

NATIONALITY OF MEMBER STATES

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Introduction

Legitimacy refers to the justification and acceptability by individuals of public power or authority. Legitimacy, in modern Western States, is based on the existence of entitlements for individuals participation in public life; these entitlements together with the concomitant duties form a status designed as citizenship. The creation of the citizenship of the Union was rooted in an effort to increase democratic legitimacy and, in the work of some authors, there seem to be an implicit agreement that the common practice of citizenship rights could become the basis for the development of a positive solidarity that might generate an independent source of legitimacy for the EU. Some authors refer to the modest process of creating a culture of rights,¹ whilst Habermas has argued that a similar development, the creation of constitutional patriotism, happened in Germany to fill the vacuum left by the excesses of German nationalism under the nazism. May the common practice of citizenship rights legitimate (i.e. be the basis of acceptance of) Union policies? There is, then, a second question: can European constitutional patriotism (justify/give way) to relinquishing immediate individual national interests in favour of collective European goals?²

This paper explores whether the citizenship of the Union may become an autonomous source for Union legitimacy by focussing on two issues. Firstly, it seems that some Union citizenship rights, particularly the rights to freely move and reside within the EU, do establish legitimacy basis for the EU. That is, the praxis of such rights may create a substrate of acceptance of European Union. Political rights, though, are the essential citizenship right therefore it is necessary to determine to which extent the political participation afforded by EU citizenship establishes a legitimacy channel autonomous from nationality. On the catalogue of rights included by the Treaty on European Union, the legitimacy deficit in the concept and implementing elements of political rights created by their reliance on nationality will be examined (II). Secondly, the difficulties to develop social rights or redistributive entitlements, on the other hand, mean that citizenship of the Union will not substitute the individuals perception of material belonging around nationality (III). In either case, it seems evident that the traditional attachment of citizenship (as a status of rights) to the idea of nation provides legitimacy grounds for the development of certain rights which constitute the essence of citizenship. If citizenship is built up as a set of rights without no reference to the community identity contained in the idea of nationality, there will be a lack of legitimacy to include certain rights. Anticipating the conclusion (IV), a concept of citizenship that goes further than the mere harmonization of certain secondary political rights seems to require the previous development of forms of pan-Union identity if it is to avoid legitimacy deficits. The reasoning will commence establishing a conceptual difference between citizenship and nation as two different ways of relating individuals to public power in their legitimacy function (I).

I. ESTABLISHING A CONCEPTUAL DIFFERENCE BETWEEN CITIZENSHIP AND NATION

Although in the frame of contemporary nation-states citizenship and nationality appear indissolubly linked, both concepts convey different ideas on the role of individuals in legitimizing public power. The concept of nationality refers, etilogically, to an undetermined attribute of a person generally assigned at birth: the concept derives from the Latin *nascere* (to be born). *Natio* referred to peoples and

tribes not yet organised in political associations, implying merely precedence.³ The concept of nation sanctioned, thus, continuity with a determined lineage as well as a geographical entity in which this lineage was established. Following Habermas, nations may be defined as communities of people of the same descent, who are integrated geographically in the form of settlements or neighbourhoods and culturally by their common language, customs and traditions, but who are not yet politically integrated in the form of state organization.⁴ The attachment to a legitimating function is closely linked to its perception as a new and alternative political subject in opposition to the king or queen as the bearer of national sovereignty. Since nations referred also to a lineage, the perception of the political subject was developed in a transcendent dimension which allowed to establish identity across time independently of the concrete individuals forming the nation in a given moment. The fundamental continuity and identity through time was established as the basic characteristic of the nation and, then, nationality expressed the link with a political community (in most of the cases, the bearer of sovereignty) before other political communities. Transcendence and differentiation are the basic characteristics of the nation as well as the foundation of the legitimacy of representative public power. The concept of citizenship emphasises the existence of entitlements for individuals as the foundation of their legitimating role. In the Roman Republic as well as the Roman Empire, citizenship meant the personal status of certain individuals, which was characterized by property ownership and, consequently, full participation in public life through positive rights. When cities became an alternative model of political organization to feudal, imperial or royal dominance, they were perceived furthermore as the source of individual freedoms. After the French Revolution, the concept of citizenship was constructed around Rousseau's notion of self-determination, primarily in developing the principle of the equality of individuals. In words of Habermas again, everyone should be in a position to expect that all will receive equal protection and consideration in his or her inviolable integrity as a unique individual, as a member of an ethnic or cultural group and as a citizen, that is, as a member of a polity.⁵ Equality of legal status seems to be an agreed characteristic of citizenship; along this line, Meehan argues that the basic element of citizenship from which capacities for full participation arise is to live under the rule of law, under a system where laws and offences are known, where there is predictability and certainty that offences will be punished but that punishment for breaches can follow only from the application of the due processes of law.⁶ Differently from the term nation, citizenship referred primarily to a personal status made up of entitlements, rights and duties. The classical account of the process of creation of modern citizenship is that of Marshall who established that the personal status results from accumulating three successive levels of fights. The first group are civic fights expressing the basic legal equality of individuals before the law. Secondly, political fights entitle the individual to participate in the exercise of national sovereignty. Finally, social fights marked the final stage of development of citizenship, although nowadays there has been some contention on Marshall's account. The blending of the analytically different legitimacy functions attached to the terms nation and citizenship must be established around the doctrine of national sovereignty. The sovereignty of king, queen or emperor was not dependent on the existence of a community and individuals were subjects who owed allegiance to the sovereign (who, in turn, owed them protection). When the nation became the source of state sovereignty it was necessary to determine the individuals entitled to participate in the political life and their new status. The nation-state provided the frame for free individual and collective action.⁷ Therefore, there is a symbiosis, as Habermas argues, between republicanism and nationalism. The new political role of individuals demanded a high degree of personal commitment, even to the point of self-sacrifice and, at this juncture, nationalism served to foster people's identification with this role: nationalism and republicanism combined in the necessity to fight and, if necessary, to die for one's country,⁸ instead of the obligation to die for the king. Both concepts converge on a criterion of exclusion. Characteristically, the exclusion established by the concept of citizenship is within the community, the excluded individuals being determined by ethnicity⁹ or gender.¹⁰ A parallel essential feature of citizenship has been a sense of being able to distinguish between "ourselves" and "others" from outside our community, whatever the territorial dimension of that community. With the need for emergent nation-states to control borders, the distinguishing characteristic became nationality.¹¹ The exclusion was founded on the understanding of the state as an entity whose telos is to express the will and further the interests of distinctive and bounded nations, and whose legitimacy depends on their doing so, or at least seeming to do so.¹² Thus, the conceptual identity between nationality and citizenship has been the result of an historical process of construction, concluding with the exclusion of certain categories of individuals from this privileged

status. From a juridical point of view, both concepts of nationality and citizenship refer to the relationship of the individual with the state, although the significance given to either concept seems to depend on the historical traditions pertinent to each state. It could be argued that in its most common usage, citizenship has a juridical constitutional meaning ad intra of the political community whilst nationality has an international juridical meaning ad extra of the said community.¹³ In this perception, nationality means the affiliation of an individual from the point of view of international law, whilst citizenship implies the host of domestic rights attached to that affiliation. The logical sequence is that nationality implies citizenship and this, in turn, implies a host of rights and, consequently, exclusion from nationality would imply, in conceptual terms, exclusion from the rights of citizenship. Despite of the convergence of both concepts, citizenship and nationality, there is a telling psychological difference among them. Nationality establishes identity of a political subject across historical time. This implies the possibility of an individual to identify himself with other nationals independently of their respective historical times. Citizenship, on the other hand, emphasises personal autonomy of individuals¹⁴ and marks the change in individual status across time. Regardless of Aaron's opinion that multinational citizenship was not possible, this difference between status and identity has allowed the creation of Union citizenship. However, the split between both marks also the limits to the legitimating function for Union citizenship. The legitimacy function for EU citizenship will be established along Weiler's dual definition.¹⁵ Weiler has distinguished two different concepts of legitimacy: formal (or legal) and social (or empirical). Formal legitimacy implies that all requirements of law are observed in the creation and functioning of the institution or system. Formal legitimacy distinguishes itself from legality because the first involves people's consent; any notion of legitimacy must rest on some democratic foundation even if this is as vaguely defined as the people's consent to power structures and processes. Formal legitimacy in the EU has two traditional sources; direct and indirect. Since citizenship of the Union attempts to establish a direct link between individuals and Union, it must be assessed whether Union citizenship improves formal direct Union legitimacy. Social legitimacy, on the other hand, connotes a broad societal (empirically determined) acceptance of the system. In Weiler's view, an institution may be socially legitimate even if broad sections of society do not favour its specific composition, programme or operation. Of course, social legitimacy implies measurement of public opinion; this paper will focus rather on whether Union citizenship alters the background conditions on which public opinion is constructed by referring to an essential element of citizenship: social redistributive fights. In this case, the lack of a national substrate sets some serious limitations to the expanding of the status citizenship to include certain essential rights.

II. The legitimating effect of the practice of political rights

The legitimating effect of the practice of political rights enshrined by the Maastricht Treaty is limited. Traditionally, CE legitimacy has been said to be dual: direct, as provided by a directly elected EP, and indirect, as provided by the Council made up of representatives of national governments. The prevalence of the indirect source is established not only by the EC decision-making procedures but it is furthermore reinforced by the subordination of political participation by Union citizens to national requirements. More significantly, the political rights of Union citizenship do not seem to create the basis for the development of constitutional patriotism (as different to nationalism): they do not entail the possibility to participate in political decision-making either pertaining national sovereignty or Union policies at the most decisive level.

1. Neutralisation of dilution of national identity in political rights of EU citizenship

The prospects for EU citizenship becoming a direct EU legitimacy source is severely burdened because the indirect attribution of Union citizenship implies denying an immediate link between citizenship and Union. As a consequence, the exercise of Union rights is conditional upon being a national of a Member State. But even the two rights to political participation expressly included are not unlimited since certain restrictions in the exercise of these rights protect national identities.

Precisely, the granting of voting rights in EP but specially in local elections, is made upon the assumption that these do not affect national sovereignty and therefore, national identity is not affected by them. The exercise of voting rights in the Member State of residence is optional: citizens may choose to vote either in their Member State of nationality or residence. This seems to be an acknowledgement that the nationality link to be a stronger and more persistent one than the link with the host country created by Union citizenship. The practical effects of the generalisation of voting

fight for EP elections seem to be reduced in terms of electoral impact. However, where a threat to national identities has been perceived (i.e. Luxembourg), careful arrangements have been made to prevent dilution of national identity.

2. Prevalence of nationality in the establishment of the political relationship between individuals and the EU

Political participation is the key instrumental political act by citizens in a democracy. Union Citizenship fights do not include a general fight to political participation in the Union. Specifically, the modalities of political participation afforded by Union citizenship do not provide the capabilities to influence the selection of governmental personnel and/or the actions they take, what Verba et al consider the essence of political participation. The modalities that do have the most important impact on Union politics because of its constitutional and institutional framework are not included as Union citizenship fights. By preserving these mechanisms from Union citizenship, national identities are reinforced by the possibility of not being superseded by the direct relationship between individuals and Union.

a. Participation in national elections

Given the overwhelming prevalence of the Council in EU decision-making processes, the most important citizens decision on Union politics is through the election of national governments, what is generally termed indirect legitimacy. Most Member States still reserve participation in national elections for their own nationals, since this is the mechanism to actualise national sovereignty. Reserving the participation for own nationals provides a mechanism for reconstructing cohesive national identities to participate in EU politics.

b. Exclusion of forms of direct participation (contracting out)

The input of direct legitimacy into the EU political system relies solely in EP direct elections: there is no other mechanism for non-mediate citizens political participation in EU politics. The exclusive initiative right granted to the Commission precludes people's initiative and referendums are, simply, nor even referred to in preparatory drafts on Union citizenship. Of course, there is no agreement on the legitimising effect of the forms of direct participation or whether they are compatible with representative democracy.

However, national mediation does allow forms of direct participation on EU affairs. Hypothetically, a government might pick citizens initiative in these cases in which the Council may suggest the Commission to initiate legislation, although practical and constitutional limitations may impede it. National referendums provide a real mechanism for citizens political participation in restricted cases. Given the impossibility of selective derogation of EU legislation, the recourse to the instrument of direct participation is reduced to constitutional decisions on membership and reform.

In either case, EU citizenship does not offer an alternative status to legitimate EU politics. National referendums are considered to be a form of expression of national sovereignty and, consequently, participation in the decision-making is reserved to nationals.

The real political effects of this exclusivity are difficult to interpretate: Quoting the small difference in votes in the French and Danish referendums on the Maastricht Treaty, Koslowski has noticed that the enfranchisement of EU citizens for referendums could affect the secession possibilities of a member state. This assertion has difficult proof. The political significance of non-enfranchisement of EU citizens for referendums in these countries in which they are required has the general effect of sanctioning EU membership as a contractual relationship between a nation and the Union itself. This seems to be self-evident in the case of membership referendums. But it becomes a fundamental inequality of EU citizens when the issue is reform. Given the unanimity requirement for constitutional reform, nationals from some Member States enjoy a greater opportunity to influence or even condition EU politics than fellow EU citizens in other Member States. Again, individuals legitimate changes of the EU constitutional through their respective national statuses.

III. Social rights and Union Citizenship legitimacy

Since citizenship is a legal status that establish equality among individuals, it legitimates polity's policies aimed to reduce inequalities and, particularly, to reduce the inequalities created by the market. The development of social rights, that are an essential component of citizenship entitlements, has been

essential to increase the legitimacy of Western States. Obviously, the market-led logic behind the European integration process is bound to create inequalities, although losers and winners are identified along national lines and not as individuals. May Union citizenship become a status legitimating Union policies targeting material equalisation among individuals? Social rights are conspicuously absent from the catalogue of citizenship rights listed in article 8. Certainly, some authors have argued that citizenship rights should not be considered to be reduced to these referred as such by the Treaty.¹⁶ In fact, a number of entitlements that can be qualified as social rights may be identified in EC law, for instance, the entitlement to receive social benefits. However, since they have not expressly formulated as citizens rights, their foundation is grounded on individuals' economic activity and not their condition of members of a political entity. They lack, therefore, the universalistic character of other citizenship rights, creating instead a two-speed Union citizenship.¹⁷ The fact that certain social rights (mainly, of industrial nature) have been explicitly included in an instrument, the Social Protocol, that does not form strictly part of the EU; which is based on an intergovernmental agreement and which is not subject to EC law and ECJ jurisdiction does not ameliorate this two-speed citizenship. The development of a general character of social citizenship rights at the European level has to come, then, through a political decision to activate the dynamic character of citizenship, as enshrined by article 8e. If there seems to be legal grounds to develop certain social rights, it may be wondered whether the development of social rights, particularly these with a redistributive profile, may be considered a legitimate endeavour of the Union. Several difficulties have been signaled.

Critical (and not so critical) accounts of the process of rights acquisition in a national context have underlined the tight relation in the addition of successive layers of rights to the development of the market (Marshall and so on). If civic and political rights were the logical correlate to individuals' equality introduced by the market, social rights were created as an instrument to modify market logic, specifically redistributive rights. Redistribution may find two sources of legitimacy. In the one hand, they may be considered necessary to guarantee

On the other hand, they can be considered as part of a Keynesianist market policy of demand stimulation where the satisfaction of individuals needs becomes also an instrument of market intervention. Both types respond to what Majone calls, respectively, social regulation, whose purpose is to solve problems created by specific types of market failure, and social policy, based in moral or political reasons (and not in the search for market efficiency).¹⁸ In both cases, the political effect is the same: incorporating individuals (and marginalised social groups) to society.

There seems to be no doubt of the centrality of the market in the development of citizenship rights within the EC. The most perfected of these i.e. freedom of movement and residence are tightly linked to the creation of the single market of which they are elements that guarantee its efficiency. Whilst this market-efficiency argument secures a wide consensus for such rights, the development of a system of redistributive social rights is a more contentious argument. The legitimating claim for EU level redistributive rights is the possible effects of the market on citizens material status, for instance, the increment of unemployment and the constraints on fiscal policy posed by the convergence policies.¹⁹ Thus, in the opinion of the Spanish government, responsibility for the reduction of economic disparities has to be assumed by the Union as a prerequisite of its legitimacy. Economic and social cohesion is a political concept that establishes the maximum socially acceptable divergence among citizens of the Union.²⁰ The objections to such a development are almost unanimously repeated. Firstly and despite neo-Keynesian inspiration behind the Commission White Paper on growth, competitiveness and employment,²¹ the EU does not have a macroeconomic policy, nor budget or fiscal resources to alter the effects of the single market. Secondly, the lack of commonality of the EU seems an unsumourtable obstacle for redistributive entitlements. The reference frames for creating or eliminating social rights are national cultures and, specifically, the degree of economic welfare that in each member state permits granting given social rights. There are, therefore, differences in the way different societies may perceive what are the social rights attached to the concept of citizenship or even the tendency towards increasing or decreasing this catalog. Whilst some authors signal that the backwardness of Southern Member States erodes the basic equality of citizenship in material terms,²² others have emphasized that the egalatory concept underlying in the principle of social and economic cohesion is not the provision of individual entitlements (which would be opposed since it would erode competitiveness) but interregional redistribution.²³ Effectively, the objective of social and economic cohesion is not even interregional redistribution, but interestatal redistribution.²⁴

Thus, although some authors have argued the development of a Union social policy (and, specifically, redistributive rights) can help to produce greater solidarity²⁵ and, in this sense, to create a community, it seems however, that solidarity is rather a prerequisite for developing redistributive social rights. These organise solidarity systems but since they serve to compensate different states of necessity across time, space and life situations; redistributive rights seem to be part of communities self-perception and identities.²⁶ For Majone, the delicate value judgements about the appropriate balance of efficiency and equity, which social policy express, can only be made legitimately and efficiently within homogeneous communities.²⁷ It must be recalled that the development of national welfare states in Europe was promoted by a relatively strong perception of common (most male-informed) citizenship, molded by identity-shaping experiences such as wars and grounded in an underlying social homogeneity.²⁸

IV CONCLUSIONS

The provision of material status for individuals within the EU under the concept of citizenship does not seem to have improved EU legitimacy. Nationality, the legal repository of national identity, is still a prevalent and more qualified legitimacy source for the EU system and politics. This brings back the matter to the problem put forward by classical integration authors: whatever legal status is given to individuals, the creation of a European community, in Tönnies' sense, seems to be a prerequisite for legitimising the polity.