational level⁷, complicates the physiognomy of the complex world context following 1989 (Beck 1993)⁸. The political entity traditionally cloaked in the *summa potestas* in the West, the nation-state, has historically been the first to suffer from the proliferation of actors that hold in check at various levels its claims to unquestioned superiority on vital questions: peace, security, the protection of the rights of its own citizens and, to a no lesser degree, of «*quest workers*». This is true the more so if such a state bases its own legitimacy on a *liberal* and democratic form of government, and on a consolidated system of social protection that enables the citizens to enjoy effectively the opportunities offered to them by formally sanctioned rights⁹.

⁷ Multinational companies, movements of opinion, pacifist, ecologist and humanitarian organizations, associations of citizens and consumers, pressure groups, press agencies, churches and religious sects, supranational organizations, terroristic networks and legal orders.

⁸ The multiplication of crises and their expansive potential, that is, the capacity to involve the major powers and other legal actors, whether of the state or not, through the so-called «operations of international policing» put into effect by the supranational organisms existing today, is in any case based on an overall figure that includes the phenomena that the actors have to deal with, – at whatever decision-making level they find themselves.

⁹ It has been maintained for a decade now that a notion of democratic citizenship freed of the more serious theoretical difficulties should help to focus on the tension existing between the protection of rights guaranteed by the constitutional state and the problems of globalisation, «which make the effective enjoyment of them depend increasingly on the possibility of their international protection» (Zolo 1994: X). Citizenship proves to be a point of equilibrium, nowadays increasingly precarious, between the reasons of belonging to a concrete collective identity, and the reasons of universally conceived rights, i.e. the totality of political, legal, ethical rights and obligations, springing from the anthropological image (profoundly modern and European) of an individual with free and autonomous attributes. It might be concluded that the rights of citizenship, traditionally coinciding with the rights of participation in the deliberative activities of a community of a territorially delimited character, presupposes an equally limited notion of solidarity, that can be applied solely to «peers». The division of benefits in terms of well-being and the security that results from it depend in the final analysis on the will of the community itself to recognize certain individuals as its own mem-

3. As for the symbolic narration that has so far legitimated European politics, it can be said that it has justified national (more than democratic) belonging *on the basis of the positive valorisation of sharing, of solidarity rights reserved for citizens*¹⁰. It is in this particular sense that we should understand both the exemplariness, typical of Western Europe, of the union between nation-state, welfare and democracy and the problematic aspect of such a combination *rebus sic stantibus*. This is valid as long as the nation-state is the only fulcrum of reference for the ascription of belonging with respect to the whole range of constitutionally recognized rights at the level of European polity. In some member states social rights are still referable to this selective identity filter, while in others (German Federal Republic) this is not the case. The same empirical evidence contradicts the Marshallian *récit*, denying, that is, that social rights can in themselves be considered a natural and painless expansion of the notion, which is indeed selective, of political citizenship. The preliminary question that needs to be faced is that of the models of citizenship that underlie the systems of *inclusion* (not only material, but cultural and social). According to the model – either permanent assimilation or temporary intercultural coexistence – the connections and the reciprocal effects of the various classes of rights with respect to their effective enjoyment by the beneficiaries are modified (Zincone 2001). But this

bers and to exclude others. The characteristic democratic identity for the European societies of the present is not antithetical with respect to supranational identity, which will be able to establish relations of synergy with the national identities.

¹⁰ What we are talking about is the bond of identity that, without the aid of symbols linked to the presumed and imagined unity of the people, could never have replaced in a stable and lasting form the preceding, more restricted and fragmented loyalties of the past: of family, of clan, of guild, of village, of dynasty. It is interesting to note how Habermas (1996), with whose overall institutional solution one must not necessarily agree, establishes a parallelism between the situation of (western) Europe today, and that in which the European peoples found themselves in the last century; they were at the same time objects and subjects of processes of symbolic, more than institutional, elaboration, conducted in the light of the unifying idea of nation by the respective intellectual elites. These operated in such a way as to set at the centre of the public sphere, for purposes of institutional integration, the real or presumed *origins and destinations*, that were declared *common* to all social strata and classes, so as to reappraise significantly (or sublimate into a higher synthesis) the differences from the «*ancien régime*». From then on, nations have become, as modern forms of politics, the sources of power to bestow upon a class of individuals the title of citizens, excluding others from the enjoyment of the benefits deriving from it, and at the same time exempting them from the corresponding duties.

question is outside the scope of this contribution. It is enough to recall its importance with respect to the discussion about the different categories of rights, which, precisely, are not separate segments, but capacities and entitlements in a mutual equilibrium with respect to the type of citizen that appears today, when what is at stake is a state entity that is much more exposed than in the past to the effects and repercussions of the situations in which the economies and social systems in all the other parts of the globe find themselves. The migratory flows and the conditions of fair treatment of the non-citizens and/or new citizens are not phenomena to be dealt with sectorially with respect to broader political visions, and therefore highly demanding with respect to the commitment to democratic *accountability* in concrete *policies*, the only ones able to fulfil the commitments already assumed in the two prologues, of the Charter and of the Constitution, and re-affirmed in the text (Parts I and II) in the form of declarations of principle.

The Charter of Fundamental Rights represented an important passage towards the constitutional protection of the whole range of rights. The reason is in the declaration of indivisibility of social rights with respect to civil and political rights. With respect to the proclamation of merely economic rights, a proclamation that has at least until today marked the history of the process of integration and of the jurisprudence of the European Court of Justice, the Charter, incorporated into the Draft Constitution, made clear the equal rank of the categories of rights. On this point, however, there are authoritative dissenting voices, as has been said. The Charter enunciates a relatively limited number of social rights, not mentioning the right to work, to fair pay, to housing (De Schutter, in Zagrebelsky 2004). One cannot, moreover, ignore the malicious interpretations concerning the proclamations of indivisibility of rights, according to which the latter reflect an evasive will or a compromise-seeking indecision of the drafters with respect to the hierarchy of the categories of rights, criticisms that touch in particular the case of social rights (Grimm, in Zagrebelsky 2004). These, independently of the treatment reserved for them in Part III of the Constitution, and to the already explicit references in the Charter to «national laws and practices», in actual fact depend on economic constraints and on the policies of the governments, in that they contain prescriptions, requests to perform addressed to the single states; the latter are certainly obliged to provide the services necessary for the achievement of the constitutional end, but the mandate

might be resolved in recommendations remitted to the will of the ordinary legislator, who hypothetically could act with full discretionary power, except for the unlawfulness of the total abrogation of entire areas of regulation on the subject with which the Charter deals at length, in the chapters entitled «Equality» and «Solidarity». Nobody can, however, deny that, according to the letter of the law, the Charter has acknowledged that social rights have the equivalent legal status to that of civil and political rights, proclaiming, in the clearest possible way, their legal enforceability, that is, the faculty and capacity of the competent judge to guarantee respect of them.

The even more delicate question, on which, from a textual point of view, it is difficult not to agree, concerns what might be called a 'structural' restriction of the scope of rights expressed in the Charter, a limitation that already seems to have been devised at a constitutional level with regard to both the *subject* and the *method*, in the context of Part III, on the organization and on the functioning of the polity «Union». Looking at the merits, in Part III of the Constitution, social policies are the object of a non-general competence that is restrictive and excludes harmonization among the states. With respect to the decision-making method, unanimity has been maintained, with the following onerous consequence: when it is a question of policies that are particularly delicate because they determine the levels and modes of provision and enjoyment of social services, and an agreement is not reached, then the power is not exercised (Allegretti 2003). The direct reference to the preceding Treaties, which are in formulation and contents much less ambitious than the mandate conferred on the Convention by the declaration of Laeken, marks a step backwards or at least it might consign to an excessively careful slowness the dynamics in other respects recognized in the same text, dynamics which tend towards the achievement of a «coordinated strategy», for example, of employment policies (Constitution, III-107). With respect to these criticisms it can be said that on the one hand, certainly, the constitutional rank of such prescriptions chains and binds social, fiscal and budgetary policies to a much less flexible and ductile legislative source than are the ordinary legislations of the states on matters of social policy. On the other hand, the constitutional rank in terms of subject and power is conferred on provisions concerning matters that are crucial for the purpose of a gradual settling down onto «minimum prescriptions» *of all the systems of welfare of the Union*, beginning with the more critical conditions regarding environment, work conditions, social security

and protection of workers. The commitment undertaken can be effective and binding for the states only if it is really within their reach or if the Union undertakes programmatically and politically to reduce the more serious imbalances.

Indeed, only if the priority of the fulfilment of rights declared indivisible were taken seriously would it be possible to envisage programmatically at community level the possibility of making the enjoyment of social rights less dependent on the budgetary conditions of the single member states. As a further consequence, it would be possible to broaden the community and the political identity-oriented allegiance, while concealing *the material limits* to the extension of such rights¹¹. Reducing the rights guaranteed *unconditionally* by the states of the Union to the rights of the person (life, physical and psychic integrity, equal opportunity¹², *habeas corpus*, rights to opinion, to movement, to confidentiality of correspondence, of residence) seems to some scholars to be a sensible and practicable path to tread; it would be neither over-ambitious or deceptive, nor would it, as a result of this, inhibit the achievement of other levels of citizenship in more adequate politico-institutional spheres, paradoxically the spheres in which must be situated the loyalties to the wider and more inclusive body politic, and therefore equidistant with respect to the requirements of those endowed with the whole range of constitutionally sanctioned rights. The variability of resources, of the ways of framing social needs and entitlements, the differences between the welfare regimes themselves within Europe require at the same time *a vision and a compensation* at Union level – at least for arbitration and coordination if not for common policy – in key matters for the satisfaction of social rights. The method of «coordination of action», re-affirmed in the Constitution (III-107), revolves round the emanation of community guide lines that tend to promote intersecting learning processes among a plurality of institutional

¹¹ Authoritative voices (Habermas 1996) invite us not to consider fulfilled the predictions concerning the inevitable decline of the peculiar forms of European politics, nor to consider the potentialities for redefinition of the «rules of the allocative and redistributive “game” to be exhausted: indeed it is necessary to re-examine more closely the specific features – we are talking about western democracies with a high *standard* of social protection – before proceeding to describing the effects, real or presumed, that are exercised on this type of order by economic and technological processes linked to the expression “globalisation”».

¹² It does not regard the right to property in that it is *ius excludendi alios*, but rather the precondition for acquiring goods as property (Ferrajoli in Zolo 1994: 270).

actors operating in agreement, but autonomously (De Angelis 2004).

Social rights, because they are of equal rank but of different structure from the other two classes, need Europe and the Union in that it is an entity of supranational rank and macro-regional dimension that does not replace, but rather completes and orientates in a non-discordant way the actions of the states answering to the needs of the citizens. The result would be that the same critical positions with respect to the virtues of the Charter and the Constitutional text re-assess the political dynamics of negotiation, of compromise, of conflict regulated at an institutional level as the privileged context for guaranteeing the effective functioning of the polity «Union».

The priority is political and programmatic; 'interiorisation' is needed, or a realization that much of the future of the institutions depends on policies that have been agreed on along community guidelines. This would also be true in the event of a failure of the process of ratification of the Constitution, an event that would mark indelibly the possibilities of legal enforceability of the Charter, and would certainly lead to very damaging repercussions in the process of integration *and* legitimation of the polity «Union». In any case, just as failure would have potentially destabilising consequences for the whole politico-institutional fabric of the Union, so the ratification of the constitutional text would not automatically correct the situations of painful friction between having to be and being, i.e. between the legal dictate and the effective conformity to all the requisites necessary for the granting and lasting appropriation of the *aquis communautaire*, on the part of the real societies of the countries newly admitted.

It is not possible to forget that a healthy dialectic between inclusion and exclusion is brought about and strengthened by the «official» proclamation of European identity in terms of a dynamic and non-hierarchical equilibrium among rights, such a model being connected to a notion of citizenship that is neither sectorial nor static, but rather propulsive and emancipatory, not over-ambitious but effective. In this last sense, there are again some analogies with what has been so far defined as the *grand récit* of European citizenship. The same difficulties of interpretation and application that have recently become manifest, and which will certainly complicate the instances and will not facilitate the jurisprudence of the Courts (Strasbourg, Luxemburg, the national courts) show exactly what is meant by a richer, more dynamic and complex notion of European citizenship than that already envisaged by the Treaty of Maastricht; the process of consolidation and definition, of

putting into effect already *formally* recognized rights makes the traditional approach to the subject of citizenship denser and specifically emancipates it from a mere reduction to the question of *formal inclusion* or *exclusion*, of being or not being endowed with rights. The question of the mere entitlement to rights should be retranslated into the rather more complex question of the quality and the relative importance of these rights with respect to the capacity to activate them on the part of the holders of rights, in other words of the question of real disparities, asymmetries, structural and potentially permanent inequalities. Often immigrants and, even more so, the new citizens, who can exhibit the credentials of European citizenship over the whole territory of the Union, do not effectively enjoy the set of proclaimed rights. It is not just a matter of phenomena of racism and xenophobia spreading in certain regions of Europe, but equally of other manifestations of hostility and verbal and non-verbal discrimination, apparently inoffensive, but really quite pernicious and pervasive (because critically not controlled by those responsible), which are potentially erosive of the bases of cohesion and liberal and democratic responsibility. The ordinary citizen is induced – by habits, attitudes, amply consolidated and accredited messages of widespread consumption – to resort to biting, injurious stereotypes to classify ‘foreigners’ (even more so if not prosperous and therefore needful of benefits). What counts is simply the negative definition of stereotype, and its immediate relevance to relations between human groups¹³. As a result of the use of stereotypes, tendentious behaviour involves the axiomatic and non-revisable ascription of negative qualities to all the components of such a group, which in this way is stigmatised once and for all, and with extremely narrow margins of manoeuvre for the individuals of which the group is composed. In the face of obvious cases of individual divergences from the stereotype used by the observers to penalize the group, recourse is made to the sophism of exceptionality, so as not to facilitate osmosis or

¹³ By stereotypes is meant crystallisations of characteristics with a high level of simplification, a high degree of tendentiousness and of homogeneity, that some (observers) attribute to ‘someone else’, different from him/herself or his/her own kind, a ‘someone else’ that is important or considered such for the observers in that he/she exemplifies a group or category (target group) which they fear or from whom they expect alien and *therefore* harmful behaviour. From the point of view of the observers, ‘homogeneity’ means that the stereotype is broadly shared by them. From the point of view of the object observed, ‘homogeneity’ means that the characteristics attributed are believed to be generalized to all or almost all the components of the target group.

dynamics of interchange between groups, let alone processes of integration.

To these elements, not necessarily linked to an actual discriminatory intention towards the target groups of stereotypes, but nonetheless presaging subordination, should be added one even more decisive and comprehensive than the preceding ones. As the gender studies have already suggested with respect to women, institutions, legal forms, the practices of regulation and attribution of costs and benefits dominant in the community that hosts migrant foreigners, and the actual structure of rights with which they are forced to live, have been conceived by someone else or for someone else. These «ill-fitting» rights have been formulated in a foreign language, expression of a different culture, of daily practices that require competences that are not merely linguistic, and therefore sometimes obscure, ambiguous and impenetrable for the «non-initiated». The communicative and pragmatic incompetence simply confirm the inadequacy and dissimilarity with respect to the 'healthy' model of interaction that the observers have in mind, and from which the stigmatised individuals are removed. It is on these difficulties – already observed and analysed by those who are concerned with the different kinds of structural asymmetry among groups – that the definition of *denizens*, so well fitting to such circumstances, is constructed. Passing from the formal recognition to the effective exercise and enjoyment of rights by those endowed does not belong to the definitions of the doctrine of virtue, but to that of the doctrine of right, it is not a question of benevolence, but of the fair application of constitutional laws. On such an effective application rests the legitimacy of any order that is inspired by the constitutional principle, as is also the Union «of 25», which is active and responsible before its own citizens not only through the mediation of activity of the states. Certain factors of democratic functionality, present if not strikingly obvious, cannot be ignored. The institutional and political result that we have before us is as much the fruit of fifty years of diplomatic negotiations conducted with intergovernmental methods, as the precipitate of politically binding expressions of popular will (the elections of the European Parliament, the referendums); these, which are institutionalised expressions of assent or dissent, while not being effective from the point of view of the direct bond of democratic responsibility – European citizens do not have the power to condition through the elections of the Parliament the structure and composition of the Commission – do not however conflict with the

democratic principle, in its broad sense: elections and referendums are the channels through which democratically elected governments, the same that conducted the diplomatic initiatives, signed and ratified the treaties, are supported and confirmed in their decisions. Again here it is a question of politically motivated and politically articulated choices, made by actors whose democratic investiture is not in question. This does not deny, but rather specifies the criticisms directed at identifying the democratic deficit of the Union as a polity that advances direct claims to recognition of identity by its citizens.

4. It is not so much a matter of disowning or repressing national identities, towards which a sense of belonging has long existed (with differences from nation to nation), as of harmonizing the different levels and the different historical vicissitudes of political and legal cultures, of loyalties, of rights, of duties within the polity «Union». On the one hand, it cannot be ignored that many of the initiatives intended to consolidate the collective perception of belonging to the Union – although oriented not in a chauvinistic, but a liberal and democratic sense – are not facilitated by the progressive inclusion of new components, of countries distinguished by strongly heterogeneous politico-cultural traditions and practices with respect to the countries that are already members. On the other hand, the demands coming from this side of the political agenda are increasing, in ever wider sectors of the European population, the awareness of what is non-renounceable for «us», and what is, on the other hand, intolerable – the uncertainty of the law, administrative abuse, the police state, discrimination, torture, state terrorism, and, last but not least, the death penalty – contributing to the spread of the conviction that a common European identity is not a chimera, but something already perceptible and institutionally

¹⁴ Even those who have a preference for the lexis of political identity (European, in particular), of which the semantic areas of reference should be specified, might hope that, in the near future, the Union will become a responsible political actor in its own right, and capable of intervening in international affairs without producing negative repercussions on the societies and economies of the member states, meaning by this the standards of living and of social protection effectively enjoyed by the beneficiaries. This seems plausible, even before more sophisticated questions present themselves, such as those relative to the role of civilian power, having specific imperatives that are both functional and juridical, which could push the Union to continue the progressive enlargement towards the East until some components of the so-called ‘circle of friends’ are included fatally (for some) in its own orbit. It is not necessary to venture onto this elusive ground, to understand that it is absolutely not possible to relegate the issue of

operative¹⁴. Think of what has been the definition (and the verification) of the conditions for entry of the aspiring states, among which an important role was played by the existence of an admittedly relative homogeneity of a constitutional nature regarding rights, the principle of legality and of the democratic development of institutions has had a vital role. In other words, the *corpus* (however exiguous) of the distinctive qualities of a common European identity is written largely in terms of a culture of rights. The jarring and problematical fact is that, even at the more elementary level of perception of identity, such a sensibility, sometimes strongly reactive to violations, does not necessarily imply the acceptance of a fixed and predetermined hierarchy of the classes of claims deserving protection (civil rights, political rights, social rights, beside the most recent case of the rights of the new generation). This is perhaps the sign of an insurmountable difficulty for common sense as well as for the class of professional jurists, symptom of a fluidity of axiological attitudes, which has found confirmation in the very formulations of the Charter, until today cogent and enforceable constitutional law, but nonetheless loaded with ambiguity with respect to the priorities of application. If this is true, and if a radically negative evaluation is given of the juridical contribution of the Charter with respect to social rights, the problem of the solidaristic approach, and as such characterizing European identity would now be more intricate than ever. The supranational level invoked previously to make up for the unkept promises of the national democracies with respect to the rights of solidarity would be, if not eluded, at least considerably weakened.

It is however illusory to think that it is possible to resolve the difficulties of democratic representation of the member states by limiting ourselves to proposing once again at a supranational level a model that, as we have seen, is already in difficulty at a state level, and because of the complex of problems that day by day become increasingly «global». The structure, internally differentiated according to level of competence of the modes of political decision – as can be seen in the European polity – might be confirmed as a neither occasional nor temporary model for the institutional structure of the Union, provid-

the extension to the new states to merely 'technical' problems, almost as if it did not closely concern the 'dense' problem of the identity of a voluntary political association, that has given itself rules and objectives of peaceful and just coexistence, as is the case of the Union.

ed that the opaque aspects are eliminated from it to the maximum degree, and increased those of openness to the public, of transparency and of accountability of the single institutions for their actions. Such an objective cannot be reached without the continuous activity of the social actors that are committed at a supranational level to the creation of a European civil society, the absence of which is lamented or even feared by many. In order to contrast the undesirable aspects of the general framework, the European Union will have to constitute a form of regional integration congenial to relations of tolerance, and also have the aspirations and potentialities to transform itself into a «civil power» (Telò 1999), that intends to consolidate uniformly the empire of law. To achieve both of these things, coexistence of differences and universal guarantee of the rule of law¹⁵, the Union will have prove itself able to reduce conflicts, exhibiting in routine political and administrative practice – and not only in high-sounding declarations of principle – a clear sensitivity to rights *side by side with* tolerance towards cultural differences, as well as a vocation for the correction of the more serious social inequalities, with the means that only an institutionally consolidated macro-regional reality can have at its disposal.

In conclusion, we will not deal with the issue of the progressive weakening – neither planned nor wished for – of the very sources of legitimation of the national states; while it should be confirmed that the economic and above all monetary union achieved in Europe has already eroded the sovereignty of the states in favour of the supranational instance, on which in the future delicate decisions regarding redistribution are incumbent. There are already considerable limits to the margins of manoeuvre of the national governments regarding economic and financial matters, and they are of a permanent nature¹⁶. It was certainly a question of constraints imposed on the states by a logic of adaptation, which has tried and is trying to anticipate and sup-

¹⁵ The example of France shows how the bold universalistic defence of the lay nature of the state often conflicts with the second principle, of tolerance of differences, despite the consolidated experiences and habit of coexistence with cultures and populations of North Africa.

¹⁶ There is no doubt that accepting the Pact of stability (and the relative sanctions for the states that exceed the threshold of 3 percent of the deficit/GNP relation) constituted a fundamental stage in the process of institutional transformation; the states, in fact, undersigned a massive loss of sovereignty in favour of the supranational instance.

port the functional imperatives of the market. In any case, it must be recognized that the constraints deriving from the economic sphere have exercised a powerful accelerating effect on political integration. We have further examples in the events linked to the enlargement to the east. Let us not forget how the onerous obligations imposed in Copenhagen were accepted *ob torto collo* by the candidate countries, and with all the limits gradually absorbed by their respective legal orders, to make competitive, in a homogeneous and integrated way, the national economic contexts within the much wider area of free exchange constituted by the Union.

However, as for the events of the first fifty years of the process of integration, so also in this case it would be reductive to limit oneself to considerations of a functionalistic kind, above all for the reasons of heterogeneity of the institutional and identity-related traditions to which reference was made, which require appropriate, far-sighted modes of political intervention, aimed at the coexistence of differences in the constitutional spirit. It is not for accessory, but for substantial, reasons that at present important projects for the creation of employment policies and common social policies are being discussed at the level of community and intergovernmental institutions: these policies are among the few that are able to realize in practice, and not in high-sounding declarations of principle, that common European space (now composed of 25 'fellows') characterized by the principles of equal dignity and solidarity of which the Charter speaks. Beside the limitation, imposed on the margin of intervention of the states, now the creative potential of the political power must be asserted, strengthened as it is thanks to the transfer of specific and vital competences of economic and political orientation by the states to the Union.

The promises formulated in terms of the constitutional principle of solidarity could not be maintained effectively without a previous redistribution among the various institutional instances, on the basis of differentiated territorial extension, of specific costs and competences in social matters, a redistribution that could produce *ex parte popoli* a multi-level social citizenship, which does not replace, but supplements and completes the national social citizenship. We already see a divarication between belonging to a national community and (specific) rights, as is demonstrated by the fact that the status of resident and worker is a sufficient requisite for the enjoyment of social rights. If these have constituted an important factor of integration within the

national democracies, it is only legitimate to ask what the adequate ways are not so much to achieve through rights a single, unitary European social citizenship, as to make possible different combinations of social contexts which however intersect on a shared nucleus of rights and duties, equal with respect to the level of fairness, efficiency and sustainability attained.

References

- Aa.Vv. (2001), *Cittadinanza e identità costituzionale europea*, Il Mulino, Bologna.
- Allegretti (2003), *Il senso d'Europa nel progetto della Convenzione*, in «Democrazia e diritto», n. 5, pp. 91-113.
- Assmann, J. (1992), *Das kulturelle Gedächtnis*, Beck, München.
- Barbera, A., Zanetti, G., eds. (1998), *Le basi filosofiche del costituzionalismo: lineamenti di filosofia del diritto costituzionale*, 2nd edition, Laterza, Roma-Bari.
- Beck, U. (1993), *Die Erfindung des Politischen*, Suhrkamp, Frankfurt am Main.
- Bobbio, N. (1990), *L'età dei diritti*, Einaudi, Torino.
- Bobbio, N., (1990), *Diritti dell'uomo e società*, in Bobbio 1990: 67-86.
- Bourlot, A., Parsi, V.E. (2001), *Il 'racconto' della cittadinanza europea nella Carta dei diritti fondamentali*, in Aa.Vv. 2001: 105-182.
- Cerutti, F., Rudolph, E., eds. (2001a), *A Soul for Europe*, vol. I, *On the Political and Cultural Identity of the Europeans. A Reader*, Peeters, Louvain.
- Cerutti, F., Rudolph, E., eds. (2001b), *A Soul for Europe*, vol II, *On the Cultural and Political Identity of the Europeans. An Essay Collection*, Peeters, Louvain.
- Cerutti, F. (1993), *Fra Europa e mondo: i dilemmi di una identità sovranazionale*, in «Teoria politica», 9, n. 3, pp. 77-95.
- Cerutti, F., ed. (1996a), *Identità e politica*, Laterza, Roma-Bari.
- Cerutti, F. (1996b), *Identità e politica*, in Cerutti 1996: 5-58.
- De Angelis, G. (2004), *Culture di welfare a sicurezza sociale europea*, in «Élite», n. 4.
- De Schutter, O. (2004), *La garanzia dei diritti e principi sociali nella «Carta dei diritti fondamentali»*, in Zagrebelski 2004: 192-221.
- Elazar, D.J., ed. (1979), *Federalism and Political Integration*, Turtledove Publications, Ramat Gan.

- Elazar, D.J. (1995), *Idee e forme del federalismo*, Edizioni di Comunità, Milano.
- Elazar, D.J. (1997), *Dallo statalismo al federalismo: uno spostamento di paradigma*, in Miglio 1997: 151-172.
- Ferrajoli, L. (1994), *Dai diritti del cittadino ai diritti della persona*, in Zolo 1994: 263-292.
- Friese, H., a cura di (2002), *Identities*, Bergahn Books, New York-Oxford.
- Grimm, D. (1996), *Una costituzione per l'Europa?*, in Zagrebelsky, Portinaro, Luther 2001: 339-367.
- Habermas, J. (1998), *L'inclusione dell'altro*, Feltrinelli, Milano.
- Habermas, J. (1999), *La costellazione postnazionale*, Feltrinelli, Milano.
- Henry, B. (2000), *Mito e identità. Contesti di tolleranza*, Edizioni ETS, Pisa.
- Henry, B. (2002), *Identities of the West. Reason, Myths, Limits of Tolerance*, in Friese 2002: 77-106.
- Henry, B. (2001), *Political Identity as Myth? The Role of Symbols for the Political Identity of the Europeans*, in Cerutti and Rudolph 2001b: 49-72.
- Loretoni, A. (2000), *Interviste sull'Europa*, Carocci, Roma.
- Marks, G., Hooghe, L., Blank, K. (1996), *European Integration from the 1980s State-centric versus Multi-level Governance*, in «Journal of Common Market Studies», 34, 2, pp. 341-378.
- Miglio, G., ed. (1997), *Federalismi falsi e degenerati*, Sperling & Kupfer, Milano.
- Passerini, L. (1998), *Identità culturale europea. Identità, sentimenti, relazioni*, La Nuova Italia, Firenze.
- Pernice, I., Mayer, F. (2004), *la Costituzione integrata dell'Europa*, in Zagrebelsky 2004: 43-68.
- Rodotà, S. (1994), *Cittadinanza: una postfazione*, in Zolo 1994: 293-318.
- Telò, M. (1999), *Lo Stato e la democrazia internazionale: il contributo di N. Bobbio oltre globalismo giuridico e relativismo*, in «Teoria politica», XV, n. 2-3, pp. 533-562.
- Telò, M., Magnette, P. (2001), *Justice and Solidarity*, in Cerutti and Rudolph 2001a: 73-89.
- Walzer, M. (1997), *On Toleration*, Yale University Press (translated into Italian by R. Rini (1998), *Sulla Tolleranza*, Roma-Bari) .
- Weiler, J.H.H. (1995), *The State «über alles»*. Demos, Telos and the German Maastricht Decision, Harvard Jean Monnet Working, Paper, n. 6.
- (1999), *The Constitution of Europe*, Cambridge University Press, Cambridge.

- (2004), *Federalismo e costituzionalismo: il «Sonderweg» europeo*, in Zagrebelsky 2004: 22-42.
- Young, C., ed. (1999), *The Accomodation of Cultural Diversity. Case-Studies*, Macmillan Press, Hampshire and London.
- Zagrebelsky, G., Portinaro, P.P., Luther, J., eds. (1996), *Il futuro della costituzione*, Einaudi, Torino.
- Zagrebelsky, G., ed. (2004), *Diritti e Costituzione nell'unione europea*, Laterza, Roma-Bari.
- Zincone, G., ed. (2001), *Secondo rapporto sull'integrazione degli immigrati in Italia*, Il Mulino, Bologna.
- Zolo, D., ed. (1994), *La cittadinanza. Appartenenza, identità, diritti*, Laterza, Roma-Bari.
- Zolo, D. (1995), *Cosmopolis*, Feltrinelli, Milano.

Summary

Foreword <i>Barbara Henry, Anna Loretoni</i>	5
---	---

I IDENTITY AND RIGHTS

Europe on the Eve of the Constitution <i>Biagio De Giovanni</i>	13
Euro-scepticism Its Benefits and Shortcomings <i>Enno Rudolph</i>	27
Constitution, European Identity, Language of Rights <i>Barbara Henry</i>	37
The Charter of Fundamental Rights of the European Union Between New and Old Rights <i>Anna Loretoni</i>	59

II IDENTITY AND CONSTITUTION

Human Rights Conditionality and the European Constitutional Identity <i>Cesare Pinelli</i>	75
Principles of Integration with Respect to the Fundamental Rights in Europe <i>Jörg Luther</i>	87

Exporting Democracy and Human Rights in the Constitutional
Debate of the European Union
Paolo Bianchi 107

Social Rights
Recognition and Prospects
Salvatore Vuoto 125

III
CITIZENSHIP AND INTEGRATION

The EU at Stake
The Social Requirements of Enlargement
John Pinder 151

Fundamental Rights, Citizenship and Democracy
Roberto Castaldi 169

Fundamental Rights in the Multicultural European Society
Francesco Belvisi 177

A Mirror Image?
The Emerging United States of Europe
Paolo Ruspini 189

The European Union and the Challenges of Enlargement
A Fundamental Rights Perspective
Marco Meloni 205

The European Constitutional Process
Giorgio Napolitano 227

The Authors 243

Finito di stampare nel mese di dicembre 2004
in Pisa dalle
EDIZIONI ETS
Piazza Carrara, 16-19, I-56126 Pisa
info@edizioniets.com
www.edizioniets.com