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THE JOINED DESTINY OF MIGRATION AND EUROPEAN CITIZENSHIP

abstract

In this paper I try to unpack the nest of issues that recent waves of migrations bring to the floor and show how immigration plays a crucial role in the making or unmaking democratic citizenship in post-national Europe. Although recurrent terrorist attacks make harder and harder for many opinion-makers and ordinary citizens to associate immigration with positive opportunity for European citizenship, the paper argues that the right to free movement and of emigration is embedded in the nucleus of principles and ideals that makes for European citizenship since the Treaty of Rome. Subsequently, the paper introduces the category of statelessness and uses it to tackle the problem of the legal and political evolution furthered by the practice of rights within the horizon that is defined by the ideal of a European post-national citizenship. Refugees and immigrants are interpreted as a challenge and an opportunity in the spirit of Hannah Arendt's intuition that citizenship brings to the floor an unsolvable paradox between the human and the political. The conclusion of the paper argues that stateless people—the migrants—personify this paradox as they can be the locus of a new political practice that signals an incipient form of citizenship, truly disconnected from the nation as the European citizenship aspires to be. The denial of many civil and political rights to undocumented immigrants and the detention of thousands of migrants in the camps located at the peripheries of Europe contrast radically with the community of rights that Europe has sought to be since its inception.

keywords

Migrations, European citizenship, Post-national citizenship, Community of Rights

The process of European unification has opened up important possibilities for innovation in the domain of citizenship. Political theorists and jurists have spoken profusely of a supranational and post-national paradigm of political freedom that would disentangle citizenship from nationality, a revolution no less radical than that of 1789, when “the conquest of the State by the nation” started and “the State was partly transformed from an instrument of the law into an instrument of the nation” (Arendt 1950, p. 230).

The political history of modern Europe shows that whereas the formation of the territorial State unified and equalized subjects under one sovereign law, it was national sovereignty that made possible the construction of democratic citizenship in Europe (Brubaker 1992). The two in pairings of “subjecthood” and “citizenship” and of “stateness” and “nationality” are embodied in this history and preside over the relationship between European citizenship and migration. This historical process started with the French Revolution and was perfected in reaction against Napoleon’s subsequent expansionism. It acquired the characteristic of a twofold movement as national dismemberment of imperial orders and revolutionary call for self-determination and political liberty (Soysal 1994). The individual and the nation emerged as the two European agents of political legitimacy at the domestic level and became the symbols of political and moral resistance against all forms of continental domination, whether in Immanuel Kant’s 1795 warning against a “despotism without soul” or in Benjamin Constant’s 1814 dissection of illiberal and belligerent imperialism. The nineteenth century struggle for national self-determination was part of this legacy, theorized by Giuseppe Mazzini as *means* to human progress and political emancipation and a necessary step toward a global brotherhood under “the Law of Peoples”.¹ The European Union is the latest chapter in this continental political history, which is national and cosmopolitan at once.²

This is the ideal context of the construction of European citizenship as “the extension of citizenship beyond the State as a matter of legal reality” and a challenge to the privileged link between “nationhood” and “citizenship” upon which democracy developed (Preuss 1998a, p. 139). The challenge is not actually to “state-ness” *per se* but to “nation-stateness” (Preuss

1 This is Mazzini’s own expression to designate a global assembly of democratic nations; see Urbinati 2008, ch.1.

2 Hence Jürgen Habermas recently tried “to develop a convincing new narrative from the perspective of a constitutionalization of international law which follows Kant in pointing far beyond the status quo to a future cosmopolitan rule of law: the European Union can be understood as an important stage along the route to a politically constituted world society” (Habermas 2012, pp. 1-2). See also Seyla Benhabib 2006.

et al. 2003, p. 4). European citizenship decouples the two paradigms that marked the history of modern citizenship, “subjecthood” (stateness) and “nationhood” (Preuss 1998b, p. 318). “Thus European citizenship can be regarded as a step towards a new concept of politics inside and simultaneously beyond the framework of the traditional notion of politics defined by the nation-State” (Preuss 1998a, p. 148). Hence, the dialectic between European citizenship and migration has great momentum and shows how their destinies are unavoidably intertwined insofar as the way to deal with the latter will have unavoidable implications for the meaning of the former. The twin destinies of European citizenship and migration come from this: given that *ius soli* is a congenial principle for stateness and *ius sanguinis* is a congenial principle for nationhood, the construction of a supranational level of legal identity questions the latter and exalts the former.

Migration intervenes in the interstices between stateness and nationhood and can provoke political decisions that can lead either toward a progression or toward a setback of European citizenship. There are reasons to be pessimistic about which of the two trajectories we will face, since in recent years, nation-States have become protagonists again, bilateral diplomacies have gained the upper hand, frontiers have become less opened to refugees, skirmishes over certificates and repatriations go on unceasingly, and the identification of immigration with illegality is now rooted in the minds of the general public and national governments. The issue of immigration becomes fatally more concerned with border security and the protection of the European member States and less with inclusion and integration, of rule of law and justice. The economic crisis and the trade-off between costs and rights it justifies had the effect of furthering the nationalistic paradigm as the change from Mare Nostrum policy to Frontex operation Triton policy proves. In the face of debarkations of refugees from all over the world and the growth of an immigrant population, the EU seems to be less willing to be the laboratory of a new supranational citizenship.

To be sure, juridical institutions are more faithful than the political ones to the Fundamental Rights of the European Union, as the decision of the EU Court of Justice (ECJ) to reject *inter alia* the Italian law (Berlusconi government) that introduced the crime of illegal entry demonstrates. This decision reveals that there is a disjuncture between the Europe of rights and the Europe of politics, and thus an opportunity for the paradigm of supranational citizenship to resist the attack of nationalism. It is impossible to tell whether this juridical skirmish over the interpretation of basic rights in single cases will have an impact on the politics of immigration when migration is a mass phenomenon as at present. But in spite of what Europe wants or does not want, in one way or another, migrants are now part of its identity, of what it is and will be.³ They are the testing ground for the European project of transforming “the ideal of cosmopolitan citizenship into a reality” (Preuss 1998a, p. 149). In this paper I shall try to unpack the nest of issues that migrations bring to the floor and show how immigration plays a crucial role in the making or unmaking democratic citizenship in post-national Europe. I will first illustrate the nucleus of principles and ideals that European citizenship embodies – in particular the right to free movement – and then introduce the category of statelessness which I propose in the last section of the paper to tackle the legal and political evolution furthered by the practice of rights and the ideal of a European post-national citizenship. I interpret this challenge and the opportunities it may open in the

3 The restrictions on immigration and even asylum have actually impacted the decision by national courts and EU court, which align with the anti-immigration nationalistic discourse dominating national publics; see Ayten Gündoğdu 2014, pp. 107-125.

spirit of Hannah Arendt's intuition that citizenship brings to the floor an unsolvable paradox between the human and the political. The conclusion of the paper argues that stateless people – the migrants – personify this paradox as they can be the locus of a new political practice that signals an incipient form of citizenship, truly disconnected from the nation as the European citizenship aspires to be. The denial of many civil and political rights to undocumented immigrants and the detention of thousands of migrants in the camps located at the peripheries of Europe contrast radically with the community of rights that Europe has sought to be since its inception.

- 1. Born on the freedom of movement**

The European Union was born on the freedom of movement and with an economic ambiguity that did not disappear, not even when with the Lisbon Treaty EU citizenship was entrenched by a family of rights built around “free movement” and “non-discrimination” between and across EU member States (Isin and Saward 2013, p.1). The Treaty of Rome established “Free Movement of Persons Provisions” and created a *de facto* embryonic supranational citizenship that was then formally instituted by the Treaty of the European Union in 1993. This last Treaty related the freedom of movement both to labor, in order to facilitate the mobility of workers within the Union, and to citizenship, which was given a clearly supranational identity and made “derivative” of that of the member States. The Lisbon Treaty, finally, defined European citizenship as “additional” to that of the member States thus making a further step toward dissociating it from national belonging and attaching it to the individual person. Quite appropriately, Engin F. Isin and Michael Saward render this last formulation as “enacting European citizenship” or associating citizenship not with membership or being (part of a nation-State) but public acting instead, “to acts of citizenship: claims to multiple legal and political forms of access to rights, or recognition, made by a myriad of actors, be they formal EU citizens or not” (Isin and Saward 2013, p.2).

So conceived, citizenship is primed to open unexpected possibilities for legal inclusion, beyond the strictures of national identity and State territoriality. To anticipate the sense of my argument, this activity-based formulation of citizenship is somewhat sensitive to the condition of the refugees “precisely because they are citizens of nowhere” and in this sense “potential citizens of the world” (Hassner 1998, p. 274). We may thus say that situating the freedom of movement at the core of European citizenship was revolutionary, the child of a modern ideal of liberty and peaceful cosmopolitan order. This ideal relies on a philosophy of human nature that is based on individual freedom as the condition for responsible and responsive behavior, and thus the construction of a legal order centered on the liberty of the person, equality before the law, and independence, as in Kant's formulation. The Treaty of Rome acknowledged that migration is a “basic fact of human life which reflects the quest of individuals and collectivities to improve their life condition” (Preuss 1998b, p. 316).

Historically, the right to exit, or the right to freely move from, has been made synonymous with individual freedom and limited government (dictatorial regimes commonly follow up on successful coups by closing their borders and revoking passports). The correlation between regime form and free movement was achieved when rights were conceptualized and gradually engrafted into States' constitutions. Thus the right to movement became equated with individual freedom. Beginning with the eighteenth century, the free circulation of goods, wealth, and labor within a country and between countries was equated with a quasi-utopian freedom because commerce would replace conquest, and free exchange imperial occupation and exploitation. In Adam Smith's footsteps, Kant made almost an eulogy of movement and contrasted human beings' ability to live everywhere with other creatures' confinement within ecological niches. In his mind, the very form of the globe seemed to match with human's propensity for motion and the ability to make even lifeless, impervious, and empty spaces, like

the ocean or the desert, into expedients for communication (Kant 1795/1991, pp. 107-115). In Kant's view, movement was naturally related to humans' anthropological need for *commercium*, a word that in his rendering denoted something more and richer than economic exchange. It denoted in fact the mental disposition human beings have to meet new challenges and advance in experience and knowledge. It was thus the human condition itself that required and, in one way or another, created political and legal orders that were congenial to it. Constitutional republican government represented the moral and legal recognition of free movement and stood opposite to despotic regimes, which, in Montesquieu's lucid conceptualization, engendered stagnation, *and* immobility – thus poverty due to lack of communication. Even in contemporary experience, dictatorial regimes that revoke passports and close borders are associated with economic distress and stagnation rather than commerce and prosperity (Sen 1999).

Yet freedom of movement is a composite kind of freedom. It presumes direction toward somewhere and is associated with some ends or goals to be achieved through it, so as to acquire the character of means (Bader 2005). Moreover, movement occurs within space and implies borders of some kind, physical or symbolic, theoretical or existential, legal or material. Thus, although historically it had a quasi-utopian meaning, freedom of movement was always correlated with limits. One might say that this character is common of all rights, which are in a relation of reciprocal correlation with obligations and duties. Yet freedom of movement has some peculiarities of its own that make it difficult to theorize with “no restriction” (Carens 1987/1995, p. 237)⁴.

On some important occasions, the complexity of this right translates into an asymmetry between the right to exit and the right to enter so that whereas forbidding exit to citizens is a sign of tyranny, forbidding entry to foreigners has never been so stigmatized.⁵ The Universal Declaration of Human Rights translated the asymmetry into norms: Article 13 declares that “Everyone has the right to freedom of movement and residence within the borders of each State” and that “Everyone has the right to leave any country, including his own, and to return to his country”. Freedom of movement *within* one's State, right to *exit from* it and right to *return to it* – this specificity exemplifies the asymmetrical character of the basic freedom of movement. Kant's cosmopolitan right to visitation, or the duty we have not to treat one another with hostility simply because we look different, presumes not only that *commercium* is part of our anthropological nature, but also that we have as moral beings something to preserve, and our language or the several particular characteristics we carry with us when we travel or move are precisely part of our individual identity the cosmopolitan right to visitation is meant to protect.

The cosmopolitan right to hospitality is an exquisite individual and civil right that presumes our vulnerability and the fact that we are not undifferentiated beings but “this” or “that” human being; moreover, it presumes that there are in the globe many norms and legal and customary orders. The tension between the inhabitants of the world reflects the asocial sociability that Kant's philosophy postulates, a condition that militates against cultural purism but also against individual isolationism and solipsism. As Jeremy Waldron has acutely observed, “the cosmopolitan right” has little to do with the potential for a world federation (which is instead the domain of “the right of nations”); it is an exquisite individual right that

⁴ See also Carens' more recent book (2013) dedicated to the theory of open borders.

⁵ “In ancient Greece, the Delphic priest regarded the right of unrestricted movement as one of the four freedoms distinguishing liberty and slavery. Ceremonies held to free slaves ritualistically proclaimed that the slave could now ‘run away to whomsoever he may wish’. And the major restraint that Sparta placed on its half-free Helots was depriving them of the right to move elsewhere” (Dowty, 1987, pp. 11-12).

presumes a worldview that is “entirely pragmatic concerning the likely effects on freedom of various juridical arrangements[...].The circumstantial propositions about the peoples of the world living side-by-side within a determinate and spherical space, of their being unable to flee decisively from contact with one another, not to mention the prevalence of human curiosity and the urge to discover – all this means that even for a proponent of cultural integrity, isolation would be a lost cause” (Waldron 2006, pp. 89 and 91).

All this together allows us to appreciate the importance of making of the right to movement into the first citizen right that the European States recognize. It was a right not only to exit but also to enter: this is the revolutionary implication of The Treaty of Rome, which was thus oriented toward cooperation among States in order to create a legal space in which the right to movement could be finally symmetrical, thus a perfect right. The EU started as a legal order agreement that lifted internal barriers and allowed a mixing of nationalities. It prepared the terrain for further dissociation of individual rights from the nation-State as the unique agent of rights protection. Beyond the nation-State, a legal order was put into being that would host and protect all the European citizens, even against their own State if needed. The Treaty of Rome resulted thus more than in opening the door to a decoupling of citizenship from the nation; moreover it made State borders themselves open.

The European Union was born on the freedom of movement and with an explicit assumption in Kantian terms: people tend to move, interact and communicate for reasons that are their own, with the consequence that this indirect process of systematic public relations would eventually engender the need of a more perfect political union. The open space that European citizens were to occupy by travelling, resettling, and directly communicating was primed to form a new mentality and in this sense a European spirit, the first nucleus of the cosmopolitan spirit that Kant envisaged. “To consider oneself, according to internal civil law, as an associate member of a cosmopolitan society is the most sublime idea a man can have of his destination” as he can feel at home in the world.⁶ European citizenship was inspired by this philosophy, which oriented the behavior of each State both toward its citizens, the other States, and all individuals (Hassner 1998, p. 285).

Hence, although the freedom of movement at the European level was firstly conceived according to the State members’ economic concerns, it evolved toward the construction of a political citizenship made of a constellation of civil and political rights attached to the individual and not derived by an European demos. In spite of the active role played by the States, “over the course of the unification process the balance has shifted dramatically within the organizational structure in favor of the European citizens” (Habermas 2012, p. 31). Born in a non-democratic way and with primarily economic concerns, the legal and juridical structure developed later on by the Lisbon Treaty would give centrality to European citizens and conform “unequivocally to democratic principles” (Habermas 2012, p. 31). European citizenship appears to be constituted by a web of rights and legal constructs that satisfy the democratic principles without the subordination to the national level and without the reference to “the expression of self-determination of a sovereign European people” (Grimm 2005, p. 96).

Certainly, the economic reasons for the right to movement and the role of the member States never disappeared. They were, however, never so preponderant to obstruct the formulation of decisions concerning the citizenship of the EU that were able to make it a formal legal status (the Maastricht Treaty of 1993) to be incrementally increased by the subsequent treaties of Amsterdam (1999), Nice (2003) and Lisbon (2009). Although it is hard to define the

⁶ Kant’s citation quoted in Hassner 1998, pp. 285-286. See also Daniele Archibugi 2008, pp. 114-119.

institutional identity of EU, it is certain that its commitment to the centrality of citizenship projects it beyond an economic community. The central themes of the “constitutional treaty” of Lisbon are “human rights, democracy, the rule of law, welfare provision or solidarity, and the enhancement of culture” (Grimm 2005, p. 99). If asked to synthesize in a sentence the character of this construction, one could say that EU embodies in its genesis the reason of its existence, that of making the European countries interdependent economically in order to make Europe an open space for their citizens and thus become a peaceful and cooperative environment subjected to a constitutional politics that grew without a direct plan or the will of some body. In this Kantian movement from war to a perpetual peace, from national to cosmopolitan, the *beginning* of the history of European Union was encapsulated.

This is the perspective that leads Jürgen Habermas in his *The Crisis of The European Union: A Response* to depict the philosophical move from the national to the supranational and to the cosmopolitan forms in which law and politics are coupled together in Europe in a work of progressive subjection of power to right and law. The eighteenth century invisible hand logic makes sense of the argument that wants European citizenship not to have a monadic foundational source. The nationalist and populist accusation moved against the EU not to be democratic because it lacks a founding “we the people” is, Habermas wrote recently, the remnant of nineteenth century constitutionalism, which grounded its political legitimacy on a pre-legal and heteronomous entity like the nation. Equally wrong is the accusation that economic interest is the inner motor of the EU and the Community of Citizens is a myth covering the reality of a market without a State. For both readings, the economic reason contained in the original right to free movement remained *de facto* the only substantive reason keeping together the continental space. Against these mirror-like interpretations, Habermas has recently proposed a return to Kant and invoked a legitimacy principle superior to the nation and to any other heterogeneous reason, like the economy, while is based on the progress of political relations from violence and the arbitrary use of power toward a constitutionalized politics open to justification and the citizens’ quest for accountability (Habermas 2012, p. 7). Within Habermas’ reading, thus, the “executive federalism” that developed since 2008 is a sign of a return to the past, with the centrality of plenipotentiaries meetings behind closed doors seeking decisions that have to satisfy first of all sectarian interests, be them nationalistic or financial.

The question we should ask is whether the Kantian paradigm is sufficient in a moment in which the process of unification comes to a standstill. Whether the Kantian paradigm was a successful strategy in starting the process of European integration because of its ability to deflate the role of political will and make agreements feel the outcome of a voluntary decisions by equal partners, today a return to Kant seems toothless. The challenges facing European citizenships would require a political determination in Altiero Spinelli’s spirit more than Jean Monnet’s and Robert Schuman’s. As a matter of fact, Kant’s paradigm is itself very demanding and far from self-processing as peace is more demanding than the mere absence of war (Isiksel, *forthcoming*).

Furthermore, the paradox of the eighteenth century paradigm of indirectness and political will deflation can explain *both* the civilized function of the constitutionalized politics that the legal practices of the EU have created through the years *and* the “executive federalism” that the practice of a market without a State has engendered in later years of economic crisis. Both of these results are possible within the indirect process toward a transnational interaction and a kind of interdependence that is activated by the logic of unintended consequences and the invisible hand of *doux commerce*. It is not implied in this paradigm that its indirect process is able to lead the European Union toward a more democratic integration. And it is

written nowhere that the cosmopolitan spirit of hospitality will consolidate by force of legal habit if the latter's implementation is left to the member States as it happens now. Both the political evolution of the European Union beyond economic interdependence and the political evolution of European citizenship need to be politically desired, promoted, and implemented. "Having been excluded from the decisions that shaped ever-closer union, European publics are now consenting to the arrogance of technocracy by professing dismissive euroskepticism, resentful populism, and virulent xenophobia" (Isiksel, *forthcoming*). The problem with the eighteenth century paradigm of a civilization achieved without the need (and the risk) of mobilizing the political will is that it is unable to offer valid reasons for why the EU should proceed further in its integration and why European citizenship should become more inclusive and not simply arbitrarily hospitable towards the masses of refugees pressing at its door and the immigrants residing in its territory.

The difficult balance within the right to free movement between political prospects and economic interests, what I have been defining as its original ambiguity, finds confirmation in the shift from the construction of supranational citizenship to the protection of national and economic interests in the wake of the financial crisis of 2008 and mass migration. Intergovernmental practices and nationalist closure of borders are dramatic implications of that shift and a threat against European citizenship as well. Immigration, and moreover mass migration, challenges the vision of transnational citizenship as a spontaneous or self-incremental process and brings to the floor the need for political institutions at the European level that are able both to overcome the practice of "executive federalism" and to reinforce European citizenship.

2. Stateless people within the european "societas civilis sive politica"

Let us return to the issue of the ambiguity of civil and political rights in the name of interests, national or economic, that the Treaty of Rome contained and that intensified with the growth of immigration and the deepening of the economic crisis. At the beginning of the European process of unification, that ambiguity applied essentially to internal immigration (the early concern in 1950s and 1960s). Subsequently, it applied to extra-communitarian migration by shaping both the politics of integration with legal immigrants (referred to as 'third-country nationals') and that of repression with paperless migrants. Some scholars have thus argued that "EU Citizenship amounts to little more than a cynical public relations exercise, and that even the most substantive right (to free movement and residence) is not granted according to an individual's status as a citizen 'but in their capacity as factors of production'" (Weiler 1998, p. 13; see also Ackers and Dwyer 2004, p. 457). If the basic right of freedom of movement is so directly connected to economic reasons—the circulation of a competitive labor force—this means that national boundaries are interpreted and used as mechanisms functional to an international division of labor. They become the loci of the conflict between opposite interests because while foreign workers undermine a nation's working class when the hosting State allows them to be less socially protected than its national working class, they meet with the interests of those economic sectors whose competitiveness relies on cheap labor (Sassen 1988, pp. 36-37).

This conflict is at the core of what James Hollifiel has called the "liberal paradox," that fact that a democratic society based on an open market and freedom of movement maintains a degree of legal closure in order to shelter the social contract between labor and capital, thus acknowledging that its welfare state presupposes a closed and uniform society. Strategies of legal closure are not necessarily brutally direct (blocking borders, incarcerating and repatriating illegal immigrants). In fact, they are mostly indirect, particularly when addressed toward legal immigrants, for instance limiting their civil and social rights, making naturalization hard, restricting their access to social services, or impeding family reunification

(Hollifield et al. 2014, pp. 4-6). In sum, for European States, and now also the European Union, regaining control over their borders amounts to admitting that “immigration control may require a rollback of civil and human rights for noncitizens” (Hollifield et al. 2014, p. 9). In this sense, immigration is the crucible of European citizenship as the field of tradeoffs between rights and labor: “States can have more foreign workers with fewer rights, or they can have fewer foreign workers with more rights, but they cannot have both numbers (open labor market) and rights” (*idem*). Hence, the question of migration is not merely one of border security or economics; it is not even a question confined within the right of movement as it could be in the case of the citizens belonging to Europe’s member States. It is broadly and directly an issue that pertains to the configuration of citizenship and the identity of European Union, whose destiny is mirrored in the way the EU relates to migrants now and in the future. Indeed the economic crisis has deepened the trade-off between rights and interests in many European countries and, regardless of the ideological coalition in power in the member States, the politics of immigration that have been adopted are a blatant violation of the values associated with the community of citizens Europe aspires to be, democratic principles, the rule of law, the right to petition, both with the long-term resident immigrants (it is a general trend in European States the restriction of the naturalization politics and the curtailing of civil and social rights to third-country nationals) and with the paperless migrants as several European countries have made it harder for refugees to enjoy the right of asylum (see the German revision of art. 18 of the Constitution) and easier for national governments to adopt detention and repatriation as security policies or border protection policies.⁷

A nationally based solution to migration amounts to two main policies: crude strategies of expulsion and incarceration of paperless immigrants, and the selection of the preferred immigrants who better fit the economic needs of the national community. Faster visa and residential policies are used today by several European States as strategies to cope with their shortage of a labor force with specific skills and age and also to lower the social rights to European workers. “These policies, by all means, have taken the form of a race for the fittest, a ‘battle for gains and brains’, with nationally different regulations” (van Houtum and Pijpers, 2015).⁸ Thus, restriction of asylum, difficulty of integration, detention in the host centers located at the border of Europe and in airports and finally expulsion are the strategies that qualify European citizenship as a new form of national citizenship rather than a supranational or even cosmopolitan citizenship, as envisaged in the idealized view of the Lisbon Treaty. At the core of this European nationalist politics of borders lies the disconnect of human right from civil and political rights, of the individual and the citizen, a contradiction with the Lisbon Treaty which, as said above, although States that the citizenship of the Union is complementary and does not replace national citizenship, ascribes to the former a number of rights and duties in “addition” to those stemming from citizenship of a State member. It ascribes to EU citizens who reside in a member State of which they are not nationals the right to vote and to stand as candidates at local elections and in the elections for the European Parliament. Moreover it gives them the right to diplomatic protection by any State member

7 Detention and deportation were and are used as exceptional measures in time of emergency to confine suspected terrorists or “enemy aliens” but since 1990s detention “has been normalized as a legitimate tool used by states in immigration control”; in Europe from 2000 to 2012 the number of camps for immigration detention “has increased from 324 to 473” (Gündoğdu 2014, pp. 116-127).

8 A related policy has been that of making a “civic stratification” that is to say of disarticulating the status of immigration in order to make it more manageable by the hosting countries, not in order to protect more effectively the rights of the immigrants; thus differentiation and hierarchy had been made in relation to employment, asylum, job seeking, residence seeking, family reunification, naturalization (see Lydia Morris, 2002).

and the right to petition the European Parliament. As Ulrick Preuss has written, “nationals of third countries are excluded, and the list associated with it [European citizenship] are quite short,” yet “to be a citizen of a supranational entity is a major innovation,” insofar as it is contrary to the traditional nation-State framework. In this sense, “European citizenship could even be conferred on individuals who do not possess the nationality of any of the member States. European citizenship would open the symbolic space for social activities which finally could lead to a European *societas civilis sive politica*” (Preuss 1998a, pp. 139 and 148). To rephrase Isin and Saward’s above mentioned interpretation, the Lisbon Treaty’s formulation proposes “enacting European citizenship” as it associates citizenship with action which gives individuals the rights to make claims to multiple legal and political forms of access to rights, which means to be recognized by a myriad of actors, “be they formal EU citizens or not.” To paraphrase Arendt, it enacts the “right to have rights.”

3. Citizenship as political actorship: where migrations and european citizenship meet

In the aftermath of the Universal Declaration of Human Rights, Hannah Arendt wrote: “Recent attempts to frame a new bill of human rights have demonstrated that no one seems able to define with any assurance what these general human rights, as distinguished from the rights of citizens, really are” (Arendt 1949, p. 26). A divorce between human rights and political rights makes both human rights and democracy devoid of the possibility of contestation and actions in public which democracy entails rights, individual and civil or in current sense “human”.⁹ This divorce would be as questionable as that between liberalism and democracy because if democracy requires an open discussion in order for the citizens to develop opinions and views upon which they can exercise their freedom of choice this means that democracy implies individual rights in their fullest. Political rights cannot exist or being practiced without each individual being free to form, express and change her views, without the right to a voice that is public and expressed in public. The idea of European citizenship contains this principle when, first it keeps basic rights and political rights tied and second, in order to better actualize their tie, it dissociates citizenship from national belonging.

Within this normative context, citizenship becomes a fully political and legal condition. In this rendering, the autonomy of the legal order from the nation is claimed. To go back to the issue with which this article began, the State imposes its power (coercive and protective at once) on all the inhabitants living in its territory – citizens and non-citizens – but the nation links rights to birth (a natural fact) and thus excludes. The State includes all under its power while the nation wants the State for itself. Arendt thought that no institution, whether national or supranational or international, was free of this aporia, which was the reason why she shared in the traditions of those theorists who excluded the possibility of a global political government. She recognized that a federal organization of sovereignty allows for more secure human rights because of its detachment of the State from the nation, but did not fantasize of a global federation that would solve this conundrum. Retaining the tension was her answer, which entailed reading the original formulation of the “declaration of the rights of man and the citizen” as a fortunate indeterminacy, the sign of openness and contestation of all attempts to sever the two (Arendt 1946, pp. 138-141).

Stripping “man” of belonging to a legal order, that is to say interrupting its relation to the “citizen” would entail two outcomes equally frightening in Arendt’s mind: opening the door to the possibility of statelessness and subsuming the implementation of human rights under Samaritan morality. The former eventuality would translate into sheer domination and the latter would become a system of infantilization; both conditions would make the

⁹ This argument is at the core of Gündoğdu’s recent book (Gündoğdu 2014).

recipients of human rights a dependent subject, a non-person. Statelessness thus translates into rightlessness. In the twentieth century Germany and part of continental Europe, ethnic cleansing was realized after reducing (and by reducing) the Jews and the members of other national minorities, like the Roma, to the status of non-citizens in the country where they were born or resided and enjoyed full citizenship right, with the ensuing well-known outcome that they could be deported and eliminated en masse.

Political rights, those tragic events prove, are not superimposed or separable from human rights insofar as the latter are ineffectual without the legal protection of the State. A stateless person is at the mercy of the potentate of the moment. One might object that to be under a tyrannical State is not after all better condition than being stateless. Yet living under a tyrannical regime and being subjected to its arbitrary will do not translate into a legal non-existence. To be subjected to a tyrant can translate into conspiring against him and fighting for political and civil liberty: political agency is affirmed, proclaimed and actualized even at cost of life and imprisonment. But to be subjected to no State, to be a subject to a nowhere legal place of sort, entails not having any voice or any political agency.¹⁰ Against whom can a legally non-existing individual mobilize, create an opposition opinion, join a resistance movement, revolt and change the regime, or simply contest, voice her claims, and petition? Thus a tyrannical State is a better condition than no State at all. In this sense, Arendt wrote that statelessness is fatally connected to rightlessness.

As legal personhood is an identity that is associated with political voice, its absence equals deprivation of a vindication agency. This is the condition that is underlined today in the phenomenon of mass migration, which involves not isolated immigrants as individuals who decide to leave their country of origins, but masses of people who are recognized as statelessness by world opinion. They are stateless for various reasons: because the State they come from has ceased to exist due to wars or civil wars, or are fugitives who have to keep their identity secret to eschew the consequences of repression due to their religious creed, gender, or ethnic identity. Statelessness refers thus to the condition whereby an individual is not considered as a national by any State under the operations of its law and is, therefore, not entitled to any right or privileges enjoyed by the nationals. The international community has recognized the gravity of this problem after World War II and committed to overcome the stateless condition.

The UN refugee agency was born out of World War II in order to help the millions of Europeans displaced by the conflict to return home and regain their legal and political status. The Office of the United Nations High Commissioner for Refugees was established on December 1950 by the United Nations General Assembly with a three-year mandate to complete its work and then disband. Its plan to have a short life bespoke the identification of displacement and statelessness as an emergency and thus a temporary condition. By 1951, the United Nations Convention started another program on the Status of Refugees and in 1954 adopted the Convention on stateless people and gave itself the mission of helping people to overcome their statelessness condition. In 1961 many countries signed the convention, pledging to assure a nationality to stateless people born on their territory and to favor naturalization and political integration.

UNHCR became more and more important and active during the succeeding years, coinciding with several new waves of emergency: refugees from countries of the Eastern bloc; refugees from the decolonization wars in Africa; from displacement crises in Asia, Latin America;

¹⁰ See the excellent analysis of Arendt's idea of statelessness as rightlessness by Gündoğdu (Gündoğdu 2014, ch. 4 and 5).

from the wars in the Balkans and Africa; from the recent revolutions in North Africa and the civil war in Syria. According to a survey released on March 2014, statelessness affected more than 10 million people worldwide and leaves them with no identity. While human rights are conceived as in principle universal and inborn, a large range of fundamental human rights are in practice denied to stateless people thereby making their lives more unbearable and at the mercy of those who succor them.¹¹ Without political rights no rights are enjoyed, although human rights are ascribed to persons as if they were flowed from their natural existence. For reason of war, persecution of religion, ethnic and gender problems, famine and destitution, countries in all continents have produced an unforeseeable increase of migrants, refugees who flee hunger and violence, and ask for asylum. Yet stateless and displaced people are only in small proportion refugees and asylum seekers. Mostly they are irregular migrants, without the requisite documentation for expatriation or for being accepted in the host country, and use unauthorized border-crossing points. More frequently, they are victims of smugglers.

In both countries of asylum and countries of origin, the UNHCR works within national political, economic, and social structures that directly affect the lives of refugees and other people of concern to bring policies, practices and laws into compliance with international standards. In situations of forced displacement, the UNHCR employs advocacy to influence governments and other decision-makers, non-governmental partners and the public at large to adopt practices ensuring the protection of those of concern to UNHCR. Article 2 of the Statute of the Office of the UNHCR declares that countries should be “admitting refugees to their territories, not excluding those in the most destitute categories” and asks the States to assist the High Commissioner “in his efforts to promote the voluntary repatriation of refugees” or in “promoting the assimilation of refugees, especially by facilitating their naturalization”. Thus, although UNHCR is humanitarian and not political by statute, it holds statelessness is a political issue because it is a condition to be overcome in a way that is “consistent with human rights”, thus either by making possible inclusion and naturalization in the host country or by promoting their “voluntary” repatriation. Neither detention nor enforced repatriation are considered an option because they are in flagrant violation of human rights.

The destiny of migrants must thus be settled and not by any kind of settlement but by a legally recognized one, with rights protected by a legal order – which is in fact a form of, or an accompaniment to naturalization. This amounts to acknowledging that citizenship is the necessary condition for making the enjoyment of human rights certain (as a matter of fact, UNHCR operates in those situations in which the disassociation of human rights and citizenship exists). Given the deeply political nature of the phenomena associated with immigration and migration, for the EU to be *societas civilis sive politica* the juristic power of the Court is not enough, because while the Court discusses and resolves individual cases, these mass phenomena ask for political decisions.

The decision to extend the rights associated to European citizens to residents of European territory who are not citizens and to extend civil right to migrants is exquisitely political and calls upon the EU to be made, not solely the member States. These decisions are consistent

¹¹ Mr. Mitt cited their inability to have national identity documents, vote, register marriage or children, own property, have access health care and being blocked from obtaining employment as some of the challenges stateless people faced worldwide. According to the report, statelessness in West Africa occurred for a variety of reasons, including discrimination against specific groups in a country, discrepancies in nationality laws, and administrative practices obstructing access to documentation. See more at: <http://citifmonline.com/2014/12/19/one-million-people-west-africa-stateless-unhcr/#sthash.BaQDsl1Q.dpuf>.

with the origin of the European *droit de cité* as it developed from the right of entry and residence – it was a right for and of immigrants. As a right tied to immigration, its operational implementation has to be able to take into account “the diversity of collective situations and individual trajectories covered by this term” (Balibar 2004, p. 47). Whereas at the time of the Treaty of Rome, the citizens of European States were the immigrants that the right of entry and residence intended to protect, immigrants of non-European origins living and working in the European States or undocumented migrants in the detention camps are the new immigrants, are the phenomena whose conditions the European rights should be adapted to. Étienne Balibar proposed to overcome a strict definition of these rights by including the right of paperless migrants in the detention camps to petition and to address their representative claims toward the European Union as well as the rights of resident immigrants to full political rights (Babilar 2004, pp. 46-50).¹² The right to movement must be endowed with the right to voice, as the very UNHCR charter suggests.

The novelty in these last years, starting from the revolt in Greece in December 2008, is that migrants have shown a willingness to use a political language, to exercise some form of citizenship, putting in practice what the European myth has been preaching. It happened at Rosarno, in Italy, at the beginning of 2010, when the African seasonal workers organized themselves in order to react against their half-slavery. It happened outside of Europe, in Australia, where in a detention camp more than three hundred migrants decided to hold a hunger strike in order to speak to authorized officials of the Australian government and have their request accepted not to be repatriated to Afghanistan, from where they had fled; they asked for interlocutors with bargaining authority, just as we citizens do when we want to have our voice heard. But to us that voice is given by the Constitution of our States and the European several conventions and treaties. To them it is denied in spite of the human rights they are supposed to enjoy.

In all these cases, although in different circumstances, migrants have voiced a clear self-proclamation of political subjectivity, an important step because an explicit vindication of human rights alone does not give the power to oppose what is to be expected from their status as refugees, i.e. repatriation. Not to be repatriated is a request originating from having not only human rights, but also political voice. In these cases as in several others in European countries, immigrants and migrants act as if they were citizens and in doing so they make a request for political rights as human beings – they claim a supranational and cosmopolitan citizenship. This is the novelty that is emerging from the recent movements of stateless migrants. It is an important challenge to Europe’s progressive and democratic ambitions, because the reasonable necessity of regulating migratory flows must no doubt be coupled with a project that endows migrants the dignity of political agency, as a power to make proposals and raise objections, to bargain and have the claims represented, thus situating themselves beyond and independently of their belonging to a nation-State. Their claims are consistent with the ideal of a cosmopolitan community to which European citizenship belongs as an institutional framework of which “the ‘citizens’ and the ‘people’ are the constitutive founding subjects” (Habermas 2012, p. 54).

12 This half-citizenship is however deeply disturbing, although its proposal can be moved by good intentions. A precedent of this half-citizenship is to be found in the ancient Roman republic, which adopted a resolution known as *civitas sine suffragio* with its Latin *socii*; this semi-citizenship did not include the right to vote but included some civil rights that only Roman citizens enjoyed, like economic transaction and the rule of law. As second class citizens, their condition did not actually entail a temporary status or transition toward full citizenship; at any rate, the decision on their destiny was wholly in the hand of the Roman citizens who had a discretionary power over them as over all other subjects without rights. See Mouritsen 2007; for a recent re-evaluation of *civitas sine suffragio* see Pettit 1997, pp. 27-28.

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