

The Charter of Rights and the European Constitution *

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Abstract

Perjalanan Konstitusi Eropa dalam kerangka pembentukan 'Negara Federasi Eropa' berada dalam persimpangan yang belum menunjukkan arah berakhirnya. Prosedur legal formal melalui referendum yang tidak mendapatkan persetujuan semua negara anggota bukan alasan utama tidak diterimanya Draf Konstitusi Eropa tersebut. Tetapi lebih jauh lagi terhadap materi yang diatur dalam draf konstitusi tersebut. Artikel ini mencoba mempertanyakan dan menjawab tentang keberadaan Draf Konstitusi Eropa sebagai salah satu aspek signifikan dalam proses pembentukan 'Negara Federasi Eropa' serta implikasinya secara politik dengan mendasari kepada 3 (tiga) latarbelakang yaitu; politik, alamiah dan pembatasan yang melingkupi draft Konstitusi Eropa tersebut.

Keywords: European integration, democracy, fundamental rights, constitutions, European Unions

1. Why a European Charter of Rights?

To identify the reasons for the European Council of Heads of State and Government decision (Cologne, 3rd and 4th June 1999) to draft a Charter of Fundamental Rights of the European Union, this decision should

be analyzed within the context of European unification. The import of any discourse depends on the context in which it is placed, that is, the significant relation between what we say and the rest of the reality. At the end of the eighteenth century, the American and French revolutions transformed the subjects of absolute monarchies into citizens enjoying a full entitlement of rights and no longer just obligations. Today we see the need

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to extend the rights' revolution to an international level, to that sector of political life that still belongs to the "state of nature" - the ground where diplomatic and military clashes among the States occur. We can no longer ignore those groups of citizens, those civil society movements who demand to participate in political decision-making at international level and that demand recognition of their rights at international level too. In Europe, until recently, protection of fundamental rights was guaranteed by the States and was considered adequate. However, at a continental level the European Court of Human Rights, the first tribunal in history protecting human rights at international level, extended its jurisdiction over a wide space that since the 1950s has progressively widened to comprise 46 States and 800 million inhabitants, from Brest to Vladivostok.

1.1 Crisis of the institutions and European unification

The need to provide a constitutional framework for a system of government operating at international level, which recognizes citizens' rights and is based on democratic decision-making procedures took shape in the Fifties over a more limited area: the Europe of Six that today has become the Europe of Twenty seven and that it is destined to extend further east and south in the next few years. With the development of European

integration, or more precisely, with the formation of a borderless economic space within which goods, services, capitals and people circulate freely and, moreover, with the decision to adopt one common currency, national governments have decided to relinquish the most relevant aspect of their sovereignty which, as a consequence, has to be reorganized at European level, confronting the constitutional issue of developing European statehood. Furthermore, two needs of a truly political nature arose from the Economic and Monetary Union in relation to the delegation of a common foreign and security policy and justice and home affairs to the European Union. These are, as we know, the second and third pillars of the Maastricht treaty. The external projection of the Economic and Monetary Union (international commercial and monetary relations) already represented an aspect of foreign and security policy which at the same time provides an incentive to complete the unification of Europe in the sector of external relations which will take place by transferring the competence of foreign, security and defense policy at European level to enable Europe to speak with one voice.

However, the one critical external factor that has contributed to aggravate the crisis of EU institutions and to which the Nice treaty has been unable to provide a satisfactory

answer is the issue of EU enlargement. As the number of the EU member States has doubled during the recent years, the Union has been obliged to make some basic changes to survive and confront the new pressing challenges ahead. In the vision of those who conceived it, the meaning of this project is to achieve the unification of all Europe. Nonetheless this project hides a deadly danger: without strengthening European institutions, the Union risks to lose its own political consistency and become diluted into a large free trade zone. It is unthinkable to continue to base European institutions on decision-making procedures based on principles such as those of unanimity and the right of veto, thus granting the veto right to small States such as Malta and Estonia.

The creation of a borderless European economic space has mostly been at the origin of the decisive thrust towards the Charter of Fundamental Rights because, in line with economic unification, a new European civil society has developed with its own conflicts of economic interests and consequential violations of rights. An increasing number of problems such as clandestine immigration and international organized crime cannot be addressed by single States.

This has led to the need to transform this economic space into the space of liberty, justice and security

that constitutes the third pillar of the Maastricht Treaty. In other words, the need has arisen to extend the principle of the rule of law at European level. A further incentive for the development of a Charter of Rights came from problems related to the enlargement of the Union to comprise central and eastern European States, or more precisely, the declared need to offer a higher standard of protection of fundamental rights than presently guaranteed by the European Convention on Human Rights to which these countries are signatories, and to include in particular, economic and social rights.

European integration can be defined as a process during which the exclusively national identity of civil society is lost and it acquires, next to it, a European identity, thus moving towards the direction of a federal society. Or, it is the formation process of a new popular reality, a pluralistic unity of European nations. This means that the European people will not be a nation but a *federal people*.

The unification of Europe shows an increasing contradiction between the tendency of the economic process, which has progressively taken a European dimension, and the resistance opposed by national institutions. The latter prove to be inadequate and ineffective to govern processes that transcend national borders. However, at European level where it would be possible to control

and to direct the unification process, there is no real government in spite of the powers conferred on the European Parliament, the Commission and the Court of Justice; there is an overarching diplomatic mechanism that still concentrates a significant amount of power within the Council, that is, national governments.

The European unification process developed according to the functionalist method, i.e. a strategy suggesting to start from the economy and to rely on the hypothesis according to which "politics will follow" or, the reversing the the famous general de Gaulle's formula "*l'intendance suivra*" (supply corps will follow). The States have welcomed this choice because it has enabled them to proceed along the line of less resistance and to relegate as far as possible into the future the issue of the transfer of sovereignty in favor of supranational institutions.

Nonetheless, this choice has exacted a high price: the States have been progressively divested of their sovereignty, losing control over the economy to non-state actors, such as multinational banks and corporations, and over security to the United States without the transfer of sovereignty to the EU. Here lies the crux of the crisis of national and European institutions and the need for a European Constitution of which the Charter of Rights is but a first and partial answer.

1.2 *State crisis and the decline of democracy*

One of the most striking consequences of the national State crisis is the decline of democracy. The most crucial contradiction of our times is that the issues from which the fate of the citizens depend, such as the control of the economy and the protection of the environment, have reached international dimensions onto a ground where democratic institutions do not exist and democracy remains within State borders, where only secondary issues of political life are decided. The decisions that determine strategic political directions, having escaped the control of democratic institutions, are firmly placed in the hands of international political and economic powers.

1.3 *The democratic deficit of the European Union*

This contradiction between the dimension of political and social problems and the size of democratic powers who should resolve those problems represents the most critical aspect of the European Union's current situation, commonly known as "democratic deficit". The facts that some substantial of powers are monopolized by the Council, the diplomatic intergovernmental organ that decides behind closed doors and unanimously, defines the extent of European institutions' democratic

deficit. The fundamental role of this organ within the power system of the European Union which is justified by the need to defend anachronistic national interests, represents one of the most serious distortions of the democratic principle and operates on two levels: that of ordinary administration (Council of Ministers) and that of the definition of main political trends (European Council of Heads of State and Government). Two aspects define the democratic deficit. On the one hand, the Council by maintaining the decision-making power on matters of greatest relevance removes legislative powers from the European Parliament, which has not yet acquired equal powers with the Council. On the other hand, on matters of great impact such as foreign policy or fiscal matters the Council decides unanimously and not by a majority vote as principles of democracy would demand. This type of organization of European institutions suffocates democracy as it prevents citizens from electing the government. As decisions of great impact are taken by the Council and not by the Parliament, the circuit of trust between the people and its representatives at European level is missing, thus weakening or even undermining the legitimating process of European institutions. European elections still fail to be the democratic tool the citizens use to choose the government of the European Union.

Citizens elect the European Parliament through direct elections, and this is proof of an ongoing process of democratization of European institutions, which remains, albeit, incomplete, given that Europe continues to be governed mostly by the Council whose composition and decisions are not influenced by popular vote. Although the architecture of the European Union incorporates institutions of a federal nature (a Court with supranational powers, a directly elected parliament, a single currency and a central bank) its structure still maintains strong intergovernmental institutions.

1.4 The constitutional deficit

The democratic deficit goes hand in hand with another phenomenon that could be described as "constitutional deficit" and by this term I mean to say that a residue of absolutism still exists within the European Union. Not unlike the absolute monarchs of the past, the Council hoards legislative and executive powers, taking them away respectively from the European Parliament who only shares decision-making powers with the Council in many but not all sectors and to the Commission that only has limited governing powers.

On the one hand, on matters of great importance such as foreign policy and security or taxation, the Council has absolute decision-making

powers that it does not share with the European Parliament. On the other hand the Commission shares executive powers with the Council. Therefore the power of the European Parliament to grant or withdraw confidence to the Commission is not equivalent to the power of control that the Parliament enjoys in regard to the government in parliamentary regimes given the Commission subordination to the Council.

It is true that the structure of European institutions is inspired by the separation of powers. The institutions of the Parliament, the Commission and the Court have been conceived respectively as the potential legislative, executive and judiciary branches of a future European Federation. In the institutional evolution of the European Community and the European Union the trend to strengthen the powers of the Parliament, the Commission and the Court is clearly visible but nonetheless the fact remains that these institutions are still subordinate in many areas to the Council, or, in other words, to national governments.

1.5 The demand for a European Constitution

The increasingly insistent demand for a European Constitution essentially based on the need to overcome the democratic and constitutional deficit stems from this analysis of European institution limitations. If we consider

the degree of development of European Union institutions, it is easy to conclude that, at this point in time, not many changes will be needed. It will just be a matter of extending in any direction the joint decision-making power of the European Parliament, which will play the role of the Lower House, and the principle of majority vote within the Council, in order to transform the latter into a House of States; concentrating the executive powers within the Commission; awarding to the European Council of Heads of State and Government the role of collective presidency of the Union.

If, broadly, these are the fundamental guidelines of a European Constitution, the latter, which was signed by 25 Heads of State and Government on 29 October 2004 in Rome (and, for the time being, has been ratified by 18 states out of 27), incorporates the Charter of Fundamental Rights of the European Union. *The Charter may be interpreted as the expression of a process of constitutionalization of the European Union, of the transition from a Union of States based on a single market and single currency to a union of citizens based on human rights.* Substantially, if by constitutionalism we mean the mechanisms put in place to limit and contain the powers of government, then charters of rights have been conceived precisely for this function. We should remember that Article 16

of the Declaration of the Rights of Man and the Citizens of 1789 states that "A society in which no provisions are made to guarantee rights or separation of powers, has no Constitution." It must be clear that the division of powers is the fundamental mechanism to protect rights and prevent abuses on the part of the government.

2. The nature of the Charter of Rights

Having defined the context in which to place the analysis of the Charter of Rights, it is now possible to define the nature of the document. First of all it should be noted that the Convention that drafted the Charter was not assigned with the task to produce an innovative document. The Convention received a double mandate: a) to make an inventory of rights already codified in the European Community treaties, within the common constitutional principles of the member States in the European Convention of Human Rights and in social charters of the Council of Europe and the European Union; b) to list them into a single document % a catalogue of rights of the European Union. The objective of the text proclaimed in Nice on 7th December 2000 was the declaration of a nucleus of common principles indispensable to define the identity of the European Union, especially in view of its enlargement. It was therefore a matter of finding the minimum common

denominator of the principles inspiring the political culture and constitutional tradition of the western world enshrined in the constitutional charters of member States and of the European international organizations (the Council of Europe and the European Union).

However, as it has been noted, on occasions the Convention forced the Cologne mandate and introduced some innovations, inserting rights still lacking a constitutional dimension. Among these we may point out those related to the protection of the most vulnerable groups and individuals in society, such as the rights of the child, the disabled or those born of the need to face new challenges to individual liberties and which stem from information technology (protection of personal data), environmental pollution (protection of the environment and improvement of its quality) to biotechnologies (prohibition of reproductive cloning).

At the same time and in other sectors, for example in matters of equality, the Charter provides a more limited protection than that already contained in some of the member States' constitutions. As a whole, I believe it is possible to argue that although the Convention has partially exceeded the mandate of the governments, the Charter of Rights remains a *ascertaining rather than an innovative instrument*. Nonetheless, the task performed by the Convention is

far from irrelevant as it has defined a written text as an important condition to direct the activities of the judges, as confirmed by the fact that the courts have started to apply it although it has not yet been recognized as being juridical binding.

3. The Charter limitations

In principle, a Charter of Rights should be understood as part of a Constitution that also regulates the structure of the constitutional bodies and their relations and distribution of competences. This work was accomplished by a Convention, which in 2002-2003 drew up the text of a constitutional treaty made of 448 articles (54 of them form the Charter of Rights), 36 protocols and 50 declarations, a cumbersome book of 483 pages. The whole process of European unification has developed along a line of lesser resistance so as to delay as far as possible the transfer of sovereignty to a European federal government. The construction of the European institutions was the effect of a process of stratification and overlapping of treaties and institutions, which culminated in the drafting of the Constitution, whose unaccomplished aim was a simplification of the texts regulating the EU.

The development of the Charter has been made in such a way as not to question the sovereignty of the States nor to change the political order as

defined in the treaties. This objective is stated in the second paragraph of Article 51 which reads: "This Charter does not introduce new competences or new tasks for the Community or the Union nor does it seek to modify competences and tasks as defined by treaties". Critics of the Charter should become suspicious of the climate of unanimity accompanying the approval of the Charter, both from the Convention and the institutions of the European Union (Council, Parliament and Commission) who proclaimed it within the first few minutes of the Nice summit on 7th December 2000. The hard clash of nationalist interests between France and Germany on the institutional reforms and the structure of the European Constitution should shed some light on the nature and the limitations of the Charter of Rights. This debate should demonstrate that it is not only necessary but it is also possible to face jointly the problems of the Charter and of the Constitution. In fact, and only within the scope of a constitutional debate aiming to examine the foundation itself of political coexistence, questioning the basis of an old form of State (the national State) and making a global reflection on the historical meaning of the new form of State to be built, true innovations of fundamental rights may emerge. If this hypothesis is well founded then it is possible to consider the Charter approved in Nice as a *working document* to be completed and

improved. The Charter should be considered as a dynamic document still open to improvements and not a text carved in the marble, destined to remain untouched for a long time.

To justify this point of view I will examine two particularly significant examples to highlight the limitations of the Charter: the first concerns the right to peace, the second, European citizenship. Furthermore, I shall illustrate what to me seems a paradox of the present constituting phase: rights without obligations.

3.1 *The right to peace*

It should be observed that in the Charter peace is not recognized, as it deserves to be, as the cornerstone of the building of fundamental rights. The word peace only appears on the first part of the Charter's preamble where in a formulation lacking moral energy, still far from attributing to this principle the nature of fundamental identity of the European citizen, it reads: "The European peoples in creating an increasingly tight union have decided to share a future of peace based on common values".

What has escaped the framers of the Charter is that the most important achievement of the EU is undoubtedly peace. After centuries of warfare, Europe has never before lived so long in peace as it now has in the post-2nd world war period which coincides with the beginning of the process of

European unification.

What is peace? It is not simply the absence of war. This is the negative notion of peace which Kant called "truce" and placed in the same category as war. Instead, positive peace requires a political organization which prevents war through entrusting the power to settle conflicts among states to a federal authority acting on the basis of law. According to Kant's philosophy, the foundation-stone of peace is law and – more precisely – the extension of law to the sphere of international relations. In other words, peace is a political organization that makes war impossible and "ends all wars forever".

"War appears to be as old as mankind, but peace is a modern invention", said Henry Maine. War has always been considered a normal event in political life, the vehicle for settling conflicts unsolvable through diplomacy. The novelty of the EU lies in the fact that it represents the most successful attempt so far to build a new form of statehood at international level, even though its pace has been slow and hesitant.

The EU is the most intensively regulated region of the world. Its political institutions impose restraints on what sovereign states may do in their relations with each other, and in this it shows the way to what the UN could become in the future: namely, the guardian of international law and

the framework of a process of constitutionalization of international relations.

The process has advanced to such a stage that war among European Union member states has become inconceivable. The current political debate on the Constitution shows how far the process of unification in Europe has advanced. In other words, slowly and imperfectly something like a European Federation is taking shape.

3.1.1 European unification and peace

This is the objective that qualifies and defines the novelty in the European unification design. Schuman's "Declaration" of 9th May 1950, formulating the project of the first European Community (Coal and Steel European Community), argued that the High Authority would have established "the first concrete basis of a European Federation indispensable to maintaining peace" and this clear and simple formula defines the end and means. Europe that for centuries has been the battlefield of the struggle for hegemony between France and Germany has been transformed into the ground on which supranational institutions shall be developed. Force is being gradually replaced by law (and more precisely directives and regulations) in regulating European society and economy. The end of this federalist design is the development of supranational institutions whose task it is to remove international

relations from the state of nature. Of course, the European federation does not resolve the problem of expelling violence from political life. It only resolves it among its member States. Only with the achievement of a global federation, peace will cease to be a limited reality realized in a part of the world. It is of significance that Europe, the theatre of the most devastating wars in history, has become the most fertile soil in the world to trial adequate peace building institutions. Following the reconciliation between France and Germany and between the other nations of the continent, a process of pacification has started and continues to grow among the peoples of Europe. The enlargement of the Union to encompass the countries of Central and Eastern Europe is nothing more than the unification of two Europes once divided by the iron curtain. It is the pacification of a large territory that, after the fall of the blocs, has known the horrors of ethnic nationalism, civil war and genocide.

3.1.2 The nature of the right to peace

At this point in time, let us ask ourselves what this bloodless pacific revolution means to the individuals. All major revolutionary transformations which have asserted new values and new and higher forms of political coexistence have promoted the extension of individual rights, and the recognition of new rights. Since we are using the word peace in its

Kantian meaning, we could therefore define "the right to peace" as the collection of rights to be guaranteed to the citizens of the European Federation. The right to peace is like a tree trunk with several branches which represent the different generations of rights as they have progressively been recognized by the modern State and that can be extended at European and global levels only after the assertion of new forms of federal statehood. Peace, in conformity with the principles affirmed by federalist culture, following a tradition of thought extending from Kant to Kelsen provides the premises of human right protection. Dieter Senghaas refers as "the hexagon of civilization" the six political transformations that marked the stages of the civilization process within the modern State and that have created the conditions for 'internal peace' to be possible: 1. "the de-privatization of violence (monopoly of violence); 2. "Control of the monopoly of violence and assertion of the rule of law (Constitutional State)"; 3. "control of emotional states" through "the disarmament of citizens and socialization through institutionalized forms of conflict resolution"; 4. "democratic participation"; 5. "social justice"; 6. "a constructive conflict culture", aimed at compromise and tolerance. A further specification might be required if we consider that new rights are emerging and they

require protection. I specifically refer to the rights related to environmental protection, protection of personal data, genetic heritage and so on.

Faced by the increasing interdependence among the peoples and the States of Europe and the world and the development of a process of globalization, the hexagon of civilization needs to be extended to the international level to build "peace among States". The European Constitution will be the beginning of this process; it will guarantee permanent peace among the federated States and will affirm the right to peace for all European citizens, meaning that the European federal institutions will guarantee the protection of human rights above the States in that space where relations of force among national governments still prevail, through the right of veto.

3.1.3 The European Federation as the model and the engine of world unification.

The declaration of the right to peace in the European Federation should be the starting point for its world-wide extension.

The success of the political action to build the European federation shall be a determining event for the future of federalism as it will demonstrate that it is possible to give life to a union of States transcending nations and in particular nations divided by century-old conflicts. The European federation

shall not only be a model for the unification of other regions and for the whole world (UN reform) but will also be the *engine* driving this process.

First of all, it is foreseeable that the example of the European federative process will determine an acceleration of similar trends, which are in progress with an uneven degree of development, in other regions of the world, it will reinvigorate federalism in the United States and India where it has experienced a centralistic involution and in Russia, where an attempt is being made to govern the transition from socialism to democracy and market economy with quasi-federal institutions.

Furthermore, a full-fledged European Constitution can promote world unification and federal-type reforms of the United Nations. In order to reach these aims, the Constitution could expressly declare *the European Federation readiness to transfer its own military sovereignty in favor of the United Nations*, along the lines of the Italian Constitution (art. 11), which states that limitations of sovereignty are allowed in order to establish international organizations assuring peace and international justice.

I shall just confine myself to one example. The European Federation will become the laboratory of international democracy. Since the EU has created the first supranational parliament in history, it will become

the leader of this new political formula and as such shall be inclined to extend this experiment at global level, promoting the democratization of the United Nations. Furthermore, the European Constitution should include a clause stating the commitment *to put the armed forces of the European Federation at the disposal of a global police force*.

There are several initiatives that the European Federation may take in this field. For instance, the proposed formation of a permanent body of volunteers recruited directly from the UN and ready for immediate intervention at the organization's behest, which has been under discussion for several years. A decisive European commitment could unblock this stalemate situation.

3.2 *The European citizenship*

In its fifth chapter, the European Union's Charter of Fundamental Rights summarizes and reiterates all the norms related to matters of European citizenship albeit without defining the revolutionary significance of this institution: the recognition of civil and political rights to those who, until recently, were considered foreigners. Consequently, the readers of the Charter are put in a condition to appreciate the sense of extraordinary innovation implicit in the establishment of European citizenship.

3.2.1. *From national to European citizenship*

The establishment of European citizenship may be understood only if related to the crisis of the national State and the need to overcome the limitations of national citizenship. In national ideology, being part of a nation is not based on the recognition of rights that can be acquired by anybody. Rather, it is based on pretended natural and unchangeable characteristics that must be defended against the danger of contamination by other nationalities. The ethnical and cultural characteristics become a criterion to grant access to political rights to some while excluding others. National values are values glorifying separation, the refusal to share the values of surrounding societies and which subordinate universal equality of all individuals to national values. Nationalist extremism gives belonging to one nation a quasi-religious aura whose function it is to represent the national group as a natural and eternal entity. It is an ideology that promotes the unity and independence of the nation as an absolute political priority to which even civil and political rights, equality and peace must be sacrificed, if necessary. The characteristics of national citizenship have taken shape under the pressure of continuous conflicts among nations, which, to effectively face the danger of aggression, have cultivated social

cohesion thus creating closed societies.

By promoting increasingly closer co-operation among national states, European unification has undermined the old concept of citizenship which is proving incompatible with the basic trend of contemporary history creating multi-national and multi-state forms of economic and political organization.

3.2.2. *From exclusive loyalty to the plurality of belonging*

The cultural aspect of European unification has been neglected so far. It has been conceived as a problem whose solution may offer an additional instrument to promote European unification and to assert its power in the world. Behind this concept of European culture lies the national model and the project to build a national identity at a European level with the same characteristics of exclusiveness and homogeneity that have distinguished the national model. However, the national model, although in decline owing to the decay of national sovereignties, and partially discredited, is still dominant and does not seem to open the way to any alternative.

Nonetheless the successful building of the European Union depends on the ability to plan a new form of statehood that is no longer national but exactly the opposite: a form of political coexistence

embracing all different national identities and capable of creating a climate of tolerance among them. Once they are divested of their closed-up nature by having overtaken the formula of fusion between state and nation, national cultures still tend to survive. They are so deeply rooted that it is difficult to think of a European culture capable of suppressing and replacing them.

However, this vision of a homogeneous European culture is not even desirable. The influence that culture can have in the formation of the identity of the European citizen consists in teaching us to live in peace, accepting our differences. European unity will have a pluralistic character. As argued by Ernst Jünger already in 1975, "The European Constitution shall [...] create a political-territorial unity in full respect of all historical diversities. Europe can become a motherland but, nonetheless, several motherlands will remain on its territory. In this framework, large and small populations will flourish better than ever. With the end of competition between national States, Alsations will be able to live like as Germans or French without being forced to become either one or the other. But most of all, they will be able to live as Alsations, just as they desire. It is a recovery of liberty that will become evident even among the minorities, the different progenies, the cities. More freely than in the "old house",

in the "new house" we can be Britons, Guelfs, Sorabs, Polish, Basques, Cretans, Sardinians or Sicilians". The Federal Union facilitates the meeting of different cultures, fosters differences and thus favors the resolution of one of the biggest problems of the modern world. The problem to resolve then is how to build the citizenship of the future, since globalization is the basic trend in contemporary history. The definition of European citizenship is placed on the inclined plane of a new conception of citizenship, intended as a phase of passage towards world citizenship.

National citizenship is characterized by its exclusive nature. National culture does not permit the existence of loyalties outside the nation. Conversely, European and world citizenship shall be forms of multidimensional federal citizenship, organized so that at the same time every individual is citizen of communities of different dimensions from the smallest (local community) to the largest (the supranational community). European "civism" will be different from national "civism" because it will overtake it both from the top and from the bottom. The assertion of federal citizenship does not demand that we deny our differences to declare our faithfulness to Europe and humankind. It certainly means reaching the universal but without denying our origins, be it as

Milanese, Lyonnais, German or Spanish.

3.2.3. *Constitutional Patriotism*

Jürgen Habermas has often underlined that the legitimacy principle within a plurinational community like the European Union, of which the United States and Switzerland are an example, cannot be based on a supposed linguistic, cultural or ethnic unity. The identity of the European citizen shall be based on constitutional patriotism, meaning that this identity, on the one hand, will be of a patriotic nature to assert that the State is the higher form of collective life and that therefore there are higher values than private interest and individual egoism. On the other hand, however, the European citizen identity will have to free itself of its belonging to a nation intended as a closed entity, to assert its own loyalty to the universal principles of rule of law, democratic participation, social security and peace. These are multicultural values and as such, universal. If this perspective prevails, national loyalty, an expression of a world in the grip of necessity, fear and violence, will leave its place to constitutional patriotism.

3.2.4. *Limitations of European citizenship*

If citizenship is the legal condition defining the rights and duties of an individual belonging to a State, the

difficulty in applying this formula to the European Union becomes immediately clear inasmuch as the Union is not a State. If it is true that the European Union already possesses some of the characteristics of statehood, such as the recognition of the right to vote at a European level, it is also true that citizens' rights and obligations are real only within the borders of a State or the space where a juridical order applies. The limitations of European citizenship are therefore the limitations of a citizenship without either a Constitution or a State.

Notwithstanding that, the difficult assertion of this first form of supranational citizenship is an expression of the trend towards the formation of European statehood. The most significant results obtained by the Maastricht Treaty consist in the recognition of franchise and the right to be elected in municipal and European elections in the place of residence. It is an important innovation because it has allowed to separate what the national State has always kept unified: nationality and citizenship. The fusion of nationality and citizenship represents one of the most severe limitations of national democracy: the recognition of civil and political rights to those who fulfill the prerequisite of nationality and its negation to foreigners, whose exclusion shows that suffrage is not universal but restricted to national

citizens.

In a world where war is the last resort of the States to resolve international conflicts, the exclusion of foreigners to access political rights has a solid foundation: the latter may be under suspicion of collaborating with the enemy. The institution of European citizenship, notwithstanding the limitation of its contents, must therefore be interpreted as a stage in the process of pacification among European peoples.

It should be remembered that both the French and Russian revolutions in their beginnings, when nationalism had not yet put out their universalistic fire, had asserted the principle of extending the right to vote to foreigners. The problem is reemerging today even more sharply following the crisis of the national State, the development of European unification and other processes of supranational unification. After granting the right to vote to an increasingly larger number of individuals mainly thanks to the fall of census and sex limitations and the lowering of the age limit, the new goal in the struggle for the extension of the right to vote is represented by the fall of nationality limitations.

In other words, the recognition of the right to vote and other political rights should be linked simply to a residence requisite. The implications of this principle are explosive as they attack a bastion of national ideology.

3.2.5. *The rise of cosmopolitan citizenship*

The bestowal of political rights based on residence criteria, independent of nationality, is a principle applied by all Federations of States. The full development of this conception of citizenship will progressively extend to the whole planet through the achievement of cosmopolitan citizenship.

The essence of European unification consists of the process of overcoming the national principle. Therefore, it has paved the way to the recognition of political rights to extra-communitarian citizens. The right of petition to the European Parliament or to report cases of bad administration to the European Ombudsman has been extended to extra-communitarian citizens. Furthermore, Denmark, Ireland, Holland and Sweden have recognized active and passive rights in municipal elections to all legally resident citizens, including extra-communitarians. That civil and political rights of non-European citizens, recognized without demanding of them to obtain the nationality of their place of residence, is an expression of the rise of the principle of cosmopolitan citizenship within the European society.

That voting rights have so far only been recognized at municipal election level shows that the conditions for the extension of these rights at international level is not yet ripe.

Nevertheless, the exercise of the right to vote at local level enables migrants to influence policies impacting substantially on their living conditions, such as housing, education and health. It also promotes their effective integration in the community where they live. We could also add that there is nothing hindering the extension of voting rights to all residents at provincial and regional levels. On the other hand, the prospective of a transformation of national States into member-States of the European Federation creates the conditions for extending recognition of these rights also at national level. And if the European Federation should succeed in following the example of the great revolutionary transformations that preceded it, it cannot be excluded that the Federation will be able to assert progressively the principle of recognition of political rights to all its residents. Only with the application of this principle at all levels the Federation will be able to claim its nature as a multinational political structure open to the rest of the world as the first stage towards the unification of humankind. The assertion of the principle that all humans as rational beings, and independently of their nationalities, are recognized as equals in the exercise of their rights represents the first step towards extending this principle at global level. Dahrendorf, in unison with Kant, argued that

"citizenship will never be complete until such time as a global citizenship comes into existence". The rising of a European citizenship, in spite of its contradictions, places the unification of Europe as a great experiment of supranational government with its important consequences for the rest of the world.

3.3. *The rights without obligations paradox*

One of the most considerable contradictions of the separation of the Charter of Rights from the total process of the elaboration of a European Constitution lies in the paradox of rights without obligations. The Constitution represents the political context within which not only rights but obligations too must apply. Although the ongoing European Constituent Process is facing the challenge of defining a new form of post-national and plurinational statehood. Hegel's statement that "the internal strength of the States" rests in "the union of rights and obligations" (*Philosophy of Right* § 261) is still a valid principle as a political community must necessarily be founded on rights and obligations. I believe that we can therefore say that a State has a Constitution in the true sense of the word only when the supremacy of law and freedom of the individual are guaranteed. In this context we should also underline that, according to Hegel, the State is not

only a voluntary association established to protect life, liberty and property (Locke), but it also represents an expression of solidarity among individuals that manifests itself at times of danger or in an emergency, like in a war. It is at times like this that the ability of the citizens to overcome the narrow limits of individual egoism is put to the test.

3.3.1. The old and new organization of the defense system

If we analyze the powers that a Constitution must necessarily grant to a political authority so that it can call itself a State, we see that among these powers there is not only the currency (whose control has been transferred to European level by 13 out of 27 member states) but also defense. These are the constitutional changes that would allow Europe to come out of its subordinate position vis-à-vis the United States and to exercise its own influence on world politics.

Since the decision to transfer the defense competence may meet resistance from nuclear-armed States (France and the United Kingdom), then we may hypothesize a gradual solution to the problem. For example, the Constitution may regulate defense as an initial shared competence and define the timing and procedure for the transfer of exclusive competence to the federal government. It should be pointed out that only seldom a Constitution is born with the ability

to answer all the rising and unforeseen challenges of history. We may quote, as an example, the Constitution of the United States, which, in its original version, was lacking a Charter of Rights that was subsequently added with the first ten amendments. Furthermore, although transferring monetary competence to the federal government, the Constitution did not provide for a Central Bank; which was established only after the enactment of the Constitution.

After the introduction of the euro, this is the right moment to enter the territory most jealously guarded by governments: the external sovereignty of the State pertaining to foreign policy and defense. The structure of the European defense system should be organized in function of the threats to Europe. If it is true that national States may no longer be defined as States because of the increasing gap between the real country, which is already European, and the legal country, which has remained national; it is equally true that national governments are aware of the new direction history has taken and are seeking to adjust their own institutions, as a typical example, the abolition of compulsory military service.

This is one of the most typical institutions of the national State. In the past, the creation of powerful standing armies was the product of strong political and military pressure national

states underwent on their borders. The national State has not just promoted citizen participation in the decision-making process (universal suffrage) and to State administration (the possibility of entering the public administration through a competition process). It had also demanded the participation of adult male citizens in a defensive function through compulsory military service. Just like a fortress under siege, the national State has been obliged to build a centralized power apparatus as the most adequate instrument to face the tensions that have continuously divided the European continent since the time of the formation of the modern territorial State. The institution of compulsory military service introduced in France in 1793 during the revolution, transformed the national State into a formidable war machine that made it possible for Napoleon to conquer the whole of Europe and was imitated by all other continental national States. The citizen-soldier is the emblematic figure of a historical era: that of the European system of national States, so steeped into violence that the supreme duty of a citizen was to kill or to die for his Country. Furthermore, compulsory military service is, together with public school, an instrument of nationalist ideological formation of youth. The goal of both institutions was to build on that strict psychological cohesion (*l'union sacrée*)

needed for the government to respond effectively to all external threats.

Another consequence of the organization of the world into national States there is no space for conscientious objection. In particular, two characteristics of the national political formula make the latter incompatible with conscientious objection. First and foremost, national ideology views national solidarity as the supreme political value. The individual and humankind are subordinate to the nation. Secondly, according to this political outlook, the division of humankind into national States cannot be overcome and violence is the only last resort to resolve international conflicts. Anyone who, in refusing violence, tried to avoid the obligation of serving his country with arms, have been judged a traitor.

As it is well known, the United Kingdom and the United States have adopted an alternative decentralized or federal institutional model not based on the fusion of State and nation. On the contrary, it considers it natural and legitimate that many nations may coexist within the boundaries of the same State. In these States military service only became compulsory in extraordinary emergencies, such as world wars, and the legitimacy of conscientious objection has been recognized. This shape of organization of the

institutions is the result of a favorable geographical position that has protected these States from the threats of aggression by great powers.

The explanation of the historical and political roots of the two models of defensive system enables us to point out the reasons that pushed the national States of the European continent to adopt a defensive system based on compulsory military service and the denial of conscientious objection as devised in France in the wake of the Jacobin-Napoleonic tradition.

This model is waning because its preconditions do not exist any longer. On the one hand the national State has lost its political self-sufficiency, since control over security and the economy as they has shifted respectively at Atlantic and European levels. On the other hand, European integration has overrun national borders and opened the way to the development of a European economy and society. It is the condition for the formation of a European people and a European Federation, which will recover control of the economy and security. However, the crisis of the national State has provided a space for the affirmation of policies and institutions that contradict the principles inspired by this form of political organization. More specifically, the loss of military independence of Western European States to the advantage of the United

States of America after the end of World War II, has provided the preconditions to initiate changes in the structure of national defensive systems. This process has developed in two stages.

In the first stage, which started immediately after the end of the second world conflict, all member States of the European Community, with the exception of Greece, recognized the legitimacy of conscientious objection. This is a rift in the bastion of the national State that has introduced a contradiction into the principle of national legitimacy and the tension towards a new principle of legitimacy. The right of conscientious objection has been recognized for a category of individuals - young people who for ethical or religious reasons refuse violence. This right has introduced an innovation into the constitutional obligations typical of the national State: the recognition that different points of view and behaviors may coexist. Hence, the State has arranged separate treatment (military service and civil service) and codified a situation of disparity for the few who refuse violence and the many who accept it. However, at least throughout the entire period of the cold war, this general principle according to which young people have to serve their country in arms and must therefore be ready to die and kill, remained unchanged. The fact

remains though that a glimmer of hope came on into the anarchic and violent world of national States at the time when this form of State went into crisis, thus allowing the dream of a world free of violence to enter the realm of possibilities.

In a second stage, starting from the end of the cold war and the fall of the blocs, the conditions were ripe for the abolition of compulsory military service. It is a decision that France, the very state who introduced this institution, took in 1994 and which opened the way for similar steps to be taken by the rest of Europe. As a consequence of this decision, the nature of the continental and British defensive systems have come considerably closer. Germany is the last important exception to the adoption of this new model of defense.

What we read in the French government *White Book* on defense ("for the first time in its history France has no direct threats to its borders") is valid not only for all the countries of the European Union but also for the other industrialized States. The level of potential conflict must remain low among these States if they do not want to jeopardize the continuation of the globalization process. For this reason, the model of European defense must be conceived so as to allow Europe to contribute to the development of a stable international order and an open global market. The European armed

forces shall have to be committed to intervene, if necessary, against those who threaten the pursuit of these objectives.

The main lines of what is supposed to become the European defense model shall be defined by the internal and international context within which the European government shall operate. First and foremost, the multinational and federal structure of the European institutions will in itself be a limitation to aggressive foreign policies. Furthermore, Europe as a world actor can countervail but not replace the United States. Since it cannot and does not want to play the role of banker and gendarme of the world, its political interest is to promote the evolution of world States system towards multipolarism without hegemonic powers. This new international situation is supposed to create conditions conducive to political stability and international cooperation. What we may forecast on the basis of these considerations is that Europe will be able to entrust its own security to a light defensive system. And if it wants to maintain a small military force, its efforts will have to be oriented towards the promotion of a constitutional world order and protect it by putting its own troops at the disposal of an international police corps under the UN control.

The substantial difference between the European Federation and all other federations that have so far existed is

that while the latter have undergone a process of centralization in response to the strong political and military pressures coming from the great powers, the European Federation will be born in a world where globalization and the decline of power politics will develop strong trends towards cooperation and international organization, that the Federation will contribute to consolidate.

The French government has met the consequences of this new situation and has defined *a new concept of defense, with the abolition of compulsory military service and the development of a small army of professionals, as well as the establishment of a civilian service*. These are the fundamental lines that will inspire the future model of European defense.

3.3.2. A European civilian service

It is unthinkable that the national State would have the strength and the necessary consent to stimulate young people to a renewed commitment to civic values. The crisis of the State manifests itself as an eclipse of moral values, of political and social solidarity, of patriotism. A civilian service within the framework of a European Federation seems to be an adequate institution to renew and give new vigor to civic values. It should be remembered that the European Commission has started a project of voluntary European civilian service

for young people in a State different from their own country. The limitation of this initiative is that, at least for now, it is not an alternative to military service. It is indeed a significant aspect of the assertion of European citizenship, although its full potential has not yet been developed.

In most advanced industrialized countries, neither the State nor the market may on their own answer all the challenges facing a modern society. Consequently, a third sector has emerged that expresses itself through volunteerism as the assertion of a new aspect of the concept of citizen. To be a good citizen does not only mean voting, respecting law, paying taxes, going to school and working but also requires a commitment to an activity expressing solidarity towards other human beings. Public powers (from the local community to the European Union) play an indispensable promotion and coordination role that should not suffocate but should instead empower the various spontaneous voluntary work group initiatives. European civilian service as an expression of emerging European statehood, will be on a par with professional military service – it will enroll those who freely exercise the choice to live a military life –, will promote the European civism, will strengthen supranational solidarity among citizens and will contribute to the democratization of the European

Union. Considering that, as it stands, the European Union is not much more than an economic union, it cannot be the vehicle to promote values that transcend market horizons. However, the European civilian service may represent, in terms of the formation of the European citizen, a true alternative to the model of the citizen-soldier at the time of the sovereign nations. Only a European Federation, able to govern European society and economy and to promote world peace, will have the authority to establish a civilian service that will

become an obligation of all citizens where both men and women on completion of their studies shall perform this task as a fundamental stage in the formation of the European citizen. It should be underlined that the international dimension of the civilian service in reaching out to assist the development of eastern and southern countries is an alternative to a Europe locked like a fortress. This means that within this framework, it will be possible to develop the moral energies required to contrast the rise of European nationalism. □

