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ON DUBIOUS PARALLELS: THE TRANSNATIONAL EUROPEANS AND THE JEWS. A NOTE ON GARETH DAVIES' *ARTICLE*

LOÏC AZOULAI*

ABSTRACT: In a recent *Article* published in this *Journal*, Gareth Davies draws a parallel between European citizens as fashioned by EU law and pre-war Europe's Jews (G. DAVIES, *How Citizenship Divides: The New Legal Class of Transnational Europeans*, in *European Papers*, Vol. 4, 2019, No 3, www.europeanpapers.eu, p. 675 *et seq.*). This parallel raises two serious issues. One is the complete lack of contextualisation of such a dubious comparison. The other is the lack of careful methodological engagement with the ways in which EU law operates in actual practice. This note cautions against the use of such parallels and calls for the development of renewed categories to analyse and critically assess the European Union and its law.

KEYWORDS: European Union Citizenship – Jews – European legal scholarship – methodology – social and cultural contexts – polarisation.

I should like to state that it is not my intention to offer a reflection on Gareth Davies' *Article* published in this *Journal* under the title *How Citizenship Divides: The New Legal Class of Transnational Europeans*.¹ This is not a reply aimed at discussing the substance and merits of the argument put forward. Certainly the analysis of Union citizenship law as creating a separate class of people undermining the integrity of the state and local communities is most unsatisfying, worthy of a meticulous review. But this is not the place to engage in this discussion. Any comment on substance might weaken, or take away the outrage that I feel about some irritatingly thoughtless statements appearing in this *Article*.

In the conclusive part of his *Article*, Gareth Davies writes: "*The idea of a rootless cosmopolitan elite with many of the social and economic characteristics above, and a similarly*

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¹ G. DAVIES, *How Citizenship Divides: The New Legal Class of Transnational Europeans*, in *European Papers*, Vol. 4, 2019, No 3, www.europeanpapers.eu, p. 675 *et seq.*



tense relationship with more rooted and immobile citizens, is fairly ubiquitous, but the granting of a specific and privileged legal status to that group is a distinctive European step" (p. 693). This is not unheard in European legal scholarship. This is the well-known view that individuals fashioned by EU law sound like abstract and isolated creatures, with a feeling of homelessness and engaged in a form of free-riding. This view was famously echoed by Theresa May's statement on 5 October 2016 that *"if you believe you're a citizen of the world, you're a citizen of nowhere. You don't understand what the very word 'citizenship' means"*.

In this *Article*, the Author thought it was useful to go beyond this now rather conventional if completely unsubstantiated view and adds: *"In this European context it also invites parallels with Europe's Jews. They too were part of European states, and yet often seen as outsiders within them. They too were economically successful, and thanks to their connections with other Jews often distinctively transnational both in identity and in lives"* (*ibid.*). To which he adds some qualification, perhaps in order to mark his distance from a purely anti-Semitic discourse: *"They were sometimes seen as the most European of Europeans, but were also vulnerable because of this. Their alleged lack of loyalty to the nation and cosmopolitan rootlessness, as well as their alleged alien values, were, still are, core features of anti-Semitism"* (*ibid.*). If this was not bad enough, then came this: *"A psychoanalytic perspective might invite us to wonder if the continent is trying to regrow its lost limb, to repair its self-harm, and create a class that is an echo of the one it lost"* (*ibid.*).

It seems to me that, faced with such dubious words, I have the duty not to remain silent but to express my judgment firmly.

First of all, I would like to remind that there is no such thing as "Europe's Jews" as a homogenous social group in pre-war Europe, with people who would be *"part of European states"* in the sense of living in *"host states"*, who would be *"economically successful"*, mostly focusing on *"uprooted professions"* such as trade and finance, and being *"transnational both in identity and in lives"* thanks to their *"connections with other Jews"*. These are scandalously insufficient statements because they point to nothing but stereotypes. That Jews would have special social and cultural features that would make them *"the most European of Europeans"* is just a code for saying that they were unable to root in a national community and history. It is certainly a fact that these stereotypes were commonplace in Europe at the time. But does this allow one to suggest that they were based on actual social and cultural features?

The only way the Author marks his distance from these stereotypes is by alluding, in some instances and not all, to the way the Jews were *"seen"*, and by classifying some of their features, and not all, as *"alleged"* features. Unhappily, this is immediately followed by an astonishing leap: we are invited to wonder if Europe is not trying to *"create a class that is an echo of the one it lost"*. What is to be understood by this? The whole point of the *Article* is to argue that European citizens are *"legally separate"*, *"they are privileged"*, and *"they are threatening [...] in a way that is disadvantageous to non-members of that*

class". Union citizens would constitute "a class" structurally bound to "humiliate welfare institutions and in doing so frightens those who need them most" and to threaten "local traditional values" (*ibid.*, pp. 690-691). As is made clear throughout the text, the specific features of European citizenship – "separate, privileged, threatening" (*ibid.*, p. 688) – are not just subjective elements, reflecting social perceptions and social biases; they are structural features enshrined in a legal regime. The European citizens are not "perceived" as a threat. According to the Author, they are constructed as a threat through law. But, if the European citizens are, in legal terms, really (and not allegedly) a threat, how can this portray resonate with the Jewish comparison? Does it mean that Jews were actually "privileged" and "threatening"? Or does it mean, just to the opposite, that European citizens are not really "privileged" and "threatening" but rather subject to stigmatisation and made vulnerable because of this? If the latter is true, the whole point of the *Article* collapses. In any event, it seems clear that the parallel between Union citizens and Europe's Jews is ill-founded. It is the least felicitous analogy, and the one most likely to awaken feelings of hate and intolerance (towards both Jews and European citizens).

Now, let us assume these are uncontrolled leaps in the course of drafting an *Article*. We got it wrong. The true thinking of the Author on the matter is different. His intention would be to alert us to the fact that, despite being a wonderful innovation, EU citizenship law carries "risks", and we should be aware of these. What kind of risks? This does not emerge clearly in this *Article*. The Author mentions but does not substantiate risks of destabilisation of domestic welfare structures and risks of destabilisation of entrenched local values and habits. One would also think of the risk of distortion of this regime by politicians, activists or others willing to generate anti-EU sentiments. There is no doubt that it would be wrong to be blind to the growing sentiment among various groups of people across Europe that the European Union – its machinery, policies, and laws – are both too remote from pressing needs of people and too intrusive in people's everyday lives. One must attend to the backlash of European integration in Member States' societies that manifests in a number of ways, from disagreement to protest, from disillusion to a sense of disorientation or despair.² But why then rely on the terms used by those who attempt to instrumentalise and exploit this sense of disaffiliation to Europe? Why borrow the language used by nationalists and populists? Why use their language as an analytical frame for describing the operation of EU law? What happens in the *Article* is precisely this: the Author disguises the sentimental language of fear and separation in the clothes of an academic discourse; it turns convenient terms used to inflame social passions ("*separate, privileged, threatening*") into analytical categories. This is hardly understandable. This certainly does not serve the argument. More importantly, this points to a lack of careful methodological engagement with the ways in which EU

² See on this L. AZOULAI, *The Madness of Europe, Being Attached to It*, in *German Law Journal*, Special Issue n. 1, January 2020, pp. 100-103.

law may, in actual practice, contribute to shape or strengthen all sorts of cultural and social claims or fears. We certainly need to deepen our understanding of the social and cultural contexts in which EU law operates. Dubious parallels and outrageous categories do not provide sound foundations for such a study.

I would say more. There was a time when thousands of young Europeans let forth the cry *"We are all German Jews"*. This was to signify the relation of solidarity and fraternity with the victims of the inhumanity represented by Nazism, and it was to signify a form of solidarity among Europeans. We are all aware that we are living disturbing and perilous times. This alludes not only to the erosion of democratic orders, but also to a sense of deep polarisation in European societies. At such a serious moment in time, isn't it our responsibility to resist the reckless message, this sad cry: *"They are a class of Europeans/Jews"?*