

CITIZEN AND SUBJECT

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A POSTCOLONIAL CONSTITUTION FOR THE EUROPEAN UNION?

IN MANY OF his recent interventions Etienne Balibar has stressed the strategic importance of including the history of colonial expansionism (maybe better: the history of what Edward Said has termed the *colonial project*) in any critical reflection on the question of European citizenship and constitution. This inclusion, not exclusive to academic debate, is a fundamental issue of everyday life in Europe due to the “increasingly larger and legitimate presence, despite the suffered discriminations, of populations from colonial origins in the old metropolises”. Reflecting on colonial history then is ridden with “new tensions and violence” whilst potentially inscribing what Balibar calls a “lesson of otherness” into the very code of European citizenship and constitution: the European recognition “of otherness as an indispensable element of its own identity, its virtuality, its ‘power’” (Balibar 2003, 38-39).

It is precisely this *ambivalence* of the colonial legacy that lies at the core of this paper. Starting from some conceptual remarks on the history of the discourse of citizenship in modern Europe and its relationship with the “colonial project”, I will try to highlight some characteristics of the present constitutional situation in Europe, stressing the relevance of the peculiar position of migrants in order to evaluate the whole development of the new European citizenship in the making. These characteristics, this is one of my main theses, are bound to influence the political development in Europe independently of the future of the “Constitutional Treaty” which is being currently discussed and which has been rejected by the referendums held in France and in the Netherlands this past spring. This is not to say, of course, that the referendums are not going to have important, although ambivalent and still open, political and constitutional consequences: both a nationalist backlash and what Slavoj Zizek (2005) has termed the return of “proper politics” in the shape of a radical reinvention of the European political space are possible in the next future. But the constitutional elements highlighted in this paper are part and parcel of what we can call, following an important section of the European legal theory of the 20th century, the *material constitution* which has taken shape within the framework

of the European integration process. Every political option, and especially every radical leftist option, will have in the coming years to take these elements into account.

1. Balibar's valuable considerations prompt a number of questions. First of all: what is new in the "lesson of otherness" referred to by Balibar? In post-colonial studies otherness is widely recognized as an essential element of European identity since the beginning of modernity. As for instance Homi Bhabha or Gayatri Spivak taught us, a movement of contamination, transits and translation (a movement of *metissage*) contradictorily cohabits within colonial experience and anticipates the "postcolonial" present. It is important to stress that, in light of postcolonial studies, the relationship between Europe and its "others" is not to be reduced to a simple opposition (which could be described in terms of "exclusion"). That relation, to borrow the Lacanian term used by Spivak (e.g. 1999), must instead be reconstructed bringing it back to a movement of *forclusion*. Let's try to simplify the somehow esoteric language of many postcolonial critics: Since the image of Europe and its "civilization", beginning in the 16th century, takes its shape within a movement of constant comparison with the images of the "barbarism" (but also of the "liberty") of "savage" peoples inhabiting the spaces which are open to the European conquest, those peoples then, are themselves not confined to mark the external edge of Europe, but are from the very beginning *implied* in the theoretical and practical work which produces the unity of European space and the concepts which articulate that unity.

The concept and discourse of citizenship are no exception to this rule. In recent years we have learned for instance from Immanuel Wallerstein that it is not possible to understand the history of the capitalist mode of production without considering it from the very beginning as a *world-system*. Elaborating on the work of such a conservative legal thinker as Carl Schmitt, we have understood that it is not possible to make sense of the development of the *jus publicum europaeum* (that is, at the same time, of the modern European system of States) without considering the global scope which was conceptually inherent to it since the discovery and the conquest of the "new world". I think that we must apply a similar approach to the concept and the institutions of modern European citizenship, stressing precisely their *global scope* since the very beginning of their history.

Starting with John Locke in late 17th century, a set of borders defined not only the legal and political experience of the citizen, but also what we can call the *political anthropology implied in the modern European discourse of citizenship*,

that is in the way in which the individual was imagined and constructed as a citizen (see for instance Mezzadra 2002). We know the importance of the relationship between citizenship and property introduced by Locke. But it is important to underscore that the concept of property itself is in John Locke an “anthropological” concept (that is, it is rooted within a determinate conception of “human nature”). It indicates first of all the *property of the self*, that is, the capacity of an individual to rationally dominate his passions and to discipline himself in order to be able to do that labor which constitutes in turn the foundation of every “material” property. Only *this* individual is able to become a citizen, and by the same time this figure produces its own borders, that is, a series of figures which are bound to be the “others” of citizenship: the woman (who, in Locke’s view, is *by nature* destined to subordinate herself to the authority of the man within the family), the atheist, the foolish, the “idle poor”, and the *American Indian*.

It is precisely this Lockean image of the individual as a citizen (with the “epistemic” and material violence implied in it) that was for instance taken as presupposition by Emerich de Vattel in his *Droit de gens* (1758) to legitimate the European colonial expansion: The inhabitants of the spaces outside Europe were not characterized by the property of the self theorized by Locke (that is, *they were not individuals*), and this was the reason why they could not develop either a conception nor a practice of exclusive property of the land they inhabited, which could therefore be “justly” occupied by the Europeans. Certainly, Vattel himself was quite crude in his writing, stressing at the same time that the natives could be justly “exterminated” if they resisted the superior European right of conquest (Vattel 1758, I, VII, § 81, p. 78). This is of course a crucial characteristic of European colonialism, the point in which the epistemic violence implicit in it turns out to be the origin of an absolute material violence. Ranabir Samaddar, among others, has shown us that terror and violence did not limit themselves to accompanying the moment of conquest, but rather shaped the very constitutional history of modern colonialism, defining it as the history of a permanent state of exception.

Nevertheless, terror and violence are only one side of the European colonial history and project. As Ranajit Guha has shown, working on the Indian case described by Samaddar himself, the perspective of the “conquistador” gave way quite soon, in colonial knowledge as well in colonial governmentality in “British India”, to the perspective of the “legislator” (Guha 1997, p. 77). It is this shift of perspective that creates the space in which the distinction between citizen and subject, which I used for the

title of this presentation, could operate. Once again we are not confronted here with a simple relation of exclusion. If the colonial subject is the “other” of the metropolitan citizen, their relation cannot be conceptualized in the same way in which we can understand for instance the relation between the “barbarous” and the citizen of the ancient Greek *polis*. To put it very briefly, the “educational” character of modern European colonialism (see for instance Metha 1999), which is best represented by the writings of Macaulay, implicates the very definition and experience of the colonial “subject” in the space and in the logic of the discourse of citizenship. It is this implication which lies at the core of the European colonial project and which explains the peculiarly contradictory dimension of colonial law, colonial constitutionalism and colonial governmentality (see for instance Plamenatz 1960 and Thomas 1994).

While the distinction – and the contemporary existence – of citizen and subject corresponded to other distinctions that allowed a hierarchization of the space of citizenship within the metropolis itself (most notably, to the distinction between “active” and “passive” citizen), it posed peculiar problems to European political and legal thinking. These problems, at the core of the problems posed by the contemporary existence of “representative government” in the metropolis and “despotism” in the colonies, were solved for instance by John Stuart Mill, as it is well-known, by the development of a logic of the “not yet” (Chakrabarty 2000). Writing at the beginning of the 20th century, the Italian jurist Santi Romano explained the necessity of colonial subjecthood in terms of a fundamental distinction in the quality of *historical time* in which the colonies were living. The specific backwardness of the peoples subject to colonial dominance made it necessary to rule them not according to the principles of “constitutional government” prevailing in Europe but according to the principles of “the patrimonial State existing before” it (Romano 1918, p. 104).

Henry Sumner Maine, the great British jurist who served for seven years in the 1860s as a legal adviser to the colonial administration in India, also referred to a difference in the quality of historical time while commenting in 1875 “the spectacle of that most extraordinary experiment, the British Government of India, the virtually despotic government of a dependency by a free people” (Maine 1875, p. 33). Almost summarizing his own experiences in “British India”, he wrote about the task of colonial administrators: “the British rulers in India are like men bound to make their watches keep true time in two longitudes at once”. “Nevertheless”, he added, “the paradoxical position must be accepted...” (Ibid., p. 37). It had to be accepted in

order to govern *progress* as a process involving England and India in a common history while maintaining among the two an unbridgeable border, a *temporal* as well a spatial border, which had to be ruled under the mark of pure domination.

I think this is a good definition, although on a very abstract level, of the peculiarity and contradictions of the modern European colonial project and experience, a definition which, I repeat: on a very abstract level, can be applied well beyond the British and the Indian case. The tracing of that absolute spatial as well as temporal border (a kind of “metaborder”), that is the logical condition of the distinction between citizen and subject, was by the same time conceptually as well as historically implied in the tracing of the borders among European nation-States, that is in the production of the spaces within which the modern history of citizenship inscribed itself. If this is the case, always remaining on a very abstract level, we can see in the challenge posed by anti-colonial struggles and movements to the very existence of that metaborder one of the most important roots of our present condition. The manifold delusions and defeats that marked the history of decolonization notwithstanding, that challenge was eventually successful, and this is the reason why only stressing the link to anti-colonialism it makes sense to call our present condition a *postcolonial condition* (Young 2001). At the same time, however, precisely because of the ways in which the end of colonialism came about, postcolonialism denotes a situation in which the “metaborder” between metropolis and colonies no longer organizes any stable world cartography but the possibility is given that it reproduces itself, in a rather fragmented way, within the territory of the former metropolises themselves (Mezzadra – Rahola 2005). It is in the background of such a definition of postcolonialism that I am now turning to analyze the European constitution.

2. First of all, it is necessary to highlight some very broad characteristics of the European constitution, in order to understand what is the relation it has with the concepts and the practice of modern constitutionalism. Of course there are important elements of continuity, but my hypothesis is that these elements are placed within a general framework that is significantly new in its essence and expresses a relative break with the experience of the modern State. If we try to analyze the European constitution in terms of the basic concepts which were developed within this historical experience, we risk ending up with the same impression that Samuel Pufendorf, in the late 17th century, got in front of the Holy Roman Empire: The European constitution could take in our eyes the shape of a *monstrous creature*.

The first anomaly of the “European constitution” in comparison with the traditional understanding of constitutionalism lies in the fact that we are confronted here not so much with a constitution as a formal document which determines the framework of the political and legal development within the fixed borders of a determined political unity, but rather with a constitutional *process*. I think this is a *structural feature* of the European constitution, and not a provisional situation that will be stabilized by the final approval of the constitutional treaty. To put it briefly: *The European constitution is by definition a constitution in the making for a body politic in the making*. The only possible comparison to be made in modern history in this respect is with the American constitution (that is, by the way, with a constitution which was deeply influenced by colonial experience), and it is not by chance that this comparison has been made quite often in the last years (see for instance Moulier Boutang 2003). But in the European case the flexibility does not concern only the borders of the political unity, it seems rather to be a key feature of the “formal” constitution itself.

To talk about the European constitution as a constitutional process means to take into account a radical subversion of the relation between some of the main concepts developed within the tradition of modern constitutionalism. Let’s take for instance the concepts of constituent power and constituted powers (see Negri 1999). In European modern legal thinking this relation was always developed as a temporal relation: *First*, there was the expression of the constituent power, which was *then* bound to be silenced within the constitutional framework instituted by its action. In the case of the European constitution this model doesn’t seem to work. In the European constitutional process the power of innovation, which is implicit to the concept of the constituent power, seems to be rather fragmented on a plurality of levels and to live in a permanent tension with the constituted order of powers. This means, on the one hand, that the European constitution is open to its constant transformation and that the logical possibility is given to imagine the relation between social movements and institutions in the European space in a way that is significantly different from the one characteristic of the experience of the modern State. But on the other hand, the openness of the European constitution refers to a situation in which also the working of powers gains new chances of freedom and arbitrariness, in which the transition from the paradigm of government to the paradigm of governance (see for instance Borrelli, Ed., 2004) opens up the space for new forms of governmentality, that are not necessarily “softer” than the ones connected to the traditional paradigm of government.

We can analyze the same set of questions in terms of the distinction between the concepts of “formal” and “material” constitution, which has been developed by an important section of European constitutional theory in the 20th century. In the European constitutional process this relation seems to be assumed as a tension that is not bound to be inscribed within a fixed framework. And once more we are confronted here with the ambivalence of the openness of the European constitutional process: The concept of material constitution points indeed on the one hand to the constitutional relevance of social and political conflict; but on the other hand it sheds light on the importance of a set of processes and actors (*administrative* processes and actors, from the point of view of classical modern legal theory) which are relatively free to operate independently of the “formal” provisions of the constitution.

It seems that among the commentators of the European constitutional process, especially the ones who stressed the importance of the *already existing European constitution* (that is, as it was stressed at the beginning of the paper, already existing independently from the ratification through a formal constitution or “constitutional treaty”) got this point. In the analysis of such authors as Dieter Grimm, Joseph H.H. Weiler, Ingolf Pernice and Franz Meyer, what is stressed is precisely the overlapping of constitutional circles and levels of different scope which concretely shapes the European constitutional space, registering and pushing forward the disarticulation (that is, the crisis and transformation) of the classical notion of constitutional order (see for instance Meyer – Pernice 2003).

But how can we define precisely the kind of “political space” which is emerging in the framework of the European constitutional process? Among recent literature on the subject, I find the book by Ulrich Beck and Edgar Grande, *Das kosmopolitische Europa* (2004), particularly interesting and thought-provocative, although I don’t necessarily share the peculiar European enthusiasm that shapes their perspective. In a key chapter of their book, Beck and Grande try to apply to the European body politic the concept of *cosmopolitan Empire*. Starting from the assumption that the European Union is neither a State (be it in the form of a “Superstate” or in the form of a federal State) nor a Confederation of States (Beck – Grande 2004, 83), they propose to apply to it the category of Empire stressing what in their eyes, is the main difference between it and the State:

The State tries to solve its security and welfare problems establishing fixed borders, while the Empire solves them precisely through the variability of borders and external expansion (Ibid., 91).

On the one hand, the emphasis put on the expansion (sure, through “consensus” in Beck’s and Grande’s analysis) as a key feature of the European Union points to the structural importance of the eastwards enlargement, in the sense that it can become the mirror in which it is possible to see the European political space reflected in some of its most important characteristics (cf. Rigo 2005). On the other hand, it is important to underscore that the variability of the borders of the European Union corresponds to the internal heterogeneity of its space. The persistence of nation-States themselves within the European Union, which are not bound to be overcome in the constitutional process, but rather expand some of their powers in the framework of that process and become fundamental articulations of the “cosmopolitan Empire” (Beck – Grande 2004, 114-119), is part and parcel of this heterogeneity. Furthermore, as Beck and Grande themselves stress in their book, either on the level of constitutional or on the level of territorial analysis, it is possible to distinguish an area of “full integration”, an area of “deepened cooperation”, an area of “limited cooperation”, and an area of “enlarged domination” (Ibid., 101-102). It is in the context of this heterogeneity of the political space and constitution of the European Union that it is necessary to develop the point made by Beck and Grande themselves: “the European Union is also ... the *postcolonial Europe*” (Ibid., 58).

3. There seems to be a wide consensus in recent literature on the subject that the functions and the institution itself of the border are undergoing deep transformations in the context of “globalization”. Particularly important here are the transformations related to the issues of citizenship and migration. Consistent with the thesis put forward by Beck and Grande, it seems that we are experiencing an overcoming, although not a linear one, of the modern State model. While in this model the tracing of fixed borders (and the clear distinction between inside and outside) was the condition of the development of citizenship, nowadays we are confronted with a process which has been described as a “deterritorialization” of the border (see the literature discussed in Mezzadra 2004b and the essays collected in the first section of Mezzadra, Ed., 2004). And it is important to point out that the concept of “deterritorialization” doesn’t refer to a situation in which space and territory do not play any more a role in the working of border, but rather to a situation in which the latter cannot be confined to a given place, which is the territorial limit of a political unity.

The new border regime which has taken shape in Europe within the framework of the Schengen agreement seems to be a perfect case-study for this process (cf. for instance Walters 2002). To put it briefly, once again: What

Beck and Grande describe as variability of borders seems to correspond to a simultaneous process of undoing and retracing of borders themselves. On the one hand the European “external borders” projects their shadow well beyond the “limit” of the territory of the European Union (involving for instance such countries as Morocco, Tunisia, Libya, Ukraine in their management). On the other hand they tend to trace themselves back within the European “polis”, as it becomes particularly clear (although it is in no way limited to it) in the existence of *administrative detention centers* for migrants (that is, of a peculiar institution of the new border regime) in most European States.

This process of undoing and retracing of borders has worked simultaneously in the making of European citizenship, and I think we should try to understand the consequences of this coincidence. My hypothesis is that European citizenship itself is being constructed as a *heterogeneous space*, and it is precisely this heterogeneity of European citizenship that creates the condition for the postcolonial re-emergence of the distinction between citizen and subject within the European constitution. The heterogeneity of European citizenship is expressed also formally in the text of the constitutional treaty, where it is constructed as “second grade citizenship”, since it depends on the national citizenship regulated by member States (art. I-10).

We can now go back to our starting point, picking up again the analysis developed by Étienne Balibar. Just taking his departure from this specific regulation of European citizenship, Balibar has indeed stressed that the national management of the inclusion mechanisms of citizenship are now “totalized at the European level”, transforming the “non communitarian foreigner”, that is the migrant coming from outside the European Union, in an “excluded from the interior”, in a *second class citizen* (Balibar 2001, p. 191). I would like to add that this process, in which Balibar sees the root of a “re-colonizing” of migration (Ibid., 78), takes place in a situation in which national migration policies are increasingly developed under the pressure of European directives, and especially of the new border regime which I have briefly discussed earlier. The effect of this border regime is to produce a movement of *selective and differential inclusion* of migrants, which corresponds to the permanent production of a plurality of statuses (finding its limit in the *illegal alien* who is bound to become a permanent inhabitant of European political space), which tends to disrupt the universal and unitary figure of modern citizenship. This process lies at the core of the whole transformations of citizenship; that is, it doesn’t concern only migrants but it tends to involve growing sections of “autochthonous” populations in

Europe through the fragmentation and “precarization” of rights which are connected to “neoliberal” politics. Moreover, it seems to be one of the key features of the transformation of the European labor market, which is increasingly determined by what the “European Monitoring Centre on Racism and Xenophobia” of Wien defined in 2001 as the “ethno-racial division” of work in Europe.

The heterogeneity of European citizenship corresponds under these conditions to the heterogeneity of the governmentality regimes that rule European populations and European spaces. A growing number of people living in Europe do not seem to inhabit the social space which corresponds to the expansion of citizenship rights, that is “civil society”. Rather, their lives are increasingly the targets of the technologies of governmentality which define what Partha Chatterjee has called the *heterogeneous* space of *political society*, and which “often predate the nation-state, especially where there has been a relatively long experience of European colonial rule” (Chatterjee 2004, 36).

A new form of politics, which has been called *domopolitics* by William Walters, crisscrosses the rationality of liberal political economy in the governance of mobility. “Domopolitics” refers at the same time to the Latin word *domus* (house or home) and to the Latin verb *domare* (to tame, to domesticate, also used metaphorically to indicate the act of conquering or “subduing men or communities”) (Walters 2004, 241). It is precisely this act of conquering, with its colonial imprint and covered by the rhetoric of security in the European *domus*, which crisscrosses the making of European citizenship if we analyze it from the point of view of European migration politics. And I totally agree with Walters (who coined the term *domopolitics* in the context of an analysis of the paper published in 2002 on migration management by the British government called *Secure Borders, Safe Havens*), that the governance of mobility aimed at through the peculiar mixture of domopolitics and liberal political economy which seems to shape European migration politics doesn’t try “to arrest mobility, but to tame it”. It doesn’t aim at “a generalized immobilization, but [at] a strategic utilization of immobility to specific cases coupled with the production of (certain kinds) of mobility” (Ibid., 248), that is, it tries to promote what I called earlier a process of selective and differential inclusion of migrants.

4. The concepts of “political society” and “domopolitics” refer to specific colonial technologies of governmentality and power that crisscross the multilevel European constitution, revealing some unpleasant consequences of

the postcolonial nature of the European constitution. But on the other hand there is another side of this very postcolonial nature. It has to do with the “increasingly larger and legitimate presence” of migrants (of “populations of colonial origin”) in Europe, stressed by Balibar in the quotation from which I took my departure. The emphasis here must be on the adjective *legitimate*. I think that the legitimacy of the presence of migrants in Europe, independently of their legal status, can and must be interpreted in the terms suggested by a radical re-reading of the concept of citizenship. According to this radical re-reading, which I tried to develop elsewhere (cf. Mezzadra 2004a), citizenship cannot be reduced to its formal, institutional definition. There is a second face to citizenship, and this second face concerns the social and political practices that challenge the formal definition of citizenship.

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