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Can the EU Foster a Post-national European Identity by the Extension of European Constitutional Rights?

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The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values. [1]

In his analysis of the Charter of Fundamental Rights of the European Union, John Erik Fossum points out that it is an attempt to foster political allegiances among the European citizens by legal and political means.[2] According to him, a clearly developed philosophy underlies this project, namely a rights-based constitutional patriotism.[3] The extension of rights to European citizens is supposed to increase the allegiance of those citizens beyond the boundaries of their respective states, thus creating a “post-national type of attachment”.[4]

Universal rights form an important topic in many debates, both about the EU specifically and about political theory more broadly. There are debates between communitarians and liberalists, between liberal-democratic or republican forms of democracy, between the value of collective rights versus the value of individual rights, between universal rights and rights that are protective of minority cultures.[5] It is not the intention of this essay to describe the scope of these various arguments adequately, despite their relevance. Furthermore, it will have to ignore or treat indirectly many issues that are relevant to the construction of a European identity, such as the democratic deficit and immigration.

This essay will instead take the notion of constitutional patriotism and try to problematize it (but not necessarily disprove it), aided by opposing theories, individual arguments and some very brief case examples. The aim is to establish what the effects of the extension of European constitutional rights could be in regard to the creation of a European identity, and more importantly what the potential pitfalls and areas for improvement are. The overall argument is that rights alone are not enough to constitute a European identity, and they certainly cannot be expressed in rigid forms like in the Constitution or in the Treaties. They should especially not be forcefully imposed, which unfortunately is exactly what has happened through the purely intergovernmental ratification of the Lisbon Treaty.

Beyond the Nation-State: Constitutional Patriotism

According to traditional political theory, two aspects have founded citizenship: on the one hand, the extension of rights to the members of a society, on the other the attribution of a set of shared values. These two elements, rights and identity, seem to have decreasingly decoupled in the post-war era.[6] Fueled by globalization but also partly by processes within the EU itself, this trend has elevated the notion of rights to a transcendental, universal level.[7] As an example, Yasemin Soysal points to the existence of a very large group of immigrants in Europe that has not got, and does not seek to get, citizenship. Still they have all the rights that normal citizens do (except for voting rights, and even those they sometimes only lack them on the state level).[8] This causes a large transformation in the sources of legitimacy for rights: they no longer derive from relations with state governments; they can no longer be expressed in territorial terms.

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According to Jürgen Habermas the centralized, territorially defined nation state at first “laid the foundation for the ethnic and cultural homogeneity [which made the current form of modern democracy possible], albeit at the cost of excluding and oppressing minorities”.[9] Yet this nationalism is to him not an integral part of citizenship, and even though it was essential in the past for the creation of nation states, Habermas denies the existence of a conceptual link.[10] Rather, the basis for citizenship is a constitutional consensus, a procedural law that treats all citizens in the same way and thus provides them with certainties; civil rights which guarantee a fair treatment and mutual recognition within the state.[11]

Extrapolating this understanding of citizenship to the European Union, Habermas argues that Europe’s nations constitute isolated cultural spheres that cannot integrate with each other. However, he thinks that it would be possible to bridge these differences by creating a common political culture, deriving from a European “constitutional patriotism” that is based on the idea that citizenship does not originate in national background but in rights.[12] This allows the states and peoples of Europe to find a positive commonality in their citizenship, creating a “common political culture”[13]. It also bases European citizenship solely on a common interpretation of universal rights, separating any “obsolete” concept of a particular ethnic identity.[14] There has to be a clear differentiation between the political (public) and the particular (private, national) sphere. All national cultures have to contribute to this “common politicocultural self-understanding”, not so much by looking for historical commonalities but by distilling their political principles into generalized ideas that can also apply in other countries.[15]

There is an important difference between observing that rights and identity have become decoupled in their relation to national governing institutions, and claiming that they were never linked at all. This claim is essential to constitutional patriotism. In the following section, I will examine its validity and implications.

The relation between rights and identity

Bellamy and Castiglione point out that even though all European countries subscribe to universal rights, such as freedom of speech and privacy, the way in which respective countries interpret them differs. An example in the case of freedom of speech is the way in which German newspapers must discreetly omit certain aspects of their politicians’ private life, whereas in Britain the newspapers have much more freedom to publicize their leaders’ personal affairs – the public even expects them to do so.[16] In other words, universal rights can only become meaningful when put in the context of a national identity.[17]

Similarly, even if rights could be meaningful in themselves, we should find out what happens to particular identities when they are separated from rights. Formerly, identities they were at least partly based on rights that had their normative foundation in the state. Now, these founding principles of identity are suddenly supposed to be universalized, spread out over 490 million people. Soyal states that this results in reinventions and new articulations of national identities on terms that are not right-based, giving rise to negative identifications and exclusionary narratives.[18] A somewhat paradoxical dialectic arises: the more universal rights come to be consolidated, the more groups will feel the urge to define what distinguishes themselves from others, the more claims are made about particularistic identities.[19] In this view, it seems that the aim of the constitutional patriots is running out of bounds. The notion of rights is indeed becoming post-national, but that does not mean that the essence of citizenship does as well. Rather, the function of rights within the concept of citizenship is fading, and the notion of identity is again becoming more significant. What causes this?

According to Ruzza and Schmidtke, the process of globalization, trans-boundary mobility and an increased atomistic lifestyle in Western Europe have all attributed to a feeling of alienation. This feeling has given rise to a need for identity, explaining the strong revival of regionalist groups. In the cases that there was not such an identity available, they were constructed, like in the case of Northern Italy and the Lega Nord.[20] In this case example, there was a general discontent with corrupt Italian politicians. In the same time, there was a wider sense of alienation and lack of identity that the authors claim is endemic to all of Western Europe and that they attribute for a large part to the spreading of individualist values.[21] Political leaders like Umberto Bossi will subsequently be able to mobilize grievances – which could be anything from corrupt politicians or economic deprivation to any other sense of injustice against the governing establishment[22] – and connect them to the issue of alienation.

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In cases where a strong identity exists, rights will already have assumed a specific meaning. A study of Quebec's rejection of the Canadian Charter of Rights and Freedoms shows that the unilateral imposition of rights can create more conflict, rather than address the existing one.[23] The Charter met with great opposition, spawning claims that it was unnecessary and not protective enough of certain cultural and linguistic rights.[24] Fossum therefore points at the importance of what he calls co-originality (mutual involvement in the conception of rights), something that he admits has been lacking in the process of EU constitution drafting.[25] Rights define the scope of political debate in the form of a legal-normative framework. They mirror whether in a polity, negative freedom will be favored or whether there is the necessity for positive discrimination.[26] Therefore, constitutions and other historical agreements are in many cases contested and adjusted, examples being the civil rights movement in the United States in the 60's[27] and the ascension of Quebec into Canada.[28]

We can conclude several things from the above examples. First, particular issues define the importance and form of both rights and identity, and in this sense there is a correlation between them. Secondly, if rights or identity are not clearly defined and applicable, particular issues can redefine and substantiate them. This shows clearly in the political opportunism of individuals like Bossi. Thirdly, rights cannot just be imposed on citizens, as this might neglect or exclude identity.

In short, the EU cannot separate the political and the cultural realm, as the public realm is "infused with competing moral claims", which makes it very hard to try to regulate the public sphere in accordance with a set of standardized values.[29] For example, there are just too many differences between social democratic and libertarian conceptions of economic rights, and every compromise between the two systems would be viewed as unfair by both parties. Even marginal taxation still infringes on the right of negative freedom that a libertarian would like to see. Adopting negative liberty in the constitution, however, would negatively frame the debate about social policies that the social democrat would like to hold.[30] There is also the danger of adopting one specific set of values, which would amount to "cultural tyranny" by one culture over all others in the EU.[31]

The assumption that an identity – or even civil rights which are supposed to constitute that identity – can be handed out to (or imposed on) passive citizens, is wrong.[32] The question therefore becomes whether we can allow existing identities into the interpretation of universalized rights, and whether this will still be conducive to the creation of a European identity. The next section will deal with this question.

The Virtue of Differences

In her analysis of Islamic organizations in France, Soysal found that particular identity groups (in this case Muslim women looking for cultural recognition) make use of their post-national citizenship by challenging the national authorities on the basis of their specific interpretation of universal rights.[33] These kinds of arguments give rise to debates with a functional foundation, rather than a national one.[34] This means that they are held on an issue-specific basis and in the above example of Muslim women even by different Muslim communities across Europe, creating "transnational communities".[35] Here, culturally specific issues link into Habermas' transnational rights, creating a post-national dialogue. Yet they do not provide the basis for a "bridging political consensus", but rather a basis for contestation.[36] This is not a flaw, but rather a strength of European identity building.

Zabusky illustrates this point with the results of an anthropological observation conducted in the European Space Agency. It appears that workers from different EU countries, when put together in a country different than their own, feel especially European.[37] Being isolated from their own culture made them highlight their mutual differences.[38] The reflection of that fact in their daily chats created a recurrent pattern of conversation that became indicative of their relationship: they all shared a sense of otherness, a feeling of belonging to a group that was inherently different; they found this stimulating rather than alienating.[39] Research conducted in four EU-15 countries points out that there is indeed a post-national sense of European identity present among citizens, who all emphasized diversity as its key feature.[40]

Along these lines, Bellamy and Castiglione propose that diversity itself should be the most important characteristic of the European identity. The EU has evolved into a political arena in which citizens are starting to be active on the level

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of specific issues, separating the classical state's territorial and functional aspects to create a "multi-level, polycentric institution".[41] In order to institutionalize this, they propose an "ongoing political constitutionalism", relying on inclusion of citizens within the political processes and the constitutionalization of the EU.[42] Disagreement needs to be incorporated in the political system, so that there is no false homogenizing but rather a realistic discontent that forces the polity to adapt itself and "recognize, respect and represent the values, opinions and vital interests of its members".[43] The emphasis on rights sidelines the truly important aspect of citizenship, which is the civic virtue of participation.[44] Participation will give transcendental rights substance and make them constitutive – rather than obstructive – to particular identities. Through dialogue, disputants can learn about each other's arguments and try to find commonalities. Thus, they can come up with compromises on specific issues, which will lead to a practice of coexistence.[45] The key point here is not the nature of that compromise, whether it will be maintained for a long time, or whether it is between regional, national or even transnational actors. The point is that the European judicial and political systems should allow discussions to take place without a normative bias, creating "dispositions of civility, tolerance and reciprocity", which constitute particular identities that are inclusive rather than exclusive.[46] This is the only kind of identity that Europe needs, and the only kind of identity that it could have: one of cultural pluralism.[47] This finding has led some commentators to the conclusion that the abolition of immigration laws[48] or the creation of a European football league[49] would be the best ways to let Europeans intermingle and by doing so define themselves in both European and national terms.

This has serious implications for the way in which constitutional rights are established. For example, it explains the failure of the Constitutional Treaty, of which the Charter was a part: only 55 percent of the EU-25 citizens knew about the existence – leave alone the purpose – of the Convention on the Future of Europe in 2003.[50] The Convention did not act as a "constituent assembly", lacking in public involvement and being too intergovernmentalist.[51] Even proponents of constitutional patriotism admit that such lack of citizen involvement and political will threatens to drain the Charter from its significance on purely procedural grounds alone.[52]

More importantly, we have established that even basic rights are problematic, as they fundamentally frame the content of political discussions. This means that the common values that "the peoples of Europe" so optimistically base their Charter on are virtually nonexistent. The constitutions of all European countries stem from sometimes fundamentally different political traditions, an example being Italy's communist ideological heritage versus France's revolutionary republican traditions.[53] This is why all of the rights in the Charter have been deliberately honed down to the lowest common denominator to fit all of the different interpretations that at this moment also exist within the EU's individual nations. The Charter is therefore only the consolidation of the status quo, institutionalizing national rights and making the way to a pluralistic identity even harder.[54]

Conclusion

Constitutional patriotism carries several imminent threats. It imperils the meaning of rights, by making them either too dogmatic or too universal. In the latter case it disconnects them from the institutions (be it national or post-national) and in the former it alienates the people with a particular minority identity that does not fit the general framework. Furthermore, we have found that it is not sufficient – even dangerously counterproductive – to base a political identity on universal individualist values and rights only. Rights should be the result of public debate, rather than form preconceived constraints on it. European institutions should create the space for an issue specific, transnational spaces for civic contestation. There, and only there, a European identity can be formed from the bottom-up, rather than be imposed by European leaders from the top-down.

This essay does not answer some essential questions, for instance how the EU will manage to engage its citizens in democratic participation.[55] Within the context of the essay question however, it does make clear that the extension of rights is not a "quick fix" for legitimacy problems, and that any feeling of allegiance and patriotism must follow civic engagement. It will never precede it.

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[1] Preamble to the “Charter of Fundamental Rights of The European Union”, first sentence.

[2] John Erik Fossum, “The European Union: In Search of an Identity”, pp 319-340 in *European Journal of Political Theory*, 2003; 2, 337.

[3] Fossum, *In Search of an Identity*, 336.

[4] Fossum, *In Search of an Identity*, 327.

[5] See (among others) Will Kymlicka, *Liberalism, community and culture* (New York: Oxford University Press, 1989), 162-178 & 253-258.

[6] Yasemin N. Soysal, “Changing citizenship in Europe: remarks on postnational membership and the national state”, in *Citizenship, Nationality and Migration in Europe*, pp 17-29, Ed. David Cesarani and Mary Fulbrook (London: Routledge, 1996), 17-18.

[7] Soysal, *changing citizenship*, 19-20.

[8] Soysal, *changing citizenship*, 21.

[9] Jürgen Habermas, *Citizenship and National Identity* (1990), Appendix II (pp 463-490) to *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge: Polity Press, 1996), 493.

[10] Habermas, *Citizenship and National Identity*, 496.

[11] Habermas, *Citizenship and National Identity*, 496.

[12] Habermas, *Citizenship and National Identity*, 507.

[13] Habermas, *Citizenship and National Identity*, 500.

[14] Ephraim Nimni, “Constitutional or Agonistic Patriotism? The Dilemmas of Liberal Nation-States” in *Constituting Communities: political solutions to cultural conflict*, pp 95-116, ed. Per Mauritsen and Knud Erik Jørgensen (London: Palgrave Macmillan, 2008), 102.

[15] Habermas, *Citizenship and National Identity*, 507.

[16] Richard Bellamy and Dario Castiglione, “Beyond Community and Rights: European Citizenship and the Virtues of Participation”, in *Constituting Communities: political solutions to cultural conflict*, pp 162-186, ed. Per Mauritsen and Knud Erik Jørgensen (London: Palgrave Macmillan, 2008), 165.

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[17] John Maynor, "Constitutional Patriotism or Neo-republican Citizenship: A Way Forward for the EU?", in *Constituting Communities: political solutions to cultural conflict*, pp 187-207, ed. Per Mauritsen and Knud Erik Jørgensen (London: Palgrave Macmillan, 2008), 195.

[18] Soysal, *Changing Citizenship*, 23.

[19] Soysal, *Changing Citizenship*, 26.

[20] Carlo Ruzza and Oliver Schmidtke, "The Northern League: Changing Friends and foes, and its political opportunity structure", in *Citizenship, Nationality and Migration in Europe*, pp 179-208, Ed. David Cesarani and Mary Fulbrook (London: Routledge, 1996), 196 & 204.

[21] Ruzza and Schmidtke, *The Northern League*, 196 & 203.

[22] Ruzza and Schmidtke, *The Northern League*, 201.

[23] Fossum, *Constitutional patriotism*, 10.

[24] Fossum, *Constitutional patriotism*, 10.

[25] Fossum, *Constitutional patriotism*, 12.

[26] Richard Bellamy, "The Right to have Rights: Citizenship Practice and the Political Constitution of the EU", pp 41-72 in *Citizenship and governance in the European Union*, ed. Richard Bellamy and Alex Warleigh (London: Continuum, 2001), 45.

[27] Bellamy, *The Right to have Rights*, 46.

[28] Will Kymlicka, *Multicultural Citizenship* (New York: Oxford University Press Inc., 1995), 118.

[29] Yasemin Soysal, "Changing Boundaries of Participation in European Public Spheres: Reflections on Citizenship and Civil Society", pp 159-179 in *European Citizenship: National Legacies and Transnational Projects*, ed. Klaus Eder and Bernhard Giesen (Oxford: Oxford University Press, 2001), 168.

[30] Bellamy, *The Right to have Rights*, 51-2.

[31] Maynor, *Constitutional Patriotism or Neo-republican Citizenship*, 196.

[32] Bellamy and Castiglione, *Beyond Community and Rights*, 175.

[33] Soysal, *Reflections on Citizenship*, 170.

[34] Bellamy and Castiglione, *Beyond Community and Rights*, 167.

[35] Soysal, *Reflections on Citizenship*, 171.

[36] Soysal, *Reflections on Citizenship*, 175 (n. 20).

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[38] Zabusky, *Discourses and Practices of belonging*. 195..

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- [39] Zabusky, Discourses and Practices of belonging.194.
- [40] Antonsich, Narration of Europe, 514.
- [41] Bellamy and Castiglione, Beyond Community and Rights, 168-169.
- [42] Bellamy and Castiglione, Beyond Community and Rights, 175-177.
- [43] Bellamy and Castiglione, Beyond Community and Rights, 175-177 &180-181.
- [44] Bellamy and Castiglione, Beyond Community and Rights, 182.
- [45] Bellamy, The Right to have Rights, 57.
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- [53] Bellamy, The Right to have Rights, 59.
- [54] Bellamy, The Right to have Rights, 60.
- [55] For suggestions on this, see Bellamy, The Right to have Rights, 62-63 & Ephraim Nimni, Constitutional or Agonistic Patriotism? The Dilemmas of Liberal Nation-States, pp 94-116 in Constituting Communities: political solutions to cultural conflict, ed. Per Mauritsen and Knud Erik Jørgensen (London: Palgrave Macmillan, 2008), 107-112.

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