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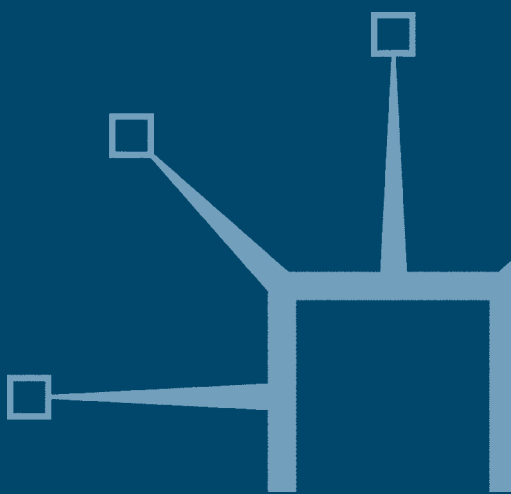
Making European Citizens

Civic Inclusion in a Transnational Context

Edited by

Richard Bellamy, Dario Castiglione and Jo Shaw



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Making European Citizens

Civic Inclusion in a Transnational Context

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Preface

This volume is concerned with the idea, institutions and practices of citizenship beyond the nation state. It explores how this new political context has transformed the very categories of citizenship. Europe, and particularly the EU, provides the most developed example of transnational governance. However, discussions of European citizenship have tended to employ a somewhat passive understanding of the citizen. They have seen citizenship as either the result of a top-down granting of a common set of rights and political institutions, or focused on how far European integration has led Europeans to identify with each other or with Europe as an historical and cultural entity. This volume adopts a more active perspective. Citizens are not simply made by legal, political or social processes. They also make themselves through their exploitation and shaping of these processes. Such active citizenship involves more than simply voting. It entails the capacity to organise both socially and politically to promote certain ideals and interests. Achieving such mobilisation at a transnational level involves different entitlements, opportunity structures, skills and levels of identification to those required at the local and national levels. As a result, the status and practices of citizenship are altered, though it remains to be seen whether we are witnessing the rise of a fully fledged postnational form of citizenship or, more modestly, just the establishment of a series of mixed forms, which tend to integrate national and transnational dimensions.

This volume involves a multidisciplinary team of contributors drawn from law, political science, sociology and political economy. They examine the various ways in which European citizenship is changing our ideas of civic standing, providing opportunities for mobilisation and interest representation, and re-defining the political space for democratic participation. They also look at the different institutional and social strategies that contribute to defining the role of citizens and their inclusion in European decision making. In the introduction, the editors offer an overview of the theoretical significance and legal and institutional development of European citizenship as a transnational practice. Throughout the volume, as the title indicates, we try to suggest that European citizenship is the (as yet uncertain and often contested) result of a process rather than a simple status.

The volume is primarily the result of research undertaken by the editors and the contributors as part of an ESRC Project on 'Strategies of Civic Inclusion in Pan-European Civil Society' (Grant L213252022). That Project was part of the ESRC Research Programme on 'One Europe or Several?' We gladly acknowledge the ESRC's financial support and the help we received from Professor Helen Wallace, the Director of the Programme. Throughout

our research and during the writing-up period, we benefited from discussions with other researchers involved in the 'One Europe or Several?' Programme in the course of numerous meetings and conferences. Useful comments and suggestions were also provided by a Dissemination Meeting on 'Institutional reform, citizenship and civil society in the enlarged Europe', organised in London with the participation of academics and policy experts working in the area. For assistance with the final manuscript, the editors are grateful to Rob Lamb. For her patience and encouragement throughout the (alas) much-slower-than-planned progress of this volume, we are extremely grateful to our editor Alison Howson.

This book is dedicated to three young European citizens: Amy, Leo and Nicolai. They have extended their parents a remarkable degree of freedom of movement and, though goods, services and capital from various European states have come their way in exchange, we are grateful for their indulgence and look forward to seeing them benefit from their own exercise of European citizenship some time in the future.

RB
DC
JS

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Introduction: From National to Transnational Citizenship

Richard Bellamy, Dario Castiglione and Jo Shaw

In one of the most famous (if apocryphal) rhetorical flourishes of the Italian Risorgimento, the politician Massimo D'Azeglio remarked how 'Having made Italy, we need to make the Italians' (Bellamy 1987: 6). Many commentators, *mutatis mutandis*, make a similar observation with regard to the European Union. However, D'Azeglio was calling for a state-led policy of political education and national acculturation. Though some have advocated such measures, we believe such a strategy to be neither possible nor desirable. Our investigation of various ways of 'making European citizens' has rather different presuppositions and aims. For a start, we do not assume that the EU has been 'made', in the sense of completed. Likewise, what citizenship means and what it entails in contemporary societies remain open questions, as does the nature of the relationship between the political community and its members. Nor can one treat the construction of citizenship as an entirely elite-driven, top-down process. Ours is a more problematic statement. First, it implies a research agenda: the investigation of whether, and if so how, EU citizenship has been constructed as a formal status, a practice and a normative commitment. Second, it invokes a certain methodological perspective: one that sees the construction of citizenship as a dynamic and contested process emanating as much from below as from above. Therefore, the studies comprising this volume address the degree to which European citizens are not only being 'made' and 'transformed' by European institutions and contemporary social and economic conditions but also (and more importantly) 'making' and 'transforming' both themselves and the European political space.

The meanings of citizenship

The immediate context of our research is provided by the Maastricht Treaty. By establishing the status of European Union citizenship, it prompted academics, politicians and the general public to ask a number of questions

about the very nature and attributes of the citizen within modern societies. In particular: can citizenship be de-coupled from nationality; does EU citizenship complement (and if so how) national citizenship; or does it subvert it and offer something either similar or totally different at the European level? (Shaw 1997, 1998; Weiler 1997).

Among scholars at least, there is general agreement that if a form of pan-European citizenship is possible, it must involve a fundamental re-thinking of the ideals and the institutions underlying both the status and practices of citizenship itself. Hence, discussions of EU citizenship have tended to lead to a broader examination of the future of citizenship. However, the possibility of a historical transformation of the very conception of citizenship poses the question of what it has meant hitherto to be a citizen.

The term 'citizen' has taken different meanings in different historical periods and languages (Pocock 1992; Ignatieff 1995; Bellamy 2004; Preuss 2004). Max Weber distinguished between three discrete meanings, each related to a particular social-historical phenomena typical of western civilisation (Weber 1968: p. 239). By a citizen, we may understand a member of a 'city', a socio-geographical entity; or a member of a political community, a geo-political entity; or, finally, a member of a particular social strata or class, a socio-cultural entity. The third meaning is apparent in the German term *Bürger*, but even in other languages it is not entirely unrelated to the other two meanings due to its close historical association with the economic life of the city. Nonetheless, the meanings more directly related to our current usage are the first and second. These share a common genealogy and, in certain historical periods, have tended to coincide.

In spite of the obvious links that the idea of the citizen has with life in a city, the concept of 'citizenship' has mainly referred to the political (or state-related) dimension of membership. Yet, on at least two counts, this meaning is no less prone to ambiguities. First, being a member of a political community means different things depending on the requirements of membership. Second, the meanings of membership change in relation to the type of political community of which one is a member. In many respects, these two conditions of membership coincide, so that the entitlements and responsibilities of being a member often depend on the kind of community to which one belongs, but there may also be requirements that are unrelated to the nature of the polity. As a consequence, the historical meaning of being a citizen has fluctuated in relation to whether it was applied to the Greek *polis* or the Roman Empire, to the Medieval and early Renaissance city-states or the early modern absolutist monarchies, to the revolutionary nations of the eighteenth and nineteenth centuries or the present democratic and constitutional states. Moreover, each of these historical experiences has produced particular understandings influencing later uses of the term, and in some cases providing mythical models, which later thinkers and societies have grappled with in trying to adapt their own practices to the ideals of the past.

In broad historical outline, the idea of citizenship as political membership originated in Greek political thought, where it was defined as one of the aspects of a 'democratic' view of the political order. Citizens were those members of a political society whose basic equality was established by the constitution recognising them as entitled and capable of being rulers and ruled in turn. The constitutive principle of this political regime, as one in which all citizens had 'full and equal membership', was established through various institutional arrangements and political practices of the active (and virtuous) citizen. Although this idea of the equality of all members of a political community has remained a central feature of the idea of citizenship throughout its history, its basis has shifted away from the ability and duty to be self-ruling, to one of unqualified entitlement for each and every adult. Gradually, as John Pocock (1992) has observed, the Greek, mainly Aristotelian, paradigm of active citizenship gave way to a different paradigm stemming from the Roman juristic tradition and its later developments in medieval and early modern natural law. This tradition tended to view the relations between people as being mediated by relationships between people and 'things'. Property rights and civil private law provided the model for the citizen's place and role within the community, as a subject who had exchanged his (and more recently her) natural liberty for a right to protection. Thus, citizens were no longer seen as mainly public agents, but as 'subjects',[1] oriented less to political action for the common good than the pursuit of their personal goals under the protection of the law or of public power. The concentration of powers in the state and its administration was regarded as much a defence of as a threat to the individual. Consequently, the rights of citizens came increasingly to be conceived as 'subjective' rights, establishing a limit to the burdens and obligations that public power itself could impose upon those subject to them. The partial re-reading of the role of the citizen in jurisprudential terms, as a subject, and the identification of the citizen with all adult members of a community, have both, in different ways, obscured what was originally an entirely political relationship defined by a certain kind of constitutional regime, replacing it instead with a legal and status relationship, comprising obligations, entitlements and privileges. However, this 'privatisation' of the rights of citizenship has been accompanied by, and to some degree promoted, the universalisation of citizenship to the whole of the adult population within the political community, regardless of their moral or material characteristics. In this, both private and international law have contributed with the creation of a corpus of positive laws and rights addressed to the 'person', irrespective of his or her affiliation to a particular political body.

But the history of the partial 'privatization' of the figure of the citizen is only part of the modern history of citizenship. The more definite meaning that we ascribe to citizenship today emerged from the socio-economic transformations resulting from the American and French revolutions, on the one

side, and the Industrial Revolution on the other. This dual revolution, and the resulting formation of the (democratic) nation state as the paradigmatic form of the political community, provided the material and intellectual basis for a distinctively modern conception. The different national, and partly ideological, narratives that have contributed to this modern understanding within Europe have been discussed in a companion volume to this one, dealing with the *Lineages of European Citizenship* (Bellamy *et al.* 2004). From a more general socio-historical perspective, a fairly well-established narrative exists (roughly that of Rokkan (1974), Marshall (1950) and their elaborators) for the making of democratic citizenship in Western Europe during the nineteenth and twentieth centuries (Weale 2005: ch 1). On this account, it was the product of the interrelated processes of state building, the emergence of commercial and industrial society, and the construction of a national consciousness, with all three driven forward in various ways by war.

Though these three processes tended to be phased, each of them provided certain preconditions of democratic citizenship. The first, state-building, phase consisted of administrative, military and cultural unification at the elite level, accompanied by territorial consolidation and the creation of an elementary, state-wide bureaucratic and legal infrastructure. This phase created a sovereign political body possessing authority over all activities within a given territorial sphere, with those people residing within it becoming its legitimate subjects. The second phase saw the emergence of commercial and industrial economies. This process led to the creation of the infrastructural public goods required by market economies, such as a unified transport system, a standardised system of weights and measures and a single currency, and the establishment of a regular and unitary legal system. Markets also gradually broke down traditional social hierarchies and systems of ascribed status, fostering freedom of contract and equality before the law – particularly with regard to civil and economic rights. The third, nation-making, phase involved the socialisation of the masses into a national consciousness suited to a market and industrial economy by means of compulsory education, linguistic standardisation, a popular press and conscript armies. These promoted a common language and guaranteed standards of numeracy and literacy appropriate for a mobile workforce capable of acquiring the generic skills needed for industry. They also helped create affective bonds between both co-nationals themselves and them and their state.

The net effect of these three processes was to create a 'people', who were entitled to be treated as equals before the law and possessed equal rights to buy and sell goods, services and labour; whose interests were overseen by a sovereign political authority emanating from their corporate unity; and who shared a national identity that shaped their allegiance to each other and to their state. All three elements became important for democratic citizenship. The first provided the basis for regarding all persons as entitled to the equal

protection of the laws – a condition people came to see was unlikely to obtain without an equal right to frame them. The second created a community of interest, most particularly in controlling those running the state sufficiently to ensure that the rulers responded to and promoted the concerns of the ruled rather than oppressing them. The third led citizens to consider themselves as a people, sharing certain common values and various special obligations towards one another. It also fashioned the context for a public sphere in which people could communicate with each other using a common idiom and according to rules and practices that were broadly known and accepted. As a result of these socio-historical developments, we now tend to refer to citizenship as a complex constellation of normative and descriptive meanings indicating membership of a political community possessing the attributes statehood, popular government and nationhood. It remains to be seen how far these characteristics remain relevant today.

The dimensions of citizenship

The particular way in which these three component parts of the idea of the modern citizen (as the subject of a state, the active member of a democratic society and the fellow member of a national community) have been conceived and combined has depended on historical contingencies. Nevertheless, throughout its many variants, this has remained the dominant model for over a century. Its success has depended on the fact that its three historically grounded components matched closely the more abstract dimensions of membership of a political community, with all of them serving to bolster the kind of integrative function played by citizenship itself in modern societies.

From an analytic perspective, we can distinguish three dimensions characterising membership of a political community: the *discretionary*, the *decisional* and the *allocative*. The *discretionary* imension refers to the rules or principles of membership according to which individuals and groups of people are either included or excluded from a particular political community. As we saw, in modern nation states this dimension has been mainly parasitic on concepts of nationality. However, the definition of national membership has varied greatly across time and space. It has been associated with different views of what constitutes peoplehood – from the sharing of a common history or ethnic origins, to the degree or length of permanence on the territory, cultural or linguistic homogeneity, and common beliefs and values or institutions. While nationality tended to provide the criteria for distinguishing the citizen from the 'outsiders' of that society, other criteria were used to restrict the standing of citizenship to a particular class of 'insiders'. Indeed, even when state and/or national citizenship was defined in rather universalistic terms,[2] there remained forms of exclusion that applied to some people who, in all other respects, were considered part of the society. The exclusion of children is the most obvious example, but such exclusions have also been

extended to other groups or classes of individuals, such as workers and women, depending on the contingent criteria of (naturally or socially defined) competence that were associated with proper membership of a political community (Dahl 1989: ch. 9). Historically, and throughout the formation of the modern democratic state, the question of the standing of citizenship, as the mark of civic dignity (Shklar 1991: 2–3), has been a very contested terrain and was often at the heart of repeated battles over the extension of the franchise (Rosanvallon 1992). Thus, the discretionary 'boundaries' by which citizenship is defined are never easily fixed, and may both depend on and influence the shared conception of political membership.

The *decisional* dimension concerns the roles and responsibilities attributed to the members of the community in the chain of command and decision making. Democratic communities are founded on the principle that members should have an equal say in how the affairs of their community are conducted. This requires a constitutional structure and a series of societal arrangements through which the general principle of fairly equal influence and participation is given some concrete substance. The traditional mechanisms used by modern democracies to implement such a principle include the institutions of democratic representation, the general dependence of the executive upon the legislative, the separation and balance of powers, and public opinion formation through a competitive party system and an open civil society. However, for this complex institutional mechanism to be effective, a certain level of political activism and concern with public affairs has proved necessary. Without such involvement, democratic citizenship tends to become void and ineffectual, turning into mere subjecthood.

The *allocative* dimension of citizenship regards the way in which the material and symbolic resources of the community are distributed among its members. The importance of this dimension has greatly increased with the expansion of the social functions of the modern state. The development of social rights, as a way of counteracting the alienating and disempowering features of market societies, has provided the *telos* for this dimension of modern citizenship (Marshall 1950; Turner 1997). Social rights ensure that the formal aspects of equality do not become completely meaningless. However, once again the stability achieved in modern society is neither fixed nor above contestation.

The various dimensions of citizenship play an important legitimating role in the way in which the community is organised internally. As a result, citizenship fulfils an important *integrative* function, as a form of social glue contributing to hold the community together. In this way, it enables the state effectively to perform its main functions, which are those of protecting its members, sustaining their chosen life styles and providing the context for their sociality. The principles underlying the *integrative* function are obviously not self-standing, but depend on a particular combination of the other

three dimensions. As we saw in the previous section, the modern democratic nation state was able to give a certain unity and a strong integrative function to the idea of democratic citizenship by identifying this practice with a people, whose unity and identity were concurrently defined along the other three dimensions. Thus, the people's commonality (*discretionary* dimension) presupposed a set of shared values, common memories, and a kind of mutual sentimental bond between both the people themselves, and them and their homeland. On the basis of such a commonality, that very same people shared in the sovereignty of the state and in its will and capacity for self-rule (*decisional* dimension). The system of commonly shared and agreed rules and institutions provided for the development of a complex system for the regulation of social exchange and support of forms of solidarity (*allocative* dimension), thus further strengthening the sense of commonality binding society together.

The challenges to citizenship and contemporary models of the citizen

Since the 1970s many have started questioning whether the democratic nation state, as a general form of political organisation, still offers a comprehensive and self-sufficient context within which citizenship can operate. As a result, they have feared a parallel weakening of citizenship's integrative function and have sought to rework its components and their relation to its various dimensions. For the very socio-political context that has given modern citizenship its concrete meaning and institutional form is now the object of several challenges transforming it from both the inside and the outside.

One set of challenges stem from ethnic diversity and minority nationalism within the state, and globalisation (often associated with commercialisation and Americanisation) without. These developments potentially threaten national political cultures. They have prompted debates over the importance of nationality and a shared culture as sources of reciprocity and allegiance between both citizens themselves and them and the state. Another set of challenges stem from the political, social and administrative problems posed by the growing electoral apathy of citizens, the fiscal crisis of the welfare system, and the transformations of the relationship between the public and private sectors induced by neo-liberal policies. These developments have also been broadly linked to market-driven global forces and a multicultural concern with recognition at the expense of the politics of redistribution. They have given rise to debates over the degree to which markets or the law prove better than democratic politics in enabling citizens to influence public and private producers and service deliverers and hold them to account.

The first set of challenges is evident in the concern of sociologists in particular with the rules of membership that give access to citizenship and in comparing the responses of different social systems to the growth in

immigration (Brubaker 1992). There has also been a related debate among political theorists over the degree to which liberalism and democracy either conflict with or assume some form of national political community. Both academics and policy makers have fiercely debated such issues as the content of civic education in schools and the degree to which naturalised citizens should be obliged not just to adhere to the political norms of the host nation but also to acquire various of its social and other cultural characteristics, such as the dominant religion and language.

These discussions are connected to an earlier clash between liberals and their communitarian critics initially prompted by the second set of challenges. Communitarians had argued that liberals encouraged a self-defeating form of extreme individualism by concentrating on rights to the neglect of the claims of society and the common good. However, this opposition has also fed into debates stemming from the first set of challenges concerning the plausibility of cosmopolitan theories of democracy and the claims of international justice. Recently, communitarians and liberals have been criticised by a third school of thought: republicanism. Republicans criticise both for presenting a rather passive view of the citizen. They are charged with underestimating and undermining the integrative function played by civic participation and the cultivation of the virtues citizens display in their dealings in civil society based on generalised networks of trust and reciprocity. This new emphasis on the virtues and responsibilities of the citizen has given rise to discussions about the range and sustainability of such qualities (Galston 1991); the role of voluntary associations, of social capital, and of other institutions as seedbeds of civicness (Kymlicka 2002: p. 312); and over how citizens, either individually or through joining together in organisations, need to be more self-reliant in the face of the growing crisis of the welfare state.

Overall, contemporary debates about citizenship have divided between liberal, communitarian and republican schools of thought.[3] Each of them emphasises one of the three components of modern democratic citizenship identified earlier. They associate this component with one of the three dimensions of citizenship we explored, regarding it alone as the key to the integrative function of citizenship within contemporary advanced (or postmodern) societies. Thus, liberals advocate the *citizenship-as-rights* model. They focus on the allocative dimension and insist on the equal status of the citizen as a rights-bearer. By contrast, communitarians adopt the *citizenship-as-belonging* model. They focus on the discretionary dimension and explore the supposedly shared cultural, ethnic or other characteristics of the citizens of any given community. Finally, republicans prioritise the *citizenship-as-participation* model. They insist on the enduring value of sharing in the decisional dimension. They see the citizen in more classical terms, as possessing certain requisite civic attitudes and capabilities to participate in the community.

For liberals, democracy is but one, and not necessarily the best, means for individuals to exercise and secure their rights of citizenship. Indeed, within a global and market-orientated society, the law and impartial regulators may be superior guarantors of individual rights. For them, citizenship is a matter of entitlement rather than political participation or civic commitment. For communitarians, citizenship arises only when a people or *demos* share a common good and values through belonging to a relatively homogenous and circumscribed political community. For republicans, citizenship is a practice that involves the active involvement of the citizen not only in determining the law and keeping the rulers accountable, but also in nurturing the social capital and the associational networks that sustain and invigorate democracy, while reinforcing social solidarity.

These three models are not mutually exclusive. Indeed, most accounts of citizenship tend to include elements of each of them. However, they respond to the challenges of globalisation and diversity in different ways. The liberal view suggests these challenges can be met by weakening the association of citizenship with either a communitarian sense of belonging or a republican emphasis on participation. Rights can provide the focus of a constitutional patriotism and their protection by third party arbitrators often achieves democratic goals of equal concern and respect better than democracy itself. By contrast, communitarians and republicans suggest that democrats have to resist these challenges to some degree if citizenship in any meaningful sense is to be possible.

Citizenship of the Union

The debate on European citizenship needs to be situated in the context of this recent revival of interest in the citizen's role and character. EU citizenship first developed within a more juridical and administrative discourse, which had as its prime aim that of defining the specific, mainly economic, rights and liberties that accrue to member state nationals in relation to the nascent European juridical space. However, the often contradictory demands that lie behind criticism of the EU's legitimacy have pushed this discussion beyond that early stage, leading it to take on board the current preoccupations of sociologists, political scientists, theorists, politicians and policy makers mentioned above. As we shall see, EU citizenship has much of the form and some of the substance of the liberal, rights-based, model. Curiously, though, it remains largely framed – some would say compromised – by a communitarian notion of belonging. For access to EU citizenship remains dependent on being a national of a member state. Meanwhile, republican notions of participation remain the Achilles heel of EU citizenship.

The general background to citizenship in the European Union was provided by the original EEC Treaty, with its provisions on free movement of

workers (primarily Articles 48 and 51 EEC), and secondary legislation. The latter comprised measures concerning the rights of workers and their families to take advantage of free movement, and measures for the co-ordination of national security legislation to ensure the free movement of the workers and their families. On the basis of this material, the European Court of Justice gradually developed a broad based case law. For example, it developed a concept of the 'worker', which included those in part time work, those whose work provided them with an income below the national minimum, and those on training programmes. It also extended the rights of workers and their families in relation to educational rights.

More generally, the Court took the old EEC Treaty article on non-discrimination on grounds of nationality (Article 7 EEC) and used that as the basis for extending protection for citizens of the Member States when either visiting or taking up residence in other Member States. The famous cases in this area include *Cowan*[4] and *Gravier*.[5] In *Cowan*, the Court held that a British visitor to Paris who was mugged on the Metro, had access on the same basis as French nationals to the French criminal injuries compensation fund. In *Gravier*, the Court held that a French national studying in Belgium was entitled to access to higher education on the same basis as nationals. In other words, it established that it was contrary to the non-discrimination principle for her to be charged a fee that was not imposed on nationals studying in Belgian universities.

Taken together, these legal principles led commentators to suggest that there already existed a concept of 'citizenship' under European Community law, though this was mainly oriented around the free movement provisions, and hence could be described as a form of 'market citizenship' (Everson 1995). Similarly, to the extent that citizenship could be regarded as being embedded within the context of the existing framework of the 'constitutionalised' European Community treaties, it was firmly linked to the common market concept, and to the idea of the European Communities as a legal framework – at least in the first instance – for economic integration.

Therefore, it would be correct to suggest that the transformation of the 'European citizenship' concept into something more political took place as the direct consequence of the Treaty of Maastricht, and of the impetus that this gave towards a more political orientation of the EU itself. Citizenship came onto the agenda of the intergovernmental conference on political union which met during 1990 and 1991 as the result of a Spanish memorandum suggesting 'special rights' for citizens of the Member States, at the core of which would be fundamental rights.[6] However, the deeper origins of the more political concept lie in the 'special rights' debate begun at the Paris Summit in 1974, and carried on after the Addonino Committee was charged in 1984 with reporting on issues relating to a 'People's Europe'.[7]

The Treaty of Maastricht produced a new Part II of the Treaty establishing European Citizenship: Articles 17–22 EC. These provisions have since been

amended twice. The first amendment consisted in the addition of a small sentence (in italics below) that the Treaty of Amsterdam made to Article 17, and qualifying the citizenship of the Union as having the character of complementarity in relation to national citizenship:

> Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. *Citizenship of the Union shall complement and not replace national citizenship*.

The key 'marker' of Union citizenship is thus the nationality of the Member States, which remains a matter for the Member States themselves to determine.[8] The formal citizenship rights established in the EC Treaty cover the following areas:

- Rights to residence and free movement enjoyed by all citizens of the Union (Article 18 EC). The second amendment to the citizenship provisions, introduced by the Treaty of Nice, allowed the Council to act by a qualified majority under the co-decision procedure with the European Parliament when adopting measures to implement these rights. However, this does not apply in respect of matters relating to passports, identity cards, residence permits, or in relation to social security and social protection matters.
- Rights on the part of citizens of the Member States to vote and stand in local and European Parliamentary elections when resident in another Member State, under the same conditions as nationals (Article 19 EC[9]).
- Rights to diplomatic and consular protection when on the territory of a third country on the part of any Member State which has an embassy or consulate in that state (Article 20 EC).
- Rights to petition the European Parliament, to apply to the European Ombudsman, and to write to the institutions in their own language and receive a reply (Article 21 EC).

Although it does not appear in the citizenship title, one could plausibly add to this list the right of access to documents, under conditions laid down in legislation, and the general principle of transparency – although the latter term is not explicitly mentioned in the Treaty (Article 255 EC). However, like the rights of access and engagement with the Union institutions, these rights are not limited to Union citizens, but are granted to all natural and legal persons resident in the Union.

Finally, in the context of subsequent case law it has proved of some importance that Article 17(2) EC provides that 'Citizens of the Union shall enjoy the rights concerned by this Treaty and are subject to the duties imposed thereby.' Significantly, this explicitly links the citizenship provisions to the

non-discrimination principle, already mentioned, which now appears in Article 12 EC.

Article 22 EC guarantees the developmental nature of the citizenship provisions, requiring the Commission to report periodically to the European Parliament on their application, and establishing a truncated Treaty amendment procedure, whereby the Council may unanimously agree changes to these provisions, on a proposal from the Commission and after consulting the European Parliament, 'to strengthen or add to the rights laid down' in the Treaty. Such a change would need to be ratified by all the Member States in accordance with their respective constitutional requirements.

Initial reactions to the Treaty of Maastricht citizenship provisions varied greatly (Shaw 1998). On reflection, it is probably fair to say that both the wildly optimistic assessments, which saw the citizenship provisions as an integral part of a radical new era of political integration for the EU, and the pessimistic assessments, which found it hard to find any value-added in the provisions, in comparison to the existing EC Treaty *acquis*, have been proved incorrect. The true impact of the provisions lies somewhere in between. However, before considering the case law and legislative developments which have occurred on the basis of these provisions, it is important to consider the treatment of citizenship in the Treaty establishing a Constitution for Europe, negotiated initially by the Convention on the Future of Europe which met between February 2002 and July 2003, and subsequently finalised by the intergovernmental conference which concluded in June 2004.[10]

While an early Convention document appeared to suggest that the language of EU citizenship would become that of 'dual citizenship' (national *and* EU), the more orthodox language of complementarity has been reasserted, if not indeed strengthened in the final versions. Article I-10 refers to citizenship of the Union being *additional* to national citizenship. The same four groups of rights (free movement, electoral, diplomatic and consular and engagement with the Union's institutions) introduced in the Treaty of Maastricht remain the core of Union citizenship (Article I-10(2)). They are further fleshed out under broadly the same conditions as the present EC Treaty in Part III of the Constitutional Treaty. The exception to this is that previously Article 18(3) EC excluded the adoption of measures on passports, identity cards, residence permits and similar documents, and measures on social security and social protection. Article III-125(2) allows the adoption of such measures by unanimity in the Council. Some additional grounds for confusion and misunderstanding arises from the inclusion of citizens' rights in Part II of the Constitutional Treaty as part of the text of the Charter of Fundamental Rights, which was negotiated in 2000 by an earlier Convention. The confusion arises because the substantive provisions of this Charter contains some rights already guaranteed under EC and EU Treaties. These rights were left unchanged by the later (constitutional) Convention and the 2003–04 IGC. Thus there is recapitulation in the text of the Charter

and consequently also in Part II of the citizens' rights that are listed above, although Article II-112(2) attempts to avoid any conflicts so far as it provides that

> Rights recognised by this Charter for which provision is made in other Parts of the Constitution shall be exercised under the conditions and within the limits defined by these relevant Parts.

NGOs sought at an early stage of the constitutional Convention's work to bring pressure on the negotiators to widen the scope of Union citizenship beyond the nationals of the Member States, so that this could become a form of citizenship of residence for all those lawfully resident in the Union, including third country nationals. Such an initiative was firmly resisted, confirming the current logic of Union citizenship as that of breaking down distinctions and barriers between national citizens, and relatively privileged aliens, that is, the citizens of the other Member States, while keeping a firm distinction between this group and third country nationals. The point is reinforced, in a way that resonates politically in the context of the post-9/11 security agenda, by a series of moves, under the EU's justice and home affairs competences, to strengthen the boundaries of what some call 'Fortress Europe'. Thus Article I-3(2) declares that 'the Union shall offer *its citizens* an area of freedom, security and justice without internal frontiers, and an internal market where competition is free and undistorted' (emphasis added), leaving open the question of where this leaves the legitimate security and safety interests of the millions of non-EU citizens lawfully resident in the Union and its Member States. However, Article III-257(2) does commit the Union to framing a common policy on asylum, immigration and external border controls which is 'fair to third-country nationals'.

One interesting innovation appears in the very first article of the new Constitutional Treaty (Article I-1):

> Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union, on which the Member States confer competences to attain objectives they have in common.

The plethora of reference points on which this article grounds the constitutional power of the European Union highlights its highly ambiguous nature as a polity. The invocation of the will of the citizens is clearly an attempt to make citizenship at the EU level more politically authentic, but is contradicted both by the reference to the constituent power of the 'States of Europe' and by the reference to the continuing functional character of the EU as an association of states on which they confer competences to attain objectives they have in common.

The Constitutional Treaty also provides greater explicit coverage of the issue of democracy than previous treaties did. Although this can hardly be said to solve what the literature calls the EU's democratic deficit (Føllesdal and Hix 2005), a number of provisions engage with some aspects of it, by making reference to the political agency of citizens. Thus Article I-45 refers to the democratic equality of citizens and Article I-46(3) refers to their right to participate in the democratic life of the Union. As one dimension of the concept of participatory democracy developed in the Constitutional Treaty, Article I-47(4) makes provision for so-called 'citizens' initiatives', whereby a petition with one million signatures submitted to the Commission may generate a legislative initiative. Finally, Article I-50(3) deals with the right of citizens and other residents to have access to the documents of the institutions, a provision which repeats existing texts under the EC Treaty, but this time under the explicit heading of the principle of transparency.

It was not until 1998 that the Court of Justice made its first significant pronouncement on the effects of the post-Maastricht Treaty provisions on Union citizenship. In *Martínez Sala* v. *Freistaat Bayern*,[11] the Court held that a Spanish national who had long-term residence in Germany could rely upon the non-discrimination principle in Article 12 EC as the basis for claiming access on the same basis as German nationals to a German child-raising benefit for her new born child. This was an interesting extension of previous case law, as Martínez Sala herself belonged to the group of economically inactive migrants who were not traditionally protected by the scope of EU law. There have been further incremental extensions of the protection of the access of EU citizens to various social benefits, even where they are economically inactive. In *Grzelczyk*[12] the Court held that a French national studying at a Belgian University was entitled to a minimum subsistence benefit on the same basis as nationals, when he found himself unable to work part time alongside studying in the final year of his course. He was protected by the principle of non-discrimination on grounds of nationality, read in conjunction with the provisions on citizenship which protected the right of residence of EU citizens in the Member States. Interestingly in *Grzelczyk* the Court also engaged in a verbal flourish which has been repeated since that time on numerous occasions in its case law. It noted that Union citizenship 'is destined to be the fundamental status of nationals of the Member States'. This enables them, as a matter of principle, to enjoy the same treatment in law irrespective of their nationality, subject only to exceptions, which are expressly laid down, and which must be proportionate in character.

The conclusion from the case law which has developed since 1998 is that the introduction of a legal conception of citizenship in the EC Treaty from 1993 appears to have re-energised a line of Court case law on the equal treatment of the nationals of the Member States when they are resident in, or visitors to, the other Member States which had largely stagnated by the beginning of the 1990s. In areas concerning non-economically active

categories such as students, children, carers and others who may be unable to work, the Court has applied the equal treatment principle with regard to both access to a number of key social benefits and also the right of residence in the Member States of parents of EU citizen children who are not themselves EU citizens. Both *Grzelczyk* and the 2005 case of *Bidar*[13] have seen the Court of Justice expressly reversing restrictive case law from the 1980s on the entitlements of migrant students under national student and other welfare support systems on the express grounds that the constitutional creation of Citizenship of the Union in 1993 makes a difference to the legal background against which it adjudicates on the current entitlements of nationals of the Member States. It would be overstating the case to suggest that the citizenship provisions have revolutionised the case law, since its genetic heritage clearly lies in earlier cases such as *Cowan* and *Gravier*, as well as in case law on the free movement of workers and their families, but it has certainly added an impulse to further development and given the Court of Justice greater leeway to justify its activism in the field.

By the same token, and following the logic already mentioned of citizenship of the Union being concerned with 'special rights' for the nationals of the Member States, and not third country nationals, the case law development in recent years on the latter figure has been limited to those categories where there is a special connection with EU law. The most important categories are those third country nationals who are members of the families (spouses, parents, and children) of EU citizens, and those third country nationals who can benefit from special regimes of legal protection such as Association Agreements with third countries of which they are nationals.[14] EU citizenship makes little direct difference to this case law. Nevertheless, there have been small movements in the legislative domain, for example covering the status in the Member States of third country nationals who already benefit from long-term residence, such as family reunification and the extension of the social security co-ordination system.

National, transnational and postnational

Overall, Union citizenship is still a modest affair. Its attributes are largely defined in terms of a bundle of legal rights. These offer citizens additional entitlements at the EU level – not least formal and some substantive equality within the EU's sphere of competence. However, notwithstanding the EU Constitution, which incorporates the new Charter of Rights, there is little evidence of a liberal rights-based pan-European Constitutional patriotism. With the obvious exception of a small number of refugees, attitudes towards the EU remain filtered through national attachments. A decision on rights by a national court or legislature is likely to be perceived as more legitimate than that of the ECJ on those occasions where the two clash. To the degree that belonging remains grounded in a communitarian sense of nationality,

then it seems fitting that EU citizenship should be based upon and act as an adjunct to national citizenship. However, the fact that the EU commands only a limited degree of allegiance of its own arguably limits the capacity for republican forms of participation to develop. Indeed, some republicans regard a liberal rights-based framework as itself a constraint on participatory citizenship (Bellamy 2001).

And yet, as suggested in our narrative, citizenship of the Union possesses some distinctive 'expansionist' features. These have been seized upon by the supporters of a federal and postnational EU who favour a correspondingly more self-standing form of Union citizenship. Such a European-wide conception of citizenship has gained currency on the back of three implicit principles of EU citizenship. One is the equalisation of social status across the European space, as a functional by-product of free movement within a free market. The second is the extension of the principle of administrative transparency to include political control over the policy-making functions acquired by the Union. The third is the establishment of rights of political participation on the basis of residence, something that, though narrowly applied to the nationals of other Member States, it would seem natural to extend to third country nationals.

Each of these three implicit principles points to aspects of the development of a transnational dimension of politics that may require the reform of social and political structures and of the ways in which citizens relate to them. Within such a transnational context, European citizenship has become the object of contrasting projects. These aim either to reconstitute the integrative function of modern citizenship at a European-wide level, or to use it as a prop for securing the viability of nation-based citizenship in the face of global and multicultural pressures. Because of its obvious transnational character, European citizenship seems to highlight the tension between the more universalistic and the more particularistic features of modern democratic citizenship.

From different perspectives, these tensions have been highlighted by Alasdair MacIntyre (1995) and Rainer Bauböck (1994), in their analysis of how a universalistic discourse of democratic and rights-based citizenship has dealt with the issue of immigration. MacIntyre notes how, in the American experience, a patriotic 'morality of particularistic ties and solidarities has been conflated with a morality of universal, impersonal, and impartial principles' offering a model for the assimilation of immigrants that is conceptually incoherent, but that has proved socially compelling for 'the survival of a large scale modern polity which has to exhibit itself as liberal in many institutional settings, but which also has to be able to engage the patriotic regard of enough of its citizens, if it is to continue functioning effectively' (1995: 228). Bauböck has noticed another form of incoherence between the 'internal rights of citizenship in closed societies' and the 'human rights which serve as a standard of justice in the international community of states'

(1994: viii). The tension between these two types of rights is due to the way in which two aspects of citizenship – as membership of an 'inclusive polity', and as a status marker in the 'international system of states' – increasingly interact as national boundaries become more porous and people more easily mobile.

In many ways, the debate about Union citizenship, as a form of postnational citizenship, reflects these two sets of tensions characterising universalistic and particularistic interpretations of modern citizenship. Some of the proposed solutions tend to argue that the more particularistic features of citizenship can be subsumed within a strongly universalistic framework by either jettisoning ascriptive identities as a basis for membership of the political community and grounding it instead on an ideal-based form of patriotism (Habermas 1992), or adopting a domicile paradigm of citizenship (Kostakopoulou 2001). Other solutions insist instead on the central role that forms of collective identity play as markers of citizenship, but suggest that in Europe this can only take a 'minimalist' meaning, defining the community in mainly legal terms (Eder 2001: 237–9; Preuss 2004), or functioning as a super-ordinate form of citizenship, aimed at restraining and civilising the more particularistic impulses of national citizenship (Weiler 1997).

However, such understandings of the postnational character of European citizenship do not fully address the problems posed by the crisis of the integrative function of citizenship at the national level. Indeed, the 'expansionist' principles of European citizenship that we identified above seem to pose as many problems as they solve. The equalisation of social status addresses only one aspect of equality in a modern complex society, by guaranteeing a certain freedom of movement within the European economic space. But such equalisation (in other terms, the allocative dimension of European citizenship) needs to be maintained by forms of solidarity capable of sustaining redistributive policies across Europe. Moreover, equalisation may endanger certain forms of cultural and institutional diversity that shape the particular ways social solidarity has taken root in different national experiences.

Democratic transparency and accountability at the European level are vital for citizens' empowerment, besides being an important instrument for their mobilisation. However, these goals require the careful construction of a complex institutional system, through which citizens can express their democratic voice and exercise responsible control over political and administrative decision making at the European level. Moreover, such an institutional system (giving expression to the decisional dimension of European citizenship) would not stand in a vacuum. For a series of institutions and political agents operating at the European level already exist, and, more to the point, there are established forms of democratic organisation, representation, participation and decision making at national and sub-national levels. The challenge is to reinforce the European level without falling foul of the two related risks

of undermining established democratic channels to which people may more readily relate, and thereby creating a larger gap between the citizens and their representative institutions.

The recognition of full membership rights across Europe on the basis of residence (whether eventually extended to the right to vote in national elections, or to third country nationals) could be considered as another 'natural' step towards the 'universalisation' of the rights of citizenship to all those affected by the political decisions of an inclusive community. But this virtual abolition of the discretionary dimension of citizenship poses the problem of how to sustain forms of social solidarity across time, and how to ensure durable co-operation and responsible behaviour from citizens.

None of these problems can be easily solved, and European citizenship is far from being a panacea. Nonetheless, it is possible to imagine the construction of European citizenship (as a constellation of rights, obligations and practices) as contributing to their solution. The specific integrative role that EU citizenship may be playing – partly in combination with national citizenship, and partly in substitution for it – will depend on the combination of rights and practices that the citizens of Europe will be able effectively to use, so that, as a result, they may feel more – not less – empowered over their own life and conditions.

Strategies and opportunities of civic inclusion

The studies comprising this volume offer an analysis of the, as yet rather limited, opportunities offered by European citizenship in this respect. As the authors show, numerous strategies for civic involvement and empowerment exist at the European level. Some of them exploit the liberal rights-based framework to construct a more postnational understanding of civic standing; others notice the openings created by a European civil society for building transnational movements and/or strengthening the demands of local, but marginalised groups; yet others insist on the costs and benefits of creating a veritable European space for the representation of interests. These sets of strategies and opportunities are the focus of the three main parts comprising this volume, with the fourth and final part offering different overviews of the prospects and challenges for democratic citizenship in Europe.

Part I explores different ways in which European citizenship may contribute to the civic standing of people living within the territories of the Union, by looking at the practical reach and the theoretical consequences of experiments in alien suffrage, in the use of the principle of affectedness, and in the exercise of constituent power. Each of these experiments point to ways in which European citizenship, by appealing to and establishing principles that go beyond the traditional boundedness of nationality, may contribute to some form of transnational and postnational understanding and practice of

citizenship. Nonetheless, each of these experiments has found it difficult to exclude the Member States from exerting a decisive influence and control over the application of these very principles, so that these attempts to empower European citizens on a basis different from their nationality can be said to have only partially succeeded.

As Connolly, Day and Shaw show in Chapter 2 the practices of 'alien suffrage', like those recently developed through the establishment of EU electoral rights, represent an important test for the analysis of the normative models of postnational citizenship. The granting of electoral rights to non-nationals is a contested practice in all polities. Debates about the extension of electoral rights are often deeply embedded in wider national debates about insiders and outsiders, immigration, nationality law and the assimilation or recognition of immigrants. In the EU context, electoral rights for EU citizens are a special case linked to the adoption of a framework of free movement rights for certain privileged semi-insiders. In spite of the present limited scope of such rights, they have a symbolic importance, since they may prepare the ground for an extension of EU citizenship, via the fair treatment principle, to third country nationals. Indeed, within the EU, the debate has partly shifted to the question of what rights ought to be given to third country nationals, and what are the respective responsibilities and rights of the Member States and the EU and its institutions. And yet, the generally low level of take up of EU electoral rights, their low visibility in much of national political discourse, and the de facto political marginalisation of this practice puts into question the validity of alien suffrage as a strategy for a significant transformation of our conception of electoral participation beyond traditional national boundaries. At best, the current practices of alien suffrage in the EU can be considered as part of a silent revolution that is gradually and incrementally changing the popular perception of the relationship between residence and citizenship entitlements, but in doing this it is adopting the administrative route over that of confronting citizens' consciousness through a public and sustained debate. In fact, the current practice can be seen as simply moving the boundary of 'national' citizenship just a bit further, by partly extending it to the larger circle of European nations, as an institutionalised form of reciprocal arrangements rather than as a re-framing of the very conception of the right to democratic participation in the community of one's own residence, regardless of other attributes and signs of belonging.

The theme of the grounds on which one's political standing in a democratic community is established is taken up from a different perspective in Hilson's chapter (Chapter 3). By analysing the political and legal application of the principle of affectedness in the EU, Hilson explores the implications of democratic equality within a transnational context. He questions whether the territorial element that mediates the 'all-affected' principle in national experiences is still dominant at the European level. From a political

perspective, Hilson's investigation covers two different ways in which the principle of affectedness may acquire relevance: when it applies to non-nationals resident in a Member State; and when it applies to people who, though affected by particular decisions taken by the democratic community, live outside its geographical boundaries. In both cases, the universalist appeal of the principles of political democracy, establishing that people should have a fair say on decisions affecting them and their own life-chances, is mitigated, if not denied, by particularist considerations on the need to determine some boundaries for effective democratic decision making to apply. From a more legal perspective, where the application of the 'all-affected' principle is more open ended, Hilson looks at the way in which this operates in the right of access to the European Court of Justice. Like Connolly, Day and Shaw with regard to alien suffrage, Hilson concludes that the role played by this principle in the development of civic standing in Europe is at best ambiguous. Politically, its use has been cautious, supporting some of the demands for tempering territoriality and nationality as the only grounds on which to establish democratic constituencies, but leaving their dominance as yet unchallenged; legally, affectedness has been used rather restrictively on the assumption that a more generous interpretation would cause an overload of the legal system and become unmanageable.

The final chapter of Part I (Chapter 4) looks at recent experiments aimed at the formalisation of a European-wide constitutional space within which the status of citizenship might be established. Two elements of this process tend to be highlighted: the solemn declaration of a catalogue of rights, and the involvement of citizens themselves in the act of formally constituting the European polity. The first is intended to empower the citizens of Europe individually, the second aims to form them into a Demos. Castiglione's chapter discusses the political and symbolic meanings of these two constitutional experiments, and examines their shortcomings. Clearly, the political process through which the EU polity defines itself must intersect with the way in which the citizens of Europe become aware of their new status and role. But this inevitably raises the issue of the legitimacy deficit in European governance. Changes in governance and structure need to be accompanied not only by changes in the opportunity structure for citizens to take part in the decisions that directly concern them, but also by a growing awareness that there is indeed such an opportunity structure. Most of the recent constitutional initiatives, such as the Amsterdam and Nice Treaties, the White Paper on Governance, the Charter of European Fundamental Rights, and the Constitutional Convention claim to promote a more bottom-up involvement of the European citizenry. However, in both the Conventions, and in the governance reforms suggested by the White Paper, such involvement has meant little more than strengthening the principles and some of the practices of openness and transparency, while little attention has been paid to the more precise ways in which the interests, values and opinions of the

European citizens are effectively represented and given voice – both during these supposedly constitutional moments and in the constituted institutions of EU governance.

This last point serves to introduce Part II of the volume, which focuses on the ongoing institutional setting where the voice of citizens is given expression at the European level. The evidence canvassed by the chapters discussing the representation of interests in European transnational governance is mixed. The chapter on the development of a transnational party system by Day and Shaw (Chapter 5) surveys the evidence on whether the present system of Euro-parties is capable of offering a link between European citizens and EU institutions. Of course, one would not expect European political parties to provide this link in the same way that their national counterparts exercise it at the domestic level. For the link between parliament and both the executive and legislative functions are more tenuous at the European level. However, in examining the ways in which European parties both connect with citizens, by contributing to their organisation, mobilisation and ideational formation, and are trying to cut for themselves a specific space, independent from the national parties, Day and Shaw conclude that in the present circumstances it is difficult to imagine how the Euro-parties can effectively *represent* the interests of the European citizens. Instead, they seem to have opted, for the moment at least, for the more modest function of *facilitators*.

Because of the obvious limitations of the European party system, and in consideration of the original nature of the European integration process, it would seem that there may be a greater scope for functional, as opposed to political and ideological, representation of interests at the European level. Warleigh's chapter (Chapter 6) examines this dimension of European politics, focusing in particular on the role that NGOs and advocacy organisations can play as citizens' representatives. His study concludes that the influence of NGOs on policy is more issue specific and dependent on their lobbying skill and tactical alliances, not their legitimacy and representativeness. NGO members and supporters have little involvement with NGO work or the EU. Without reform of the internal governance of NGOs, they are not suitable mechanisms to enable the EU and its citizens to come together. Institutional reforms are also necessary to foster civic inclusion. These include genuine and critical consultation with civil society groups at all stages of policy making and the promotion of a dialogue with them on specific EU-policy areas and the future of the EU. As in the case of the Europarties, there are both subjective and institutional limits to the way in which NGOs can perform a linkage function between citizens and formal institutions of European governance, even though there is general agreement that a more developed system of political representation at the European level would need to give them a significant role to play.

The other important dimension for the representation of interests at the European level is that offered by the EU's regulatory powers. In certain

respects, this has developed as one of the fundamental competences of the EU, and an area where Europe is increasingly substituting for the Member States. Bartle's chapter (Chapter 7) investigates the role that European citizens play, or should play, in European regulation. His conclusion is that there seems to be little potential for the development of a participatory system of regulation without fundamental changes to the way in which the EU governs the market or purports to represent the public interest. Such a participatory model could be developed along a number of 'republican' proposals for co-regulation, and for the clear identification of stakeholders. However, NGOs themselves are sceptical about more participation and forms of co-regulation, which they fear may weaken statutory regulation and reinforce the dominance of industry in the regulatory process. Moreover, much regulatory detail of direct concern to public interests is decided on and administered at national levels, leaving little scope for the development of participatory regulation at EU level. In the short term, however, improvements are possible in consultation, the involvement of civil society, and the way in which affected interests are identified.

Overall, the studies comprising Part II seem to reinforce the impression emerging from the previous chapters that both the formal and informal channels through which European citizens can express their considered views and interests at a European level, and in a separate form from that offered by their own governments, remain limited in scope. Nor does it seem likely, at least in the short term, that any of these channels may develop sufficiently so as to offer a more transnational, as opposed to intergovernmental, set of opportunities for the representation of interests, and the formation and expression of citizens' voice. However, there remains the possibility that more diffuse developments in European civil society may be preparing the advent of a more postnational form of citizenship. The chapters comprising Part III look at some of the emerging strategies of civic inclusion and participation that are becoming available as the Europeanisation of civil society progresses.

Naturally, the very question of whether there is a European civil society is a difficult one to answer. It partly depends on the kind of definition we adopt. Most accounts tend to mix three meanings of civil society. One defines it in the more extended sense of a modern *civil* society, consisting of the diffuse system of economic, social and cultural intermediation between the state and society broadly construed. A second and more restricted sense considers civil society as the sum of voluntary associations and intermediate state organisations that facilitate society self-organisation vis-à-vis the state itself. Finally, a third specialised sense identifies civil society with NGOs and public-interest associations. Following this set of distinctions, it may be possible to talk meaningfully about the existence of a European civil society in the first sense, while the Europeanisation of the civil society in the other two senses is still very much in progress. In particular, while there is no extended

web of transnational forms of associations that can be said to fill the role in the second sense that civil society has traditionally played in nation states, there is a growing awareness of the important role that civil society organisations in the third sense may play in the process of transnational governance, even though the White Paper, for instance, gives them a rather limited and mainly passive part. The limitation of current initiatives arises from the focus being on subjecting these organisations to institutional regulation, rather than looking at them as fulfilling the more active function of creating a 'space' for the wide representation of citizens' interests.

The first chapter in Part III, by Pérez-Sólorzano Borrogán (Chapter 8), studies an example of how the new opportunity structure created by transnational politics and governance may affect the system of interest intermediation at the level of civil society. By looking at the experience of the Business Interest Associations during the Enlargement process, Pérez-Sólorzano Borrogán concludes that their integration at the European level has meant the adoption of certain models of behaviour and organisation and, more generally, a lesson-drawing model of Europeanisation, rather than an effective integration in the decision-making process at the European level. In other words, although they have not effectively integrated in a European civil society as equal players, they have used the European experience in order to re-shape the national environment in ways that have potentially made the national institutional environment more amenable to listening to the interests emerging more directly from their local civil society. As a result of this process of homogenisation, it is also possible to detect, in neo-functionalist fashion, the emergence of a more European identity.

Although, as it appears from this chapter, the interface between civil society self-organisation and transnational governance is still underdeveloped, the presence of a transnational context seems to offer a new range of opportunities to both citizens and their autonomous organisations. This is particularly evident from the other studies in Part III, which look at how the Europeanisation of civil society has offered opportunities to minority groups whose civil entitlements were traditionally curtailed in national societies. For them, the introduction of new levels of legal regulation and political representation has meant a widening of their opportunity structure and the possibility of playing one level of governance against the other in order to reduce dominance. With respect to the legal liberalisation of same sex relationships, discussed in Stychin's chapter (Chapter 9), there seems to be a positive correlation between international trends and increasing transnational notions of citizenship. These are reinforced by increasing mobility, migration and the transnationalisation of society. However, transnational social trends do not give rise simply to the replication of legal processes and standards of recognition of same sex relationships. National communities tend either to incorporate or to resist transnational trends through dominant national discourses. In some cases, the EU has worked as a catalyst for

the promotion of legal liberalisation, as in the case of Romania, where the wish to belong to the wider European community have made liberalisation more acceptable. At the same time, the process has been driven by domestic pressures for policy and attitude change. As Stychin argues, the evidence from such a case is difficult to interpret. Does it point to a more cosmopolitan conception of citizenship, or to some hybrid notion of communitarian and cosmopolitan identity?

The complex nature of the changes in attitude and opportunities that may result from the development of a transnational context is also illustrated by the chapter by Castle-Kanerova and Jordan (Chapter 10). Their research on the Roma community in the Czech Republic and its history of exclusion demonstrates how deep cleavages within civil society, reinforced by social and economic exclusion, are largely impervious to half-hearted measures taken at a local level. In such cases, the transnational context seems paradoxically to weaken social integration at the local level by decreasing mobility costs. For the Roma, the social capital generated through European networking, and the kinship bonds that sustained asylum migrations, were usually more significant than their weak links with local contexts and authorities, or their fragile bridges with local NGOs and civil associations. As Castle-Kanerova and Jordan suggest, Hirschman's famous distinction between exit and voice (1970) may be of use in this context. It could be said that in most of the European nation-states during the last 20–30 years, exit strategies (i.e. use of market options) have been favoured over voice across a large area of social issues involving the distribution of entitlements and goods. Transnational governance, particularly as it has developed within the framework of the European common market, tends to increase this bias. In some cases, like the Roma's, even underprivileged groups can make use of this option. But over-reliance on exit weakens dramatically the usefulness of alternative voice strategies, since these offer no sufficient incentive capable of ruling out opportunistic uses of exit. In these circumstances, a proper balance between exit and voice requires the construction of some common sense of loyalty (Hirschman's third category), embracing both the majority and the underprivileged minority. But loyalty often requires the promotion of a more inclusive political culture aimed at overcoming the lingering prejudices of the majority and the minority's remaining suspicions. So, from a policy perspective, it is important that strategies of civic inclusion at a European level try to balance the three options of exit, voice and loyalty so as to increase their respective effectiveness.

Conclusions

The picture emerging from the chapters whose arguments we have briefly summarised in the previous section, and that comprises the three central parts of this volume, is one of half opportunities and contradictory

tendencies. Undoubtedly, the EU context provides new ways in which the rights, belonging, and participation dimensions of citizenship can and must be re-thought in order to adapt citizens' roles and self-perception to the reality of transnational governance, and at the same time for transnational citizenship to contribute to social inclusion and integration. Nonetheless, there seems as yet to be no clear and unifying conception of postnational and transnational citizenship, which can be coherently opposed to the more traditional and nation-based version we analysed at the beginning of this chapter. For the moment, the transnational forms of citizenship have, as EU documents suggest, no more than a complementary role. But, as Chryssochoou observes at the beginning of his chapter (Chapter 11), at this stage of the European integration process one question keeps surfacing in the debates on the nature of the European Union: 'where do we go from here?'. In spite of the progressive consolidation of the institutional and legal structure of the EU post-Maastricht, the present form of the Union is perceived by many as nothing more than transitory, as is amply illustrated by persistent questions about the 'finality' of the integration process (Castiglione 2004; Walker 2004). Whether this is, or ought to be, the case is a contested issue (Moravcsik 2005). The chapters comprising the final part of this volume address this question by looking at the prospects for democratic citizenship in Europe, and whether this goal is better served by a more fully autonomous development of European-wide citizenship practices, or requires the continued centrality of the national dimension. Although both argue from a 'republican' perspective, Chryssochoou and Bellamy develop answers to the question of 'where we go from here' along those two contrasting lines of thinking.

Chryssochoou acknowledges that the EU still maintains a mixed character between an international organisation and a transnational federation, but he argues that the level of expectations raised among European citizens inevitably requires the progressive institutionalisation of civic competence at the EU level. Failure to do so would foreclose the possibility for the development of civic freedom and public deliberation in the new conditions of transnational governance, as established by the integration process. By contrast, Bellamy insists in Chapter 12 that the more diffuse mechanisms of governance at the European level must be framed by the accountable and sovereign mechanisms associated with government in order to maintain a democratic dimension. In present conditions, such governmental institutions can only be provided by the Member States, for they are best equipped to guarantee effective channels of democratic voice and control. The main question, therefore, is not how to substitute European for national citizenship, but how to integrate the two so as to keep democratic citizenship alive.

This diversity of opinions, which reflects an ongoing debate on the future of the European Union, is unlikely to disappear. It is the very stuff of what

democratic citizenship is about. If anything, the process of making European citizens must involve the continuous confrontation between different political projects. Realising them cannot be done without some active and conscious involvement of the citizens. If Europe ought to remain democratic, its political form will need to be made with its citizens' support and contribution. It is not European citizens who need to be made in the image of an already made Europe, it is a democratic Europe that needs to be constructed to reflect the (often conflicting) images of its citizens.

Notes

1. For examples of the identification of citizens and subjects, see Bodin (1992, p. 1) and Pufendorf (1991, p. 138).
2. In this sense, Dahl, for instance, refers to citizenship as a 'categorical right' (1989, pp. 122–24).
3. For different presentations of these three views, cf. Van Gunsteren (1998, pp. 16–21), Eder and Giesen (2001, pp. 3–7), Kymlicka (2002, pp. 287–302) and Bellamy and Castiglione (2002).
4. Case C-186/87 *Cowan* v. *Le Trésor public* [1989] ECR 195.
5. Case 293/83 *Gravier* v. *City of Liège* [1985] ECR 593.
6. 'Towards a European Citizenship', *Europe Documents*, No. 1653, 2 October 1990.
7. See Supp. Bull. EC 7/85. The relationship between these developments is carefully charted by Antje Wiener (1998).
8. Case C-369/90 *Micheletti* v. *Delegación del Gobierno en Cantabria* [1992] ECR I-4329, confirmed most recently in Case C-200/02 *Chen*, 19 October 2004.
9. See chapters by Connolly, Day and Shaw, and by Hilson (Chapters 2 and 3) in this volume.
10. Treaty establishing a Constitution for Europe, OJ 2004 C310/1. At the moment of writing, the Constitutional Treaty is going through a difficult ratification process, which is very likely to end in an empasse. From our own perspective, however, the constitutional text is an interesting document to analyse, even if it may eventually be rejected, for, as we discuss in the main text, it offers a useful synthesis of what is the state of play with the legal status of citizenship in the EU.
11. Case C-85/96 [1998] ECR I-2691.
12. Case C-184/99 [2001] ECR I-6193.
13. Case C-209/03 *R* v. *London Borough of Ealing and Secretary of State for Education and Skills, ex parte Bidar*, 15 March 2005.
14. Case C-200/02 *Zhu & Chen* v. *Secretary of State for the Home Department*, 19 May 2004.

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Part I

Citizens' Democratic Standing and Rights of Participation

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2

The Contested Case of EU Electoral Rights

Anthea Connolly, Stephen Day and Jo Shaw

Introduction

This chapter examines the electoral rights for European citizens enshrined in the EC Treaty by the Treaty of Maastricht's 'citizenship package' of 1993. What is now Article 19 EC (previously Article 8b) provides:

1. Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.
2. Without prejudice to Article 190(4) and to the provisions adopted for its implementation,[1] every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

We analyse the emergence and implementation of this provision, especially in view of the contribution that a concept of alien suffrage – that is, voting and standing rights for non-nationals – can and could in the future make to a thicker concept of citizenship of the Union. We regard alien suffrage as a liberal principle which holds that states ought – wherever possible – to accord political rights to permanently resident non-nationals in the name of equality, democracy and universal personhood.

The provisions for electoral rights to European citizens attracted positive responses from legal commentators in particular. O'Keeffe (1994: 96) predicted that although it was too early to expect Member States to grant electoral rights in *national* elections to nationals of other Member States, 'as it is, the effects of the change in local elections could be substantial'. But he did not see the Maastricht rights as substantially *new* rights since they already existed in a disparate way prior to their adoption in the Treaty in the laws of at least some of the Member States. Some states already gave local electoral rights to all non-nationals and others had given electoral rights to nationals of other Member States to allow them to participate in European parliamentary elections. For O'Leary (1996: 265) 'Article [19] represents a significant departure from the traditional exclusion or limitation of the rights of non-nationals in the field of political participation.' The early controversy attached to Article 19 was linked in particular to the fact that constitutional amendments were needed in several Member States to ensure implementation of the electoral rights provisions (unlike most of the rest of the 'citizenship package'). O'Leary cautioned that 'the importance of these amendments of national conceptions of sovereignty, what it entails and who can exercise it, should not be underestimated' (O'Leary 1996: 265).

D'Oliveira (1994: 139) pointed explicitly to the radical power of the new provisions highlighting the absence of a clear link between *local* electoral rights and *citizenship* at the *Union* level. He suggested

> that granting rights at local elections [has] more to do with unexpressed endeavours to dissolve the identities of the Member States, and indeed their statehood, than with democracy on a European level.

His concern focused on the apparent incompatibility of Article 19 with what is now Article 6(3) TEU (Treaty of the European Union) requiring the Union to 'respect the national identities of its Member States'. He foresaw

> the breaking up of those direct links, which until recently existed between the definition of the legitimation of the State in terms of the sovereignty of the people belonging to that State on the basis of nationality, and the exercise of political powers in the State concerned. To my mind, the two provisions are mutually exclusive. Insofar as [Article 19(1)] entails revisions of constitutions of certain Member States … one may conclude that the Union does not respect the national identity of the Member States; assuming that a constitution could qualify as a repository of the national identity.

This suggests that by stepping into the territory traditionally associated with the principle of alien suffrage, the EU was now engaging with a contentious political issue closely tied to issues of national sovereignty and identity. This

is true even though the EU's engagement was partial (local and European parliamentary elections only) and modified (not *all* non-nationals but only EU citizens). Indeed, it could also be said that the EU electoral rights introduced additional elements of dissonance into the national legal orders because they required those Member States which already had local electoral rights for *all* non-nationals (i.e. Denmark, Finland, Ireland, the Netherlands and Sweden) either to change the existing rules in order to make sure they complied with the conditions laid down in the implementing Council Directive of 1994,[2] or to introduce an element of legal discrimination between third country nationals and EU citizens which did not exist previously (e.g. in relation to prior qualifying residence periods which are stipulated in the implementing provisions).

In some quarters, the exclusion of national elections provoked critical comment. For example, Anderson *et al*. (1994: 111) commented that

> some expected the Treaty to be more ambitious, and proposals from the Spanish and others did call for the right to vote and stand for election in national elections. […] The Maastricht ratification process showed, however, that this area is a political minefield, for the fact that the Treaty gave voting rights to 'foreigners' was one of the most potent weapons its opponents could mobilise against it.

This comment highlights the perpetual enigma of the citizenship provisions of the EC Treaty, and of the topic of citizenship in the EU context more generally, namely the simultaneous capacity of citizenship discourse both to excite and to disappoint. Early commentators almost universally saw EU citizenship as a dynamic concept (e.g. O'Keeffe 1994: 107). Furthermore, as Anderson *et al*. note, 'although the description "federal" was rejected by the IGC, the inclusion of citizenship may ultimately prove to be more radical, and it gives federalists something positive on which they might build in future' (1994: 121). To these commentators, the inclusion of political rights in the Maastricht package is 'encouraging' (ibid.). At the same time, the rights introduced – however they were viewed – were clearly very limited, and often contingent.

Presenting some of the findings of a study which explored the intersections between the liberal principle of alien suffrage and the electoral rights conferred on citizens of the European Union under Article 19 EC,[3] this chapter questions whether the case of EU electoral rights provides a 'strategy' through which EU citizenship can contribute constructively towards a project of European polity-building. This we see as an essentially normative question, and one which remained topical throughout the years of Treaty development through Amsterdam and Nice which followed the Treaty of Maastricht, and throughout what at the time of writing remained the incomplete debate on a putative Constitution for the European Union. Certainly,

as our discussion will show, the electoral rights have been an important site of contestation both in terms of the inception and implementation of these rights within the institutional framework of the EU and in terms of national political and legal reactions to the challenge of engaging with a non-national corpus of voters and potential political actors, especially in relation to the local electoral rights. Yet the initial controversy surrounding the institution of the measures and the national constitutional amendments has largely died away. More recently, the electoral rights have seemed more akin to lame ducks – with low levels of participation of those to whom the entitlements are granted in all Member States and low levels of visibility in terms of their impact upon electoral politics (European Commission 2002; Méndez Lago 2002) – rather than the Trojan horses threatening national constitutional integrity which the initial controversy might have suggested. To illuminate this paradox of decline we develop a critical analysis of the emergence, establishment and implementation of EU electoral rights. A focus is placed not only on the institutional agenda of electoral rights, where we examine in particular the role of the European Parliament, but also on the development of the provisions themselves, the negotiation of the implementing directives and the reactions at national level to the demands of EU electoral rights. We show that the ability of EU citizens to use their new rights was crucially left to the Member States, and drawing upon examples from across the EU we will show that for much of past ten years the Commission has been involved in a constant struggle to ensure the application of the non-discriminatory principle contained in the Directives.

We conclude with some more general comments about citizenship and citizenship rights in the light of the electoral rights 'project' of Article 19 EC. The possible extension of electoral rights as part of a putative 'civic' citizenship for third country nationals in the EU will be a particular focus, given the intense contestation surrounding questions of immigration, citizenship and nationality at both the national and EU levels in the early 2000s.

Alien suffrage: the institutional agenda

The following part of the chapter describes a story that begins with the inception of the European Parliament in the 1951 Treaty of the European Coal and Steel Community and ends some fifty years later with the Parliament's assessments of the two electoral rights directives.[4] It relates how the Parliament formulated an argument about the right to vote and to stand in European Parliamentary elections, how it followed up this argument and how, subsequently, the right to vote and to stand in European elections became tied up with a discussion on the right to vote and to stand in municipal elections. This is a story about the contested case of EU electoral rights from the perspective of the Parliament, about the cross-over and cross-breeding of ideas between European institutions, and between European and

national institutions, and ultimately about the right to vote as a defining feature of European citizenship.

The European Parliament began life as the European Assembly and although it was formally changed to a 'Parliament' in 1986 with the amendment of the Treaties, the Parliament had already resolved that it wished to change its name from 'Assembly' in 1962.[5] At that time it was composed of parliamentarians delegated by their national parliaments. More than a few of these were elderly statesmen and women who had been rewarded for a lifetime of service at home with what was understood to be a rather comfortable and undemanding position abroad, but amongst them were parliamentarians who were also keen 'Europeans' and who believed that the European Parliament could hold a key position in leading European integration. Two factors can be identified as impelling the Parliament first to consider the right to vote and to stand in European elections, and second to consider the right to vote and to stand in European and local elections in the place of residence. One of these concerned the seriousness with which the designation of 'parliament' was taken; many parliamentarians carried with them the conceptions about parliamentarianism and democracy that were embedded in their own national orders. The other related to the fact that contemporary parliamentarians were beginning to witness the basic consequences of western European collaboration to provide freedom of movement, that is, that by moving from one country to another, people conceived as economic migrants were disenfranchising themselves. Hence democracy considerations plus the growing awareness of a new category of market 'citizens' were the two crucial reasons why a debate on voting rights took place in the European Parliament.

The attempt to achieve direct elections to the European Parliament

According to Article 21(1) of the 1951 Treaty of the European Coal and Steel Community (ECSC),

> The Assembly shall consist of delegates whom the Parliaments of each of the member states shall be called up on to appoint once a year from among their own membership, or who shall be elected by direct universal suffrage, according to the procedure determined by each respective High Contracting Party.

This marked the start of the Parliament's debate on voting rights, including both voting rights for non-national Union citizens in European elections and voting rights for non-national Union citizens in municipal elections. For much of the 1960s, however, it was the idea of direct elections to the Parliament upon which the Parliament focused and it used arguments about 'building Europe'[6] and establishing democracy to support this aim.[7]

Although the Parliament received support from certain quarters for direct elections,[8] it encountered opposition in other places. A principal reason for this was the belief that the Parliament did not have sufficient powers to justify being directly elected. By contrast Parliamentarians themselves tended to think it would be undemocratic for the powers of the Parliament to be augmented without it first being directly elected. This conflict reached a pinnacle with the Commission's 1972 report on *The Enlargement of the Powers of the European Parliament*.[9]

Whilst the Parliament inclined towards the view that it should be directly elected and that subsequently as the most democratic body in the Community it should have stronger powers, the report concluded that the powers of the Parliament should be increased first. It found that 'The new powers would, of their very nature, constitute means of influencing events in such a way as to promote the application of Article 138 of the EEC Treaty' and also that 'the present mode of recruiting the Parliament involves a certain degree of democratic legitimacy justifying the exercise of true parliamentary powers'.[10] The report argued that since national parliaments are the root of the European Parliament and that European parliamentarians were delegated by their national parliaments which were themselves elected, the legitimacy of the European Parliament came from the legitimacy of national political processes. This stood in opposition to those parliamentarians who believed that the Parliament should act independently of the Member States; moreover, the report had the more serious consequence of constituting an institutionalised obstacle to direct elections.

When the first Summit meeting of the Heads of State and Government took place in Paris, the Heads of Government of Belgium and Italy suggested, for the first time, that the right to vote and be elected should be granted at the local level to all Community nationals.[11] These governments had been the first to consider the direct election of their own members of the European Parliament,[12] and bills to extend the right to vote in local elections in their territory had also come before their own parliaments. When the proposed law for direct elections reached the Belgian parliament, Article 4 provided that 'nationals of the member states of the European Communities who have their residence in Belgium may take part in the elections to the European Parliament under the same conditions as Belgian citizens'.[13] First, this implied that there was no question mark over direct elections to the European Parliament, and second it helped to launch the idea of extending the boundaries of the suffrage in both European and local elections. Given the problems that Belgium much later faced in transposing European legislation on the right to vote in local elections of European citizens,[14] this may be viewed as somewhat incongruous.

Nonetheless the Parliament took up Belgium's position with regard to the universal right to vote in European elections and was sympathetic to the right to vote in local elections in the place of residence;[15] by reflecting upon

these issues, the Belgian government had assisted their introduction onto the Community's agenda. The *Communiqué* from the Meeting of the Heads of Government of the Community in Paris, 1974, was critical to the development of European citizenship in leading to a working party to study the conditions and timing under which the citizens of the nine Member States could be given special rights as members of the Community. The Commission's technical reports on the topic of special rights identified 'special rights' as rights which were at that time reserved for nationals living in their own Member States. Accordingly it stated that,

> since civil rights and liberties are at least in principle generally granted to all foreigners and since economic and social rights as well as the right to become an official of the European Communities and the right to vote and to stand for election to the EP are real or potential rights, acquired on the basis of the Community Treaties, it follows that the special rights referred to in Point 11 … are first and foremost other rights which exist in the Member States … the most important would seem to be the rights to vote, to stand for election and to become a public official at local, regional, or national levels.[16]

The Commission did not refer to the right to vote and stand in European elections as one of the 'special' rights connected with citizenship and this was undoubtedly because the question of direct elections to the Parliament remained contested and the project incomplete.

Widening the suffrage in European and local elections

When the first direct elections to the Parliament took place in 1979, nationals of the Member States resident in another Member State were not able to vote, unless this had been provided for at national level, and soon afterwards the Parliament began to examine the criteria for extending the right to vote as an entitlement under EU law. The Seitlinger report[17] suggested that Member States ought to give the right to vote in European elections to those who had been resident in their country for five years or more. Those who had not resided in another Member State for five years must instead be given the right to vote by their own country of origin. The right to stand for election was to be guaranteed in the Member State of nationality alone. The report justified the right to vote in the Member State of residence by the principle of long-term residence, yet the plenary session of Parliament maintained that the right to vote should be a right conferred by the Member State of nationality alone. On the other hand, however, the Parliament did propose that the right to stand for election should be given by the country of residence after five years; this would have meant that an individual could stand for election in a country where they could not vote in the same elections (O'Leary 1996: 202). The Council did consider the Seitlinger report

several times within Coreper but no further action was taken because of other more pressing concerns.

Twelve months after the Seitlinger report there was still no agreement amongst the then ten Member States on voting rights for Community nationals. The chief reason for the lack of agreement concerned the electoral procedure; Art. 138(3) EEC had envisaged direct elections to the Parliament in accordance with a uniform electoral procedure and the glue bonding direct elections to the uniform electoral procedure had proven impossible to dissolve. Whilst the electoral procedure was not so much of a problem for the 1979 elections, it became a problem when the Parliament proposed expanding the suffrage to all Community nationals, wherever they lived. The main problem concerned the fact that no consensus could be reached on the issue of proportional representation. Indeed the Parliamentary periodical *The Week* stated that most of the Parliament's debate on voting rights did not centre on the right to vote but on proportional representation.[18] The voting rights debate also fell victim to an advanced level of stagnation in the Community, and conflicting positions on the CAP and the crisis over Britain's budget rebate were not conducive to consensus.

Following a second set of European elections in 1984, and with the aim of reviving the debate within the Council, the Parliament put forward a new proposal on the electoral procedure.[19] In an opinion, the Committee on Legal Affairs stated that it wished the electoral procedure to be genuinely uniform and pointed out that, from the legal point of view, the existence of a uniform procedure meant that the actual procedures used to achieve the principles, objectives and results of the electoral system should all be uniform.[20] Although the Parliament as a whole did not vote on the draft report which had been adopted by the Political Affairs Committee on 28 February 1985, the Political Affairs Committee had reached a decision on the residence criteria, stating that

> Nationals of a Member State shall be entitled to vote in the country of which they are nationals. The Member States shall take all the necessary measures to enable their nationals whose place of residence is outside their country of origin to exercise their electoral rights without hindrance in the Member State of which they are nationals.[21]

However, the Parliament as a whole had not consented to this proposition and therefore the matter was still in question. A resolution in June 1985 on the guidelines for a Community policy on migration stipulated that the right to vote in European elections in the country of residence would be given to Community citizens who had spent five years or more in a Community country other than their country of origin.[22] This resolution also stated that the right to vote and to stand for election at local level should be given to migrant workers from Member States 'living for a certain

period – to be specified – in a Member State other than their country of origin'. The five-year rule for European and local elections was confirmed in two resolutions passed by the Parliament on 24 November 1985 seemingly concluding Parliamentary debate on this matter.[23]

Parliament's conflicts in the second half of the 1980s

An obstacle to voting rights in the mid-1980s was caused by the Adonnino Committee, set up in 1984 and comprising personal representatives of the heads of state and government and their foreign ministers. The Adonnino Committee submitted a report to the Milan European Council which was ambiguous as to the basis of voting rights, stating that 'It is desirable to increase the citizen's involvement in and understanding of the political process in the Community institutions', and that 'the electoral procedure … shall ensure either that a citizen should be entitled to vote for candidates from his own country … , or that a citizen residing in another Member State should be allowed to vote for candidates from that Member State.'[24] Although the report recommended that discussion of the matter should continue, it was categorically clear that the subject remained within the competence of the Member States. This view was endorsed by the Council in its response to a written question from an MEP in which it confirmed that it was of the view that the reciprocity, non-reciprocity and grant of voting rights was a matter for individual Member States and also that, therefore, the intergovernmental approach was the preferred one (O'Leary 1996: 236).

When Jacques Delors took over from Gaston Thorn as President of the Commission in January 1985 he rapidly introduced a timetable for the completion of the internal market. The Commission that he led was not so immediately supportive of the right to vote in local and European elections however, and progress on the subject of the right to vote did not progress at the same pace or in the same relatively smooth fashion. The Commission's report on *Voting rights in local elections for Community nationals*[25] (for which the Parliament had waited three years) was positive in its initial paragraphs saying that the cornerstone of democracy is the right of voters to elect the decision-making bodies. It acknowledged that 'There is no doubt that Community legislation has had the effect of breaking the link between national territory and the legal implications of nationality. (The gradual achievement of a People's Europe will consolidate this trend).' 'However … the disassociation between national territory and the legal implications of nationality does not extend to political rights.'[26] The report revealed that, as in the Parliament, negotiations in Council on the right to vote had centred on whether or not eligibility for such rights should come down to residence or nationality, observing that 'The gulf between countries in favour of the nationality qualification and countries in favour of the residence qualification proved so wide that no solution could be found'.[27] The report additionally pointed out the problem of constitutional amendment, which would be

needed in many of the Member States to enable changes to the electorate in local and European elections from the Parliament's point of view, concluded on a discouraging note. The report asked whether it would be politically consistent to propose giving local elections a European character which was not enjoyed by the European elections themselves, and claimed that logic and political consistency demanded that the first step should be to give a European character to the elections which were intrinsically European, 'Once a European electoral procedure is adopted, local electoral law could develop on a reciprocal basis'.[28] In other words the view taken was that there should be no consideration of local election rights without reconsidering the uniform procedure, which was still swamped in controversy.

The Parliament was highly critical of the report and produced an interim report stating that the European Parliament,

> [4.] Rejects in particular the Commission's attempt to tie the right to vote and stand in local elections to the uniform procedure for elections to the European Parliament;
>
> [5.] Considers that the attitude which the Commission has adopted on this matter so far has severely strained the relationship between the Commission and the Parliament, which is founded on co-operation.[29]

It insisted that while the Commission may see an indisputable link between a uniform electoral procedure and the right to vote and stand in local elections, the Commission could not set aside progress on local elections and

> absolve itself of responsibility by pointing to the work on the uniform electoral procedure for the European Parliament. The two types of election have virtually nothing in common other than the fact that they are both elections. Still less can the uniform electoral procedure for the European Parliament be regarded in any way or at any stage as a precondition for the submission of a legislative proposal on the right to vote and stand in local elections.[30]

Lastly the report frankly asserted that 'In the face of Parliament's unambiguous wish, it [the Commission] has sought to mask its indecision with stalling tactics'.

Endeavouring to rectify the impasse early in 1987, Commissioner Ripa di Meana undertook to present the Parliament with a proposal for a directive on voting rights in the first half of 1988. During 1987, a qualitative change in the thinking of the Commission appeared to take place and in the 1988 Directive the Commission announced that it had been working steadily to move from 'theoretical discussion to legislative action'.[31] Furthermore it recognised and acknowledged that the right to vote in local elections is the political complement to economic and social integration stating that this

imperative is 'underlined by the goal of creating a European area'. The Parliament continued to press actively for progress on voting rights following the Commission's 1988 draft directive and in March 1989 it approved the Commission proposal subject to minor amendments. In the course of 1989, discussions concentrated around the subject of hastening economic and monetary integration and the second Dublin summit affirmed that an intergovernmental conference on constitutional reform and political union should take place.

The Maastricht process

Most explorations of European citizenship and the political union IGC refer to the Spanish memorandum *The road to European citizenship* which followed an earlier letter by the Spanish Prime Minister Felipe Gonzalez addressed to the European Council. Until this point European citizenship had been constructed in the context of an inter-institutional discourse about the assumed progress towards 'Europe'. This led to the Maastricht 'push', or at least required the Maastricht process, for something to happen. *The road to European citizenship* was keenly supranational and it consequently exposed the conflict that would inevitably arise between the intergovernmental and the supranational perspectives. Its intention and its effect was to re-situate the citizen at the heart of the European process. The document pointed out that the Community had had little effect of the daily life of citizens and that although there had been initiatives to heighten the profile of the Community citizen, 'the practical context has not made it possible to advance resolutely along the road to making the whole body of Community citizens the fundamental point of reference for Community successes and achievements'.[32] The importance that the document accorded to citizenship is illustrated by the fact that citizenship was defined as one of the three pillars of European political union. With regard to the right to political participation at the place of residence the memorandum said that political participation would begin with the freedoms of expression, association and assembly and would be gradually extended to participation in electoral processes; participation in European elections would occur in two stages – the adoption of a uniform electoral procedure followed by the recognition of the right to vote at the place of residence.

In February 1991 the Spanish government proposed a specific title of the new Treaty dedicated to citizenship. The preamble of the proposed title (drafted in grand style) claimed that the Community was

> Resolved to lay the foundation for an integrated area serving the citizen, which will be the very source of democratic legitimacy and a fundamental pillar of the Union, through the progressive constitution of a common citizenship, the rights and obligations of which derive from the Union.

Although subsequent drafts of the new Treaty retained the citizenship title, they were fundamentally unsatisfactory to the Parliament which was adamant that the Union should provide a constitutional guarantee of the fundamental rights which were additional to those contingent upon membership of a Member State.[33] Notwithstanding the Parliament's agitation, the Maastricht Intergovernmental Conference did take a more or less intergovernmental approach to European Union citizenship and consequently the Parliament claimed that the new treaty contained major shortcomings and 'fails to develop the concept of citizenship and protection for fundamental rights and freedoms'.[34]

The provisions on citizenship were inserted into the new Part II of the EC Treaty (as amended by the TEU), in Articles 8–8e EC (now Articles 17–22 EC). Art. 8b(1) conferred the right to stand and to vote in municipal elections in the Member State of residence, and Art. 8b(2) conferred the right to stand and to vote in European elections for all Union citizens.[35] The right was limited – like all citizenship rights – to those with the nationality of the Member States. The Member States declined to adopt a clause proposed by the Danish delegation which would have introduced local electoral voting rights via an amendment to the provisions on the free movement of workers. It would have matched the personal scope of these provisions by covering citizens of the Member States who were migrant workers as *primary* beneficiaries, and members of their families – including third country nationals – as *secondary* beneficiaries with derived rights:

> Citizens in the Member States and members of their families who are legally resident in one of the Member States of the European Community shall have the right to vote and be eligible for election to local Councils in their State of residence provided they have been resident in that State for three years prior to the election.[36]

Even so, it was anticipated that by removing the linkage between political rights and nationality it would be possible to 'foster a sense of belonging to the European Union' and would help EU citizens to successfully integrate into their Member State of residence.[37] However, commentators who expected either a positive boost for integration or likened voting rights, along with other provisions of European citizenship, to a Trojan horse failed to take into account the fact that the ability of EU nationals to take advantage of their rights was left to the Member States, who remained responsible for implementation.

Contesting the voting rights directives

In October 1993 the Commission presented a proposal for a Council Directive laying down detailed arrangements for the exercise of the rights

to vote and to stand in elections to the European Parliament.[38] The question of the residence qualification was still at issue and the Parliament deleted Art. 14(1)a of the proposed Directive which 'restrict(s) the right to vote to Community voters who have resided in that Member State for a minimum period, which may not exceed five years'.[39] It also rejected a derogation for Luxembourg. The Directive adopted by the Council removed the five-year residence qualification but retained the derogation for Luxembourg.[40] The local elections directive would prove more difficult to reach agreement upon and it is important to place the right to vote and to stand in local elections in the context of the 'grand bargain' and the 'package deal' of Maastricht[41] and to reflect upon previous failed attempts to implement this right. Establishing a consensus between the Parliament and the Commission would prove to be particularly problematic. The Parliament repeated its objection to a residence qualification, rejected recitals in the Commission proposal for a directive which allowed non-national Union citizens to be required to produce pieces of information extra to those required of national voters and placed much weight on automatic entry into the electoral role.[42] It added a recital stating that Member States must provide that sufficient time be allowed to inform people of their right to stand and vote (and where applicable to be entered on the electoral role) and categorically opposed a derogation which would apply to Belgium. Consequently when, in the final directive, the residence qualification was maintained alongside the derogation for Belgium the Parliament resolved that it

> [1] Declares that it cannot endorse the form in which the provision in Art. 12(2) of the Directive has been incorporated into the text;
> [2] Deplores the fact that this action has prevented any public debate on a derogation from a right established by the Treaty on European Union as a pillar of European citizenship;
>
> …
>
> [5] Believes, in view of all the above, that the Council's action can scarcely be considered compatible with the founding principles of European integration, in particular the principle of transparency and the objective of closer contact with citizens.[43]

Possible derogations and the absence of provisions concerning civil liberties (such as rights to association and expression) subsequently meant that the Directive was a somewhat watered-down version of what had originally been on the agenda; this 'watering-down' had been necessary to reach agreement and meant that fears that the voting rights proposals would have destructive effects were overstated.

Directive 93/109 EC: the right to vote and to stand in European elections

Early on, the Parliament was concerned that EU citizens would not be aware of their new rights and that the Member States would not take proper action to increase their awareness. A resolution on the June 1994 elections drew to the attention of the Commission and the Member States the need for an awareness and information campaign on European elections and expressed concern

> at the confusion that may arise from: (a) the lack of a clear understanding between the countries of origin and the countries of residence with regard to dual entry on the electoral role, (b) lack of knowledge of the new electoral systems.[44]

This resolution was followed, two months later, by a second resolution on the European elections which said that the Parliament was

> disturbed that in some Member States citizens of other EU countries entitled to vote, unlike the Member State's own nationals, must themselves take steps to ascertain the election date, [and]… convinced that it is unacceptable, and clearly contravenes the preamble to Council Directive 93/109/EC … that many citizens have to apply in person – sometimes twice – to the relevant office in order to register as voters.[45]

The Parliament's fears about ignorance of and access to the new rights seem to have been confirmed by the turnout to the 1994 elections. Although it is possible to know only who registered to vote and not who actually voted, it is generally agreed that the June elections saw a small percentage of eligible voters taking advantage of their right to vote and just one non-national candidate (out of 53 who stood) was successfully elected in her Member State of residence. Lack of information is attributed as a significant reason for this and the Second Report from the Commission on Citizenship of the Union, 1994–96, declared that an improvement in the participation of Union citizens in European elections required effort on the part of the institutions and the Member States to improve the information available to citizens.[46] Varying levels of participation are a strong indication that there is considerable differentiation between the Member States and this seems to have led to a feeling in the Commission 'that much of the problem lays at the feet of the Member States'.[47] According to a Commission report in 2000, the 1999 elections continued the trend of falling overall turnout and the proportion of Union citizens entered on the electoral roll of their Member State of residence was generally low although it had improved from the previous election.[48] The exception was Germany where EU non-national citizens were not informed

of the necessity of registering for a second time or of the relevant time limits.[49] The Parliament shared the Commission's concern at the falling registration figures, particularly since it felt that this phenomenon could delegitimise its election especially in the context of a significant increase in Parliamentary powers.[50] To this end it averred that one of the major tasks of the Convention on the Future of Europe of 2002–03 should be to 'put forward proposals aimed at making explicit the objectives and values pursued by the Union and the means of revitalising its democratic legitimacy'.[51]

Whilst turnout for the 1999 elections fluctuated considerably between the Member States (see Table 2.1) in all of the Member States the number of non-nationals registering to vote was consistently lower than the corresponding number for nationals. Some Member States (Denmark, Finland, the Netherlands, Spain, Ireland and the UK) sent letters about electoral rights directly to potential electors whenever they had contact with the local or national authorities but on the whole the Parliament has been dissatisfied with the duty to inform contained in Directive 93/109 EC since it merely states that this should be done 'in good time and in an appropriate manner'.

Table 2.1 Selected figures from the 1994 and 1999 European Parliamentary Elections

Member state	Electoral turnout (%)		Number of eligible EU nationals		Number of registered EU nationals		Percentage of registered electors who were subsequently believed to have voted	
	1994	1999	1994	1999	1994	1999	1994	1999
Austria	67.73	49.4	91,385	97,359	7,261	14,659	7.94	15.06
Belgium*	90.7	90.8	471,277	496,056	24,000	38,236	5.1	7.71
Germany	60	45.19	120,000	1,573,316	80,000	33,643	6.6	2.14
Denmark	52.9	50.5	27,042	46,400	6,719	12,356	24.85	26.6
Spain	59.1	64.38	192,074	290,085	24,227	64,904	12.61	22.37
Finland	60.3	30.14	11,296	13,898	2,515	3,911	22	28.14
France*	52.7	46.76	1,427,315	1,427,315	47,508	70,056	3.38	4.91
UK	36.4	24	400,000	400,000	7,845	92,378	1.96	23.1
Greece*	71.2	75.30	4,000	4,000	622	736	1.55	1.84
Ireland*	44	50.21	13,600	67,900	6,000	29,804	44.11	43.89
Italy	73.7	70.81	152,139	1,098,000	2,809	10,136	1.8	9.23
Luxembourg*	88.5	88.5	105,000	111,500	6,907	9,811	6.58	8.8
Netherlands	36	29.89	160,000	167,332		28,284		16.90
Portugal*	35.5	40.03	30,519	30,519	715	4,149	2.34	13.59
Sweden	41.64	38.8	150,000	148,470	36,191	40,433	24	27.2

Note: * Belgium, Greece and Luxembourg have compulsory voting; in France and Portugal, no new information for the number of potential voters in 1999; the figures for Eire do not include British citizens.

Source: Information from Commission official, November, 1999. See also Commission 2000.

The Parliament had also expressed unhappiness with the absence of deadlines for submitting applications to be entered on the electoral roll and these were, in the Parliament's opinion, unreasonably long in some cases. In Greece, France and Luxembourg, registration for the European elections meant submitting an application between 6 and 15 months in advance and in Italy the process for registration has been criticised for being highly complex:

> First you have to go to the police for a resident's card ('carta di soggiorno'), then to the city council to become a resident and then back to the city electoral office twice to put your name on the two supplementary electoral rolls (one for the local elections and the other for the EP).[52]

With regard to improving voter registration, a motion for a Parliamentary resolution on e-democracy and e-European citizenship encouraged the Member States to promote electronic voting and to put in place e-voting monitored polling stations for the 2004 European elections.[53]

In the 1999 elections 62 non-national candidates stood for election in their Member State of residence and four were elected. This represented an improvement from 1994 but illustrates the problems that parties have faced in putting forward non-nationals on their party lists. The Federation of Greens heralds the highest profile success with Cohn-Bendit (a German national elected in France – presently Green-EFA Group co-president). The Parliament's Resolution on the Second Commission report on citizenship of the Union called on political parties to accept more Union citizens who were not nationals of the country concerned as party members and candidates on electoral lists, and to encourage them to take part in the political life of their country of residence.[54] Subsequently the Parliament's proposed introduction of transnational lists for the 2009 European elections is seen as one way of providing the necessary stimulus for legitimising the adoption of non-nationals.[55] Although 2009 is some way off this would enable 10 per cent of seats to be elected via a transnational list through transnational political parties (Day and Shaw in Chapter 5 of this volume).

Directive 94/80 EC: the right to vote and to stand in local elections

France was the last country to organise local elections on the basis of Directive 94/80 EC; these took place in March 2001. Belgium was the last country to transpose the Directive. On 26 June 1997, the Commission decided to bring an action against Belgium for failure to notify of the national implementing measures. According to Mario Monti, (then Single Market Commissioner),

> We cannot expect people to take seriously efforts made by the Union to make citizens' concerns a priority if Member States fail to implement their

> rights in practice. … In the case of Belgium the Directive incorporates special rules to take account of the large number of people from other Member States. In particular, there is a specific derogation allowing the Belgian authorities to request a minimum residence period before granting the right to vote in a limited number of municipalities where people from other Member States exceed 20% of eligible voters. Despite this, Belgium has failed to fulfil its obligations to implement this Directive on time.[56]

Belgium had previously claimed that difficulties amending the Constitution had caused the delay and representatives of the Belgian government subsequently told the Court that the Directive would be implemented in the second quarter of 1998.[57] The law transposing Directive 94/80 EC in Belgium was finally adopted on 27 January 1999 and published in *Moniteur belge* on 30 January. By the end of January 1999, although all of the Member States had transposed the Directive, the Commission faced ongoing problems in ensuring that all of the Member States had transposed it properly. In Saxony and Bavaria, for example, the non-national voter was required to make a sworn statement that he/she had been resident in the municipality for at least three months without interruption. Non-national voters were additionally required to apply for inclusion on the electoral list before each election. In August 1999 the Commission issued a reasoned opinion to Greece for failing to transpose the Directive on a number of points correctly; according to the Greek legislation, persons were only entitled to vote if they had knowledge of the Greek language and had been resident in Greece for at least two years. No such requirements were in place for Greek nationals. Furthermore provisions in Greek legislation prohibited citizens of other Member States voting or standing in Greek elections from taking part in elections in their Member State of origin. Since neither Article 19 EC nor Directive 94/80 EC implied that EU nationals have to choose between exercising their right to vote and stand as a candidate in municipal elections in their country of origin or their country of residence this constituted a breach of both.

Directive 94/80 EC raised a question of the scope of the rights thereby contained and the dual status of Vienna, as both a city and a *Land*, for example, led to a challenge by an Italian citizen who argued that as an EU citizen he should be able to vote in both. The Austrian Constitutional Court held that because the city council had the power to make laws, EU citizens do not have the right to vote at *Land* level.[58] Directive 94/80 EC also shed light on the problem of the extent of legitimate non-electoral participation. In Spain, only Spanish nationals can set up a political party, although the Political Parties Act of 1978 which stipulates this is regarded by many as unconstitutional. In Luxembourg the constitution only confers this right on nationals although in practice non-nationals have it too, and in Portugal the right is

confined to nationals residing in Portugal. In Germany not more than 50 per cent of the members of a party or of its executive committee may be non-nationals.[59] In its Second Report on Citizenship of the Union the Commission affirmed the importance of political parties, both at national and European levels, in promoting the political participation of Union citizens in their Member State of residence. However the reality of electioneering means that transnational parties with transnational lists seem to be the most likely vehicle for the effective means of realising the rights to vote and to stand. The small pool of votes available to, for example, a Briton in Rome appealing to British votes, means that election is unlikely. In Italy, Dr James Watson was the first Briton to take advantage of the right to stand in another Member State at municipal level. During the 1997 Rome elections he stood as an independent on the list of the Democratic Party of the Left (PDS) and in return Labour Party activists canvassed for the PDS.

In the context of enlargement instrumentalising rights to political participation may encounter greater difficulties; in Estonia at present only Estonian citizens have the right to be a member of a political party, which under the 1994 Political Parties Act is defined as a 'voluntary association of Estonian citizens'.[60] Furthermore several Estonian parliamentarians seemed to be under the impression that because the language requirement would apply to both Estonian and EU citizens this would be enough to ensure compliance since the Directive simply calls for EU nationals and members of the host state to be treated alike.[61]

The Directive does not oblige Member States to report on implementation; as a result, the Commission sent all the Member States a questionnaire to gather the necessary information in spring 2001. Only France and Denmark did not reply to requests for information. Only one Member State, Luxembourg, has so far been able to avail itself of the derogation and the Commission (European Commission, 2002) judged this to be justified, since in 1999, 32–34 per cent of the total number of voters were non-national. There is no comprehensive information available concerning the *general* turnout in all the Member States; one of the reasons for this is that whilst some Member States can provide accurate registration figures, other Member States cannot provide any figures at all as a result of fact that central government has virtually no involvement in municipal election.[62] However, the Commission was particularly concerned by the low voter registration in Greece and Portugal (both 9%). The number of non-national candidates elected in the Member States was: Finland 5, Sweden 408, Spain 30, Portugal 3, and the Netherlands 2. Once again some Member States sent letters informing potential electors of their right to vote although Michael Schlikker of the Office of the Federal Government's Commissioner for Foreigners' Issues in Germany has asserted that 'even where towns and cities took the decision to inform EU-nationals with a letter the turnout wasn't any higher than where they didn't'.[63] In the past few years there have been numerous initiatives at

EU-wide level seeking to enable EU citizens to make use of their Art. 19(2) EC rights with information on how to register, vote and be a candidate in local elections. One such initiative was the 'Dialogue on Europe', launched by the Commission in February 2000. Its goal was to

> Encourage public debate about the future of Europe between European and national political leaders and the people of Europe. … This initiative is in parallel to the Intergovermental Conference on the reform of the institutions that will run throughout 2000 and then continue in 2001.[64]

Whilst the Commission has considered the legal implementation of Directive 94/80 EC to be satisfactory, the Parliament's response to the Commission's Third Report on Citizenship of the Union stated that the implementation of Directive 94/80 EC has been very unsatisfactory, that with the exceptions of Austria and Ireland participation has been low, and that there has been no substantial change in participation by Community voters in relation to the past.[65] The disappointment of both the Parliament and the Commission over the practical implementation of both Directives stands in contrast to the optimism with which the Parliament, in particular, originally approached the right to vote in local and European elections. However, the low levels of participation on the part of EU nationals cannot be divorced from the general political context of declining turnouts and general apathy towards political parties. Moreover the profoundly contested nature of these rights now seems to have faded into the distance in comparison to the efforts of both the Parliament and the Commission to overcome the opacity of registration and voting procedures and the language and cultural barriers to electoral campaigns.

Conclusions: the 'promise' of alien suffrage?

This chapter has shown how the role and scope of electoral rights as dimensions of EU citizenship has manifested itself over time through interinstitutional debate, via controversies over the reach of EU law into the domains of national sovereignty and in the context of struggles on the part of the Commission in particular to ensure effective implementation of the EC Treaty. Many factors have affected the degree and nature of the contestation over electoral rights, including the emerging role of the European Parliament as putative defender of the democratic legitimacy of the Europolity, the Commission's attempts to be honest broker in the balance between Member State sovereignty and the development of a supranational concept of citizenship, and more recently the impact of Article 19 upon the immigration and citizenship policies of the Member States. We have seen distinct differences in emphasis between the case of local electoral rights and that of European Parliamentary electoral rights, with the European

Parliament itself adopting a particularly entrepreneurial stance in relation to the latter scenario.

Union citizenship – while limited – has been strengthened by the inclusion of the electoral rights. Although the rights were not entirely new at the time of the Treaty of Maastricht, they provided at least one focus point for those who wanted to see something federal in character emerging from the creation of this new concept of citizenship of the Union. Yet the partial nature of the rights granted under the EC Treaty has been both a source of strength, in the sense of focusing attention upon the rights of EU citizens rather than all non-nationals resident in the Member States, and a source of weakness, in the sense of reinforcing differences under EU law between Union citizens who are privileged foreigners and third country nationals who are substantially excluded from the protections of EU law. In recent times, the earlier debate over the creation of electoral rights for citizens of the Member States has been reflected in the emerging debates over whether EU law should be extended to require the Member States to adopt electoral rights for third country nationals. Upto the time of enlargement in May 2004 only about one half of the 15 Member States give electoral rights to third country nationals, and these are largely limited to local elections (Day and Shaw 2002). After enlargement, the proportion remained level, at sixteen out of the twenty-five member states (Smith and Shaw, 2006). In the context of the evolution of the Area of Freedom, Security and Justice, and in particular the Tampere objective of ensuring fair treatment in the Member States for lawfully resident third country nationals, the Commission was forced to consider whether or not it should propose the inclusion of an obligation on the Member States to extend local electoral rights to third country nationals. It decided not to, taking refuge in the argument that there was no competence under the new post-Amsterdam Title IV of Part III of the EC Treaty to enact such a provision. The Parliament too has considered the question, opting for a halfway house persuasive provision, suggesting in its report and resolution that the Member States ought to extend such rights to third country nationals, but not that they must do so.

Yet ultimately the trajectories here are different. The debate over the fair treatment of third country nationals can never benefit from the supranationalist and federalist logic which supported the move to enact electoral rights for EU citizens. Absent a dramatic shift towards a concept of global citizenship, EU citizenship remains a distinct and bounded concept, replicating national citizenships in its insistence on a categorical outer border defined by a *national* concept (i.e. the sum of the nationalities of the Member States). The attachment to residence-based citizenship is contingent, dependent upon each individual satisfying the formal requirement that he or she be a national of a Member State. If the electoral rights of the Treaty of Maastricht in particular had the capacity to raise the suggestion that the national identities of the Member States might be in danger, because of the requirement that the constitutions of several Member States be changed to accommodate the

requirements of Article 19 to the domestic concepts of the franchise, then the question of extending electoral rights to lawfully resident third country nationals, even if politically desirable from the point of view of normative principles of non-discrimination and social inclusion, would probably go well beyond the tolerance level of many Member States at the present time. While the contestations over Article 19 and the Directives have largely been settled, they offer a narrative which suggests the continuing capacity of the electoral rights debate to divide, not to unite, the Member States and the EU institutions.

Notes

1. This refers to the establishment of a uniform electoral procedure for the European Parliament.
2. Council Directive 94/80, OJ 1994 L368/38.
3. *The Boundaries of Suffrage* research was undertaken by Anthea Connolly, PhD Student; Stephen Day, Research Assistant; and Jo Shaw, Project Director. Substantial parts of this chapter draw upon the unpublished work of Anthea Connolly: *The Theory and Practice of Alien Suffrage in the European Union*, PhD Dissertation, University of Manchester, 2003. The financial assistance of the ESRC (Grant No. L213 25 2022), of the Socio-Legal Studies Association and of the Universities of Leeds and Manchester (PhD Scholarships) is acknowledged with thanks.
4. Council Directive 94/80 EC laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals; Council Directive 93/109 EC laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals.
5. The conventional title was changed from 'Assembly' to 'Parliament' by Resolution of the Assembly of 30 March 1962. J.O. 1962, 1045.
6. Ninth general Report on the Activities of the Community, 1 February 1960 to 31 January 1961.
7. 'The European Parliament demands that the application of the principles of a constitutional theory based on democracy and the primacy of the law should be reinforced in order to ensure the future development of the Community.' 4 *Bulletin de la Communauté Européene du Charbon et de l'Acier*, Chronologie Années 1950–1960, Luxembourg 1967, 68.
8. The Italian government had introduced measures concerning the direct election of Italian members of the European parliament, and in 1968 Christian Democrat MEPs asked the Italian government to invite other European governments to begin the direct election of their members. Cahiers de documentation européene, octobre–décembre 1968, Parlement Européen, 69.
9. Vedel Report, Bull. EC Supp. 4/72.
10. Ibid., p. 60.
11. Bull. EC Supp. 7-75, point 2.2.3.
12. It is also notable that the Luxembourg Socialist Party had made it a standing stipulation that there should be direct elections to the EP in 1969, it called on the government to table a bill to this effect. European documentation – a survey, April–June 1969, European Parliament, 67.

13. Patijn Report, EP Working Doc. 368/74, 13/01/75, 43.
14. See the discussion below.
15. Article 7 of the Parliament's draft Convention on direct universal elections to the Parliament called for voting rights for all Community citizens irrespective of their place of residence.
16. Bull. EC Supp. 7-75, point 2.2.2.
17. Seitlinger Report, draft text on the electoral procedure, A1–988/81, 26/02/82.
18. The Week, The European Parliament, 8–12 March 1982.
19. Bocklet report, EP Working Doc., A2-1/85.
20. See the commentary on this report in Report on a proposal for an electoral procedure incorporating common principles for the election of Members of the European Parliament, Committee on Institutional Affairs, Rapporteur Mr Anastassopoulos, A4-212/98, 02/06/98.
21. Ibid., Art. 2(i).
22. Resolution on guidelines for a Community policy on migration, OJ C 141/462, 10/06/85.
23. Resolution on the problem of migrant workers, OJ C 342/140, 19/12/83.
24. Bull. EC Supp. 7/85 – A People's Europe.
25. Voting rights in local election for Community nationals – Report from the Commission to the European Parliament transmitted for information to the Council, Bull. EC 7/86, can also be found in COM(86) 487.
26. Ibid., p. 8, parentheses added.
27. Ibid., p. 43.
28. Ibid., p. 44.
29. EP Interim report, *Vetter Report, drawn up on behalf of the Committee on Legal Affairs and Citizens' rights on voting rights in local elections for community nationals residing in a Member State other than their own*, A2-197/87, 06/11/87, 5.
30. Ibid., point 12.
31. Proposal for a Council Directive on voting rights for Community nationals in local elections in their Member State of residence, COM(88) 371.
32. Reprinted in F. Laursen and S. Vanhoonacker (eds), The Intergovernmental Conference on Political Union – Institutional Reforms, New Policies and International Identity of the European Community (EIPA, Martinus Nijhoff, 1992), 328.
33. 'Citizens and other must be given a framework of equality and solidarity. Unless it is seriously distorted, this concept can no longer tolerate a legal and political framework which denies the full enjoyment of fundamental freedoms. In essence it is no longer possible to day to dissociate the concepts of citizenship and democratic freedom.' EP Interim Report of the Committee on Institutional Affairs on Union Citizenship, Bindi I, A3-139/91, 6, and EP Report of the Committee on Institutional Affairs on Union Citizenship, Bindi II, A3-300/91.
34. Report of the Committee on Institutional Affairs on the results of the intergovernmental conferences, EP Doc. A3-123/92, 26/03/92, 4.
35. Article 19 of the consolidated EC Treaty.
36. Conference of the Representatives of the Governments of the Member States, Political Union, CONF-UP 1777/91, 21 February 1991, copy of a letter from Ambassador Riberhold, Danish Delegation to the IGC on Political Union to Mr Ersboell, Secretary General of the European Council of Ministers.
37. Communication from the Commission on the application of Directive 93/109 EC to the June 1999 elections to the European Parliament; Right of Union citizens

residing in a Member State of which they are not national to vote and stand in election to the European Parliament, COM(2000) 843.
38. COM(93) 534, 27/10/93.
39. Froment-Meurice Report, EP Doc. A3-357/97, 15/11/93.
40. Council Directive 93/109 EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals. OJ L 329/34, 30/12/93.
41. J. Lewis, 'Is the "Hard Bargaining" image of the Council misleading? The Committee of Permanent Representatives and the Local Elections Directive', (1998) *Journal of Common Market Studies*, 36iv: 495.
42. Proposal for a Council Directive laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals (COM(94) 0038), OJ C 105/8, 13/4/94. For the Parliament's reply see, EP Report of the Committee on Legal Affairs and Citizens' Rights and the opinions of the Committee on Institutional Affairs and the Committee on Regional Policy, A4-11/94.
43. Resolution on Council Directive 94/80EC of 19 December 1994 laying down detailed arrangements. … Minutes of 05/04/95.
44. Resolution on voting rights for citizens of the Union in the European elections, OJ C 44/159, 20/01/94.
45. Resolution on obstacles to, and discrimination against, EU citizens participating in the European elections, OJ C 128/317, 21/04/94.
46. Second Report from the Commission on Citizenship of the Union COM(1997) 230, 27/05/97, 2.
47. Interview with an official from DG Justice and Home Affairs, Brussels, November 1999.
48. Communication from the Commission on the application of Directive 93/109 EC to the June 1999 elections to the European Parliament, COM(2000) 843.
49. Due to the necessity of registering for each election the Commission, in July 1999, sent a reasoned opinion to Germany. This case is the only one where a reasoned opinion has been sent. In 1998 the Commission began infringement proceedings for incorrect transposal against Greece and Sweden and it dropped proceedings against Italy after the relevant legislation was amended. Sixteenth Annual Report on monitoring the application of Community law 1998, COM(1999) 0301. Also Third Report from the Commission on Citizenship of the Union, COM(2001) 506, 14.
50. EP report on the Third Commission report on Citizenship of the Union, Committee of Citizens' Freedoms and Rights, Coelho, A5-0241/2002, 20/06/02.
51. Resolution OJ C 44/159, 20/01/94.
52. Dr James Watson, Chair British Labour Party in Rome, private correspondence, August 2000.
53. Motion for an EP resolution on e-democracy and e-European citizenship, tabled by Marco Cappato and other pursuant to rule 48 of the Rules of Procedure, B5-0115/2002, incorporated in A5-2002/241.
54. EP Resolution on the Second Commission report on citizenship of the Union (COM(97)0230), Minutes of 02/07/98.
55. See Recommendation on the draft Council decision amending the Act concerning the election of representatives of the European Parliament by direct universal

suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976. Committee on Constitutional Affairs, A5-212/2002.

56. See 'Municipal voting: European Commission decides to refer Belgium to the Court of Justice', http://europa.eu.int/comm/internal_market/en/people/voting/573.htm.
57. *Commission* v. *Belgium (Right to vote and to stand as a candidate in municipal elections)* Case C 323/97 [1988] ECR 4281.
58. B3113/96 *Verfassungsgerichtshof*.
59. COM(2000) 0843. EU law does not affect these rules.
60. Section 1(1) of the Political Parties Act of June 1994, as amended most recently in March 2002. This Act can be found in English on the website of the Estonian Legal Translation Centre. www://legaltext.ee/indexen.htm.
61. Interview with Stephen Heidenhain, OSCE Mission, Tallinn, July 2000. On 21 November 2001 the language provisions of the Estonian electoral laws were abolished. For further details see Day and Shaw 2003.
62. In order to tackle this problem the Commission has asked the Member States to provide registration figures for their ten largest municipalities concerning participation and candidates.
63. Interview, Berlin, May 2000.
64. Dialogue on Europe: the Challenges of Institutional Reform: the first public debate on 8 March 2000, IP 00/219. There have also been calls from national parliamentarians for governments to do more. In the UK Roger Casale (Labour) called upon the government to launch a national campaign to inform people of their rights. European Communities Bill, Hansard, 12/11/97, 964.
65. EP Report on the Commission report on citizenship of the Union COM(2001) 506, Coelho, Committee on Citizens' Freedoms and Rights, A5-241/2002.

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3

EU Citizenship and the Principle of Affectedness

Chris Hilson

Introduction

The principle of affectedness, also known as the 'all-affected' principle, is one of the key tenets of democratic theory. At its heart, the principle is a straightforward one, encompassing as it does the idea that all those who are affected by a political decision should have a say in its making. The question raised by this chapter is what role, if any, the principle does and should play within EU citizenship. Given the close link between citizenship and democracy, the chapter will inevitably need to consider the debates about the affectedness principle that are found in the literature on democracy (Dahl 1970; Whelan 1983; Saward 2000). However, the principle is also used in areas which – while not directly connected with democracy – are of key importance from a citizenship perspective. As we shall see, it is, for example, employed as a means of limiting the personal scope of accountability-related citizenship rights such as access to the European Court of Justice (ECJ). The chapter thus seeks to add to the existing literature by considering the part played by the principle in this, more obviously 'legal', area of citizenship.

The chapter will involve an analysis of the principle of affectedness in three separate contexts: first, as a means of determining the personal scope of voting rights for those resident within states; second, as an argument for extending the voice of citizens beyond states; and, finally, as a means of limiting the personal scope of citizenship rights such as access to the Court of Justice.

Voting rights within states

During the nineteenth and twentieth centuries, voting rights were progressively extended in many European countries, including the UK, to include middle class men, working class men, women and young people (Saward 2000). Although this progressive extension of the franchise was typically argued for using the principle of political equality, the affectedness

principle played an important underlying role. Equality was called for precisely *because* these previously excluded groups were equally affected by political decisions. As Mill put it, in the context of an argument for extending the franchise to women: 'All human beings have the same interest in good government; the welfare of all is alike affected by it, and they have equal need of a voice in it to secure a share of its benefits' (Mill 1962: 290).

Not that affectedness was the only supporting principle. Another supporting argument for political equality was the famous rallying cry of 'no taxation without representation' which was a feature of eighteenth century British political debate (and which was picked up on, in the context of transnational voting rights, by the American colonists reacting to taxation by Westminster). There is obviously a degree of overlap between what one might call this 'contribution principle' and that of affectedness because, if one is taxed, one is affected, at the very least, by the fact of being taxed. However, the two principles are obviously not synonymous because the opposite is not true: one can be affected and yet not pay tax. Indeed this latter situation forms the basis for the reverse side of the contribution principle – namely 'no representation without taxation'. Key liberal thinkers ranging from Mill to Rawls (1971) have argued that the franchise should not lie with those who, although affected, are unemployed and hence not paying taxes (albeit, in Rawls' case, only if, as in his surfers of Malibu example, the unemployment is deliberate).

The discussion so far has involved the extension (or restriction) of the franchise to resident nationals. When one comes to the issue of voting rights within states for resident aliens, the picture becomes complicated by the issue of nationality. As we shall see, both the affectedness and the contribution principle may be used to argue for voting rights for non-nationals. However, the *type* of election in which they are allowed to vote is typically restricted in practice because of their nationality.

Within the EU, resident aliens fall into two camps. On the one hand there are EU citizens residing in a Member State which is not their own. And on the other, there are third country nationals living in EU Member States. The contribution principle could be used to argue for both types of resident alien being granted the vote in local and national elections. After all, in most instances, they will be employed in the relevant State and paying local and national taxes there. One cannot use the contribution principle to argue for their participation in European Parliament elections in quite the same way, since they do not pay taxes directly at European level (though they do so indirectly via the contributions of the relevant Member State). However, the latter situation is not of course unique to resident aliens.

In practice, it is the affectedness principle which has been used by the Commission to support the grant of voting rights for resident, 'foreign' EU citizens in local and European Parliament (EP) elections. In relation to local

elections for example, the Commission argued

> As far as local elections in the Community are concerned, residence appears to be a more appropriate criterion for determining the place of voting than nationality. Actually living in a municipality means that various aspects of daily life are influenced by decisions taken by the elected body which runs the municipality. Examples are education, planning, local amenities and voting on local taxes which apply to nationals of other Member States resident within the municipality. (Commission 1988)

Although the law, as it currently stands, has halted with the grant of voting rights to EU citizens in local and EP elections, the logic of the affectedness principle does not of course stop there. Instead, it argues for the similar grant of voting rights to resident third country nationals (TCNs) in local and EP elections and also for the grant of voting rights to foreign EU citizens and resident TCNs in national elections. After all, as residents of the various territories (local, national and EU), they will be affected by many of the legislative decisions made in respect of those territories.

Voting rights in national elections: sovereignty and affectedness

In the case of national voting rights, the Commission has raised a specific argument *against* extending them to non-nationals, to the effect that national elections are different because they 'play a part in determining national sovereignty. The national aspect of these elections is clearly incompatible with the participation of non-nationals, even nationals of other Community countries, since the Community is not intended to impinge on national sovereignty, or replace States or nations' (Commission 1986).

This particular argument by the Commission is questionable. Clearly what the Commission has in mind here is constitutive popular sovereignty rather than functional state sovereignty: even in 1986, few would have claimed that the Community was not intended to impinge on the latter. If popular sovereignty can be seen as the will of the people, what the Commission could legitimately claim is that the Community was never intended to interfere with a state's sovereign ability to define for itself who its 'people' are (whether by harmonising nationality laws or by making States accept resident alien suffrage in national elections).

However, what the Commission actually seems to be claiming here is that a state could never decide to allow non-nationals to vote in national elections, *even if it wanted to*, because this would be incompatible with popular sovereignty. The legitimacy of this assertion rests on whether one accepts its view of sovereignty. On the one hand, the Commission could be adopting a communitarian-inspired view of sovereignty, which locates it in a homogenous ethno-cultural nation. Under this approach, state power or authority (sovereignty) derives from the people as a collective, homogenous, nation (Neumann 1992). On the other hand, it could be adopting a *strict* social

contract-based approach to sovereignty. Here, one might argue that requiring a deep level of commitment to a polity in the shape of nationality is particularly appropriate for those elections where matters of high politics are resolved. From this perspective, excluding foreign EU citizens from national elections and resident TCNs from national and (to the extent that EU governance now involves issues of high politics) European Parliament elections, would be perfectly justified. However, if one adopts a *generous* social contract-based model of sovereignty, then one might argue that it is incompatible with popular sovereignty for states to disallow permanently resident non-nationals from voting in national and EP elections. On this view, permanent residence creates a sufficient level of commitment to the host country and the argument is that state power is only legitimate if *all* those affected, via permanent residence, have a voice in its exercise.

Affectedness and citizenship status

The link between citizenship and democracy was touched upon briefly at the start of the chapter. As Holden notes, the core idea of democracy is rule by the people, and the relevant people has traditionally been those who are, legally, citizens of a particular state (Holden 1996). The legal status of citizenship is usually based on nationality. In other words, only those who are nationals will typically possess democratic political rights such as the right to vote. If the affectedness principle is used, as it has been above, to argue for the extension of voting rights to resident aliens, the question is whether it requires them to be granted full, nationality-based citizenship status. The answer is that it does not. A Member State could grant resident aliens nationality of that state. However, the affectedness principle would equally be satisfied by the conferral of comparable electoral rights without the grant of nationality and thus citizenship. In other words, while the affectedness principle requires the grant of equivalent, political citizenship rights, it does not require the grant of citizenship per se.

Although, in principle, the above status issue involves *all* resident aliens (foreign EU and TCNs) in *all* elections (local, national and EP), much of the recent debate surrounding it has involved the political rights of TCNs in local and EP elections. This is because, as we have seen, foreign EU citizens already have voting rights in local and EP elections and, again as seen above, the case for voting rights in national elections has not met with success. It is therefore to the debate in relation to TCNs that we now turn.

Voting rights for TCNs in local and EP elections

In essence, there are three options available. First, as the European Council suggested at Tampere, Member States could be encouraged to offer TCNs 'the opportunity to obtain the nationality of the Member State in which they are resident' (European Council 1999). This would thereby give them EU citizenship, since under the EC Treaty EU citizenship is premised on nationality. Second, one could break the link between EU and national citizenship and

grant TCNs EU citizenship (O'Keefe 1994). And third, one could grant TCNs rights comparable with those of EU citizenship and in doing so provide them with the status of what the Commission has described as 'civic citizenship' (Commission 2000) – which, while it sounds rather more impressive, appears to be denizenship (Hammar 1990) by another name.

Relying on the first option alone would be inappropriate because differing approaches to the conferment of nationality would lead to a distinct inequality among rights for resident aliens across Member States. One might respond by saying that disparate Member State naturalisation laws should be harmonised. However, the prospect of Member States giving up their sovereignty on the issue of nationality seems remote – a view supported by the declaration attached to the Maastricht Treaty to the effect that: 'the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned' (The European Union Migrants' Forum 1995). The second option is also a political non-starter, as most Member States would simply not accept EU citizenship having a stand-alone status with no link to national citizenship. Though some might describe it as a form of second class citizenship, it is thus no surprise that the Commission has chosen the third of the above strategies. However, movement on the grant of rights to TCNs within this strategy has principally taken place in relation to *social* rights. Thus, for example, the Council has issued a Directive Concerning the Status of Third-Country Nationals Who Are Long-Term Residents (Council 2004), which provides long-term resident TCNs with a right of residence in other Member States.

Despite the apparently attractive logic of the affectedness principle, we remain a long way away from a situation where TCNs enjoy *political* rights comparable with those of EU citizenship. Unlike social rights, where the Amsterdam Treaty provided a legal base for congruence,[1] there is no legal base in the Treaty allowing the Commission to propose a similar congruence for political rights (Commission 2001). To achieve parity for electoral rights will require a revision of the Treaty. And given the hostility a number of Member States demonstrated in having to grant such rights to EU citizens,[2] the prospects for TCN electoral rights do not exactly look promising. We therefore find ourselves in a strange situation where the affectedness principle has been used by the Commission to argue for voting rights for resident, foreign, EU citizens in local and EP elections, but where this has not be carried through for TCNs. Even if one accepts the strict, social contract, sovereignty-related argument about the need for a deep, nationality-based commitment in matters of high politics, this does not explain the continued exclusion of TCNs from the franchise in local elections.

Devolution

As we have seen, the logic of the affectedness principle suggests that the franchise ought to be extended to resident aliens in certain circumstances.

However those who argue along these lines are obviously not contending that resident aliens in a state will be affected by *every* political decision made within or in relation to that state. Residence entails affectedness but only in some instances. And this is of course true not only of aliens but of *all* residents in a state – nationals included. The affectedness principle can therefore be used to argue that those who are resident inside a state will not be affected by many regional or local decisions and that such decisions ought therefore to be devolved downwards if they are not already decided at those levels. After all, just as the principle of affectedness dictates that all those who are affected by a political decision should have a voice in its making, so the reverse is also true: in other words, those who are not affected by a decision should not have a say. Where a political decision is essentially local in effect, it is appropriate that only locals should have a voice.

Transnational citizenship

So far, in considering political, voting rights, we have principally examined arguments for granting a voice to those affected *within* states who are currently disenfranchised. However, the principle of affectedness can also be employed to argue for and against giving a voice to citizens *beyond* the state.

As Held has pointed out, the previously assumed symmetry or congruence between the voting 'input' of citizens and government 'output' within a bounded nation-state, no longer holds true (Held 1995, 2000). Along similar lines, Schmitter argues that while in the classical model of the state, 'the exercise of public authority in different functional domains is coincident or congruent with a specific and unique territory', there is in the EU a 'growing dissociation between territorial constituencies and functional competences' (Schmitter 2000: 15).

Although both authors are making a similar point, the context of their point differs considerably. Schmitter is concerned with the issue of variable geometry within the EU where, in the context of the Economic and Monetary Union opt-outs for example, the competence of the EU within that functional policy area does not coincide with the territory of the EU as a whole. In contrast, Held is arguing that, with globalisation, there are increased inter-dependencies between states – economic, environmental, health and so on – which mean that those affected will, in many cases, no longer just be those residing within a national territory, but also those outside. Since the functional output of states spills over territorial boundaries rather than being coincidental with them, citizen input should do the same.

Not surprisingly, the implications of applying the affectedness principle also differ considerably. In the context of opt-outs and variable geometry, the affectedness principle argues for the *exclusion* from the political process of the voice of citizens from Member States who have an opt-out. Because their Member States are not bound by the relevant measures, those measures

cannot be said directly to affect them. However, in terms of institutional practice, the affectedness principle is only partially respected here. As far as the Council of Ministers is concerned, Member States with opt-outs are not allowed to vote.[3] However, representatives of unaffected Member States in the EP are able to vote, which is somewhat anomalous (Usher 1997).

With Held's globalisation thesis on the other hand, as we have seen, affectedness argues for the *inclusion* of the voice of citizens from other states. Held's vision of what he terms 'cosmopolitan democracy' has not been without its critics. Implicit in Held's argument against confining democracy to the territory of the state is that, in an interconnected world, it fails to respect the key democratic principle of affectedness. However, as Saward points out, the way in which Held seeks to institutionalise the affectedness principle is by imposing new, regional and global *territorial* layers of government (Saward 2000). The EU provides a good, regional-level example. In the EU, action at Community level gives out-of-state citizens, not a right to vote in other territories as such, but nevertheless a voice in other Member States that is mediated via their representatives in the Council and the European Parliament. The Large Combustion Plants Directive,[4] which aimed to resolve the problem of transboundary acid rain, is a good example of this. Through this Directive, citizens of each Member State have ended up with some voice in environmental decision making in other Member States.

However, the problem with this supraterritorial approach from the point of view of affectedness, is that of over and under inclusion. Some who are not affected will be included, and some who are affected will not be included. Thus, we have already seen that acid rain requires cross-state action. But to involve all EU states (as the Large Combustion Plants Directive does) is to include and thus give a voice to a number of states that are not obviously affected at all (acid rain being a largely Northern European problem). Conversely, there are some directives, such as the Wild Birds Directive,[5] the effects of which do not stop at the EU's territorial borders, which nevertheless fail to give a voice to affected third country citizens.

Creating new regional and global territorial layers of government is, however, just *one* way of providing affected outsiders with a voice and, for the reasons outlined above relating to over and under inclusion, it is not one which fully respects the affectedness principle. There are of course other ways of giving a voice to affected outsiders. Some of these are themselves necessarily territorial in nature and thus ultimately also fail fully to reflect the affectedness principle. One could, for example, encourage states, whose conduct affects citizens in other states, to cooperate or negotiate with those other states along classic, intergovernmental lines (Saward 2000). Another territorially based way of providing affected outsiders with a voice is 'reciprocal representation' – allowing elected representatives from legislatures of affected areas to sit and vote in the affecting area's legislature (Dobson 1996; Schmitter 1997; Saward 2000). There are obvious parallels here with the

so-called 'West Lothian question' in the UK. The problem is that Scottish MPs have the right to vote on purely English matters and a common solution prescribed is to create a separate English Parliament and to convert Westminster into a federal UK Parliament. Under this federal route, Scottish nationals would be granted a say in English policies which affect them via the federal Parliament. However, in theory, the *existing* arrangement could be revised to provide a similar result. Scottish voters, resident in Scotland, would continue to be able to vote for Scottish MPs to sit and vote in the UK, Westminster Parliament on English matters that affect them. The only changes would be that they would be legally unable to vote on matters which affect England only. And, in addition, English voters would have to be similarly placed to send representatives to the Scottish Parliament to vote on matters affecting England.

The problem with negotiation and reciprocal representation is that, given that they are both *necessarily* territorial in nature, they potentially raise the problem of over inclusion and thus do not fully reflect the affectedness principle. In response, one could argue that while it is natural to see the state as the appropriate territorial locus for negotiation and representation respectively, this need not actually be the case. Instead, engaging lower levels of government may better reflect the affectedness principle. Thus, with negotiation, a much better fit with those affected may well be possible if negotiation takes place between regional or local governments, bypassing the relevant nation states. And similarly with reciprocal representation, if representation of a whole state in a foreign state parliament would over-represent in the sense of including many who are not affected, there is always the possibility of providing for selective foreign regional or local representation in national, regional or local assemblies (Schmitter 1997). Nevertheless, even with such tinkering, such methods are ultimately still constrained by their necessarily territorial nature: even local or regional territorial boundaries are unlikely precisely to reflect the contours of relevant affected communities.

Indeed, the only way to ensure the full respect of the affectedness principle would be to abandon territorial layers and their associated constituencies altogether and to adopt purely functional constituencies instead. In Saward's terms, this would involve putting 'everything up for grabs', defining the scope of constituencies on a functional, policy-by-policy basis using the principle of affectedness (Whelan 1983; Saward 2000). Under this approach, there would be no requirement to align constituencies with existing territorial ones. However, as Saward notes, using the affectedness principle as the primary means of delineating political communities 'falls down in seeming to require a different constituency – in effect a new political unit – each time a collective decision needs to be made' (Saward 2000; see also Whelan 1983 and Dahl 1970).

Under a non-territorial approach, this problem of fixing the relevant community remains, whichever form of democracy or democratic mechanism

one seeks to employ – whether it is representative, direct, or deliberative democracy. With representative democracy, it is thus no surprise that the only practical, real-world examples of functional representation that tend to be given are based on language (as in Belgium), ethno-cultural groups (such as the Inuit) and worker representation (Saward 2000; Abromeit 2002). Only in these areas are the contours of the relevant functional constituency relatively easy to trace. In other policy areas, as Abromeit notes, ' "functional units" are marked by their unknown size and by the impossibility of determining beforehand who belongs to them' (Abromeit 2002: 14–15).

Much the same is true of direct and deliberative mechanisms such as transnational referenda and deliberative fora. In fact, these two particular democratic mechanisms are capable of being employed on either a territorial *or* a purely functional basis. With a referendum for example, the ability to vote in the referendum could be made available to *all* citizens from all EU Member States, just affected Member States, or just affected regions or local areas. Here, the scope of the referendum would be territorial. Alternatively, voting could be restricted to only affected citizens irrespective of territorial borders (which may be over or under inclusive). This would be more clearly functional. Similarly with deliberative fora, these could, on the one hand, be composed of citizens (or their representatives) from all EU Member States, just affected states; or just affected regions or local areas. Or, on the other, they could comprise just affected citizens (or their representatives) irrespective of territorial borders.

With both mechanisms, the problem of defining the relevant affected community will be great whether a territorial or purely functional basis is chosen. However, the problem is likely to be far greater with the latter. In the context of transnational referenda, Saward comments that 'the practical difficulties of defining constituencies according to who is affected by discreet issues across borders normally leads to the rejection of the idea' (Saward 2000: 42). Saward himself is more optimistic, pointing to the possibility of cross-border initiatives or collaboration between citizens in delineating the appropriate constituency, and the bottom-up triggering of such referenda by transnational civil society. However, while the latter would ensure that at least some of those affected would be able to bring a referendum into being, it is arguably a little too optimistic to expect the former to be able to present a perfect picture of the overall affected community. It *may* work in successfully identifying affected states within a territorially based referendum; however, it is highly unlikely to identify, with any degree of accuracy, affected citizens within a purely functionally based system.

Abromeit's preferred solution for transnational referenda in the EU is to make voting available in all Member States. Hers is, in other words, a territory-based approach. However, she claims that the affected functional constituency will subsequently identify itself through the process of casting their votes in the referendum: those who bother to vote will be those who

feel and who therefore are affected (Abromeit 1998). On this view, the single-issue nature of the referendum as a political mechanism may be particularly well suited to the demands of the affectedness principle. Although this is an attractive argument, it does not quite fully meet the affectedness principle however, because given the ultimate EU-territorial boundary of the referenda, it still suffers from potential under inclusion of affected third country citizens.

Similar problems present themselves with transnational, deliberative fora. Of course, under some versions of deliberative democracy, it does not appear to matter whether affected outsiders actually get to participate, it being sufficient that the appropriate domestic forum takes their interests into account in its deliberation (Thompson 1999). However, under other versions, deliberation must take place between all those affected (Dryzeck 1999) and it is in this context that one is again faced with the problem of determining the precise contours of the affected community. Of course one might point to an element of reflexivity within deliberative democracy, and argue that the scope of the relevant deliberative community should itself be decided deliberatively. However the danger there is that the nature of the 'initial' group may be 'incorrect' but never modified precisely because it is lacking the affected others to argue for their own inclusion.

Network governance

Saward's view is that while the affectedness principle 'has fatal flaws as the primary means of delineating political communities, it has great attractions as an important supplementary guide to mechanisms and institutions' (Saward 2000: 38). His argument is that Held's 'extra-territorial layer' model of transnational democracy does not fully reflect the affectedness principle and that supplementary mechanisms such as transnational referenda and deliberative fora, may ensure a fuller application of it.

However, the question is whether the EU, as a key example of the extra territorial layer model, really fares so badly in the affectedness stakes. If one conceives of cosmopolitan democracy merely as the creation of regional or global democratic legislatures, with citizens simply voting periodically in elections, then it is easy to see that affectedness will not be best reflected. However, to view, for example the Large Combustion Plants Directive, only from the point of view of voting in Council and Parliament by one's representatives (as we did above) is to see only half of the democratic picture. What it misses is the role that functional representation can play as part of network governance (Kohler-Koch 1999). Thus, national and transnational interest groups, which lobby the various EU institutions at the European level, can be seen as representing their particular functional constituencies, providing them with a transnational citizenship voice. The advantage of such lobbying is that it tackles, in part, the problem of over and under inclusion. With the former, it enables citizens from the most affected

Member States to register the *intensity* of their interests in a way in which voting is unable to reflect. And with the latter, it allows third country citizen interests a voice. Thus, with the Wild Birds Directive example given earlier, third country citizens may have had no voting voice in the Community legislature, but interest groups would have been able to state their case by lobbying during the legislative procedure. Of course, one should be wary about making too grand a claim for this arrangement as far as affectedness is concerned. After all, it is unlikely that *all* those affected will be given a voice that truly represents their interests (Schmitter 1997; Abromeit 1998; Føllesdal 2002). Some interests are obviously better able to organise than others and the risk of a cosy and exclusive corporatism is ever present and needs to be guarded against carefully. That said, the point is that there is perhaps less need than Saward suggests to experiment with transnational referenda and other such mechanisms. To some extent at least, existing supranational arrangements – if viewed through a governance lens and not just a Parliamentary government one – can be seen as already providing a reasonable reflection of the principle.

The discussion above concerns the application of network governance as a (already existing) supplement to more formal, democratic institutional arrangements at *Community* level. However, one might equally apply the notion at *state* level. Thus, in the context of under inclusion for example, one might argue that the lack of a voice for foreign affected citizens in a particular state may be made up for, in part, by the ability of foreign interest groups representing those citizens to apply democratic pressure within that state (Schmitter 1997). Similarly, in the context of over inclusion, it is likely that 'locals' within a state who are the only ones affected by a particular issue, or at least more intensely affected than others nationally, will seek to apply pressure through interest groups and other forms of association so that their voice is heard more loudly within the public sphere. To focus on voting and other formal democratic mechanisms is therefore to miss a vital part of the democratic process in which active citizens can play a key part.

Limiting the personal scope of citizenship rights

Under the EC Treaty and the Charter of Fundamental Rights (European Parliament, Council and Commission 2000), a number of the formal EU citizenship rights are enjoyed exclusively by EU citizens (and thus only by nationals of Member States). In particular, only EU citizens have a right under the Treaty to move and reside freely between Member States, electoral rights in local and EP elections, and a right to diplomatic and consular protection. Other formal rights – such as the right to petition the EP and apply to the Ombudsman, and the right of access to documents – are shared with resident TCNs. Yet others are broader still, with no explicit nationality or residence restriction at all. The formal right to good administration in Article 41

of the Charter (available to 'every person') is of this type, as is the right of access to the Court under Article 230 EC.[6]

However, the personal scope of citizenship rights may be limited not just by reference to nationality or residence, but also or instead by affectedness, concern or interest. In legal terms, this is a very common 'standing' or *locus standi* requirement, governing who is entitled to make a challenge. The right to petition the EP is limited in this way, as is the otherwise cosmopolitan right of access to the Court of Justice although, interestingly – unlike in some domestic jurisdictions – the right to complain to the Ombudsman is not similarly limited (Irish Ombudsman 1996).

The right to petition under Article 194 EC states that EU citizens and TCN residents have the right to address a petition to the EP on matters 'which affect him, her or it directly'. In theory then, 'direct affect' here is an extension of the existing nationality and residency limitations. However, in practice, as the European Parliament fact sheet on the petitions procedure notes, '(t)his latter condition is given a very wide interpretation' (European Parliament 2000), which may lead one to question the need for it in the first place.

With access to the Court, the relevant affectedness-related standing requirement is, in contrast, given an extremely restrictive interpretation. Under Article 230, *any* individual may have standing to challenge an act before the Court, but generally only if the measure is of 'direct and individual concern' to him or her. Direct and individual concern or getting affected is thus the only real limitation to what is otherwise a cosmopolitan right – there being no *explicit* restrictions in terms of nationality or residence on those who can sue. Neither is there any *implicit* assumption that either nationality or residence entails affectedness. On the one hand, non-resident TCNs will have standing to sue, so long as they can establish direct and individual concern.[7] And, on the other hand, EU citizens (resident or otherwise) may be denied standing if they cannot prove direct and individual concern.[8] Direct concern and individual concern are separate elements, both of which have to be established by an applicant. However, individual concern is the most relevant for present purposes and, in any case, it is individual rather than direct concern that has, historically, posed the greater hurdle for applicants. The test for individual concern is extremely restrictive. It is not sufficient for an applicant to show that they are affected by a measure – not even that they have been adversely affected.[9] Instead, you must show that you have been affected uniquely, in a way that differentiates you from all others.[10]

Ignoring for a moment the ECJ's *extreme* affectedness requirement, at first sight, the above standing limitations appear a fair reflection of the affectedness principle. After all, in the context of democracy we have said that all *those who are affected by a political decision should have a say in its making*, but that those who are not affected should have no such say. And to apply the principle here would be to say that those affected by a political decision

should be able to hold the decision maker to account (through a petition or via the Court), but that *those not affected should not*. Apart from the fact that the emphasis of the principle differs as between the two contexts – one stressing more the positive, inclusive application of the principle and the other the negative exclusionary aspect more (as the italicised sections of the text above illustrate) – the two areas would seem to be quite similar. However, a closer examination reveals that this is not the case. Within democratic theory, respect for the affectedness principle is widely accepted as necessary in order to uphold the values served by democracy. However, within the area of accountability and administrative law, the need for the application of the negative, exclusionary affectedness principle is highly contested. And this is, in part, because the values served by administrative law are themselves highly contested (Hilson and Cram 1996).

On the one hand, there are those who adopt a private-rights inspired view of the role of administrative law, who tend to be in favour of imposing restrictions on standing such as an affectedness requirement, for both practical and principled reasons. On the practical side, they argue that without restrictions on standing, the courts or other relevant bodies will be flooded with cases and the administration will be overwhelmed. This is often accompanied by arguments to the effect that those with a more direct concern are likely to provide better focused arguments, thus aiding the court or body concerned and, ultimately, the cause that is being defended. As for principle, their view is that the role of the courts in public law actions is to adjudicate between an individual's affected rights or interests and the wider public interest. On this view, for the courts to adjudicate on matters of public policy in the abstract, in the absence of an affected individual, is illegitimate.

On the other hand, there are those who favour a 'citizen action' approach to administrative law, who remain unconvinced by the alleged practical problems posed by liberalising standing and who, from the point of view of principle, favour the maintenance of the rule of law and sound administration. On the practical side, they stress that there is little evidence to suggest that freeing up standing requirements leads to a significant increase in the number of cases. Cost and time put most people off making applications, not rules saying that they cannot make them. As for effectiveness of argument, they argue that those without a direct interest are just as likely to make a focused argument as those who are directly affected. The quality of an application has more to do with a person's qualifications and experience than with direct or individual affectedness. In relation to principle, their view is that the more 'police patrols' (McCubbins and Schwartz 1984) there are to keep a check on the administration, the less likely it is that illegality or maladministration will go unchecked. By placing restrictions on those who can bring challenges, this crucial oversight capacity is inevitably reduced.

The ECJ's current approach to standing under Article 230 clearly falls within the first rather than the second of the above approaches. Indeed, in adopting an extremely strict version of the affectedness requirement as its standing hurdle (unique affectedness), the Court would appear to be extremely (many would say unduly) sensitive to issues such as the effect of significant numbers of challengers on its caseload and on the smooth running of the Community administration. However, in the discussion below, it will be assumed that, at some stage in the future, the Court may well move to a less extreme stance, albeit one that continues to rely on a notion of affectedness as a restriction on standing.

Who is to be regarded as affected?

We have now analysed the affectedness principle in three separate citizenship contexts: first, as an argument for extending or restricting the personal scope of political citizenship rights within states; second, as an argument for extending the political voice of citizens beyond states; and, finally, as a means of limiting the personal scope of more explicitly legal citizenship rights such as access to the Court of Justice. With these contexts in mind, we now move on to consider the crucial issue of the basis upon which one decides who is affected by a particular policy decision.

Weale gives the example of a decision on whether or not to build a swimming pool and theatre in a particular town and concludes that while residents can clearly be regarded as affected whether or not they wish to use either facility, 'neither the distant aesthete, who thinks the theatre an improving experience for people, nor the distant swimming champion, who likes the thought of a swimming pool full of people doing their lengths, is qualified by their interest to have a say in the decision' (Weale 1999: 161).

Why then are local residents to be regarded as affected and the distant aesthete and swimmer not? If the facilities are publicly funded, one answer may be that locals are affected and should have a say because the relevant buildings are being built with their money as local taxpayers. Nevertheless, one might again see this as the contribution principle at work as much as the affectedness principle.

In fact, the distant aesthete and swimmer *are* of course affected by the decision, if only psychologically. However, under the principle of affectedness, taking an interest cannot be equated with having a legitimate interest. Affectedness, in other words, is a normative rather than a descriptive question. One needs to decide who ought to be regarded as being affected, not just to take at face value those who say that they are. It would appear, therefore, that one needs to have reference to a particular political theory in order to determine whose interest is legitimate.

From a liberal perspective, the interests of Weale's distant aesthete and swimmer should not count. Indeed, from such a perspective their preferences

are external rather than personal or self-regarding. External preferences are, in the words of Dworkin, those which involve 'preferences people have about what others shall do or have' (Dworkin 1978: 134). In the case of the distant swimmer and aesthete, their preferences are not personal since they are not actually intending to use the swimming pool or theatre; they are merely external in the sense that they are preferences about what others should have. From a liberal perspective, external preferences should generally not count, democratically, because any government action based upon them will typically fail to respect the valued liberal principle of neutrality as between conceptions of the good.

However if one changes the example to a distant environmentalist who is concerned about an environmentally detrimental activity in another state, what is the position then? Of course in some instances that person will be physically or physiologically affected by such activity and thus his preferences are personal ones which should be taken into account. Transboundary problems like acid rain and migratory birds are obvious examples. However, what if the activity affects the distant environmentalist only psychologically in a similar manner to the distant aesthete or swimmer? Here, it becomes less easy to draw a distinction between self-regarding and external preferences. One might say that a preference about the upkeep of an unremarkable pond or lake in another territory is an external one and that the outsider's interest should not be regarded as legitimate in such a context. If the locals wish to destroy the unremarkable, so be it. However, what if the locals are threatening to destroy a unique landscape feature famous throughout the region or the world, or if the threat is to an endangered species? With these examples, it can be argued that the preference is no longer merely an external one because the resource is properly to be considered a common one. One could therefore argue that local, government action in accordance with these 'foreign' preferences is necessary in order to keep available critical natural capital which is fundamental to allowing current and future generations to pursue an environmentally inclined conception of the good. In response, one might point out that this is to privilege a conservation-based conception of the good over a more destructive ethic which might be equally appealing to some people. However, rather than point to liberalism's essential indeterminacy as a result of this (Bellamy 1989), one might equally argue, as Coglianese does, that it requires government to achieve a pragmatic balance between competing conceptions of the good: 'To remain neutral, government would not decide whether the logger's or the hiker's vision of the good life is better, but it would make available, to the extent possible, resources for both loggers and hikers' (Coglianese 1998: 51).

The real indeterminacy problem with liberalism is that it cannot then go on to provide us with an answer as to when something crosses the line from

the unremarkable to the remarkable. What we are forced back upon is empirical observation. Thus, having said that the principle of affectedness is a normative question and that merely taking an interest should not be equated with having an interest, ultimately, the question of who should be regarded as affected or having a legitimate interest must be decided empirically (Hilson 2001). Just because a distant aesthete shows an interest in the construction of a local theatre does not make it a national theatre of truly common, national concern. And this must remain true even if he (and some others from outside the area) intends to visit it to use its facilities. However, while it is not enough for one, or even a few outsiders to demonstrate an interest, there must come a point when a *sufficient* number of people outside an area demonstrate a concern about an issue, that they should be included in the relevant political or judicial decision-making process.

Conclusion

As things stand, affectedness plays a somewhat ambiguous role in EU citizenship. It has been used to justify inclusion of foreign EU citizens in local and EP elections and yet it has not been applied in respect of TCNs or national elections. In the context of subsidiarity, a number of supranational Community directives can be justified by the fact that citizens in more than one Member State are affected. And yet, when it comes to litigation before the Court of Justice, those very same citizens are likely to find themselves excluded by an extremely restrictive interpretation of affectedness. An explanation of the difference between these latter two approaches of course turns on purpose: affectedness is designed to be an exclusionary instrument in the standing context whereas arguments for supranational action will necessarily require a more inclusive stance. That said, one needs to be sure that the means are necessary to achieve the relevant purpose and, in the case of standing, doubts have been raised as to whether the ECJ's extremely restrictive interpretation of affectedness is necessary to prevent the Court from being overwhelmed by applicants.

Ultimately, the affectedness principle only really works uncontroversially where it is used as a supporting, *ex post facto* justification for an already bounded constituency, as in the two former examples above (votes for foreign, EU citizens, and subsidiarity). Where the intention is to use the principle on a stand-alone, *ex ante* basis to determine particular constituencies, the principle is simply too open-ended to be useful or may find itself in conflict with other principles (such as, for example, sovereignty). Standing before the Court of Justice would appear to lie in the latter camp, albeit that the Court really has no choice other than to work with the principle in some shape or form and the constituency is determined on a case-by-case basis as particular individuals come before the Court.

Notes

1. See Arts. 62(3) and 63(4) EC, which provide, respectively, for measures to be introduced to allow resident TCNs to move freely for three months, and to reside permanently in other Member States.
2. Witness the Article 169 EC (now 226) proceedings brought against Belgium (C 323/97 *Commission* v. *Belgium* [1998] ECR I-4281).
3. On, for example, EMU, see para. 7 of Protocol no. 25, On Certain Provisions Relating to the United Kingdom of Great Britain and Northern Ireland, annexed to the EC Treaty.
4. Directive 88/609 [1988] OJ L336/1, replaced by Directive 2001/80 [2001] OJ L309/1.
5. Directive 79/409 [1979] OJ L103/1.
6. Though not a formal citizenship right as such, the right of access to the court, as a key accountability right, ought to be one (along with for example, the rights to petition and the right of complaint to the Ombudsman, which are formal citizenship rights).
7. See for example Case T 161/94 *Sinochem Heilongjiang* v. *Council* [1996] ECR II-695, where an action brought by a third country (Chinese) exporter against a Community regulation imposing an anti-dumping duty was held to be admissible.
8. See for example Case C 321/95P *Greenpeace and Others* v. *Commission* [1998] ECR I-1651, where Greenpeace and local residents on the Canary Islands (part of Spain) were denied standing to challenge a Community decision to grant structural funds for the construction of two power stations on the islands.
9. Cf. Advocate General Jacobs' Opinion in Case C 50/00 P *Unión de Pequeños Agricultores* v. *Council* [2002] ECR I-6677, who suggested that establishing an adverse affect on one's position should be the key to standing under Article 230. See also the Court of First Instance's judgment in Case T 177/01 *Jégo-Quéré et Cie* v. *Commission* [2002] ECR II-2365.
10. The differentiation test comes from Case 25/62 *Plaumann* v. *Commission* [1963] ECR 95. See the ECJ's judgment of 25 July 2002 in Case C 50/00 P, note 9 above, where it rejected the suggestion of AG Jacobs and confirmed the traditional, *Plaumann*-based approach.

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Case T-161/94 *Sinochem Heilongjiang* v. *Council* [1996] ECR II-695
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4

We the Citizens? Representation and Participation in EU Constitutional Politics

Dario Castiglione

Introduction

During the past few years, two moments in the ongoing process of European political integration have been considered by many as important steps towards the construction of EU citizenship. In this respect, both the 'Charter of Fundamental Rights of the European Union' (hereafter, the 'Charter') and the 'Treaty establishing a Constitution for Europe' (hereafter, the 'Constitutional Treaty') have raised great expectations. The fact that, at the time of writing, the status of neither document is resolved – the Charter being still nothing more than a general declaration, while the Constitutional Treaty may never be approved – is only of partial relevance to the arguments developed in this chapter. The focus of my discussion is not on the substantive provisions for citizenship offered by the two documents, which are summarised and briefly discussed in the introductory chapter of this volume, but on the way in which the politics of constitution making may, or may not, have contributed to establishing the subjective conditions for EU citizenship.[1]

The previous two chapters of this volume have looked at the transformation of the principles of civic standing within the European transnational space, paying particular attention to whether new criteria of democratic recognition and participation are emerging from the legal provisions and practices of EU citizenship. In this chapter, I shall look at two other strategies aimed at establishing a role for European citizens. The one associated with the Charter was mainly intended to define the subjectivity of European citizens in so far as they are granted specific rights within the European legal and political space. The one pursued through the formulation of a European Constitution was intended as part of a process through which the European *Demos* might establish itself. The thrust of my argument is that both

strategies were pursued hesitantly, if at all, by the European political classes, a fact that can be regarded not only as a failure of leadership, but also as reflecting both the mixed nature of the European polity – still divided between supranational and intergovernmental *modi operanda* – and the complex pattern of allegiances and aspirations characterising the citizens and the peoples of Europe. The considered judgements, in relation to the issue of citizenship, which I develop in the two main sections of this chapter are, respectively, that the 'Charter strategy' was inherently *ambiguous*, while the 'Constitution strategy' was *timid*. However, as I briefly argue in the concluding section, their partial failure does not necessarily imply an entirely negative scenario. For, first, constitutional politics more than normal politics tend to blend interest politics and symbolism, so that their result cannot always be judged unequivocally and in the short term. Second, the contested and uneven path of European constitutionalisation may not be, in itself, a bad thing for the construction of democratic citizenship in Europe. Whether this is actually the case, only time can tell.

It is evident that, the decision to write the Charter and that to provide the European Union with a formal constitutional text were part of a self-conscious attempt to establish a more definite political structure, thus offering a concrete way for European citizens both to identify themselves with a European-wide polity and to become aware of the broad terms of their own membership of the Union. Whether such attempts may bear any fruit in the long run, it is difficult to say. But, indubitably, the drafting of the Charter and the subsequent constitutional convention have marked the beginning of a proper constitutional debate in Europe. Such a debate, previously restricted to a small group of politicians and academic circles, has progressively, though decisively, acquired *political* relevance. This is confirmed by the dramatic nature of the Constitutional Treaty's ratification process. What makes the constitutional debate politically relevant now, in comparison to only a few years ago, when the academic debate was no less rife, is that the constitution has become a concrete political objective even in the eyes of those who oppose it. This does not imply an agreement on the substance of the issues involved, but it signals the emergence of a common ground on which constitutional issues can be discussed, a common ground represented by the diffuse perception that some of these constitutional issues are important, while their resolution must involve a new level of public awareness. Of course, such a perception is not universally shared. Some are convinced that the constitutional debate is a self-inflicted diversion for which the European political class may eventually pay a heavy political price, while they believe that it would be better for EU politics to return to business as usual (Moravcsik 2005). By contrast, others, who are supportive of both the Charter and the Constitutional Treaty, fear that the European public may reject these constitutional moves on the basis of an assorted number of nationally based prejudices and circumstances, so that they too

paradoxically prefer the new phase of European politics to be conducted within the restricted circle of the Eurocrats and the national elites. I shall return to this series of attitudes in the concluding section of this chapter. For the moment, I shall concentrate on whether the processes of writing the Charter and the Constitution have contributed to – or failed in – the establishment of a deeper European citizenship.

The Charter strategy and its ambiguities

Meeting in Cologne in the early June of 1999, the European Council decided to set up a body whose task was that of drafting a EU charter of rights. The two main questions that such a decision and its implementation pose for the promotion of EU citizenship concern the scope of the Charter, and its substantive input to the formulation, interpretation and application of rights at the European level. In this section, I shall examine these two themes in turn.

Why the Charter?

There are at least three main reasons that either implicitly or explicitly have been advanced as a justification for the adoption of a fully fledged text enunciating the fundamental rights of the European citizens. One takes the Charter to be an instrument for making European citizens aware of their own standing and rights within the EU legal and political environment. A second sees the Charter as representing a shift in the formulation of the main aims of the European Union, and hence of what the Union means, or should mean, for its citizens. A third, finally, sees the Charter as the way of establishing an effective mechanism for rights-protection at the European level. Each of these interpretations tends to put a certain emphasis on a rights-based conception of citizenship, though, in truth, none of them needs to rely on such a conception in order to sustain their particular interpretation of the Charter's scope. All of them, however, assume that the Charter greatly advances the cause of European citizenship.

The first, and most obvious interpretation takes its cue from the official document approved at the Cologne meeting, where it is said that 'the Heads of State or Government agreed … that it was necessary, at the present stage of the Union's development, to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens'.[2] This view suggests that the Charter's rationale lies in making rights 'visible'. Although the rights were already enshrined in some of the founding Treaties of the Union (Articles 6 and 7 TEU), neither the European citizens nor the European leaders would seem to be fully aware – or so this interpretation suggests – of their role as guiding elements in EU policy making. In many respects, this interpretation is the one to have prevailed both in the working of the Convention and in the final decision taken at the Nice IGC in December 2000 to limit the Charter's applicability and

significance by avoiding its formal inclusion in the Nice treaty. In line with such an interpretation, the Charter was only accorded a declaratory status, which made it neither strictly justiciable in form, nor innovative in substance.

Such an interpretation, however, tells only part of the story. If the Charter's rationale was exclusively to collect and systematise the fundamental rights already inscribed in the European legal system, it becomes harder to understand why this was not simply accomplished by appointing a technical committee under the Commission's supervision. It fact, it would seem that that there was a fundamental ambiguity in the conception of the Charter from the very beginning. This was not simply intended as a technical document drafted *for* the European citizens; but also as a political document *by* the citizens of Europe, meant in part to legitimise the growing process of European integration. Such a view was de facto captured by the decision taken in one of the first meetings of the group of representatives chosen to draft the Charter, to rename themselves as the 'Convention', a far more evocative and historically resonant title than the original 'body' (in other European languages: *Gremiums, enceinte, organo*), which sounded rather bureaucratic in both function and scope. Indeed, throughout the Convention, there was a growing feeling amongst many of its members and participants that it was possible to push the parameters fixed at Cologne outwards, and draft a document with constitutional ambitions (hence innovative in both substance and form), which could eventually become the preamble for the future Constitution of Europe. In the event, this is what happened, although the text of the Charter was eventually integrated as Part II of the Constitutional Treaty in 2004 rather than as its preamble.

With hindsight, this appears as a different construction of the 'visibility' argument, suggesting that in making the rights of the citizens visible, the Charter was in fact the first step towards a Constitution of Europe, laying the normative foundations for the Constitution, and offering an alternative procedure to the IGC for settling major institutional issues at the EU level. Although this remained a minority view, it offered a powerful ideal narrative, stressing the symbolic value of the Charter, placing it firmly within the European constitutionalisation process, and suggesting a possible resolution to the democratic deficit. Indeed, for some (Rodotà 2001), there was more than symbolism at work in the Charter, for they considered the sanctioning of the fundamental rights of the European citizens as a way to give juridical substance to the European *Demos*, thus cutting the Gordian knot of what comes first, the *Demos* (the European people), or the political unity of the state (the European democratic state).

In one respect, and this was part of its appeal, this kind of reasoning captured the importance of the new chapter in the European constitutional process opened up by Maastricht and Amsterdam, which required a more direct approach to the legitimacy of the integration process. But, as may

become clearer when we discuss the constitutional draft, it failed to see that such legitimacy does not operate in a political and institutional vacuum, for legitimate forms of social, political and juridical subjectivity are already in place at various levels in the European Union, and even more evidently at national levels.

The other two justifications often put forward to explain why a Charter of rights was needed are more concerned with its substance than its practical and symbolic role. Since they both relate to the effects of the Charter on the European rights regime – the second theme of this section – I shall only discuss them briefly. One justification emphasises the *social* value of the Charter, for it is argued that, by formally establishing human and citizenship rights, it offers a counterweight to the dominance of the rights of economic freedom, and the free market philosophy, which have so far dominated the integration process. In other words, it was hoped that by enshrining a broader conception of rights in the Charter, this would contribute to determining both the direction of policy making in the European Union and to shaping the expectations of the European citizens. It is, however, remarkable that no significant step towards a more 'social' Europe were made during the brief season, at the end of the 1990s, when almost all governing parties in the Member States were left-of-centre. If anything, the way in which both the stability pact and monetary policies were 'protected' against political cycles suggests that there was a willingness even in social democratic governments to entrench neo-liberal macroeconomic choices at a European level against more socially sensitive policies. This failure to press on with a more 'social' Europe is particularly telling, for at the time the centre-left dominance offered a particularly favourable context for turning the European Union towards more socially oriented policies on at least three grounds. First, and most obviously, because the centre-left dominance of national politics made it possible, at least in principle, to find a substantive agreement on a kind of 'new deal' in EU politics. Second, because most of the left across Europe seemed to have abandoned its negative view of European integration as mainly driven by capitalist forces and objectives, while it now considered the Europeanisation of politics as part of a progressive agenda. Finally, because the New Labour government in Britain, besides being one of the main point of reference for the 'Third Way' kind of politics that most of the centre-left governing parties seemed to advocate, had promised to put Britain at the centre of Europe, thus removing what had seemed until recently a powerful obstacle – in the form of the veto of one of the big Member States – against any attempt to co-ordinate social policy across Europe. As it turned out, all three conditions were both temporary and in a way illusory. Moreover, it should be noted that social democratic governments, above all those in power in Northern European countries, seemed reluctant to transfer social policy decision making to the European level, perhaps because their fear that such a transfer may result in even more

free-market oriented policies. Indeed, this would seem the main reason that has motivated the majority of the Norwegian electorate against joining the European Union.

The other substantive justification for the Charter considers it as a form of rights protection. For this to be distinguished from the 'visibility' argument, however, it needs to be showed that this is true in practice, and that the Charter makes a real difference to rights protection in Europe. In fact, before embarking on the drafting of the Charter of fundamental rights, a series of reports on human rights policy within the Union were commissioned.[3] None of them suggested that human rights were not formally recognised in the Member States, nor did they express concern about the ability of the European Court of Justice, for instance, to base its case law on a recognised body of rights broadly shared by the Member States' legal systems and cultures. Most of the proposals emerging from these reports were more concrete, though less eye-catching, than drafting a charter. They comprised measures to improve rights monitoring within the European Union, accession of the union to the European Convention on Human Rights, the setting up of a Commission for human rights within one of the Directorates. These measures would have ensured scrutiny by external or specialised bodies, and the inclusion of measures to promote human rights at the centre of the EU decision-making structure. Yet these practical proposals proved too controversial to be adopted.

Overall, the substantive reasons offered for the drafting of the Charter confirm its ambiguous nature, caught as it is between its underlying aspiration to recognise the importance of citizens' rights as part of the new phase in the European integration process, and its very limited capacity to empower European citizens. As an instrument for the promotion of social policies in Europe and for the protection of human and citizenship rights, the Charter seems to be little more than a rhetorical statement, whose impact on the European citizens' civic standing is clearly limited in scope.

The Charter's impact

In spite of its limits, and of its declamatory form, the Charter has now acquired a semi-official status, which, at least from a rhetorical perspective, makes it a point of reference for both legal advocacy and policy action. So, what kind of impact one may expect from it? As explicitly sanctioned by Art. 51 (1), the Charter is a status quo document, which brings together rights already sanctioned by the European legislation.[4] The limitation of the proper jurisdiction of the Charter to EU law strictly conceived is a point on which the Convention remained divided. Furthermore, there is no evidence that the Charter and its approval may settle the intricate issue of competence-competence.

There are other less than satisfactory aspects of the Charter. It is paradoxical, for instance, that the attempt formally and solemnly to fix a list of

fundamental rights runs the risk of freezing a limited group of rights in time. This is partly due to the fact that, as already noticed, the Charter has been drafted as a status quo document. As such, its underlying vision is biased towards economic and other rights that were functional to economic integration, while contrasting with a broader, social welfare vision of rights, which was constitutionalised (or politically entrenched, as in the British case) in large part of Europe after 1945. The Charter risks therefore freezing EU rights twice, first by fixing them at the current state of play in the European Union, and second by fixing them to a vision that most national constitutions and legislations have long overcome. To this it may be objected that, as for any other document of the same kind, the Charter can be read as the 'floor' rather than the 'ceiling' for rights protection, and that in this sense it neither increases nor diminishes the rights already sanctioned at national level. But if one accepts this position, it is hard to see what progressive role the Charter might play in the promotion and protection of rights in Europe. Indeed, it is more likely to produce policies that systematically remain below the average European level of social protection, at least in those states which were EU members at the time when the Charter was drafted. Article 51 (1) of the Charter, for example, restricts the Charter's applicability to the actual implementation of EU policies and so is narrower then the ECJ's current view that it can adjudicate on the consequences for rights of measures by Member States that might effect the implementation of EU policies.

An issue closely connected to the question of the substance of the rights established by the Charter is that of their 'meaning', which is to be distinguished from the issue of their implementation, though the two are closely connected. For obvious reasons, documents such as the Charter cannot but be very general in their formulation, raising complex questions of interpretation and specification, which are distinct from other contentious issues, such as those of possible conflicts between rights or their compossibility. The generality issue is unavoidable, but not decisive, in so far as it is usually overcome by the contextual way in which such general documents acquire meaning within the framework provided by law, legislation and broadly shared legal and political cultures. The meaning of such rights may remain contested, but their contextual specification offers instruments for the citizens to claim, exercise and occasionally fight for the widening of their rights.

Although there is a growing body of EU law and legislation, many of the rights listed in the Charter run the risk of being vacuous statements. There are two reasons for this. One, as suggested, is that EU law and legislation are still limited in their scope and extent, the other that it is very difficult to define the discursive context within which the rights established by the Charter can be given meaning. If one looks, for instance, at the right to free education (Art. 14), it is rather difficult to see the implications that can be drawn across Europe, where the question of freedom of education is

intimately linked to institutional and cultural history, which defines not only the right itself, but also the context within which debates and contestations about this right take place. There is no doubt that, by stating the right at such a general level in a broader European context may have the salutary effect of forcing different institutional and cultural traditions to confront each other, perhaps helping to establish better practices and better medium-range principles, but this implies a more direct effect of the Charter over national law and jurisdiction, something that is, however, rejected by Art. 51, and can be resisted on the basis of the principle of subsidiarity. In other words, the rights established by the Charter are even more underdetermined than it is usually the case for such documents. In this sense, the Charter looks less like a constitutional bill of rights for a political entity, such as Europe may aspire to become, and more like a Declaration of rights operating at an international level across a group of nations. It thus wears on its sleeves the very ambiguity that it was meant to overcome.

The limits of the Constitution strategy

As we have seen, one of the main reasons for the ambiguity underlying the Charter is its reflecting, rather than resolving, the ambiguities and deep divisions characterising the European polity. It would therefore seem – and indeed this is what many have either argued or hoped for – that the writing of a European constitution, with the inclusion of the Charter in it, would address precisely these ambiguities by giving political 'finality' to the Union.[5] There are two aspects to this argument that are relevant to our discussion. One is the role that the constitution, and more precisely constitution making, plays in either the generative or the transformative experiences of a polity; the other, germane to the central issue of this chapter, is the role that the citizens play in such a process. In democratic politics, the two questions are closely connected.

A European constitutional moment?

Although proposals for a European constitution have been advanced for many years, as it has already been suggested, this has only recently become a politically relevant issue. The process started in 2001 with the Laeken declaration, and, on the face of it, some of the practical reasons presented on that occasion resemble the 'visibility' argument examined in connection with the Charter. Here the issue was not to make explicit a rights regime already established by the treaties, but to organise the many provisions set up by successive treaties in a more coherent framework and, particularly, to address the need for an institutional and decision-making structure capable of dealing with recent waves of enlargement and an increased level of political integration.

Part of the trouble with this constitutional process, however, has been that the European Union already has a constitution of sorts. Admittedly, this is not a properly written text (not, at least, in the form of a self-styled constitutional document). It is both incomplete and in flux, in the same sense in which the scope, operations and territorial boundaries of the Union are still undefined. Moreover, and partly for its piecemeal and non-documentary quality, there is confusion over what its ground rules and values are (Shaw 2000: ch. 5). Perhaps because of these alleged limitations, it was thought that an answer to the practical problems faced by the Union could be found in an agreement over a *formal* document, enshrining the fundamental principles of the Union and setting up a clear division of powers and competences between both the institutions and the transnational and national levels. At one point, some of the eurosceptics even considered this to be a viable option, in the hope, from their own perspective, that it might stop the drift of powers and competences from the Member States to European institutions.[6]

As it was for the 'visibility' argument, behind the more instrumental considerations supporting the drafting of a written constitution, there lay a powerful ideal narrative that saw in the making of the (formal) constitution a way of giving normative grounding to the European polity and to the idea of a European *Demos* (Fischer 2000; Habermas 2001). One particularly successful form of such a narrative of the normative properties of constitution making is that associated with the work of the American constitutionalist Bruce Ackerman (1991). Although his is mainly an interpretation of the American constitutional experience, on the face of it, it seems amenable to more universal applications.

At the core of Ackerman's theory of constitutional moments, there is a dualist vision of democracy, characterised by a two-track law-making process, one for 'normal' and the other for 'constitutional' politics. Normal politics is mainly oriented towards substantive policy making, while constitutional politics sets the general legal and constitutional framework within which the polity functions. As Neil Walker has suggested, in Ackerman's vision constitutional moments are characterised 'both by *discontinuity* and by *transformation*' (Walker 2004a). In this respect, constitutional moments mark a significant difference between two periods of normal politics, and can therefore be judged by the effect they have on the way in which normal politics is conducted after they have taken place.

However, for Ackerman, there are other important characteristics that need to be in place for constitutional politics to be both effective and legitimate. These include a deep, broad and decisive popular mobilisation, capable of articulating its transformative project in the language of public reason; a sustained period of public deliberation; and the elaboration of a coherent set of principles, which can function as a credible guide for normal policy making for an extended period (Ackerman 1991: 290). These characteristics

derive from Ackerman's own view of the quality of participation in modern democratic societies. According to him, though democracies cannot rely on the full commitment of their citizens in the ordinary political process, they must nonetheless expect citizens to make their own clear (and sovereign) voice heard in important and decisive moments of politics.

Such properties, which mark off constitutional from normal politics, can be judged as events unfold, even though they may need to be validated by their capacity to produce certain kinds of effects for the constitutional moment to succeed. In fact, Ackerman also contemplates the possibility for constitutional moments to end in failure, something that occurs in those cases in which the proposed transformations do not reach the codification phase (Ackerman 1991: 267). Thus, the normative validity of constitutional moments is not merely consequential. Constitutional politics is legitimate not merely because it produces something new and distinctly different, but because it is able to express, at particular moments, the generative force of democratic sovereignty. Its validity needs therefore to be fully inscribed in Ackerman's more general vision of dualist democracy as a system of legitimate government. This assumes that ('We') the people are able to engage in a higher form of law-making at certain historical junctures, thus making it possible for the citizens to conduct the normal (and less demanding) business of interest-driven politics in between such junctures.

When seen in its entirety, Ackerman's framework offers a number of procedural criteria for the evaluation of the present phase of constitution making in Europe. From such a perspective, the Laeken process can be assessed by looking at the internal dynamics and deliberative and mobilising qualities of the different phases through which constitutional politics develop (Fossum and Menéndez 2003). The tests through which we can put the current constitutional process are mainly interpretative, while it is still too early to judge its effects, independently of whether or not the process will be successfully carried through. The application of Ackerman's framework to the European context, however, presents two fundamental difficulties. First, as already observed, the legitimacy criteria outlined by Ackerman are parasitic on his general theory of a dualist democracy. Thus, it would appear that the application of his evaluative framework to the European Union depends on whether this can be considered a kind of dualist democracy – which would not yet seem the case – or whether at least it may aspire to become one. In either case, and specifically in the latter one, the Constitution of Europe cannot be conceived so much as a constitutional moment *in between* two phases of ordinary politics, but more as a *foundational* moment, from which a dualist democracy may eventually emerge. The second difficulty concerns the emphasis that Ackerman places on the sovereign subject ('We the People') in the process of constitutional politics. This difficulty is particularly cogent if one assumes that the European constitution is a *foundational* Moment, standing at the start of a series of cycles of ordinary and constitutional politics.

The adoption of Ackerman's model therefore requires the solution of what is still a very open question in the European debate: who is the *subject* of the European constitution? This is none other than the much discussed question of the European *Demos*: whether it is possible to envisage the formation of a European people, or whether differences between European peoples can not and should not be overcome. So, once again, we have come full circle in our discussion. The problem that the European constitutional moment was meant to solve turns out to be the prerequisite for it to be regarded as legitimate.

The citizens and the Constitution

The question we are left with is where to find the normative resources on which to establish the constitutionalisation of the European polity. As we have seen, neither the Charter of rights nor constitution-making seems sufficient to establish democratic citizenship across Europe. Contrary to the experiences of national constitutionalism, there is no pre-political founding myth on which to fall back. Moreover, the likely *subjects* of the European constitution (the states and/or the peoples of Europe) have an already well established legal and political personality (and their own recognised sovereignty) that cannot be easily dissolved in a larger and undifferentiated Europe. It is this kind of reality that the contitutionalisation of Europe and the construction of European citizenship need to accommodate. In fact, a more realistic assessment of the present phase of European constitutionalisation and of its impact on democratic citizenship needs to consider three interrelated issues on which there is more disagreement than may perhaps initially appear: the appropriateness of the institutional instruments to be used as part of the process of constitutionalisation, the level of citizens' participation and the timescale of the process.

Disagreement about the institutional forms of European constitutionalisation concerns the two related issues of the proper institutional channels through which to conduct it and the kind of public deliberation and decision making needed for it. In this respect, the adoption of the Convention method – even in the half-hearted way in which it has emerged – has played more than a symbolic function in correcting the previous practice of constitutionalisation. In the past, constitutionalisation – if it can be so called – had mainly progressed as the result of the interpretative function of the European Court of Justice and of the solidification effect produced by successive treaties negotiated at an intergovernmental level. The Convention method has had the effect of widening both the debate and the participation in the process, potentially involving the whole of the European citizenry. It therefore makes a claim for a constitution that is *generative* rather than merely *interpretative* (common-law style) of constitutional principles and conventions. It also partly re-defines the character of the participants in the 'constitutional' debate by asking them to take on a new role as members

of a 'common body', the Convention, instead of simply acting as representatives of particular national interests. Moreover the broader representative nature of the Convention (also involving the European and national parliaments) and its more public, and deliberative, procedures seem to promote the idea of a constitution of the European people(s).

But this is only part of the story. Indeed, citizens' participation and representation in the Convention has been rather indirect. The selection process has been a low-key affair, conducted entirely by and within the normal governmental and representative institutions. There has been little concern over either the low level of public interest shown in the work of the Convention, or the fitful way in which the press and the media have covered its proceedings. Some of the initiatives organised to give it public visibility were fairly perfunctory, as was the case with the Youth convention, while the attempt to involve citizens more directly through the participation of civil society organisations was largely symbolic and not thought out properly. It was significant that, while the Convention was still in session, denunciations were made at the Social Forum organised in Florence of the aloofness of the convention process from the debate about Europe and its geopolitical place in a globalised world – an issue that the Social Forum's participants regarded as of true concern for the peoples of Europe, as indeed some of the national debates during the ratification process have later demonstrated.

The only formal role assigned to citizens as part of the process – and this only in a number of Member States – has been that of sanctioning the constitution through referenda. Citizens, however, have been put under heavy pressure not to scupper the whole delicate balance of agreements and compromises reached at the European level. As the French and Dutch 'no' votes demonstrated, this strategy backfired. Contrary to the previous experiences of the Danish referendum on Maastricht and the Irish on Nice, it will not be easy to dismiss the popular rejection of the Constitutional Treaty. Part of the logic in calling referendums in the Danish and Irish cases was that popular consent was implicitly regarded as a rubber stamp for the agreements already reached between these and the Commission. In fact, the real intention of the national governments was to preserve the role of the IGC as the ultimate place where agreements could be both made and unmade. This, as some would argue, was still true in the case of the Constitutional Treaty, where the formal role of the IGC ultimately kept the process in the hands of the national executives, making the Convention method (or for that matter, popular ratification) a practical irrelevance. Such a conclusion, however, is not fully warranted. The truth lies somewhere in the middle, with the constitutionalisation process no longer in the exclusive hands of the governments and the European Court, but neither in those of the citizens organised as a 'constituent' power.

The extremely limited role allowed for citizens' direct participation – which is the second issue of wide disagreement – is sometimes attributed to

the relative lack of urgency and momentousness with which institutional reform is seen by the European citizens, and the difficulty of arousing popular interest in rather complicated issues of institutional engineering that seem to have neither a direct nor any tangible impact on policy. But this is clearly not true of the series of momentous decisions taken by the European Union and the Member States over the past few years, and which have precipitated the present round of constitution building. Enlargement and monetary union are constitution-making events with clear policy implications, and yet public discussion at the European level has been carefully managed and often curtailed. Where it has surfaced at national level, as in the British case about the Euro, it has been due more to the presence of a strong popular opposition (often opportunistically manipulated by part of the elite opposed to any form of integration) than to a genuine openness to a considered and well-informed public debate. Indeed, the full social and political implications of some of the policy and institutional decisions taken as part of the establishment of a European common currency, such as the 'stability pact', the role of the European Central Bank, and the price-stability criteria, have only just begun to be publicly debated. The rigidity of some of the structures and policies put in place has given rise to calls for reform from many, often quite disparate, quarters. However, these calls have met with strong resistance – not just from the institutional centre of the European Union, but also from many Member States, who fear that any change may undermine the whole structure of macroeconomic policy put together in the wake of monetary union, whose legitimacy it is felt rests more on the painstaking way in which administrative decisions were arrived at than in any clear popular support.

It is evident that at a macro-political level, Europeanisation has resulted in a timid approach to the virtues of democratic debate and democratic decision making. This timidity is largely due to the difficulty of imagining democracy in conditions where seemingly there is no unified *Demos* capable of speaking with a single voice. As a consequence, the European citizens have either been kept outside the arena where the main decisions are made, or, when this has proved impossible, they have been consulted separately, thus reinforcing the sense that the only legitimate arenas for the exercise of democratic influence are those provided at national level. Things have not been different in the constitution making process attempted during the last couple of years, thus confirming the scarce sensitivity to issues of legitimacy and participation that permeates European-wide politics.

In terms of popular participation, as has already remarked, this has been limited to the ratification referendums, though only in those Member States that have opted for this procedure instead of approval from the national parliaments. Neither before nor after Laeken, however, has there been a sustained public discussion on the forms of *ex ante* legitimation most appropriate to the task of embarking in the constitution making exercise.

A traditional form of *ex ante* sanctioning would have been the direct election of citizens' representatives to the Convention, instead of relying on second-order forms of representation such as that provided by the members of the Convention nominated by either the governments, the national parliaments or the European Parliament. Such a course of action would have, perhaps unduly, made the Convention resemble a 'constituent' assembly, giving it the upper hand over the IGC. This was both politically and normatively questionable, for the intergovernmental dimension maintains a vital legitimating function in the European Union. However, some other form of more direct representation and mobilisation were both feasible and advisable. They would have subjected the Convention (and the IGC after it) to the discipline provided by a more definite popular mandate, which referendums on ratification cannot easily provide, for representation in ad hoc assemblies established to perform a specific task lack the political discipline that regular elections confer on representatives in legislative assemblies. There were indeed other ways in which *ex ante* legitimation could have been achieved, raising in the process the level of public awareness. One option was to adopt a more visible and possibly contested procedure for the selection of the representatives of the national parliaments in the Convention. In the circumstances, the selection resembled more a form of co-optation, with no precise criteria established at either European or national level, and members selected through little publicised agreements between majority and minority parties. A second option was to have a consultative referendum across Europe, which would have gauged both European and national opinions, besides promoting a public debate on the general direction towards which the Union should go.

Forms of *ex post* legitimation were given equally little thought. A European-wide referendum on the Constitution, though advanced by some members of the Convention, was regarded as a non starter for both practical and normative considerations. Even allowing for some form of double or qualified majority, a single referendum would have imposed the majoritarian straitjacket, presupposing the existence of a single *Demos*. However, there was no discussion of alternative ways of reaching a more unified and politically meaningful result. For instance, on whether it was advisable for all Member States to put the Constitutional Treaty to national referendums, and whether national referendums should have been conducted across Europe at the same time. The latter idea was clearly rejected in the hope to facilitate an approval across Europe by carefully creating a snowball effect in favour of the Constitutional Treaty. The former idea, of having referendums at all, was strongly resisted by many of the European political elites, at least where this was not a constitutional requirement, and only acceded to out of political necessity and expediency rather than democratic conviction.

When we turn to the way in which the constitutional question was posed to the peoples or indeed the parliaments called upon to ratify the text, we

may consider the wisdom of presenting them with a single text, so putting them in the unenviable position of accepting the Constitutional Treaty without being able to express a view on some of its contents, or with a clear sense of what the Consitutional Treaty was replacing. In view of the lack of clear forms of *ex ante* legitimation, this becomes an important issue. It would have probably been preferable for the Convention and the IGC to come up with alternative texts to present to the IGC and eventually to the people and/or parliaments for ratification. Indeed, there was nothing in the Laeken mandate that suggested that the Convention should produce a single text. The decision to arrive at a single text was partly the consequence of the willingness, shared by many of the members of the Convention, to force the hand of the IGC, avoiding the danger that the government could cherry-pick from different proposals, settling for a low level compromise, which would have devalued the work of the Convention and possibly the entire process. Arguably, the drafting of more than one text would have increased the chance either for the process to stall or for the final text to be the result of messy compromises between national governments. By attempting to foreclose the IGC's options, however, the Convention also curtailed the possibility of a true political debate amongst the European citizens, leaving them with the only option of either taking the text of the Constitution as it is or leave it.[7] In the end, this proved a fatal mistake, as the French and Dutch referendums have demonstrated.

A third area of disagreement, which follows directly from the disagreement about the forms of constitutionalisation and the level of popular participation, is that on the timescale of the constitutionalisation process. This is no trivial matter, for it involves a fundamental difference between those who think of constitution making as an *event* and those who conceptualise it as a *process*. Paradoxically, those same federal supporters of the way in which the European Court of Justice had progressively upheld a new European constitutional order, have also welcomed the fixing of the constitution by the Convention. According to them, after a period of de facto constitutionalisation, we have entered a phase when a more definite constitutional settlement needs to be formalised in view of the profound changes introduced by the single market, monetary unification and enlargement. Moreover, it is often argued that both the legitimacy and democratic deficits need urgent attention, something that may only be achieved by fixing Europe's institutional architecture and the rights of the European citizens. This kind of argument, however, presents two problems. By accepting that a constitution of sort was already in place, it makes the present moment less foundational, thus posing the problem of what is the relationship between the past and the future constitutional order. By emphasising the legitimacy deficit of the European institutions, it becomes vulnerable to the counter argument that fixing the European constitution at this particular moment risks freezing the status quo, making it less acceptable to European citizens. A more

gradual process, instead, may be better at tracking and directing the political sentiments of the European peoples as they are asked to widen their sense of solidarity. It may also be more flexible and therefore better equipped at developing institutional arrangements so as to make them seem relevant to those policy projects and policy objectives in which citizens can more immediately recognise their interests and for which they may more readily mobilise.

There are two other important themes around which the disagreement about the timescale of the constitutionalisation process revolves. One is the question of the relevance of the issues at the centre of constitutional debates, and the other is the precise impact that constitutional politics makes when compared to ordinary politics. On the issue of relevance, Joseph Weiler, for instance, has been particularly insistent on the way in which constitutional mobilisation has diverted attention from the really momentous changes that have occurred, or are occurring, in the European Union, and which, as already suggested, have been managed either pragmatically or by taking decisions by default, making sure that the citizens were excluded from debating and deciding them (Weiler 2002). Enlargement, the single currency, the stability pact are examples of important and 'momentous' policies and institutional developments, on which there has been little public debate. These have been the hard choices confronting Europe, on which the formal constitutional process makes little if no impact.

Weiler's argument on the 'irrelevance' of the European constitutional debate can lead to two different conclusions. One of more local consequences is that there has been a failure of the European political class concerning which issues to put at the centre of the public debate. The other, of a wider ranging nature, would suggest that there is no difference between constitutional and ordinary politics, and that the latter can have effects as momentous as the former. There is no space here to develop a discussion of this argument, but I wish simply to note that the difference is more strategic than categorical. In a broader sense, constitutional politics is the kind of action that a series of favourable circumstances converge to create by offering a 'window of opportunity' within which it is possible to operate so as to determine the character of a polity and of its regime for a relatively long period of time. From this perspective, constitutional politics can only be judged consequentially, as it was discussed earlier. But there are a number of other important elements that follow from this 'strategic' sense, which should also be noticed. First, that constitutional politics is not tantamount to producing a formal constitution, a document, that is, that has the formal qualities of constitutional law, distinct from ordinary legislation. The object of constitutional politics is more often the interconnection between the political (the more substantive organisation of power) and the formal constitution. At times, it may concern changes in the 'material' constitution, by which one should understand important pieces of legislation or of the

organisation of the state, which do not need to be part of the formal constitution itself. In view of this, it is impossible to define the province of constitutional politics in a way that excludes ordinary politics. Second, because of its partly consequentialist character, constitutional politics finds its validation retrospectively as well as prospectively, in so far as ordinary politics makes the constitutional order its own point of reference.

In relation to the more 'intrinsic' properties of constitutional politics, these can be seen as a possible effect of the 'window of opportunity' contingency and of the capacity of both leaders and citizens to operate in such a way as to exploit the moment by organising political attention and activating mechanisms of broader acceptance and allegiance within the community (Castiglione 1995; Olsen 1997: 217–20). In the modern conditions of democratic societies, sustained public debate and the mediation of 'strong publics' make an important contribution to the emergence of broad forms of principled and strategic agreement, and practical convergence, at least in the long term (Eriksen and Fossum 2002). But all this does not necessarily require a higher level of consensus, which is almost impossible to achieve even between reasonable citizens, in view of their diversity of values, interests and empirical assessments, besides considerations on the complexities of social choice and its subject matter. Agreements in constitutional politics, as in ordinary politics, are points of equilibrium often reached through a variety of considerations and strategies, involving arguments, bargaining and negotiating processes, compromises, incomplete theorisation and strategic arguments (Elster 1996; Bellamy 1999; Bellamy and Schönlau 2004; Magnette 2004). What is sometimes considered as the binding character of constitutional consensus is at its origins – even when it emerges from truly exceptional moments of collective crisis and mobilisation, which are indeed rare – the product of a number of more or less principled compromises. At first, these compromises result in a *modus vivendi*. Over time, and by the effect of common and continuous engagement both in the business of ordinary politics and in ongoing deliberative and decision-making experiences, such a *modus vivendi* may consolidate in a shared framework, always open, however, to different interpretations or to sudden collapse – as the experience of constitutional democracies amply testifies. To conclude on this point, if constitutional and ordinary politics cannot be clearly and categorically distinguished from each other either on their substance or because of their properties, and if nonetheless there is a more strategic sense in which such a distinction can occasionally become operative, there is no simple way of saying whether constitutions, and their normative appeal, are the product either of extended processes or of decisive events. Indeed, it is probably safer to assume that both aspects tend to contribute to the making of a constitution, a fact that may indeed offer greater opportunities to the ordinary citizens to influence the outcome.

Conclusion: symbolism and politics

At the end of this survey of the effects that the recent phase of constitutional politics is likely to have on the construction of European citizenship, one may be tempted to conclude that neither the writing of the Charter nor the drafting of the Constitution will make a great difference to it. In spite of its resonant language and impressive catalogue of rights and liberties, the Charter is a very limited document in both its reach and application. Hence what I have here called its ambiguity. The constitution-making process, though raising some important questions about the nature of the political community at the European level, and though conducted in a remarkably open way, has never managed to generate a significant level of public debate and mobilisation, at least during the drafting phase. Hence, its fundamental timidity in presenting to the citizens and the peoples of Europe an image of what the European Union is for, and why the European citizens and the European peoples may have a stake in it. The case for the European constitution has mainly been made in the negative, by suggesting that without a constitution the European Union could no longer carry on. Conversely, all those major issues and decisions that make the European Union relevant to European citizens have been carefully eschewed within the debate as too controversial and divisive.

In fact, both the Charter and the Constitution have become rather empty shells, whose main value is that of being the symbols of the process of political integration in Europe. As such, they have become the easy targets of those either opposed to such a process or dissatisfied with some of its aspects. The paradoxical result is that the mobilisation and public debate that the drafting of the Constitution has not been able to achieve, because of being in itself devoid of a recognisable positive content for the EU citizens, may nonetheless come as the effect of the political confrontation over the Constitution as a symbol of what the integration process means in the lives of the citizens and peoples of Europe. The 'window of opportunity' in which European constitutional politics may operate is not the result of either the contents or intrinsic meanings of the Charter and the Constitutional Treaty. It is not even the result of the decision to somehow accelerate the process of political integration by having a constitution and a charter of rights, since, as we have seen, neither documents seem capable in themselves to promote such a process. The present 'window of opportunity' is the result of the accumulation of a series of important changes that have occurred during the last 15 years. They comprise both the transformation of the international system and internal developments to the European Union. Probably the most important change was what followed the collapse of the soviet regimes in Central and Eastern Europe and eventually in the USSR. This made it possible, and perhaps even imperative, for the European integration process to acquire a more definite political connotation. From a more internal

perspective, such a change occurred as a consequence of the acceleration of the integration process following the establishment of the single market and of the relative impetus produced by the Maastricht Treaty. The geo-political scope of these developments has increasingly become evident as the European Union has enlarged both eastward and southward, without the process yet coming to a definite end. From a more socio-economic perspective, European integration has greatly deepened as the result of important decisions such as monetary unification, the handing out of monetary policy to an autonomous Central European Bank, and the fixing of a substantive policy for economic stability based on price stability rather than full-employment. Finally, particularly after 9/11, the need for a more co-ordinated, if not common, international presence has become compelling in the face of the changing nature of international security and of its public perception. Perhaps more dramatically, the war in Iraq has highlighted the need for a more co-ordinated, if not common presence of Europe on the international scene, reflecting some of the shared sentiments and principles of the European peoples, and yet, at the same time, it has shown how difficult it is to overcome national divisions in this field.

Because of the accumulation of this array of new challenges, and because of the series of important decisions that the European elites have taken without full consultation with their peoples, it was obvious that Europe needed a constitutional debate on its future. The Charter and the present Constitutional Treaty may not have been the best basis on which to have one, indeed as discussed in the previous section, the Constitution and the Charter may have partly acted as diversions, but they have also been instrumental to open the Pandora box of democratic mobilisation on the European question. As I suggested in the introductory section, this is something that both those who support a more technocratic and intergovernmental view of European politics, and those who are in favour of a more federal, but equally elitist, vision of Europe try to resist. For both of them, democratic legitimacy takes second place after a more substantive kind of legitimacy that comes from the way in which European elites are able to produce policies in the best interest of the European citizens. However, it is illusory to think that the European citizens can be kept out of this debate for too long.

It is only the final paradox, as the French and Dutch referendums have demonstrated, that the political opposition to the constitution, rather than its unconditional support, may end up producing the long awaited engagement of the European publics with the project of European integration. Arguably, the present form of ratification of the Constitution has re-nationalised the debate about Europe and its future. This is not surprising, and it can be made the object of regret or of considered confirmation of where the likely place of democratic legitimacy still lies in the European Union, as the two chapters by Dimitris Chryssochoou and Richard Bellamy

(Chapters 11 and 12), which conclude this volume, do respectively. But the complex dynamics of public opinion over the European question both across Europe and within each Member State shows that this is very much an open debate, where ideological and national lines tend to cross in unexpected ways. In such a climate, there is obviously scope for a variety of competing visions of Europe, some of them pushing in opposite directions. The result of all this may be unpredictable, and occasionally not to our own liking. Yet, it would seem that there is no shortcut to a democratic Europe. This can only come when and if the European citizens are given a certain degree of self-determination over matters that may concern them either together or separately.

Notes

1. Research for this chapter was concluded while I was visiting research fellow at the Center for Democracy and the Third Sector (Georgetown, Washington DC), and is also part of the CIDEL RTD project under the European Fifth Framework Program. I am grateful to Jo Shaw and Richard Bellamy for their comments on a draft version of it.
2. From the EC Web site: www.consilium.eu.int/df/default.asp?lang=en, in the Introduction, under the paragraph 'Draft Charter'.
3. Cf. on this Weiler (2000).
4. 'The Charter of Fundamental Rights of the European Union' (2000/C 364/01) *Official Journal of the European Communities*, 18.12.2000.
5. On the issue of finality in the European Union, cf. Walker (2004a) and Castiglione (2004).
6. See, for instance, *The Economist*, 4 November 2000. For a discussion of this kind of 'sceptical' strategy in favour of a documentary constitution, cf. Walker (2004b), pp. 28–30.
7. An interesting, but no doubt by many considered utopian, possibility would have been the one proposed by Philippe Schmitter (2000) to stage a referendum on more than one text, with the proviso that the text that would enter into force for each Member State would be the one that got majority support in that particular state. This would, of course, presuppose the idea of a multi-speed Europe, and the formulation of compatible texts from which the citizenries of Europe could choose.

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Part II
Citizens' Voice and Interests

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5
Transnational Political Parties

Stephen Day and Jo Shaw

Introduction

This chapter examines the relevance of transnational European political parties to the processes of 'making European citizens'.[1] Up to 2006, there were eight main Euro-parties: the European People's Party (EPP – Christian democrats), the Party of European Socialists (PES), the European Liberal Democrats (ELDR), the European Green Party, the European Democratic Party (Liberal, Pro-federalist); the Party of the European Left (Communist, Post-communist, Democratic Left); Europe for alliance of nations (Nationalist) and the European Free Alliance (EFA – nationalists and ethno-regionalists). They are composed of parties from each of the EU Member States, in some cases more than one, as well as Member parties from a wider Pan-European base including Bulgaria, Romania, Norway and Switzerland. More recently established are the European Left Party (comprised of democratic left and communist parties) and the Alliance for Europe of the Nations (comprising Euro-sceptic parties). There have also been soundings on the far right (led by the Austrian Jörg Haider) about creating a Euro-party. Although linked to the European Parliamentary Groups, the Euro-parties are distinct entities that exist to fulfill a different type of role. As Thomas Jansen (2001: 25) quite rightly points out, 'European parties initially were children of the groups in the European parliament. This parenthood has from the outset ensured the groups' strong influence on party life.'

The aim of this chapter is to determine to what extent the Euro-parties are capable of playing a linkage role between the European Union as an emerging polity and 'European citizens'. In general, the notion of linkage rests upon both subjective and objective factors which set the guidelines of a party's existence: the relationship with individual citizens (the ideological or ideational dimension) and the relationship with the institutional architecture within which it is embedded (the institutional dimension). Within the constraints of the duality, this chapter aims to highlight a series of initiatives that have been proposed as mechanisms to strengthen the linkage capabilities

between European citizens and the Euro-parties. Linkage, in this context, will therefore be seen as a prerequisite for the further development of the role and significance of the Euro-parties.

In addressing these issues, there are a number of traps which it is important to avoid. First, we shall avoid the simplistically attractive route of advocating a transplantation of national representational forms and structures onto the transnational level. Second, we shall endeavour not to overstate the significance of the Euro-parties, as at present they only play a small role within the institutional architecture of the EU. Finally, we shall not expect them magically to shed the qualities associated with their hitherto elitist genesis (Day 2005). From that perspective, present-day developments should be seen as a process which has gathered momentum since the introduction of Article 191 of the EC Treaty by the Treaty of Maastricht opened up a small legal-political space by advocating a role for transnational level parties in the EU:[2] 'Political parties at European level are important as a factor for integration within the Union. They contribute to forming a European awareness and to expressing the political will of the citizens of the Union.'

The additional paragraph added by the Nice Treaty which came into force early in 2003 laid the ground for another period of accelerated change:

> The Council, acting in accordance with the procedure referred to in Article 251, shall lay down the regulations governing political parties at European level and in particular the rules governing their funding.

This bore fruit rapidly in 2003, with the adoption before the end of the year of a European Parliament and Council Regulation on the regulations governing political parties at European level and the rules governing their funding.[3]

Today Article 191 can be seen as consolidating recognition of the Euro-parties as actors within the EU. It is the extent and depth of that role that has yet to unfold. Some argue that by playing an enhanced role within the EU institutional architecture, built on linkage with national party members and EU citizens, the Euro-parties can help bring enhanced legitimacy for all concerned. A press release from the Party of European Socialists (PES) in January 2001, for example, claimed that 'without the active participation of European Political Parties there is a democratic deficit. If we want to bring Europe closer to the people we need active parties on a European level. For this, legal criteria and transparent rules are necessary' (PES 2001).

Similar statements can be heard from all the parties as they herald themselves as part of the solution for overcoming the democratic deficit. Today, what is becoming increasingly apparent is that, in conjunction with the institutional spur given to the Euro-parties by the recently adopted Regulation on funding, increasing emphasis is being given to the issue of linkage. The remainder of the chapter will deal with three interrelated themes. First, we will look at the Euro-parties as representative entities. Here

we will highlight some of the difficulties that they face in this endeavour and differentiate between what we term 'parties playing a representative role' and 'parties playing a facilitating role'. We will then look at a number of initiatives including the putative use of transnational candidate lists, connections with civil society, and the fostering of linkages with national member party members and individual/e-membership as measures that seek to address the representative deficit. Finally, we will highlight one specific initiative within the Party of European Socialists (PES), pointing out its aims and the difficulties that it faced.

The Euro-parties as representative entities

Recognition of the need for linkage and engagement with Europe's citizens is not new and was an integral part of the 1996 *Tsatsos Report* before the European Parliament which was unequivocal about the need for this dual approach:

> European political parties organized and acting on a transnational basis are necessary so that a genuine European citizenship may emerge which monitors, discusses and influences the expression of political will at European level.[4] [It went on to stress that they had to be] more in terms of goals and organization than a mere electioneering organization or an organization that merely supports a political group and parliamentary work.[5]

The double paradox for the Euro-parties is that they are being heralded as entities that could be used to help overcome the oft-cited 'democratic deficit' at a time when the citizens of the EU-25 are pulling back from providing consent to the EU-project[6] and at a time when people are de-linking from political parties per se. As Ricardo Blaug puts it (2004: 33), 'Once again, we are left to contemplate our ineffectiveness in deepening democracy, our lack of understanding of civic disengagement and our blindness to the causes of mistrust in government.' Compounding these difficulties is the reception they often receive at the EU institutional level where they are seemingly bypassed by most of the key actors. The Commission's White Paper on European Governance, for example, focused on the need to enhance civil society claiming that 'Civil society plays an important role in giving voice to the concerns of citizens and delivering services that meets people's needs' (European Commission 2001: 16). The Euro-parties, in contrast, were dismissed in a tired, oft-cited, line reciting, yet again, that 'European political parties are an important factor in European integration and contribute to European awareness and voicing the concerns of citizens' (European Commission 2001: 16). However, as so often, having made that statement the Commission's document declined to place any flesh on the bones to

give meaning to the rhetoric. Even relations with their own European Parliamentary Groups are far from harmonious for the Euro-parties. According to one leading figure 'it is always the European Parliamentary Group that is invited to prepare things for us. … We are not included … we are asking to be involved before decisions are taken.'[7]

We sympathise with those who have argued that there is a plausible link between the development of active, effective and campaigning parties at the European level and the enhancement of the democratic principle as it applies to EU policy making. Statements such as this emerge regularly from the European Parliament. However, we would argue that it is also important to recognise the complexity, contested nature, and socio-political obstacles that would need to be overcome for any such development to take place. This is not simply a case of structural reform. As Jonathan Lipkin (2004) points out 'As policymakers strive to improve the legitimacy of the EU in the eyes of its citizens, one basic difficulty they face is that the Union does not resemble anything approaching a normal democracy.' It requires a multifaceted approach that encompasses structural and institutional reform at the horizontal level, and – more significantly from the perspective of this chapter – vertical-level developments. Such developments could nurture linkages in the first place between the Euro-parties and national party members, to be followed by a more general linkage with European citizens. The development of linkages is seen as the sine qua non for enhancing legitimacy which *may* facilitate an enhanced pan-European role for Euro-parties.

The emphasis on *may* is important because scope for contestation at both the horizontal and vertical levels remains. Opponents claim that the Euro-parties simply do not matter. In debates on the Nice Treaty in the British Parliament, John Bercow for the Conservative Party, for example, argued that the lack of a European *demos* meant that there was no need for European political parties. Similarly, Bill Cash (also Conservative) argued that 'European democracy is a non-starter and European political parties unnecessary'.[8] Even amongst those advocating an enhanced role there is considerable differentiation. We would argue there remains a fundamental split between a position that envisions a direct enhanced representational role and one that foresees a more indirect facilitative role that seeks to bring about the Europeanisation of the national member parties. This latter approach would ensure that the constituent member parties of the Euro-parties raise the profile of the Euro-party (Ladrech 2002).

The *representative role* reflects an underlying normative position about the nature and trajectory of European integration. Thus if the EU is to develop as a non-state polity with a legitimate constitutional basis, transnational parties will play a vital role in this by providing representational linkage with European citizens. They will thereby contribute to the formation of a European *demos* which in turn cannot develop fully without the

representational outlets offered by some form of party democracy. If such developments are necessary for the development of a functioning polity that is capable of nurturing legitimacy and trust, and for strengthening the democratic project of political accountability and participation, then the Euro-parties will need to enhance their significance at both the macro level, through their insertion within and interaction with the EU institutional architecture, and at the micro level, by connecting with national party members and European citizens to enhance their legitimacy.

The *facilitative role* foresees the Euro-parties acting as a catalyst for the Europeanisation of their constituent parts, that is, the national member parties. Recognising that they exist within a multi-level governance arena the Euro-parties need to show that they can bring a 'value-added' and that they are not seeking to encroach upon the terrain of the national parties. Examples here include their role in the Convention on the Future of Europe and the ability to initiate policy Working Groups via which European-wide positions can be developed.[9] From this follows the belief that legitimacy and linkage can be built.

Both positions foresee the need to connect with European citizens. It is views on the nature and extent of that connection which differ. While the former envisions a participatory vehicle in mass-type party clothing, the latter is limited to the goal of raising public awareness. While the first position is concerned with promoting change, the second heralds a strategy for managing change. A number of important questions are generated by this distinction: is the facilitating role the prerequisite for the representational role or is it an end in itself? And can the sorts of linkages envisioned by those advocating a representative role be transplanted from the national to the supranational level? Both pathways are likely to produce difficulties of both a practical and theoretical nature. Practically the fear of 'capture' of the national party by the Euro-party would have to be addressed and the precise role of a supranational entity in a multi-level governance structure would have to be figured out. Theoretically the issue of representation within a supranational polity would need to be addressed. Writing on democracy at the national level, Jürgen Habermas (2003: 88–9) has argued that,

> 'Four conditions must be met in order for freely associating citizens to govern their lives democratically and influence their own social conditions through political means:
>
> - There must be an effective political apparatus for the execution of collectively binding decisions.
> - There must be a clearly defined 'self' for political self-determination and self-direction, to which collectively binding decisions can be ascribed.
> - There must be a citizenry that can be mobilized for participation in political opinion-formation and will formation, with an orientation toward the common good.

- There must be an economic and social milieu in which a democratically programmed administration can successfully provide legitimate steering and organization.'

Although we can point to an embryonic political apparatus and citizenry at the EU level, the emergence of such 'full' conditions at the EU level remains a distant prospect. Of course the political implications of this Habermasian position at the EU level would in any event be highly contested.

Concern about the general notion of a transnational party and the EU as a developing non-state polity often crystallises as concern about the twin issues of remoteness and size. The idea that 'all politics is local' is particularly powerful, especially in an era increasingly defined by insecurity. The territorial constraint associated with the conjunction between political culture and the individual psyche cannot be ignored. Remoteness can therefore be seen to compound the legitimacy deficit may eventually feed into the declining electoral turnout in the European elections. The question of scale was identified by Robert Dahl when he spoke of the problem in terms of democratic control:

> The smaller a democratic unit, the greater its potential for citizen participation and the less the need for citizens to delegate government decisions to representatives. The larger the unit, the greater its capacity for dealing with problems important to its citizens and the greater the need for citizens to delegate decisions to representatives. [He goes on to add] I do not see how we can escape this dilemma. But even if we cannot escape it, we can confront it. (Dahl 2000: 110)

In their present incarnation it seems to us that the Euro-parties display a four-fold 'deficit-gap'.

Much of this deficit stems, as Figure 5.1 shows, from their genetic design and institutional framework within which they find themselves, but it also translates into a Catch-22 scenario of dead ends. For example their lack of visibility means a lack of media coverage outside Brussels itself, but until they establish a presence the media will inevitably remain uninterested. Despite the potential opening offered by recent institutional developments such as the Regulation on party funding, the task of addressing the emotional and linkage deficit lags well behind.

Overall this compounds the continuing inability of the Euro-parties to consolidate in terms of identity or behaviour. The question that then arises is 'what, if anything, is being done to address these challenges?'. At the macro level, John Peterson and Elizabeth Bomberg are surely correct when they call for the need for the issue of Europeanisation to include society (Peterson and Bomberg 1999: 11) while at the micro level statutory openings for increased participation can be seen to offer potential answers. It is via

Genetic deficit: as Euro-parties are elitist constructs, there is little room for individual participation.	Functional Deficit: despite Article 191 the role of the Euro-parties has yet to be given substance within the EU institutional architecture.
Emotional/psychological deficit: European citizens lack the knowledge/awareness of what the Euro-parties do and what they are there for.	Linkage Deficit: Euro-parties lack a structured linkage platform with Europe's citizens.

Figure 5.1 The Euro-parties and the 'deficit-gap'

such developments that they may be able to generate the sort of 'civic solidarity' that Habermas (2003: 97) calls for as a method so that 'Swedes and Portuguese, for example, are prepared to stand up *for each other*'.

The next section will highlight a number of micro-level measures that can be seen as attempts to enhance the role and identity of Euro-parties amongst national party members and European citizens. It will also show that rhetorical commitment to linkage is often undermined by the lack of tangible support. If the Euro-party is to be enhanced and developed (to help nurture the 'we-feeling' to which Karl Deutsch *et al.* (1957) referred), it seems improbable to expect that there will not be some form of knock-on effect vis-à-vis the party's genetic structure as well as its relations with its national constituent parties and its European Parliamentary Group. Fear of Euro-party encroachment upon the realm of the national party and the European Parliamentary Groups remains a considerable obstacle to development.

Developments at the micro level – connecting with European citizens and national party members

Traditionally, national political parties have sought to influence or form social identities/interests by rooting themselves within society. This was deemed necessary to forge a presence and generate a sense of legitimacy. In recent years we can point to a series of ideas and initiatives that have sought to commence this process at the EU level. This includes the introduction of transnational candidate lists for the European elections, the politicisation of the appointment of the Commission President, the strengthening of relations with civil society, the increasing awareness of the Euro-parties amongst national party members, and the choice to offer forms of individual membership of the Euro-parties. Each of these will be dealt with briefly in turn.

Transnational lists

In a bid to generate pan-European debate the idea of reserving a certain number of seats for election from a transnational list has been put forward

by a number of influential actors in recent years sympathisers with PES, Pascal Lamy and Jean Pisani-Ferry, for example, make the point that 'the European Parliament does not play the role of the transnational representative of the European "people". It is more like an assembly where national delegations retain importance to the detriment of political lines of division' (Lamy and Pisani-Ferry 2002: 75). They look to transnational party lists as a way of developing 'genuine European political parties' (Lamy and Pisani-Ferry 2002: 76) and the need for transnational lines of division within the European Parliament as part of an overall politicisation of the Parliament. Such sentiment was also reflected in *Laeken Declaration* of the Heads of State and Government which asked: 'Should the way in which we elect the members of the European Parliament be reviewed? Should a European electoral constituency be created?'[10] This has also found favour with the ELDR. They have argued in a position paper on *Laeken* that 'such an innovation would encourage the development of truly European political parties without which the Parliament will always find it difficult to connect with the public' (ELDR 2001: point 10.4). The proposal would enable 10 per cent of seats to be elected via a transnational list.

The issue was also raised a year later during the deliberations that brought about the uniform electoral procedure for the European Parliament in June 2002. In the report, the *rapporteur*, Spanish PES MEP José Maria Gil-Robles, argued that 'the review of the Act, which must take place before the 2009 elections, could clear the way for the introduction or the rejection once and for all of that European list'.[11] Interestingly this possibility was not included in the final version approved by the Council.[12]

Politicising the election of the commission president

Tied to the electoral domain and the question of lists has been the idea of according a role to the European Parliament in the election of the Commission President. The same EP Report drafted by Gil-Robles suggested

> that the lack of … a single list could in part be offset if the parties were to decide to focus their European election campaign on the name of their candidate for the Commission Presidency. [This is] an arrangement which would enable the public to grasp more effectively the issues at stake in the election and would probably improve turnout.[13]

One possible scenario could involve an American-style election at each party convention. The successful candidate would then present his/her Commissioners to a senatorial review type process. In the words of one national party leader, 'If parliament elects the president of the Commission then that would be a real catalyst for the formation of a transnational

identity.'[14] Another possibility is for the manifestos of the majority bloc within the European Parliament to be used as a key document driving the legislative agenda of the Commission. Even the Secretary General of the Commission, David O'Sullivan has claimed that the Commission 'cannot continue indefinitely to have a purely technocratic role … we have to demonstrate that what we do is relevant. … Unless we move in that direction – a living European political debate – we will never get the adhesion of our citizens to the process.'[15]

The Draft Treaty establishing a Constitution for Europe, prepared by the Convention on the Future of Europe and under debate in an Intergovernmental Conference in 2003 and 2004, suggested a small change to the process of nominating and approving the Commission President put in place by the Treaty of Nice (Article 214 EC). The EC Treaty at present provides for the President to be nominated by the European Council, acting by a qualified majority, and for the name to be approved by the European Parliament. Article I-26 of the Draft Constitution, requires the European Council to take into account the elections to the European Council, that just precede the appointment of each new Commission, and to undertake 'appropriate consultations', before deciding by a qualified majority to put its proposed candidate to the European Parliament. The European Parliament then 'elects' this candidate, but if he or she does not receive the support of a majority of the members of the European Parliament the European Council has to use the same procedure to propose a new candidate. This offers some opportunity for European Parliamentarians to argue that the President of the Commission should, in terms of 'political hue' reflect the most successful party group in the European Parliament.

Strengthening links with civil society

In light of the rhetorical commitment given to the participation of civil society by the Commission in the White Paper on European Governance, the Euro-parties have sought to seek to strengthen their relationships with European civil society by opening up information flows to groups, providing opportunities for them to participate in the decision-making process and providing a forum where they could meet.[16] The Party of European Socialists, for example, has begun to improve cooperation with those social actors that share the same values (via, for example, the Global Progressive Forum)[17] and use pre-European Council leaders' meetings as campaigning opportunities through which party leaders can engage with the public.[18] For the EPP, the need to connect with citizens, via civil society, is an inherent dimension of their commitment to the principle of subsidiarity (Thyssen and Taes 2001). The January 2004 meeting which took the initiative to establish the foundations for the formation of a new Euro-party called the European Left stressed the need for linkages with left parties and movements.[19]

Increasing awareness amongst national party members

In recent years all of the Euro-parties have sought to raise awareness amongst national party members. In the PES this has taken two distinct forms that both relate to our twin image of the Euro-party as a representative or facilitative entity. The informal grouping *Gauche Europeenne* wishes to see the PES develop as a mass-party type organisational entity that is capable of reaching out to civil society. For this group, the essence of the mass-party, which needs to be emulated, was one of political socialisation, mobilisation and linkage.[20] To initiate such a process the group calls for a series of statutory changes that will enable ordinary (national) party members to get more involved in the PES.[21]

Aware of these concerns, the PES Bureau began the process of grappling with reform in a move that reflects the facilitating wish of the majority. The PES Activity Plan 2001–04, as presented at the 2001 Congress set as one of its objectives the consolidation and democratisation of the party 'in order to give it a greater and more democratic legitimacy amongst its member parties and the public'.[22] The resolution on 'Strengthening the PES' stemmed from the working group chaired by Ruiairi Quinn (former leader of the Irish Labour Party). This was set up to analyse how to 'strengthen the awareness and internal cohesion of the PES'. As Quinn himself pointed out, 'members of our national parties do not have a clear understanding of the role of the PES'.[23] Quinn was subsequently asked to collect an inventory of the practices of member parties in the following areas: how the PES features in national party statutes; whether the PES appears on membership cards; whether a mandate is established for PES congress delegates; the use of the PES name and logo at the national level; the engagement of social democrats living abroad via the medium of the PES; and the role of the PES in elections to the European Parliament.

Individual membership

The final initiative is that of individual membership. The underlying rationale is that membership constitutes a benefit in itself which will foster increased legitimacy. In a nominal sense, of course, national party members are already members in their corresponding Euro-party. Many feel, however, that this does not go far enough:

> I also want to be able to join the PES as an individual member, and to know that there are members of my party working for broadly the same aims in every other member states of the Union – and I want to take a part in working out what those aims should be in the longer term, as well as the shorter term, through realistic and regular debates and discussions at local, regional, national and international levels. … From my vantage point within the British Labour party I cannot say with much confidence that the outline views I have given here are either very common, or very

> uncommon either. They are, in my experience, not much discussed, except over a pint after yet another meeting.[24]

Up to 2006, arrangements were in place to enable individual membership of the EPP, the ELDR and the Greens. The ELDR has sought to develop the idea of membership furthest via its promotion of so-called 'e-membership'. At its Congress in Lublianja in 2001 it made some important additions to its party statutes:

> Article 5:
> Membership of the ELDR Party is open to all political parties in Europe *and individual citizens that* accept these Statutes, the Stuttgart Declaration and the policy programmes, as agreed by the Congresses of the ELDR Party.
>
> Article 6:
> Individual citizens, who wish to support the ELDR Party and want to be informed on European Politics and ELDR, can apply for individual electronic membership of the ELDR Party. In the event of an objection by a member party to an application for membership under this article the Secretary-general shall refer the matter to the Bureau for adjudication. The Bureau shall decide on such matters by simple majority vote. The detailed rights and responsibilities of e- members shall be identified in a separate section to the Internal Rules of Procedure of the ELDR Party.

While each of the parties set out a series of prerequisites and responsibilities for membership they fail to give much indication of the rights that membership will entail – beyond the right to be informed about party activities. It is this lack of substance that has led some to argue that it is 'deceitful to talk about membership' in any meaningful sense.[25] Whether this lack of substance can be overcome at low cost using the benefits of web-based linkage in the future represents an interesting challenge.

The Euro-parties and Euro-voters

In the light of the provisions guaranteeing EU citizens the right to vote and stand at the local and European level in their state of residence (Article 19 of the EC Treaty[26]), one might have imagined that this offered a fertile ground on which the Euro-parties could begin to flourish. The parties could be at the forefront of ensuring that Member States provide adequate information for EU citizens or could take the lead in facilitating the selection of candidates from other Member States.[27] The reality, however, is far less promising as exemplified by the experiences of what were known as the PES Local Associations. The idea behind their formation was to establish a set of local networks which were seen as being necessary in order to 'facilitate the identification of European nationals and encourage them to vote'[28] (i.e. to

Box 5.1 Document 1 – PES local and regional associations' statement of support

I support the establishment of PES local associations – consisting of European branches of PES-affiliated social-democratic, socialist and labour parties – in close co-operation with the party of the respective host country.

PES local and regional associations can improve the participation of EU citizens in local elections, and promote the representation of EU citizens on social-democratic, socialist and labour electoral lists.

PES local and regional associations can make the PES better known to the rank and file of member parties and can further extend the networking role of the PES.

PES local and regional associations contribute to bringing the work of the PES closer to the individual citizen and to the development of a European party in accordance with Article 138a of the Maastricht Treaty.

participate in the democratic process) in the wake of Article 19 EC which provides the right to vote and stand in local and European Parliamentary elections for EU citizens, based on residence rather than nationality. In many respects, it took its cue from a PES resolution which claimed that 'Voting rights in local elections for EU citizens should be fully used'.[29] The resolution pointed out that the Member Parties of the PES had agreed upon a series of aims and measures:

- To support cooperation at all levels with Socialists and Social Democrats from other countries of the EU in their own country;
- To get citizens from other EU countries to stand as candidates in local elections;
- To inform EU citizens about their new rights so that they will participate in local elections and to produce electoral information and materials in different European languages.

It was also about renewing 'the interest of all citizens in local politics and to secure as wide a participation as possible in local decision-making',[30] a point reinforced by the text of Document 1 (see Box 5.1)

The PES-London Association (PES-LA) saw itself as a 'reference point for European nationals with left-of-centre political sympathies living in the UK'.[31] There were estimates in 1995 that out of a figure of some 400,000 EU nationals only 7000 were registered to vote. In June 1997, in a bid to show that it was not merely a paper organisation, the PES-LA set out a 'programme of action' for the (then) forthcoming London Mayoral referendum and the 1998 local elections where EU nationals were entitled to vote. This took the

form of three steps:

Step 1. they would seek to contact EU nationals by, for example, placing articles in local and student newspapers. They would also attempt to make use of various cultural institutions, embassies, consulates etc.

Step 2. they would encourage EU nationals to get their names on the electoral register with the active support of borough Electoral Registration Officers (EROs).

Step 3. they would canvass EU nationals and encourage them to vote in the Mayoral referendum and the 1998 London Borough elections.

Within the House of Commons, Roger Casale MP, one of the founders of the PES-LA, called upon the government to launch a national campaign to inform people of their rights:

> I welcome the renewed emphasis on European citizenship and remind the House that, as a result of the single market and the freedom of movement that it allows, a very large number of European nationals to live in Britain today. I welcome the fact that they will be able participate fully as citizens in the local elections and in the London referendum next May. When talking about European citizenship, it is important to emphasise that, although the treaty states that European citizenship is important and that it should complement national citizenship, *perhaps more can be done to enforce the rights of European citizens, in particular with regard to voting in local and European elections. Perhaps it would be wise for the government to see whether there is some possibility of a national campaign to make those rights more widely known to the large community of European nationals in this country, so that those rights can be exercised in full*.[32]

In London the group set out its own campaign on the basis of what it called 'The London Declaration' (Document 2; see Box 5.2).

If the model of the PES-LA was going to develop, however, it would need organisational and financial help. It did receive recognition from the National Executive Committee (NEC) of the British Labour Party, and it was able to establish tentative links with the European Parliamentary Labour Party and with some of the Labour London Members of Parliament but the lack of real tangible help, such as the provision of funds or assistance with publicity and so on was perhaps a better indicator of the national party's *Laissez faire* approach to it.

As regards the relationships between the PES-LA and the PES itself, the Local Associations drew up a list of their capabilities believing that would convince the PES of their intrinsic merit. Their necessity, or so they thought,

Box 5.2 Document 2 – The PES-London Association 'London Declaration'

The Treaty of Maastricht and the concept of European Union citizenship gives each and every citizen of a member state;

- The right to vote in local elections at their place of residence.
- The right to vote in European elections in their place of residence. This represents a first step towards building a community of Europeans based on equality of rights.
- London is already a major European financial centre.
- London is also a city in which people of different nationalities, cultures and beliefs live together – despite tensions – in friendship and in peace.
- Europe is alive in London.
- Europe is growing from below – that is why we, the member parties of the Party of European Socialists (PES) with representations in London, wish to signal a new phase in our cooperation.
- We have formed an association, in order to develop common structures for our political work and in order to promote a convergence of our activities and objectives.
- We aim to elaborate proposals for the resolution of problems we experience in common.
- We aim to make all Londoners more aware of the responsibility we all share for our city.
- We aim to renew the interest of all citizens in local politics and secure as wide a participation as possible in local decision making.
- To these ends we seek to collaborate with the Party of European Socialists, the Socialist International and PES associations across Europe.

arose from their ability to

- Develop closer links between national parties and European socialists resident abroad;
- Enhance voter identification and encourage registration;
- Promote membership recruitment to national parties;
- Organise local social and promotional events;
- Develop inter-party networking;
- Mobilise support for local, national and European election campaigns;
- Disseminate information about the activities and campaigns of the PES;
- Reinforce links between the structures of the PES, national parties and the rank and file;
- Develop exchanges of experience and stronger cooperation among the national parties of the PES;
- To campaign for policies and programmes which are on the agenda of the PES.[33]

Although a number of informal links were established with the PES Secretariat in Brussels, with the Secretariat of the PES Group in the European Parliament,

with the Office of the Leader of the PES group in the European Parliament, with European Community Organisation Socialist Youth (ECOSY) and with several MEPs, the PES-LA failed to become officially recognised as a component part of the PES. With such noble aims and an initiative that attempted to enhance the citizenship provisions that the social-democratic left had so keenly supported, it seems rather strange that such aims caused various ruffles not least amongst those who were on the circulation list of the PES-LA. Many foresaw a 'hidden agenda' of pushing individual membership of the PES (which was viewed by most within the PES as a step too far). It seems as though this was used to undermine the idea of the association. Official recognition was therefore not forthcoming, which in turn cut off another potential avenue of funding. The lack of formal recognition and formal assistance would ultimately prove to be the death knell for the PES-LA.

Concluding remarks

At present the Euro-parties remain umbrella-type organisations. Although the institutional developments, associated with the Regulation on party funding, have opened the potential for the Euro-parties to develop, they continue to suffer from a series of 'deficit-gaps' which make it abundantly clear that formal-legal developments at the EU institutional level need to be paralleled by forms of direct structural and psycho-emotional linkage with European citizens. In turn, however, a capacity to inform, galvanise, reflect and perhaps even craft pubic opinion would seem to be a prerequisite. But how likely is this to emerge? Such a task raises all sorts of obstacles not least of which is the fact that the idea of enhancing the role and significance of the Euro-party evokes very different responses in each national setting. Critics claim that any enhancement will represent an encroachment upon national sovereignty. Although the Treaty of Nice has led to a strengthening of the institutional environment for the Euro-parties, its impact on national parties was qualified by an important declaration which was appended by the Intergovernmental Conference of 2000. It declared that the new provisions in

> Article 191 do not imply any transfer of powers to the European Community and do not affect the application of the relevant national constitutional rules[34]

The ideas and initiatives that have been heralded as mechanisms for enhancing the profile and legitimacy of the Euro-parties face the same sorts of obstacles. Although individual membership (which is moving in the direction of e-membership and web-based linkage) may now become a reality in four of the five main Euro-parties, it is dogged by cries that it lacks substance and is

merely symbolic. Membership also poses a myriad of questions for the issue of linkage: on what basis should membership be based? What safeguards are also necessary to prevent 'capture' by a particular group or members from a particular country? The limited support given to the PES Local Associations and the somewhat lukewarm embrace of the working group on *Strengthening the awareness and internal cohesion of the PES*, between 2000–2004, by some of the national member parties also highlights the difficulties of the transnational aspirations of the Euro-party running into nationally imposed obstacles. Tentative signs during 2004–5 though, within the PES and many of the other Euro-parties, do in fact point to the opening of a new reform drive which seems more directed and specific. The impact of this new momentum remains to be seen.[35]

Under these sorts of conditions it seems to us that any thought of the Euro-parties developing in the direction of the *representative role*, in the short-medium term is highly unlikely. Many of those who are sympathetic to this agenda fear upsetting certain national parties, and of pushing transnational initiatives too far, which in turn would undermine all of the good, incremental work that had been done in building up credibility. Hence the *facilitative* mode seems the most likely pathway for the Euro-parties for the foreseeable future.

Notes

1. The chapter is based on our joint research on *The Constitutionalisation of Transnational Political Parties* (ESRC Grant Number: R000223449) 2001–2002. Project website: http://les1.man.ac.uk/transnational. The financial assistance of the ESRC is acknowledged with thanks. The work also builds indirectly upon our joint research on EU electoral rights and European Citizenship as part of the ESRC project *Strategies of Civic Inclusion in Pan-European Society* (L213 25 2022). Stephen Day would also like to thank the European Science Foundation for funding an Exploratory Workshop in London, December 2003 on *The Role and Significance of the Transnational Political Parties*.
2. The legal foundation upon which they rest came about as a result of a joint initiative from the Christian Democrats, Socialists and Liberals. On 12 December 1990 a joint communiqué from Wilfried Martens (EPP), Guy Spitaels (CSPEC) and Willy De Clercq (Liberals) stated that 'These groups play a major part in the continuing efforts to create a transnational consensus inside the different political families. They take it as read that, without parties to express the political will of the citizens, there is no democracy! This holds good at all levels of political representation, and logically for the European Community as well, and above all for the European Union. The federal and democratic union which is the goal of Social Democrats, Liberals and Christian Democrats, must be a vital community, one in which the citizens feel at home. So the European parties or transnational federations of parties have an indispensable role which only they can fulfill. It is a role which is essential if a broad consensus is to be created, and if the effectiveness of the European institutions themselves is to be guaranteed' (reproduced in Jansen 1998: 15–16).

3. Regulation 2003/2004 OJ 2003 L297/1. For more on this see Stephen Day and Jo Shaw (2006) 'Political Parties in the European Union: Towards a European Party Statute?', in K. D. Ewing and Samuel Issacharoff (eds), *Party Funding and Campaign Financing in International Perspective* (Oxford: art Publishing), pp. 297–324.
4. See *Report on the constitutional status of the European political parties* – Committee on Institutional Affairs, Rapporteur Mr Dimitris Tsatsos, A4–0342/96. Fn. 4, p. 4.
5. Ibid., p. 5.
6. Although the Eurobarometer Survey of early 2004 indicated a relatively positive attitude amongst EU citizens towards the putative European Constitution, it demonstrated high levels of ignorance and an increasing general scepticism at the European 'project': *The Future European Constitution*: http://europa.eu.int/comm/public_opinion/flash/fl159_fut_const.pdf
7. Statement made at a European Science Foundation Exploratory Workshop on *The Role and Significance of the Transnational Political Parties*, London, December 2003.
8. See House of Commons debate on the *European Communities (Amendment) Bill*, Hansard, 18 July 2001, pp. 309–40.
9. See for example the PES position paper 'Common Security in a Changing Global Context', which claims that 'this proposal has been very well received by all National Delegations within the Socialist Group, including the British delegation, which has been closely involved in writing it'. *Willy Brandt Newsletter*, 9 March 2004.
10. *Annexes to the Presidency conclusions – Laeken, 14 and 15 December 2001*, SN 300/01 ADD 1, ANNEX I, Laeken Declaration on the Future of the European Union (http://european-convention.eu.int/pdf/LKNEN.pdf).
11. Recommendation on the draft Council Decision amending the Act concerning the election of representatives of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976, based on the Report of the Committee on Constitutional Affairs, A5–0212/2002 of 30 May 2002, p. 9.
12. Council Decision 2002/272 amending the Act concerning the election of representatives of the European Parliament by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom of 20 September 1976, OJ 2002 L283/1, following the European Parliament legislative resolution giving assent of 12 June 2002.
13. Council Decision 76/787/ECSC, p. 9.
14. Interview with national party leader, December 2001. See generally Hix 2002 and Hoffmann 2002.
15. Quoted in 'Call for Commission to be more politicised', *EU Observer*, 27 January 2004.
16 See http://www.globalprogressiveforum.org/index.cfm
17. At the national level, the Irish Labour Party has introduced a dual-track membership whereby individuals can join as a branch member with a *full* set of traditional rights and obligations or as a more loosely defined individual member. The hope is that those currently involved in civil society groups may wish to join on the basis that this gives access to an organisation which is able to influence national/European policy making but they will not at the same time be subject to the usual levels of party discipline.
18. This was an issue raised at the PES Presidency meeting held in Prague, May 2002.
19. See generally http://www.pds-online.de/sozialisten/el/index.htm

20. Informal meeting of some members of *Gauche Europeenne*, at the PES V Congress, Berlin, May 2001.
21. In a document distributed at the PES V Congress (2001), it called for the 'creation of a Statute Reform Commission, charged with elaborating new statutes to be discussed at our next congress. We firmly believe that the new Statutes should contain the following aspects: Election of the delegates by the national congresses of member parties; the right for member parties to submit resolutions to a vote; the right for delegates to submit resolutions to a vote; election rules based on the one that exist within member parties; election of the whole PES presidium by the Congress; between Congresses, the creation of a permanent Commission and if needed, the creation of ad-hoc Commissions in charge with specific themes.' Document held on file.
22. *PES Activity Plan 2001–2004*, Berlin Congress, May 2001.
23. 'Strengthening the awareness and internal cohesion of the PES', letter from Ruiairi Quinn (Vice Chair of the PES) to members of the PES Bureau, February 2000. The paper put before the 2001 PES Congress stated that, 'the Party of European Socialists has gained ground over the last years especially in terms of a coordinating mechanism for Socialist and Social Democrats in the European institutions. This development has however not coincided with a more public role of the PES, nor with greater involvement and European identity of the Members of PES Member parties.' See *Strengthening the awareness and internal cohesion of the PES*, PES Position paper compiled by Ruairi Quinn, PES Congress, Berlin 2001.
24. Letter from James Siddelley to the journal of *Links Europa*, Vol. 20, No.1, 1995. Similar views can also be found at the Conversation Corner of the PES website. See http://www.pes.org/component/option,com_simpleboard/Itemid,20/func,view/id,15/catid,5/lang,en/
25. This comment was made during the European Science Foundation Exploratory Workshop on *The Role and Significance of the Transnational Political* Parties, London: December 2003.
26. See also the chapter by Connolly, Day and Shaw (Chapter 2) in this volume.
27. To date this remains at very low levels. At the 1999 European elections some 62 candidates were selected (from the evidence available) with 4 achieving electoral success. Information provided by Commission Official July 2000.
28. *Report on PES Local Associations*, June 1996. Document held on file.
29. Resolution: Voting rights in local elections for EU citizens should be fully used, Strasbourg, 17 September 1996. Document held on file.
30. Notes of the meeting of the PES-LA held on 20 June 1997, London. The drive behind the development of the PES Local Association in Britain arose from figures in London who were part of the *European Socialist Initiative* (ESI), which sought to promote a convergence of the European left, and *Links Europa* which launched a campaign that sought to highlight the significant role that a PES Local Association could play. In addition, PES Local Associations were established in Berlin, Frankfurt, Groningen and in Malaga where British Labour Party members were in contact with the Spanish PSOE.
31. Briefing sent to various people associated with the PES-LA, dated 6 January 1996. Document held on file.
32. Debate on the European Communities Bill, *Hansard*, 12 November 1997, p. 964, emphasis added.
33. *Report on PES Local Associations*, (June 1996). Document held on file.
34. Declaration on Article 191 of the Treaty establishing the European Community appended to the *Treaty of Nice*, OJ 2001 C80/1 at C80/79.

35. See for example 'PES Reform: Proposals for a Stronger PES', PES Council Vienna, 24–25 June 2005 which can be found at http://www.pes.org/index.php?option = com_content&task = view&id = 179&Itemid = 125; and 'Regulations for EL individual membership', drafted on behalf of SDS, Czech Republic, by J. Hudeek and M. Hornychová and confirmed by the EL Executive Board 9 January 2005. http://www.european-left.org/positions/statements/stat/elstatement.2005-03-28.4556279309/view?searchterm=Statutes

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6

Making Citizens from the Market? NGOs and the Representation of Interests

Alex Warleigh

Introduction: consumers or citizens? Towards civil society in the European Union

In the years since its formal creation in the Treaty on European Union, 'European' citizenship has proved a disappointment. Those who envisaged it teleologically as the harbinger of a federal state (on the grounds that after Maastricht good governance required this step-change in integration) have yet to have their hopes realised. So too have those who expected it to provide the means by which member-state nationals might both engage more frequently with the EU decision-making process and develop a sense of cross-border solidarity with each other in the interests of democracy rather than integration per se. 'Citizenship practice' (Wiener 1998) is now feasible, although difficult, in the EU, thanks to the creation of a bundle of rights and policies under primary and secondary legislation. It is also vital if the Union's democratisation process is to succeed. However, few EU citizens appear to wish to avail themselves of this opportunity; indeed, if turn-out rates for European Parliament (EP) elections (when all member state nationals form one electorate as a consequence of citizenship provisions in the Treaty) are taken as an indicator, popular interest in engaging with the European Union appears to be *declining*, even if new kinds of actors representing social movements and NGOs have an increasing interest in, and ability to shape, EU policy (Marks and McAdam 1996; Greenwood 1997; Warleigh 2000).

In retrospect, this should be no surprise. Fascinating and innovative though it is, EU citizenship was created as, and remains, a compromise between those Member State; actors who wanted to allow enough freedom of movement to make the single market viable and those who sought a more

thoroughly political link between the Union structures and the people subject to its laws and policies (Warleigh 1998, 2001c). Thus, its ability to contribute to a Europeanisation of mass political activity was truncated at the outset, even if by the same token such potential was undeniably present.

Over the last decade, as intergovernmental conferences (IGCs) have yielded diminishing returns, the market element of EU citizenship has been predominant; there have been no significant formal changes or additions to the Treaty provisions on citizenship, even though the Charter of Fundamental Rights has now been integrated in the Constitutional Treaty presently (i.e., at the moment of writing) under ratification. In the context of European integration, member-state nationals remain primarily consumers, workers or travellers rather than politically active and empowered citizens. It is true that acts of secondary legislation, as well as judgements of the European Court of Justice, have long given member-state nationals more rights in the EU context than the Treaty explicitly provides, whether by accident or design: indeed, 'much of what makes EU citizenship worth having is scattered throughout the *acquis* rather than encapsulated in Articles 17–22' (Warleigh 2001c: 27). However, because the further development of the Treaty provisions on EU citizenship requires decisions on issues such as subsidiarity and institutional reform which have been postponed throughout the last decade, Member States have failed to take them forward. On a related issue, Magnette (1999) argues insightfully that the making of citizens from consumers faces another large obstacle. Member-state executives tend to see citizenship in statist terms, meaning that any further development of EU citizenship is considered to entail further sacrifices of sovereignty, since citizenship can only really be exercised in one territory and involve allegiance by the citizen to one governance structure (Czempiel 1974). That this is not necessarily the case is beside the point; until sufficient numbers of such actors are able to see beyond the orthodox 'ideational frame' (Kohler-Koch 2000), further development of the formal democratisation process in general, and EU citizenship in particular, is unlikely (Warleigh 2002).

Instead of sustained 'Europhoria', then, the last decade has seen the integration process become both more contested and more differentiated as a result (and as an enabler) of notable successes such as the creation of the Rapid Reaction Force and the launch of the euro. Ironically, although the European Union is now able to do more for its citizens than at any time since its inception, its popular standing is more open to question. The European Union's output legitimacy – the traditional approach towards democratising the European Union, by which it is seen to gain approval through the provision of public policies which are generally deemed successful and worthwhile – is obviously questionable given the controversies over subsidiarity and the 'democratic deficit' (for an analysis, see Bellamy and Warleigh 1998). Moreover, the European Union has not generally been able to secure the affection of its citizens through the provision of desired public goods

(Jones 2001). The Member States have refused to give the Union a big enough budget to allow it a sufficient role in redistributive policy. They have preferred instead to privilege the Union's regulatory role, leaving this to develop elliptically and opportunistically, with the EU accruing competences where it can, rather than according to a clear plan or to the wishes of the public (Blondel *et al*. 1998). Thus, whilst citizenship has a crucial role to play in the transformation of the European Union into a democratically legitimate polity, the Union has clear difficulties in providing the means by which 'European' citizens can either see the responsiveness of European integration to their priorities or even, in some cases, any benefits from it at all.

Input legitimacy (by which policy outcomes are seen to be acceptable if they result from inclusion of stakeholders in the deliberations which produce them) is also problematic. Michael Nentwich (1998) argues that citizens have 15 different opportunity structures for participation in EU policy making, but cautions that these are likely to be exploited most successfully by *organised groups* of citizens rather than individuals given the necessary levels of skill, money and time.[1] Representative democracy is also limited in the EU system despite its existence in various forms. In terms of the Union institutions, the excessively secretive Council remains the main legislative force despite its lack of transparency and accountability at either EU or national levels. The EP's powers, although often impressive, do not extend across the range of EU competence; moreover, the EP's resonance as an instrument of representative democracy remains open to question given the absence of a meaningful Euro-demos. Other bodies such as the Committee of the Regions (CoR) and the Economic and Social Committee (ESC) can influence policy decisions; indeed, the latter body is even composed at least in part of actors representing broad societal interests, as well as the more traditional 'social partners'. However, both CoR and ESC remain peripheral in both the EU system and in the popular consciousness (for a discussion of these and other bodies, see the essays in Warleigh 2001a). Thus, citizens seeking to make their voices heard in EU policy-making circles face considerable difficulty.

However, there are signs that this unpromising situation may be set to change. Although rhetoric about bringing Europe closer to the citizen is by no means new (see Wiener 1998 and Magnette 1999 for excellent surveys), the present round of institutional reform, including the ratification of the Constitutional Treaty, does appear to provide an opportunity to address issues at the heart of the democratisation process, such as the scope of European integration and the norms and practices of the EU governance system. There may be changes in terms of output legitimacy. There may also be an increase in input legitimacy: the translation of the euro from virtual to real currency has so far appeared to enthuse the public about the integration project rather more than had been anticipated. The so-called 'post-Nice process' has involved a Convention composed of representatives of not only

the Member States but also national parliaments, the EP and the Commission. There is also a process of 'civil dialogue'. The almost coterminous Commission White Paper on Governance, whilst flawed in many respects and somewhat upstaged by the 'post-Nice process' (Cram 2001; Wincott 2001), does at least give greater importance to issues of civil society involvement with the European Union than previous documents such as *Agenda 2000*, which was written to prepare for the enlargement to the new Member States of the countries of Central and Eastern Europe. Again, individuals are not targeted directly as *citizens*. However, groups which are deemed to represent them are increasingly receiving overtures from EU actors. If this vogue endures and is deepened, EU citizenship could evolve significantly, as both cause and effect of the Europeanisation of civil society.

However, this potential change requires more than Treaty reform and EU governance practice: it also demands the intervention and support of actors both willing and able to form a bridge between the Union and the citizen, in order to 'sell' EU citizenship to an often-sceptical public. These actors must help reform and shape the European Union and its policies in line with public opinion; they must also educate citizens about the European Union and provide both the skills and the means to engage with it. As a further task, they must facilitate the construction of cross-border solidarity. Obviously, this is a tall order. Furthermore, neither national governments nor EU institutions are able to take on the task. National governments are by definition territorially bound and thus unable to create a *transnational* civil society even if they perceived an interest in so doing; the EU institutions have neither the budget nor the necessary credibility. In any case, formal/institutional interventions can only be part of the process; what is necessary is a bottom-up process of political engagement to breathe life into otherwise inert Treaty provisions. Thus, both EU actors and scholars have begun to turn to actors in non-governmental organisations (NGOs[2]) as potential agents of civil society Europeanisation through citizenship practice.

In this chapter I draw on fieldwork undertaken between January 1999 and December 2000 to examine the extent to which NGOs are either willing or able to carry out this function. This empirical work aimed to uncover whether (and, if so, how) NGOs impact upon EU public policy outputs, and whether NGO supporters play a significant role in the shaping of NGO policies and decisions. I argue that NGOs have clear limits in terms of their capacity to transform EU consumers into citizens, as a result of both their limited (if often important) impact on EU policy and their own shortcomings in terms of internal governance. Most NGOs do not allow their supporters to engage directly with their policy making, and provide no or little means by which supporters can learn about or influence the integration process. Indeed, NGO supporters often have no interest in playing such a role. Thus, the often laudable lobbying efforts of NGOs provide only an illusion of greater democratic inclusion in EU policy making; if member-state

nationals are to be made true EU citizens, not only the European Union but also NGOs must reform their governance practices.

NGOs as agents of EU citizenship: possibilities and problems

Why should NGOs be seen as agents of citizenship practice in the EU? It could plausibly be contended that NGOs are a *faute de mieux* option, selected because fifty years of European integration have failed either to mould member-state nationals' sense of political identity sufficiently to catalyse active citizenship or to create an elite which could be entrusted with this function. After all, the EU has a long habit of deliberately attracting interest groups into its orbit; neofunctionalists have long argued that the involvement of such actors would be a key catalyst in deepening and expanding the Union's powers, by providing a mechanism by which interest groups could affect public policy and thereby gain a stake in the preservation of both the outputs and system of the Union (for an overview, see Rosamond 2000). Could the new popularity of NGOs in EU circles simply be a revision of this component of the 'Community Method'? In other words, are EU actors seeking to reach out to the citizen privileging democratisation or institutional interest? The White Paper on Governance (CEC 2001: 14–16) indicates that the Commission at least may not have clean hands here; its recommendations on civil society involvement in EU decision making reveal both a narrow conception of what civil society comprises and a clear wish to revitalise the Commission as the centre of a quasi-corporatist system of privileged consultation.

However, this is not the whole story; as indicated above, citizenship construction is at least in part a bottom-up process, and thus some kind of organised civil society input into its elaboration is necessary. In terms of democratic theory, the balance between output legitimacy and input legitimacy must be revisited; if the public goods produced by the European Union so far have not won the hearts and minds of member-state nationals, then increasing the ability of the latter to shape the Union's output is a logical step. For several reasons NGOs have some attractiveness here.

First, their increased presence in EU policy-making circles since the Single European Act (Marks and McAdam 1996) has meant that a wider range of political activists is aware of EU issues and is attempting to raise broader societal concerns at EU level than in the past. Thus, there is at least some social capital upon which to draw in presenting the EU as more than a glorified market. Second, many NGOs (such as Greenpeace) often have extensive membership; thus, at least potentially, they can serve as links to many citizens, rather than the more limited numbers of conscious beneficiaries of EU redistributive policies. Third, NGOs are often transnational or international in their outlook, privileging specific policy issues rather than a given

state or political system; thus, they could foster an appreciation of the need to collaborate beyond borders more easily than more traditional interest groups such as trades unions, which can be more closely tied to national structures (McLaughlin *et al*. 1993; Marks and McAdam 1996; Greenwood 1997; Young 1998). Fourth, the relative weakness of political parties at EU level has created an 'advocacy void' (Aspinwall 1998: 197), which NGOs are well situated to fill (Favell 1998). Fifth, NGOs have the virtue of being in keeping with the rise of interest politics. Although by definition this means that any given NGO tallies at best with only certain of a citizen's concerns, and may in fact tally with no concerns of many citizens, their sectoral nature is a real asset given the relative lack of popular enthusiasm for European integration per se. If integration is seen by citizens as a means rather than an end – which would help explain the small membership levels of federalist organisations – then citizens may well be reached more easily by organisations which engage with the European Union to secure, say, a minimum wage than by those which seek to promote integration for its own sake. Sixth, NGOs tend as a sector to have a good reputation with the public, making them credible advocates of engagement with the European Union if they choose to take on this role. Finally, NGOs often claim to work in 'alternative' ways which socialise and empower those they serve (Covey 1996). They may thus be capable of creating virtuous circles of 'citizenship practice' (Wiener 1998).

What emerges as a crucial concern, then, is whether NGOs are really able to make good this potential and provide the necessary civil society input. In turn, this requires analysis of NGOs' ability to both shape EU policy outcomes and socialise member-state nationals into the EU system (Warleigh 2001b). In the rest of this chapter I draw on empirical fieldwork to assess NGOs' ability to act as effective voice mechanisms for EU citizens.

NGOs and EU policy making

It would be a surprise if NGOs have absolutely no influence on EU policy making. The Union produces policy through a complex interinstitutional process of bargaining and alliance construction which functions at (sub) national and EU levels. Formal politics is heavily complemented by informal processes of deal making and influence generation inside, between and around the EU institutions (Peterson 1995). There are so many potential access points and so many actors involved that it is unlikely that NGOs (like other lobbyists and campaigners) have no ability to shape at least part of the policy process on at least some matters. Thus, what matters is whether NGOs have a regular and significant impact on EU policy outputs, and if so how they manage to acquire this.

Thomas (1999) sends a warning signal here, arguing that the heyday of NGO influence in the European Union may have passed. Issue areas such as

environment policy, once largely their preserve, are now much broader in scope, meaning that other actors have entered the arena and compete for influence and voice. NGOs may thus be squeezed out, especially given the increased insistence upon 'professional' lobbying practices by EU officials and actors. Such skills are often easier for professional consultants and private interest group lobbyists to deploy, if only for resource reasons. Thus, conditionalities generated by EU actors may vitiate NGO influence; certainly, there are echoes of this in the Governance White Paper's attempt to prescribe certain working practices to NGOs with which the Commission will develop a working relationship. It is also interesting that there were no NGO members of the 'Constitutional Convention' set up at the Laeken summit of December 2001 in order to inform the 2004 IGC.

Moreover, as pointed out by Balanyá *et al*. (2000), whilst NGOs may well influence particular policies, their overall influence is less than that of private interest groups, a point conceded also by Venables (2001), who argues that without further affirmative action NGOs will never have parity of access to EU decision makers with private interest groups. In addition, NGOs often find it difficult to establish a common NGO platform on a given issue; competition for funding, visibility and influence can mean that only certain NGOs are influential and that many NGO voices go unheard (Geyer 2001; Warleigh 2001b). Thus, it is advisable to consider NGO influence from the perspective of individual organisations; there is very often no 'NGO voice' (understood as a uniform NGO view) to be heard. An additional factor to bear in mind is the problem of agenda asymmetry; NGO actors who fail to mobilise according to the EU's legislative programme but function according to their own organisational priorities may be seen as irrelevant by EU actors. NGO actors suffer from this rather more than other lobbyists, given their tendency to campaign on moral issues and the implications of resource shortages, which may prevent them monitoring the EU agenda effectively.

However, this does not mean that NGOs have an insignificant role to play in the shaping of EU policy. Empirical work (Warleigh 2000, on which the following paragraphs draw) indicates that NGO actors can have a substantial impact on not just the ideational debate surrounding an issue (by campaigning and trying to set the agenda) but the actual content of the final legislation in question (by lobbying). This influence is primarily due to the skill of NGO actors themselves in forming, or taking part in, the winning subject-specific network (the 'policy coalition') which debates, monitors and shapes attempts to make policy. Significantly, NGO influence is thus not owed to claims to represent public opinion. Such claims are sometimes accepted by EU actors, and even put to rhetorical use. However, NGOs which have no useful information, strategic advice, or capacity to act as an 'ambassador' for the coalition to other relevant actors are unlikely to be included in the coalition no matter how large their membership. Indeed, presence in such coalitions is not in itself a guarantee of automatic influence; like any

other actor, NGO officials may be sidelined or tangential to the operation of the network if they fail to act strategically. However, by taking an active part in the coalition, NGO actors (like their partners) are able to complement direct lobbying by collaborating with other actors drawn from the private sector, national governments and the EU institutions who share complementary objectives for a given piece of legislation, in order to develop a joint strategy and position which is entered into competition with rival positions at each stage of the policy chain.

Within the policy coalition, the influence of any particular actor can be hard for an outsider to assess because participants act as sponsors for each other, each taking responsibility for 'selling' the relevant message when they appear to have the most likely opportunity for success. For example, NGO influence may lie behind the position taken by an EP rapporteur or a Commission official at a meeting of, or between, those institutions at which the NGO is not present. A briefing for MEPs presented by an industry lobby may be shaped by prior discussions with NGO officials whose concerns on an issue are symmetrical, and vice versa. This agreement may or may not be advertised, according to strategic calculation. Such agreements can be practised both vertically (between EU and member-state levels) and horizontally (between actors in and around the EU institutions). Thus, NGO influence may hide behind apparent inertia.

When trying to influence those outside the policy coalition, NGOs can, like any coalition member, face outright opposition as well as a more general lack of active support. Policy coalitions may compete on a given issue. No EU institution is monolithic, and within each institution, and even each part of them (such as Commission Directorates General or EP committees) there will tend to be no uniform view. Institutional positions on a given issue have to be generated through bargaining and debate, and this presents opportunities for both influence and exclusion to all coalition members.

All this does not amount to automatic or extensive influence for NGOs; however, it does indicate that on any given legislative issue, actors from NGOs can be very influential. The key to influence over EU policy is access to, and successful operation within, the winning policy coalition on a given issue. Both directly and via sponsors NGO actors can, and do, acquire this access; they are thus as likely to be useful vehicles for citizens' concerns as any other EU actor able to exploit the dynamics of EU policy making if citizens (or at least the supporters of any given NGO) can shape or inform what NGOs actually do as part of the policy coalition. There is obviously a potential tension here, because NGO supporters may oppose action which is necessary in order to achieve influence, such as strategic compromise. Relations between the rank and file of interest groups and their Brussels officers can often be strained for this reason (Greenwood 1997). However, should NGOs fail to operate on the basis of input made by informed supporters they are only indirect links to their supporters, and even less direct links to other

EU citizens. In order to test whether citizens can really use NGOs as means to make their voices heard in the EU system, it is therefore also necessary to investigate the internal governance practices of NGOs. To this enquiry is devoted the next section of the chapter.

NGOs and internal governance: evidence of supporter impact on NGO EU strategy

It is possible to develop criteria against which to assess supporters' ability to influence NGO policy towards the European Union, drawing in particular on the extensive literature on NGOs, civil society and development policy and adapting it to the EU context. I elaborate on this literature elsewhere (Warleigh 2001b: 624–9). Below, I adapt and explain the relevant criteria.

The first and primordial criterion is the ability of an NGO to influence EU policy outcomes.[3] The second criterion is (financial) independence: NGOs must be able to call their own tune rather than answer to the priorities of their funders (unless of course their supporters are their only source of income). The third criterion is the existence of adequate structures of decision making which permit NGO supporters to shape the decisions and strategies made by those organisations. Fourth, NGOs must be substantively rather than formally democratic: that is, they must not only have structures which allow supporters to participate in their decision making but their supporters should actively play such a role. Fifth, and as a consequence, NGOs must provide some form of education about the EU system and how it impacts upon their particular policy area in order to show supporters how and why the EU policy process could be important to their concerns. Sixth, NGOs must concentrate on advocacy/lobbying rather than the provision of services as agents of a 'regulatory state'. Should NGOs score highly on most of these counts, they are capable of helping to make EU citizens from member-state nationals/consumers of EU public policy.[4]

Financial Independence appears to be unproblematic for most NGOs, at least those which are medium-sized or large organisations. Many can count on voluntary contributions from members of the public as well as regular donations from supporters. Practices such as the operation of gift catalogues or shops also aid financial independence. Those seeking project funding felt able to accept money only for projects they wished to undertake and under acceptable funder-driven conditionalities. However, smaller NGOs are often obliged to fund themselves by project work, and can become service providers to funders rather than advocates of a specific issue as a result. Moreover, many NGO officers interviewed for my research felt that competition for resources leads to financial mechanisms of exclusion, as funders often privilege NGOs with histories of involvement in a particular policy area. Thus, those NGOs seeking 'joined-up activism' may be unable to realise this goal.

Adequate structures of decision making to allow supporter input into NGO EU-strategy are conspicuous by their absence, however. NGOs in my sample tended to function as centrally run organisations with an emphasis on inclusion of all relevant staff but at best little input from supporters amongst the public. There was little difference here between smaller and larger NGOs: thus, neither the presence of greater resources nor location closer to the grassroots has so far translated into creating structures for regular supporter input into decision making about NGO policy. In one case in the sample, however, supporters were sent opinion surveys to fine-tune campaign strategies (but not to decide their subjects or objectives) on a fairly regular basis. Supporters who proactively sought to make an input would, in most cases, be welcomed, but there were few structures in place to invite such input. Furthermore, NGO officers' understandings of accountability for their NGO's activities centred on the law, financial accounting or, in some cases, the relevant client group/focus (people in developing countries, the environment etc.). In other words, supporters were not seen as the group to which the NGO or its officers should be accountable, as they could simply cease to lend their support if they disagreed with the NGO's policy. Thus, although many NGOs take pains to provide at least some information on their activities by such media as newsletters, and in some cases run helpdesks for members to approach with complaints, I found little evidence of structures which allowed supporters either to make a regular input into the making of NGO policy or to hold officers/the NGO to account for it afterwards.

Substantive internal democracy was perhaps inevitably lacking given the shortcomings of the more formal/procedural provisions for supporter involvement. The culture of NGOs appears to be insufficiently participatory, and this both impacts upon and reflects a lack of motivation to participate in NGO decision making on the part of supporters. Some of the NGOs in the sample had carried out performance audits in recent years, and none of these surveys had revealed a greater desire for input on the part of supporters. This is a crucial finding: NGO supporters do not wish to use these organisations as a means of active citizenship. Instead, supporters wish to delegate responsibility to organisations whose broad aims they support even if they are ignorant of, and might conceivably oppose, these organisations' policy stances on a range of issues. Some of the NGO officers interviewed admitted that they did not publicise much of their organisation's policy work for this very reason. It thus appears that NGOs (at least those in the sample) are representative of their supporters in no meaningful way. However, it should be noted that this may change in the future: several interviewees stated that their organisations were seeking to take on more campaigning work, which they felt would require an increase in supporter involvement.

Education of supporters about the European Union is another criterion where assessment of NGO activity indicates little chance of success in making active EU citizens. Individual NGOs may well join umbrella

organisations as a means of deepening their knowledge of the EU system and policy portfolio, but perhaps unsurprisingly this does not appear to hold true for individual supporters of NGOs devoted to issues other than the promotion of European integration. Although NGO newsletters may well inform supporters that officers have been active in trying to influence EU policy, little if anything was attempted to explain why and how this was important to the organisation's agenda. If attempted, these efforts were always curtailed as a consequence of resource shortages. Most NGO officers interviewed considered their supporters' knowledge of the EU policy agenda to be very low, and that the same could be said of supporters' understanding of the European Union's role and powers. Other international or transnational organisations were thought to enjoy a higher profile even if supporters lacked significant knowledge about their workings and policies – especially the WTO, World Bank and IMF. Thus, NGOs currently appear to have little use as agents of socialisation into the EU system, that is, as a means by which supporters can begin to understand how and why it is necessary to engage with the EU to pursue their policy goals.

Analysis of findings relating to *concentration on advocacy/lobbying rather than service provision* reveals data of a less problematic nature, however. In terms of EU internal policy, NGOs tend to be campaigners rather than service deliverers, even if they take on such work outside the Union. However, it should be recalled that funding problems can make striking the right balance difficult for small NGOs, which might as a result abandon their efforts to influence EU policy altogether.

In sum, NGOs' ability to develop EU citizenship is thus very limited, at least for the time being. Usually able to maintain financial independence, and helpfully concentrating on advocacy and campaign work, NGOs nonetheless fail to provide the mechanisms by which supporters can equip themselves with the skills, knowledge and interests to become EU citizens in a substantive sense. Particularly telling are the shortfalls in structures of decision making, internal democracy and supporter education; judged against these three crucial criteria, NGOs fall far short of the mark. For the time being, in this regard at least NGOs engaging with the EU decision-making process are interest groups like any other.

Conclusions: can NGOs be citizens' voices in EU policy making?

In this chapter I have demonstrated that NGOs are currently unable to act as citizens' voices in EU policy making in any meaningful way. To recap: although they are often able to take part in and co-create sophisticated strategies to influence policy outcomes, and thus are able to demonstrate that engagement with the European Union is both possible and capable of generating positive results, NGOs are not at present able to provide the

European Union with greater input legitimacy. This is because most NGOs do not allow their supporters to engage directly with their policy making, and provide no or few means by which supporters can learn about or influence the integration process and related public policy. The fact that NGO supporters often have no interest in playing such a role may well exonerate NGO officers from allegations of elitism. However, it also highlights several issues which must be squarely confronted by those who seek to design strategies for making citizens of consumers in the EU context.

First, further political socialisation of member-state nationals may in fact be a necessary precondition for, rather than a fortuitous result of, citizens' engagement with either NGOs or other organisations in order to influence EU policy. Making EU citizens thus requires attention to be paid at all levels of governance to issues of citizenship in general, in order to foster a participatory political culture. If citizens have a disregard for citizenship practice in any deep way at national level, they are unlikely to develop a greater regard for it in an unfamiliar transnational setting.

Second, far more education about the European Union and its policy processes is vital, so that those citizens who wish to advance or block particular policy objectives are able to understand when, why and how to do this at the EU level, either individually or with like-minded actors. As indicated by Pérez-Díaz (1998), institutional reform of the EU will fail to register with member-state nationals if they have not first become more active citizens and self-conscious inhabitants of a European public space. Thus, even if the doors of 'Brussels' are thrown open to citizens' groups, without this change in political culture citizens are unlikely to accept the invitation or even know they have received it.

Third, all actors seeking to breathe life into EU citizenship for either normative or instrumental reasons must develop reflexive practices which view participatory governance as both means and end. This is because input legitimacy demands genuine capacity of the citizen to influence policy outcomes, albeit often (and possibly usually) via selected representatives. In this respect, the Commission is right to suggest in its White Paper on Governance that NGOs must be internally democratic if they seek influence at EU level. Whilst the EU institutions are scarcely bastions of democracy themselves, the development of EU citizenship is unlikely to be facilitated if their chosen interlocutors in policy development are no better. There is no reason why influence should not entail responsibility for each and every group of actors. Of course, the Commission must not use the internal democracy injunction to exclude from EU debates those groups it disfavours because they take a different perspective on the issue in question (Wincott 2001). However, it is entirely reasonable for the Commission to expect NGOs and other groups brought in to the EU policy process to make good their claims to represent the public, if it is seeking not only to make policy but also to help the development of EU citizenship.[5]

Fourth, if NGOs can reform their internal governance they are in principle capable of acting as one kind of citizens' voice in EU decision making. Already often able to influence EU public policy, they can usefully appeal to citizens' sectoral concerns and could thus show how the European Union is relevant to the individual. However, internal reform is a vital precondition; the making of EU citizens will not be aided by either NGOs who offer their supporters no real means of influencing their internal policy making, or by EU institutions which make claim to advocate greater democratic inclusion but fail to change their own political cultures.

Notes

1. These opportunity structures are listed as: voting in EP elections, voting at national level, petitions to the EP, participation in EP hearings and conferences, liaison with MEPs, collaboration with the Committee of the Regions and the Economic and Social Committee, use of the Ombudsman, letters to the Commission, screening Green and White Papers, attendance at Commission hearings and conferences, membership of comitology committees (if they are appointed as experts), support of interest groups which lobby at EU level, monitoring and using proceedings and judgements of the European Court of Justice, direct action/protest, and taking part in opinion polls such as Eurobarometer.
2. The term 'NGO' can be fairly elastic. I here follow the definition of the World Bank (Operational Directive 14.70, 28 August 1989): NGOs are considered to be 'groups and institutions that are entirely independent of government and that have primarily humanitarian or co-operative rather than commercial objectives; they are private organisations that pursue activities to relieve suffering, provide basic social services, or undertake community development; they also include citizens' groups that raise awareness and influence policies'.
3. As this issue was addressed above, I do not tackle it again in the present section.
4. In the following paragraphs I summarise research findings examined elsewhere with regard to the issue of civil society Europeanisation (Warleigh 2001b).
5. Of course, the Governance White Paper does permit scepticism of the genuineness of the Commission's intentions in this regard.

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7

Legitimising EU Regulation: Procedural Accountability, Participation, or Better Consultation?

Ian Bartle

Introduction

The European Union is often conceived as a regulatory order with a proliferation of rules covering a wide range of economic, technical and social matters (Majone 1996, 2000). With very limited funds to draw on compared to Member States' fiscal budgets, the most effective method of governing the European single market is by regulation. The regulatory process, however, is often perceived as technocratic and not democratic: it is an opaque process carried out by experts and bureaucrats and impenetrable to the ordinary citizen (Harcourt and Radaelli 1999) and thus appears to be a manifestation of the EU democratic deficit (Lord 2001). An example of the lack of transparency is the process of comitology which involves the delegation of technical and legal details of policy and regulation to committees composed of Commission and Council representatives but excluding parliament and public interests. A problem of comitology is that the process is not limited to technical and non-political issues but can include a range of political, social and ethical issues (Joerges and Neyer 1997; Vos 1997). Sporadic participation of public interests such as consumer, social and environmental groups in contrast to the closer involvement of business and industry in EU policy making and regulation is another manifestation of the democratic deficit (Young 1998).

Technocracy per se, however, is not necessarily the heart of the problem. There is an argument that technocratic governance and depoliticisation are essential elements of the regulatory process and effective administrative procedures are required to ensure accountability and legitimacy (Majone 1999, 2000). The EU polity being primarily a regulatory order arguably derives its legitimacy from functional logic and cannot easily, nor necessarily should

be reconciled with a political culture of democracy and citizenship. Moreover, it has been contended that the European Union does not suffer from a democratic deficit because its areas of competence tend to be those which, with broad normative agreement, are delegated to specialists to insulate them from political contestation (Moravcsik 2002).

Despite this, arguably functional or 'output' legitimacy is insufficient and the idea of enhancing the legitimacy of EU regulation by democratic means such as increasing and broadening participation has been central to the Commission's governance initiative manifested in its White Paper on Governance (Commission 2001a; Magnette 2003). One of the key aspirations of the White Paper is 'better involvement and more openness', and a key principle of good governance is 'wide participation throughout the policy chain – from conception to implementation' (Commission 2001a: 4, 10). Such aspirations were reflected and developed in two Commission working groups on 'better regulation' (Commission 2001b) and on 'consultation and participation of civil society' (Commission 2001c). One particular regulatory approach suggested is 'co-regulation' which echoes the idea of 'responsive regulation' (Ayres and Braithwaite 1992), and appears to promote inclusion and 'stakeholder' involvement while being flexible and effective.

All of this raises a number of questions: can the EU regulatory order be developed in such as way as to enhance its legitimacy? What scope do the proposals on regulation in and related to the White Paper offer to improve participation and inclusion? What are the opinions of the actors, particularly public interest NGOs, who appear to be the most appropriate actors to participate? Do they have any suggestions for enhancing participation within the EU's system of governance? This chapter commences by considering the problem of legitimacy and the regulatory state and outlines two models of regulation – 'rational-procedural' and 'republican-participatory' – from which legitimacy can be derived in different ways. This is followed by an outline of different approaches to the legitimacy of the regulatory state in Britain and Germany and their connections to the models of regulation. The heart of the chapter focuses on an assessment of the extent to which these models of regulation can be applied at EU level, and particularly the way in which mechanisms such as independent agencies, better procedures, coregulation and greater participation by stakeholders can enhance legitimacy. It is argued that these mechanisms have limited scope and that it is better to focus on establishing better forms of consultation.

Legitimacy and the regulatory state

The pressures for enhancing the legitimacy of regulation can be understood from examination of the shift from the 'interventionist state' to the 'regulatory state'. The rise of competition and new markets is part of a general Europe-wide phenomenon of regulatory state (Majone 1994, 1997). In the

interventionist state, legitimacy could be achieved (if not necessarily adequately) by ministerial responsibility and parliamentary accountability. The traditional relationship between the state and citizen in public administration was based on public service and trust (Haque 1999) and the most important aspect of this relationship was social and economic rights of citizens. All citizens had the right to the provision of basic services such as education, health and housing and, in the utility industries, the right to a service at an affordable price. Less salient were citizens' political rights of public accountability and participation. In the utilities in Britain, for example, traditionally there was some limited representation of consumer issues in the utilities with varying forms of consumer councils but they were weak and legitimacy was highly dependent on parliamentary accountability (Thatcher 1998).

The regulatory state marks a distinct shift from the interventionist state and with it the way political accountability and legitimacy is achieved. In the regulatory state many tasks are delegated by ministers to agencies and processes of ministerial responsibility and parliamentary accountability no longer appear effective ways of establishing legitimacy. Like new systems of public administration, citizens are transformed into customers or clients and the relationship between the state and the citizen is based much more on competition. The main and most obvious ways that legitimacy and accountability are achieved are by competition and business-like practices which are perceived to lead to the delivery of better services. The shift towards a privatised economy and regulatory state is now well entrenched in Britain and involves a new relationship between the state and the citizen. The citizen is transformed from a passive recipient of services to an active consumer making choices in a competitive market (Prior *et al.* 1995: 15).

It is not obvious, however, that competition and business-like practices are sufficient to legitimise the regulatory state. The privatisation of provision and the delegation of responsibilities by ministers to agencies may lead to a loss of legitimacy and the adequacy of the new relationship between the state and the citizen in relation to public services is questionable (Haque 1999). One fundamental problem of the notion of 'citizens as consumers' is that the ability to pay becomes central to the relationship. In the utilities there are doubts about whether the 'citizen as consumer' model is adequate for the provision of essential services when competitive markets often tend to favour economically strong consumers (Ernst 1994: 192; Graham 2000). No longer is the primary emphasis on service to all citizens, and cherished customers might be treated better, undercutting the very notion of public utility services. In Britain in the utilities in the 1990s a crisis of accountability in regulation has been perceived and led to questions about the new model (Graham 1998). There have been increasing questions about service quality and those responsible have appeared more and more distant. The perception of closed and unaccountable regulators and privatised companies

pursuing shareholder interests, over those of the ordinary citizen and of the consumer, have accentuated these problems.

While a neo-liberal approach to the problem suggests that legitimacy problems will subside once fully competitive markets are established, there are suggestions that more is required to enhance legitimacy. Competition itself may not be sufficient and the shift towards a market-orientated regulatory state has left political systems of accountability and legitimacy with much 'catching up' to do (Graham 1998). Two models for the enhancement of the legitimacy of the regulatory state can be envisaged: a 'rational-procedural' and a 'republican-participatory'.

A rational-procedural model

An influential model of the new regulatory state in Europe has been extensively articulated by Giandomenico Majone (1994, 1996, 1997, 1999, 2000). This draws substantially from the American experience of delegation to independent regulatory agencies and clearly defined administrative procedures to ensure good administration and accountability. It draws from 'principal–agent' theory and the importance of the separation of politics from economics. The former is the domain of democracy and political choice and the latter of rational and expert decision making and rule formulation. The policy framework and objectives are established by politicians – the principals – and detailed rule and regulation formulation and enforcement by experts in independent agencies – the agents. Delegation to independent agencies is crucial in order to ensure 'credible commitment' to policy objectives without being susceptible to the vagaries of political pressures and change (Thatcher and Stone Sweet 2002). The European Union can be seen as an exercise in delegation of specialist areas of low political salience by political principals – the Member States – to an independent expert agency, the Commission (Moravcsik 2002).

Within this model the key limitation in legitimacy – decision making in agencies distant from the democratic process – is overcome by good administrative procedures to ensure accountability (Majone 1999). Clear relations between the independent agency and the political principal, clear definitions of the powers of the agencies, well-defined processes of reason-giving, strong judicial review all contribute to legitimacy. The US approach to regulation closely corresponds to this model of procedural accountability. The 'reason giving requirements' imposed on regulatory agencies by the courts and the Administrative Procedure Act are important ways of establishing the legitimacy of regulation in the United States (Majone 1999: 14). In contrast, Britain, for example, is said to suffer, not only from inadequate independence of regulatory agencies, but also from inadequate systems of transparency of regulators' decisions and procedural accountability. In a variety of ways other European countries and the EU level suffer from problems of limited independence and procedural accountability and could learn from the

American approach. Regulatory legitimacy is enhanced by administrative procedures which both reinforce and maintain independence and establish clear procedures and processes of accountability of independent experts.

A republican-participatory model

An alternative model of the regulatory state rests on a certain scepticism about an easy separation of economics and politics and the achievement of legitimacy by procedural accountability. It is doubtful whether a clear distinction can be made between a domain of policy objectives which is rightly politicised, and a domain of policy implementation and rule making which is depoliticised. It can be envisaged, for example, that 'economic regulation' should be depoliticised while social and environmental regulation more politicised. However, regulation is inherently a complex process and cannot so easily be divided into such sub groups (Prosser 1999). Given the problems of depoliticisation an alternative to procedural formalism is to accept that much of the regulatory process is inherently political and enhance the participation in regulation of affected interests.

This model draws from republican theory of participatory citizenship and envisages a deeper and more direct form of democracy, with an active citizenry and a deeper incorporation of public interest groups (e.g. consumer and environmental interest groups) into the public policy process, than conventional liberal theories do (Pettit 1997; Schwarzmantel 2003). Ayres and Braithwaite (1992) distinguish this model from neo-corporatism schemes, putting an emphasis on direct citizen involvement, but recognise the importance of institutionalisation and associations as ways to realise greater participation.

To enhance participation in the regulatory process Ayres and Braithwaite draw on republican notions of communitarian empowerment (1992: 17). As well as increasing choice in the market they also stress 'voice' rights by empowering the citizen by giving them the right to participate in local decision making and in public interest associations up to the national level. This could be realised by a form of 'tripartism … in which relevant public interest groups (PIGs) become the fully fledged third player in the game' (Ayres and Braithwaite 1992: 56). Tripartism would promote participation by granting PIGs access to regulatory information and by giving them a seat within the negotiations between the regulator and regulated (Ayres and Braithwaite 1992: 57–8). They are reluctant to define exactly who the PIGs are but envisage the likes of environmental, social and labour interests. Perhaps the most significant public interests, in industries such as the utilities, are consumer and environmental interest groups.

Two means suggested by Ayres and Braithwaite to achieve flexibility and to enable greater participation of public interests are 'enforced self regulation' and 'coregulation'. 'Coregulation' seems to offer more scope for participation since its essence, understood from the prefix 'co' signifying 'jointly',

or 'together', implies that at least two parties are involved in the formation and implementation of regulation. The parties could be the regulated party and the regulatory agency, they could involve a group of regulated parties such as industry associations and the regulator, or possibly the regulated party and other interested and affected interests such as public interests. The term 'stakeholder' is often used to define members of the group who are either affected in some way either directly by regulation or indirectly, by being affected by the conduct of the regulated.

Regulatory legitimacy at national level

There are significant cross-national variations in approaches for regulatory legitimacy which to some extent draw from the above approaches. The US approach approximates to a model of procedural accountability. In Europe and other countries there are a variety of administrative traditions, developments of the regulatory state and mechanisms of transparency and accountability (Lodge 2001; Lodge and Stirton 2001). Britain and Germany are two countries which have different approaches with clearly different traditions of administration, different ways of achieving regulatory legitimacy and different attitudes towards the use of independent agencies (Bartle *et al*. 2002).

At a fundamental level there are cross-national differences between Britain and Germany in the regulatory state and the extent to which there is a 'new' regulatory state. The shift from the interventionary state to the regulatory state is much more clearly defined in Britain than in Germany. In Britain a standard model across a wide range of sectors has developed consisting of privatisation and the delegation of certain regulatory tasks to independent agencies. In Germany these tendencies are much less pronounced and continuity is much more evident. Something approaching Britain is evident in German telecommunications with privatisation of the national monopoly, liberalisation and the creation of an independent regulator. However, in other sectors such as energy and rail, there has been less privatisation (in part because some parts of the energy sector were already privately owned) and there has been a marked reluctance to set up a range of independent regulators along British lines (Müller 2001). The mechanisms for achieving legitimacy in the regulatory state in Britain and Germany also differ markedly. While there are cross-national similarities in the promotion of consumer choice through competition and information to facilitate choice (Lodge 2001), other mechanisms and processes differ. In Britain where regulatory agencies have been extensively adopted a clear aim has been the use of good administrative procedures and principles of 'better regulation' to assure accountability and legitimacy (Vass 2002). Recent developments also suggest the aspiration towards the achievement of legitimacy by increased participation. Since 1997 the Labour government has attempted to strengthen the role of the consumer, increase regulatory transparency and open access to

information. The proposals, enacted in the Utilities Act 2000 contain elements of citizenship which include the strengthening the rights of disadvantaged consumers and ensuring all can benefit from competition (Graham 2000: 148), and proposals for strengthening the role of consumer councils, by the statutory creation independent consumer councils, suggest increased participation. The empowerment and encouragement to participate apparent in the statutory incorporation of the consumer interest into the regulatory process and systems of complaint handling (Lodge 2001) can be interpreted as a move towards a republican style of regulation. Perhaps this is an indication of a new style of relationship between the citizen and the state involving more direct forms of participation for citizens groups in the regulatory process. One of the most significant ways of achieving regulatory legitimacy in Germany is its traditional practice of administration. The traditional importance of the law and formal procedures (*Rechtsstaat* and *Ordnungspolitik*) and the pursuit of the public interest have ensured citizens' rights and the legitimacy of regulation (Dyson 1992) and remain a central feature of the regulatory state in Germany (Bartle *et al*. 2002). There is a tendency towards privileged 'insider' role for producer groups with limited citizen and consumer involvement. Councils for consumer representation and complaint mechanisms have not been developed as in Britain and consumer organisations have had to rely mainly on lobbying and legal action (Lodge 2001). The German approach would therefore appear to have more in common with a model of procedural accountability rather than participation.

Despite evidence of cross-national convergence to the regulatory state there is no one model of regulatory legitimacy developing at national level. In Britain the use of agencies for functional legitimacy is widespread and is coupled to systems of representation and participation of public interests, particularly consumer interests. In Germany legitimacy is drawn more from formal procedures and a high degree of legalisation of regulatory processes. Neither country clearly approximates to either the rational-procedural or the republican-participatory ideal types, but aspects of each can be found in both countries. At EU level the question arises whether the legitimacy of regulation could be enhanced by drawing from elements of the ideal types and the national approaches.

Prospects for the enhancement of regulatory legitimacy in the European Union

Both ideal types of regulation, and the different national approaches, appear to offer possibilities of enhancing regulatory legitimacy at EU level. In particular, in recent years suggestions for the improvement of the EU regulatory process have included greater use of independent agencies and better administrative procedures (linked to the rational-procedural approach) and the use of coregulation (with connections to the republican-participatory

approach). The following outlines the ideas and considers the scope they offer for the enhancement of legitimacy.

The rational-procedural model: agencies and administrative procedures

Within this model legitimacy is derived from the delegation of carefully controlled competencies to expert and non-political agencies with clear procedures of political accountability. From this perspective it has been argued that the European Union does not suffer from a democratic deficit. Its greatest autonomy is in specialist areas such as central banking, economic regulation and technical administration, which have become well established within developed nations as legitimate areas for independent specialists. Moreover, arguably the European Union has extensive policy making pluralism, openness to civil society and procedural accountability (Moravcsik 2002).

However, this optimistic view is not widely shared, even by protagonists of the rational-procedural perspective, such as Majone, who argues that there is much scope for improvement as the Commission is too politicised and procedures of accountability are weak (Majone 1999, 2000). Politicisation is evident in the pursuit of narrow political interests by Commissioners, who are often national career politicians, and the increasing influence of the European Parliament on the Commission. The Commission is not the political arm of the European Union, but rather the executive and bureaucracy, concerned primarily with effective implementation of policy; thus politics and economics are not clearly separated. Competition policy is an area where the Commission has developed considerable influence, but it is a highly technical area, where experts have a considerable role. Problems have arisen for example in the early 1990s when decisions on state aids in steel and airlines appeared to reflect national political interests rather than competition criteria (Majone 2000: 285). Politicisation results in commitment and policy credibility problems as Commissioners cannot be depended on to pursue the rationally best economic decisions.

An approach to overcoming these problems involves a combination of delegation to independent agencies and clearly defined administrative procedures. Agencies are not new at EU level, by 1997 ten agencies had been established under the EC treaty covering issues such as the environment, training, and drugs (Kreher 1997) and in 2003 EC treaty agencies numbered fifteen. The agencies are, however, predominantly for the provision of information; regulatory agencies with decision-making powers, such as a possible EU regulator for telecommunications, are politically much more controversial (Bartle 2001). Despite the difficulties of establishing agencies the idea of increased delegation to agencies was taken up in an extensive report to the Commission in 1999, and agencies in a number of areas including food safety (which was set up in 2002), energy and telecommunications were

proposed (Everson *et al*. 1999). The increased use of agencies was also proposed by the Commission in the 2001 White Paper and taken up in subsequent reports as a way of 'improving the way rules and policy are applied across the Union' (Commission 2002a: 2). While the increasing use of agencies appears to be leading to a consistent pattern of governance, variety is the defining feature of existing agencies. There are agencies which mainly provide opinions and recommendations, those that undertake inspections, and those that have decision making powers (Commission 2002a: 4). Another aspect of variety manifested in sectors such as telecommunications and energy is that instead of a federal like agency drawn from the American model, the EU model is more of a network of national agencies (Majone 2000). At EU level an agency can be thought of as a 'node' at which national regulators coordinate and work together.

Independent agencies might provide a basis for credibility but good administrative procedures are necessary for establishing the accountability of agencies. A 'European Administrative Procedures Act' has been suggested to rationalise the decision making process, improve transparency, establish clear processes of reason giving, clarify the extent of interest group access and to substantiate judicial review (Majone 1999). In its recent analysis of the use of agencies the Commission has also specified a number of procedures both for internal administration of agencies and their external control (Commission 2002a). Internal structures include an administrative board, a director and appeal board each with defined functions and appointment procedures. For external control and supervision the relations with the Commission, European Parliament, Council and Court of Justice are defined as well as the powers of the external bodies vis-à-vis the agencies. The network model of EU agencies, however, raises questions of administrative procedures and accountability as there are very different systems at national level. Accountability could be achieved at national and EU levels (Commission 2002a) but it is unclear whether these could be integrated effectively at EU level.

What prospects does this approach offer for the enhancement of regulatory legitimacy at EU level? It is difficult to argue against better administrative procedures and controls of agencies but the legitimacy of regulation by agencies rests on more than this. The question is the extent to which a depoliticised technocratic form of governance, no matter how well governed by good administrative procedures, is able to enhance regulatory legitimacy. It has been argued that technocratic forms of regulatory governance in the EU are only appropriate in limited circumstances, for example, for policies with low salience ('without a public') and when the costs are borne by societal actors (Harcourt and Radaelli 1999). Technocratic governance is appropriate when there is a clear and predominant single public interest which can be established by expert analysis. Where there are choices which have distributional consequences and asymmetrical societal effects the issues are

clearly political and technocratic approaches are inappropriate. This is recognised by the Commission which says that 'the use of regulatory agencies is appropriate in areas of high technical specialism … and restricted to areas where a single public interest predominates' (Commission 2002a: 11). Do these criteria apply to many regulatory areas of substance? In a study on regulatory politics in the European Union, for example, a wide range of policy areas are covered such as cars, road transport, the environment, product safety and pharmaceuticals, of three methods of decision making – technocratic, judicial and political – the latter process, it was argued, dominated 'demonstrating precisely that the regulatory process remains highly political' (Young and Wallace 2000: 136). Also very few agencies have been set up and those that have, have limited powers indicating that there are very few areas without conflicting public interests (Wincott 2001: 906). The scope for satisfactory delegation to independent agencies without compromising legitimacy thus appears to be limited.

The idea that regulatory networks could enhance legitimacy is also questionable. It is not clear how administrative procedures could be set up to ensure the accountability and legitimacy of regulatory networks. The Commission, for example, in its recent report on the creation of regulatory agencies does not address regulatory networks (Commission 2002a). In response to the difficulties of creating federal-like EU agencies with decision-making powers, Majone, a strong advocate of independent agencies, suggests the network model is more appropriate but the administrative procedures he suggests apply to EU agencies rather than networks (Majone 2000). While elaborate administrative procedures for the legitimacy of agencies are considered, his proposals for networks are based mainly on effective functioning, which includes 'mutual trust and cooperation', 'professionalisation' and a 'common regulatory philosophy' (Majone 2000: 297). These in themselves do not directly address legitimacy nor are they administrative procedures and moreover it is doubtful whether they can be achieved in the foreseeable future. There are enduring national differences in regulatory styles and approaches, particularly between Britain and Germany as noted above, and it is difficult to see mutual trust, cooperation and common regulatory philosophies developing sufficiently for the effective accountability of regulatory networks.

The complexity and ad hoc nature of regulatory networks also militates against their use for improving legitimacy. Complexity is reflected in multiple principals (Member States and the Commission) and agents (national regulatory agencies and EU coordinating bodies) and, in contrast to agencies, networks do not involve a clear act of delegation by a single principal who could set up effective procedures. While Majone (2000: 274) argues that advances in institutional design and procedural controls could enable networks to satisfy accountability requirements, he does not draw from experience of the network model but mainly from the US agency

model where there is a clear principal, agent and act of delegation. Actual existing examples of networks, such as in telecommunications and energy, tend to be highly decentralised and set up mainly on the initiative of national regulators. While the Commission has encouraged their establishment, there has not been a clear act of delegation from the central node of the network. Given this decentralisation it is difficult to see the Commission imposing some effective and consistent administrative procedures to establish legitimacy.

Good administrative procedures have a role to play, and agencies may have some use in areas that are uncontroversial, technical and specialist. However, their potential for improving the legitimacy of a wide range of areas of regulatory policy which cannot easily and satisfactorily be depoliticised are limited. It is also difficult to see how the regulatory network model, which is complex and unlikely to develop clear and transparent procedures, can contribute to legitimising the EU regulatory process.

The republican-participatory model: coregulation and stakeholders

'Coregulation' is one mechanism of regulation that appears to offer the prospect of greater inclusion of affected interests, or 'stakeholders'. In relation to the White Paper on Governance, The European Commission notes that 'coregulation is an approach in which a mixture of instruments is brought to bear on a specific problem, typically involving both primary legislation and self-regulation, or if not self-regulation, at least some form of direct participation of bodies representing civil society in the rule making process' (Commission 2001b: 6). In the United Kingdom there have been attempts to develop coregulation, for example, in telecommunications. The telecommunications regulator, OFTEL, noted that coregulation involves the participation of OFTEL in stakeholder groups which can be when OFTEL backs stakeholder-led initiatives through statutory back-up powers, and when OFTEL participates in stakeholder groups in the development and the implementation of regulation (OFTEL 2001) At the EU level, public interest groups in varying ways have become increasingly active and influential and cannot be said to be simply 'outsiders' as opposed to 'insider' producer groups (Greenwood 1997), and appear to be a way of bridging the gap between the European Union and the citizen (Warleigh 2000). The development of consumer policy, however, has been uneven in comparison to economic integration, the primary thrust of the single market programme (Young 1998), implying that more needs to be done. Greater involvement of public interest consumer and environmental groups in the regulatory process, possibly by systems of coregulation appears to offer some scope for increasing legitimacy of the EU regulatory process.

Despite the promise of coregulation there are major limitations on the prospects of enhanced participation and greater legitimacy. Amongst

EU level environmental and consumer groups, who would be expected to be the significant participants in coregulatory processes, there is a general scepticism towards the ideas presented by the Commission in the White Paper. One of the main concerns is that the force of law will be diminished and with it the environment and consumer interest. For example, the European Environmental Bureau (EEB), which has represented eight environmental groups on governance issues, notes that voluntary agreements on regulation may lack the strength and breadth of applicability compared to regulations based on statutory law[1] and the pressure on governments to create strong regulatory bodies might also be reduced (EEB 2001). Enforcement is also a concern of the European consumers group BEUC who argue that the level of commitment to coregulatory agreements may vary significantly and that the diminution of the statutory dimension may encourage free riders who are not party to agreements (BEUC 2002). Similar concerns, about the dilution of the role of law, have been expressed by the European group of consumer cooperatives.[2]

Public interests also doubt the potential of participation in coregulatory bodies. A problem is the high level of resources required for committed participation in such bodies. BEUC, for example, notes that the 'level of resources required on both sides would in itself prevent coregulation from becoming a general or common method of rule making in the Single Market' (BEUC 2002: 9). Environmental groups go further and emphasise the massive asymmetry in resources between industry and themselves.[3] Not only is industry well established in standards organisations but they are able to produce much more substantially developed proposals. Environmental interests could therefore be very much weaker partners in these bodies. While environmental groups would like such bodies to be more transparent they are concerned about being coopted in to the process and possibly losing public support in the process. This point is echoed by the European Citizens Advisory Service (ECAS) which notes that a process of regulation which is drawn up by stakeholders could reinforce the general impression that the process is dominated by a closed elite group.[4] If the aim is connecting the European Union, its policies and regulation with citizens then there is a problem of membership of coregulatory bodies and who writes the rules. In addition, questions such as who selects the members and how easily members are replaced in response to citizens' concerns are raised by public interests.

Another reservation is that, in the multi-national environment and variable political and legal contexts of the EU, there will be less certainty about the implementation of coregulatory agreements. For example, BEUC, note that coregulation agreements will not bind all market players and the legal status of such agreements will vary from country to country with corresponding variations in the implementation (BEUC 2002: 9). Cross-national political differences are also noted by the EEB, in the Netherlands

for example, a country with relatively high environmental standards and awareness, industry knows that if voluntary agreements and related processes such as benchmarking fail, political pressure will soon rise for strong legislation.[5] The same cannot be said about some other European countries, nor importantly, about the European Union as a whole, where there is little political consciousness and focus on the European Union.

A further reservation concerns the argument made by the Commission that coregulation agreements will only apply when the decision to be made is relatively technical and uncontroversial (Commission 2001b). Some decisions may indeed be uncontroversial but as ECAS point out, the same decision, which is uncontroversial in one area, may turn out to be highly controversial in another (ECAS 2002). How is the public to know when decisions become controversial? Are they to depend on the vigilance of under resourced public interest groups? An example in the European single market is the process of agreeing upon cross-border tariffs in the newly emerging European electricity market. A process of negotiation involving national regulators, industry, governments and the Commission, named the Florence process, has been underway since the late 1990s. It is a type of regulatory network and it can also be seen as variant of coregulation as it involves negotiation of market rules by several parties. As a technical process of tariff charging there appears to be little impact, for example, on public concerns such as the environment, but it may promote a significant increase in long distance transmission of electricity which could adversely affect the environment. Although the Commission claims that the process involves 'stakeholders' (Commission 2000), there is little involvement of environmental or consumer interests. The EU environmental interest group, Climate Action Network – Europe, for example, although interested in the Florence process, has insufficient resources for full participation and analysis of the implications.[6] Cross-border electricity tariffication is just one example of an emphasis on ad hoc and flexible rule making processes instigated very often by industry which will almost invariably leave public interest several steps behind. With fewer resources they will neither be able to participate fully, nor fully understand the implications.

This raises the question to what extent coregulation and its variants are really about promoting participation of public interests, or whether the emphasis is mainly on flexibility and effectiveness. It has been noted elsewhere that while the Commission's White Paper is peppered with the language of 'involvement' and 'participation' of civil society, concrete forms are very limited and at best involve increased participation of sectoral actors rather than active citizens (Magnette 2003: 148). Linking coregulation and the principles of 'better regulation' to participation appears to be a convenient fiction for the Commission's governance initiative when the central thrust is efficiency rather than participation. For example, the Commission's report on regulation is introduced by the conclusions of the Lisbon

European Council of 2000, which stressed European competitiveness and new approaches to regulation which are effective and flexible. While the Commission added that it emphasised the involvement of civil society in regulation the impression given is that this is subordinate to efficiency. The seven principles of better regulation noted by the Commission which are 'proportionality', 'proximity', 'coherence', 'legal certainty', 'timeliness', 'high standards' and 'enforceability' note that stakeholders should have a role but do not focus specifically on participation (Commission 2001b). A specific reference to coregulation starts with the advantages in terms of 'flexibility, proximity, and (possibly) timeliness' (13) and only later mentions participation, giving the impression that it is an optional extra rather than an essential element. These approaches seem to match more closely to the objectives of industry which stress flexibility, efficiency and reducing the (perceived) burden of regulation (Amcham 2002; Unice 2002). While industry pays lip service to participation it is questionable how wide they want it. UNICE for example note that 'stakeholder organisations … should be representative at the European level, mandated to act on behalf of their constituents, and possess the necessary means to fully participate in the process' (Unice 2002: 5). The need for 'representativity' can easily exclude established public interests as well as emerging ones and add to an impression that stakeholder dialogue will be a closed process.

Better consultation and the inclusion of public interests

One of the main obstacles to greater participation is the relative weakness and lack of resources of public interests. For example, on Commission committees, environmental interests are often lone and weaker voices who have not been able to prepare adequately in comparison to industry interests. The Environment directorate notes that in response to policy proposals it can get swift and detailed responses from industry in ways which environmental interests cannot match.[7] Environmental and consumer interests also complain that some DGs such as agriculture and enterprise are rather closed.[8] The constant refrain therefore, whether it relates to coregulation or representation to the Commission is that the voice of public interests are weak and need empowering in some way. This is unsurprising and in relation to a participatory system of regulation Ayres and Braithwaite (1992: 18) note the need to empower weaker interests for a more effective system. In the European Union therefore, are there possibilities of empowering public interests to improve participation?

One possibility is to exploit an existing institution of the European Union, namely the Economic and Social Committee (ESC). The ESC is an advisory body which is a forum for dialogue and represents various economic and social interest groups in the EU policy process. Its original role was the facilitation of dialogue between the so called 'social partners', that is

business and trade unions, but has expanded in recent years to encompass a wide range of social interests – organised civil society. It claims to be the 'the representative of organised civil society in the EU political and institutional system' (ESC 2001: 2) and to offer 'a bridge between Europe and its citizens' (ESC 2002). More specifically the ESC could operate as a focal point for the development of coregulation agreements, which could strengthen public interests by formalising their role and improving information provision.

The support amongst public interests for a role for the ESC in this way is, however, very limited. While the benefits it offers in terms of putting forward opinions, information provision and networking are noted, consumer interests do not see it as an effective solution for the effective participation of civil society (BEUC 2002).[9] BEUC, for example, is 'strongly against' the use of the ESC as a means of connecting civil society to the EU because of the diversity of interests involved (4–5). Environmental interests also oppose the use of the ESC to represent civil society. They see it primarily as a forum for the social partners to engage in dialogue and would rather engage directly with the decision-making institutions (EEB 2002). Similar opinions are voiced by ECAS on the potential of the ESC to offer a bridge between the European Union and the citizen. ECAS argued that, rather than having an advisory institution acting as a focus for civil society the decision-making institutions should be more pro active in reaching out not only to civil society organisations but also to citizens.[10] Neither coregulation nor agencies coupled with good administrative procedures appear to offer much scope for the improvement of regulatory legitimacy.

The strongest and most consistent message from consumer and environmental interests appears fairly straightforward: better consultation, transparency and information provision by the decision-making institutions throughout the policy cycle is the key to inclusiveness. Greenpeace, for example, noted that although there are public hearings and formal consultation processes these are not sustained throughout the policy process.[11] Some interests such as local or regional governmental bodies, who are sometimes supportive of stronger environmental policies in the formal consultation processes, are not active at other crucial times. In the crucial stage of drafting of proposals, for example, consultation processes are informal and dominated by the stronger lobbyists. Both consumer and environmental interests noted that some DGs, tend to favour industry, particularly at decisive times in the policy process (BEUC 2002: 5).[12] The Commission does of course deny that there is a systemic bias, nevertheless they do say that they receive faster and more detailed responses from industry at crucial stages. Also 'better and faster regulation' is routinely stressed by the Commission but as ECAS noted there can be good reasons why the legislative process should not be too quick, particularly to enable all interests to be involved (ECAS 2002: 6). Another complaint of these interests is the closed nature of the Council. The EEB calls for the end of secrecy in the Council with publicisation of debates or actions

(EEB 2002) and BEUC bemoans the 'closed shop' culture of the Council at all its levels and the non-disclosure of working documents and agendas (BEUC 2002: 4).

Inclusiveness therefore could be improved by a comprehensive, sustained and committed thrust to develop and implement high standards of consultation in terms of timing, with whom and how. This would involve the identification of the affected interests at the outset of the policy or regulatory proposal and a commitment to sustained participation of the interests. The identification of affected interests is not easy; interests themselves are not always sure of the significance of a policy proposal. One technique to aid the process would be to extend the use of Regulatory Impact Assessment, which has been called for by consumer organisations. The UK's National Consumer Council (NCC), for example, argued that the costs and effects, including spillovers, of all policies should be examined thoroughly (NCC 2002). They suggested a two-stage process with an early general review and a more detailed full assessment when the policy is more developed. Clearly this could contribute to identifying the affected interests early in the policy process and making consumers better informed. In 2002 the Commission responded by proposing initiatives on better consultation and extending its impact assessment to all social, economic and environmental areas (Commission 2002b).

It must be conceded that better consultation is no panacea for significantly enhanced democratic participation. The 'community method' is still a significant constraint. The Commission retains control over consultations and the process of seeking consensus before decision making in the Council, and consultation are likely to remain limited mainly to sectoral actors all of which is unlikely to trigger significant citizen involvement (Wincott 2002; Magnette 2003). Also consultation cannot simply be equated with participation, the limitations of information available to the public on regulatory decisions and the lack of involvement at the key decision-making times are constraints on consultation (Palast *et al*. 2003: 20–3). Nevertheless better consultation offers some scope because it is an established process with involvement of a wide range of interests, it could improve the perceptions of openness and involvement and more sustained consultation processes may mitigate the problem of relatively closed consensus building before decision making.

Conclusion

The development of markets and their regulation, whether the emerging single European market or in newly liberalised sectors at national level, can create problems of legitimacy. It is not only the spread of market ideals to the provision of public services but also the delegation of regulatory competencies to unelected officials which can negatively impact on legitimacy. Different approaches to the mitigation of legitimacy problems can be seen in two ideal types of the regulatory state, a 'rational-procedural' and a

'republican-participatory', which appear to offer some scope for the enhancement of legitimacy at the EU level. The Commission's recent proposals, embodied in the 2001 White Paper and subsequent reports, develop some ideas which are based on these two approaches. The ideas were manifest in the possibility of more widespread use of agencies and the development of good administrative procedures together with an emphasis on inclusiveness and participation in the idea of coregulation.

Both approaches to the problem of regulatory legitimacy, however, are substantially limited. In the rational-procedural approach, better administrative procedures are undeniably worthwhile but the scope for legitimacy enhancement by use of regulatory agencies at EU level and the European regulatory network model is very limited. Agencies and depoliticisation are more suited to areas of technical specialism in which there is a predominant single public interest. However, how sure they can be that there is a clear single public interest and to how many areas this applies are open to question. In the regulatory process there are competing interests in a large number of policy areas in which political decisions in a political environment are necessary (Young and Wallace 2000). The regulatory network model, seen to be more suitable for the fragmented and decentralised European Union, has not only the problem of depoliticisation but also the difficulty of establishing consistent, transparent and good administrative procedures. This is a piece of ad hoc institutional reform which seems to add to the opaque and confusing system of comitology which moves the institutional system further from the citizen and creates difficulties for the involvement of weaker interests.

Also the proposals for coregulation offer little prospect of enhancing participation and citizenship in the European Union. In particular, the participatory dimension of coregulation is not fleshed out by the Commission, nor is it made clear how weaker public interests could participate in such systems in an effective way. It is also important to distinguish between the two potentially contradictory aspects of coregulation: efficiency and effectiveness on the one hand, and participation and inclusiveness on the other. It is the former, which concentrates on industry's primary concern – flexibility and the reduction of regulatory burdens – which is given primacy in the White Paper and related initiatives. What seems to be clear is that industry would be an integral part of any coregulatory arrangements but the involvement of public interest groups needs to be established as a principle and in practice will not be certain. This is reflected in the response to the proposals on coregulation of various EU public interest NGOs, such as environmental and consumer groups. Without a clear definition of both aspects of the concept it becomes a rather bland 'third way' like concept. Without directly addressing how coregulation arrangements in the European Union will be more inclusive and participatory there is the risk that the participatory aspect of coregulation will appear somewhat symbolic. Coregulation can

appear simply as a convenient way of integrating two very different aspirations, each of which should be separately addressed. The concept should not necessarily be completely rejected but it does raise the question about whether it is the most appropriate way of promoting an enhanced 'citizenship-as-participation' vis-à-vis regulation and markets in the European Union. These reflections on the proposals on EU regulation reflect other research on the White Paper: despite its language of inclusiveness and participation, the broad thrust of the White Paper is problem solving and technocratic rather than the fostering of a participatory democracy (Eriksen 2001; Steinberg 2001; Wincott 2002; Magnette 2003).

It is also questionable whether forms of participatory regulation are compatible with the EU's institutions and the way the European Union governs the market. As Ayres and Braithwaite (1992: 97–100) note, an appropriate institutional environment is necessary for the development of an effective form of tripartism in regulation. The EU's system of governance of the market does not have obvious potential for the development of effective participatory coregulation. Negative integration has been predominant in the European Union (Scharpf 1999), and 'framework regulation' and the 'open method of coordination' are policy and regulatory approaches stressed at the EU level. While cross-national policy learning and cross-national regulatory coordination (most often instigated by industry, member states or national regulatory authorities) may be possible and indeed promoted, they are not conducive for EU level harmonisation. Participatory coregulation at EU level requires the pro-active incorporation of public interests into a single and clear EU level process but this seems highly unlikely in a system of market governance which emphasises decentralisation, cross-national variation of regulatory administration and bottom-up instigation of cross-national regulatory coordination. All of this is reflected in the development of consumer policy which has been very uneven and European consumer organisations have been unable to divert the primary thrust of the single market programme from economic integration to a more consumer friendly orientation (Young 1998).

This suggests that a more modest ambition of making improvements to existing policy and regulatory processes focused on EU institutions would be a better way of approaching the problems of legitimacy. Better processes of consultation, although neither a panacea nor radical, offer the realistic prospect of better involvement and transparency. This chimes with the feelings of key public interest groups, such as the environment and consumers, who are sceptical about new mechanisms of EU regulation, particularly coregulation. Their concern is about the strength of industry and the possibility of a diminished role of law in regulation. Rather than focusing on new forms of regulation their main concern is for better systems of consultation within the established system of regulation and policy making in the European Union. Better consultation in the EU policy process focused on the

Commission appears to offer a greater prospect of the closer incorporation of public interests. Proposals for the improvement include earlier identification of the affected interests and ensuring consultation is followed through fully to avoid the appearance of symbolism.

Notes

1. Interview with the European Environmental Bureau (EEB), Brussels, 22 March 2002.
2. Interview with the European Community of Consumer Cooperatives (Euro Coop), Brussels, 19 March 2002.
3. Interviews with EEB and Greenpeace International, European Union Unit, Brussels, 10 May 2002.
4. Interview with European Citizens Action Service (ECAS), Brussels, 25 March 2002.
5. Interview with EEB.
6. Interview with Climate Action Network Europe, Brussels, 25 March 2002.
7. Interview with European Commission, DG Environment, Brussels, 25 March 2002.
8. Interviews with EEB and Euro Coop.
9. Interview with Euro Coop.
10. Interview with ECAS.
11. Interview with Greenpeace.
12. Interviews with Euro Coop and Greenpeace.

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Part III

Citizens' Mobilisation and Opportunities

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8

Lesson Learning and the 'Civil Society of Interests'

Nieves Pérez-Solórzano Borragán

Introduction

Most of the literature assessing the impact of Enlargement focuses on the institutional capability of the new Member States to meet the accession criteria as defined in Copenhagen in 1993.[1] This chapter engages with such a debate by assessing the impact of EU membership on the domestic environment of the Central and Eastern European countries. The analysis focuses on the transformation of interest politics, and particularly on the behaviour of Business Interest Associations (BIAs), as they start operating at a transnational level.[2]

Three hypotheses are developed in this chapter. First, that in the post-communist context, collective action and interest intermediation were influenced both by the dominance of elitist tendencies and by the painstaking slow process of citizen's identity formation. Second, that EU membership had a clear impact on the domestic pattern of interest intermediation, by creating new EU-oriented priorities and by facilitating a process of identification at the EU level. Third, that establishing a presence at the EU level and the recognition that this entailed became means of both recognition and legitimisation at home. The evidence presented in this chapter shows that the Europeanised activities of Central and Eastern European interest groups constitute a peculiar model of interest intermediation, where the exchange and ownership of information take prominence over the actual impact on policy making.

The chapter is divided into the three sections. The first, of a more methodological nature, presents the neo-functionalist and Europeanisation paradigms as the analytical tools for the study of those domestic changes resulting from the integration process. The second section analyses the impact of EU membership on the strategies for interest intermediation in the new Member States from CEE. The third section provides a number of reflections on the effects that EU accession has on the new Member States' repertoires for

interest intermediation and the relevance of policy transfer paradigms for the study of such effects.

Approaches to European integration

Neo-functionalism

The neo-functionalist framework provides an answer to the logic of collective action at the EU level, by explaining why groups form and develop, while portraying interest groups in coalition with the European Commission as the driving force behind Europeanisation.[3] Due to the integration project and the limited scope of Community's policy making, Commission and European interest group activities encourage solutions at the technocratic rather than at the political level. According to Lindberg (1963: 101) 'the necessity for lobbying will force groups to emphasise collective needs rather than national differences'. Furthermore, 'interest groups and political parties organise beyond the national level in order to function more effectively as decision-makers vis-à-vis the separate national governments or the central authority' (Haas 1958: 11–12). In this increasing Europeanisation of interest group activities Haas foresaw the creation of a European community of interests. Similarly, the progressive Europeanisation of policies would provoke a 'transfer of loyalties' away from the national level to the supranational level.

However, the automatic nature of this transfer of loyalties has been contested for it undermines the role played by national authorities. As Kohler-Koch has argued, the growth in the number of European interest group federations did not occur as a result of the increase in the EC's policy-making powers. Rather, 'it was the anticipation of a growing importance of the EC […] that stimulated the establishment of transnational organisations' (Kohler-Koch 1994: 171). Furthermore, it overlooked the fact that interest groups operating in Brussels, particularly Eurogroups (usually federations of national groups) are not completely autonomous from their national counterparts, thus restricting interest group activity and effectiveness. Clearly, the peculiarities of the EU polity and governance do not allow for the simple adaptation of normative frameworks of state-group relations to the analysis of the role of interest groups at the EU level, 'the European system of intermediation has its own specific features' (Grande 1996: 321).

In the context of this chapter, the analytical tools of both the neo-functionalist approach and that of its critics will be used, so that we shall be able to assess the impact of EU membership without overlooking the influence and constraints emanating from the domestic environments.

Europeanisation

The concept of Europeanisation has traditionally been used in order to assess the impact of EU governance on the Member States' domestic environment.

Radaelli, for example, (2000) defines Europeanisation by incorporating both its mechanisms and effects as a process of construction, diffusion, and institutionalisation of rules, procedure, paradigms, styles, ways of doing and shared beliefs and norms. These can be both formal and informal, are defined and consolidated at the EU level first, and subsequently incorporated at the domestic level in the form of discourses, identities, political structure and policies.

Ladrech (1994: 70) offers a narrower definition of the process highlighting its incremental nature and the domestic policy shift 'to the degree that EC political and economic dynamics become part of the organisational logic of national politics and policy-making'. Radaelli (2000) and Cole and Drake (2000: 27) focus on the mechanisms of Europeanisation and define the process as 'an independent variable, a form of emulative policy transfer, a smokescreen for domestic reform, and as an imaginary constraint'. Knill and Lehmkuhl (1999) identify two effects of Europeanisation on the domestic setting: the alteration of domestic opportunity structures with certain domestic actors benefiting over others; and the alteration of beliefs and expectations of domestic actors leading to changes in cognition and preference formation.

The fifth Enlargement of the European Union has challenged such inward-looking uses of the concept. The experience of the new Member States from CEE[4] shows that Europeanisation is not self-contained and limited only to the existing EU Member States. Indeed, as Pridham (2001: 51–2) argues, the effects of Europeanisation are more easily identifiable in the new Member States because they have taken place more recently, beside being more extensive than in previous occasions and having taken place in a rather short span of time. Grabbe (2001: 1014–16) identifies the rapid speed of adjustment, the openness to EU influence, the breadth of the EU's agenda in CEE and the asymmetrical relationship in favour of the EU as the features differentiating CEE Europeanisation from similar processes in the existing 15 Member States.

In their analysis, Lippert, Umbach and Wessels (2001: 980) define Europeanisation as a process 'about the resources in time, personnel and money directed by current and future members states towards the EU level' (Lippert, Umbach and Wessels). Ágh (1999: 839) offers an additional dimension by claiming that although a precondition for the accession to the EU, Europeanisation 'has to be accompanied by the emergence of public support for integration as tested ultimately in a referendum'. The overwhelming support for EU membership shown in the accession referenda would conclude that public support is well secure in the new Member States.[5]

Unlike the alternative approaches to Europeanisation reproduced above, Grabbe goes further in her analysis and highlights the significance of the European Union's conditionality principle as a Europeanising force in the applicant countries. She argues that 'The EU accession process is pushing

the applicant countries towards greater convergence with particular institutional models than has occurred within the existing EU' (Grabbe 2001: 1014). In her view, gate-keeping, benchmarking and monitoring, models, aid and technical assistance, and advice and twinning, are the mechanisms that illustrate the European Unionisation of CEE (Grabbe 2001: 1019–24). As I will argue in the next section, this so-called conditionality model while suitable for the study of the institutionalisation of EU rules in the accession countries from CEE, fails to account for the effect of EU membership when non-governmental actors are concerned. In the context of interest politics, the EU model of interest intermediation while incorporated into the domestic discourse has not been fully embraced by BIAs in the accession countries from CEE. As the examples discussed below demonstrate, the 2004 Enlargement has developed through a process of formal and informal integration which at times flows parallel and beyond EU activity. This informal process includes transnational networking between policy-makers, political parties, interest groups, and NGOs. This mode of integration is more extensive than the accession process itself as I will argue in the next section.

The Europeanisation of Eastern European interest representation

During the negotiation of the Association Agreements in the early 1990s, national governments from post-communist Europe were the main interlocutors voicing the interests of CEE at the EU level. They were the only legitimate representatives of their countries' interests at a time when the process of domestic political and socio-economic transition was still at a very early stage of development. Consequently, during the negotiations of the Europe Agreements, the most active interest groups trying to influence the outcome of the negotiation process were those Eurogroups whose members and interests were to be most affected by the result of such negotiations.

A decade later, the pre-accession experience[6] and the political and socio-economic transformation at the domestic level have encouraged the flourishing of more sophisticated forms of pluralist representation such as interest groups that seek an active involvement in EU-related matters at the national and supranational levels. Following Grabbe (2001) and Radaelli (2000), the Europeanisation of interest representation is here understood as the convergence of the accession countries' repertoires of interest intermediation with the EU-model. The diffusion, learning and adaptation processes will be assessed against the paradigm defining the golden rules that an interest group should observe in order to make an impact on the EU decision-making process. Such rules consist in developing good intelligence, watching national agendas, maintaining good links with national administrations, maintaining close contacts with the Commission officials,

presenting rational/technical arguments, being co-operative, positive and trustworthy, developing a European perspective, forming European-wide coalitions, not ignoring the implementation process, and lobbying early (Mazey and Richardson 1993: 44). However, before assessing the impact of the accession process on Central and Eastern European repertoires for interest representation, it is necessary to characterise these repertoires in the first place. What follows is a short excursus on the nature of interest politics in the accession countries from CEE.

Interest Representation in CEE

Post-communist democracies are the result of a systemic change that comprises a fourfold process of political, economic and social transition combined with efforts towards nation-building. These four intimately related developments explain the complexity derived from an attempt to define post-communism. The transition to democracy in East Central Europe, as argued by Nielsen, Jessop and Hausner, resulted in a systemic vacuum (i.e. a crisis of the system) which must not be confused with an institutional vacuum (i.e. the complete absence of institutions). This systemic vacuum allows for the introduction of new methods and institutions (path-shaping approach) bearing in mind that post-socialist systems are heavily dependent on the communist legacy and that the 'remnants of previous economic and political orders still shape expectations and patterns of conduct' (Nielsen *et al*. 1995: 3).

In the post-communist context, the state plays a prominent role in the management of day-to-day politics and, therefore, corporatist arrangements have become the norm, while political parties and elections epitomise the materialisation of pluralist politics to the detriment of interest politics. The degree of influence the state exercises upon interest groups is closely related to the structure of the state itself. According to Wilson (1990: 152), states which 'have had to catch up economically, have generally accumulated more power from their citizens than those which have not'. In centralised states, where power is concentrated on the executive, the capacity of policy-makers to influence the interest group system is relatively high because the state enjoys a strong position, which makes it possible for it to have an influence on their creation, and on the extent of their access to government structures, thus determining their effectiveness. Indeed, while access to the power is in principle defined along traditional pluralist lines, the channels for interest intermediation in CEE are limited by the dominant role played by both the state and dominant political parties, besides mechanisms of path-dependency. The Tripartite Councils and Parliaments are the main institutionalised channels for interest intermediation in the accession countries. This scheme played an essential role in fostering social dialogue between national governments and socio-economic interests. However, the structures for social dialogue in the accession countries are far from perfect

as explained by the Union of Industrial Employers' Confederations of Europe (UNICE):

> The dialogue between government and business needs to be further developed. […] Consultation with stakeholders is still insufficient across the board and Czech regulators need to be more open in their dialogue with the business Community. (UNICE 2002a)

In this context, the tripartite councils are important because they have ensured that – despite infrequent agreements – governments, trade unions and employers associations in Eastern Europe have remained in constant contact, thus creating the basis for emerging policy communities, which provide a more efficient environment for future negotiation and consensus. As Wiesenthal (1996: 55) argues, tripartite arrangements constitute a 'deliberate constitutional innovation', which marks a departure from Western European tripartite models. Tripartite arrangements are, in his view, the result of the prevalence of political parties over other actors, and the response to the need for more deliberative policy-making practices in the newly democratised countries.

Parliament is also an important channel for interest representation in CEE. Research by Ágh (1999) illustrates the slow Europeanisation of government structures and parliaments in CEE, while in the case of the Polish *Sejm*, research by Olson *et al*. (1998: 101–23) reveals an absence of stable committee membership and strong leadership, limiting interest groups' ability to actively participate in the decision making regarding Europe. In the Latvian case, organised sectoral interests have put pressure on Parliament to include interested parties in hearings, so that they are able to air their views on new legislation. In their view,

> There is a need to establish better channels of communication between the members of Parliament and the public […]. But first, members of Parliament need to recognise that they are not only accountable to their electorate once every four years. (UNICE 2002a)

More recently, organised interests have developed less institutionalised patterns of dialogue with decision-makers. For instance, since 2003 there are regular meetings between the Estonian Chamber of Commerce and Industry (ECCI) with the Prime Minister so that they can discuss issues of interest to them (ECCI News 2003). There are similar meetings between the President of the Hungarian Chamber of Commerce and Industry (HCCI) with the Prime Minister 'in order to carry out consultations about the situation of the economy' (Parragh 2004).

Civil society – defined as 'the independent self-organisation of society, the constituent parts of which voluntarily engage in public activity to pursue

individual, group, or national interests within the context of a legally defined state–society relationship' (Weigle and Butterfield 1992: 3) – is slowly forming, thus providing that kind of social differentiation that is requisite for a competitive democratic system. Part of the communist legacy has been a deeply individualistic society, and a generalised level of civic incompetence, which has also prevented the development of those social and organisational skills that constitute social capital (Padgett 2000: 14). According to Padgett, post-communist societies are characterised by widespread insecurity, while diffuse demands for the government to carry on supporting individuals, make it difficult to create the appropriate environment for the development of post-materialist values. The average citizen is too concerned with the fulfilment of private concerns inhibiting the possibility of collective action. Consequently, 'the post-communist society can be expected to be infertile ground for collective action' (Padgett 2000: 12–17).

Such analysis points towards another defining element of interest politics in CEE: the immaturity of the system. BIAs are still learning how to lobby effectively. As it will be argued below, these organisations lack basic skills, such as being aware of when to lobby or contact parliament; keeping track of the legislative agenda; maintaining good links with the civil service; articulating cohesive and convincing arguments; striking effective coalitions. As I suggest below, such inexperience is reflected on the terms of relationship between Eastern European interest groups and Eurogroups.

The legitimisation of interest politics has been weakened as the result of the presence in senior positions of individuals who were part of the Communist regime. According to the representative of the Hungarian Association of Craftsmen Corporations in Brussels,

> With the changes after 1989, only those [previously in charge of the government's organisations] were able to efficiently manage professional associations and organisations. Since they did not want to lose their privileges, they have tightly held to their positions. I have to admit that most of these people are real experts in their field.[7]

This evidence seems to corroborate the view that identifies the revitalisation of old networks and old behavioural patterns as factors delaying the emergence of a fully fledged system of interest representation. The articulation of interests in the former socialist countries is constrained by the 'dense and complex institutional legacy' of the previous political and economic order that still shape expectations and patterns of conduct. (Nielsen *et al*. 1995: 4).

The lack of sufficient resources and public support have seriously delayed the emergence of forms of interest intermediation other than political parties in CEE. Nagle and Mahr (1999: 127) observe that in CEE 'the metamorphosis from latent to organised interest group for members of the growing underclass […] has not yet occurred'. The citizens of Eastern Europe have not

yet fully formed their subjective class identities and, in turn, this inability to formulate subjective identities affects interest group membership. Since a single interest group will never account for all the concerns of an individual, the latter will be unable to hold more than one group identity, thus potentially reducing the possibility of belonging to one or even more interest groups. As Padgett argues, because the absence of identity securing mechanisms and of a fully developed civic culture, group mobilisation 'becomes over-dependent on the provision of selective membership incentives' (Padgett 2000: 16). These incentives are based not only on economic gain, but also on the relatively little investment required to set up organisational structures which were operational before 1989 (Pérez-Solórzano Borragán 2001b).

The confusion regarding the nature and identity of interest groups is exacerbated by the fact that not all interests within one sector belong to the same umbrella organisation. Most importantly, there have been instances when organisations representing similar interests have not managed to create a common front and even questioned each other's legitimacy, so making it more difficult for decision-makers to deal with demands coming from a variety or groups. The inability of the Hungarian BIAs to create a common front vis-à-vis the government during the reform of the Hungarian Law on Chambers, which in 2000 eliminated compulsory chamber membership, is an excellent illustration of this state of affairs. Opposition to the reform from both political parties and the business sector was slow and divided. The HCCI in particular, was unable to influence the executive early on, while the proposal was being drafted. The government was thus able to advance legislation intended to limit Hungarian business chambers' access to decision making without having to consider alterative proposal (Pérez-Solórzano Borragán 2001b). The inadequacy of the opposition's strategies was recognised by the Budapest Chamber's Deputy President, Angéla Jähl Szatmáry:

> it is partly our fault that we have not contacted them directly, thinking that it is enough to talk to entrepreneurs because they are our members. However, we now feel that we have not shown ourselves enough to the legislators. I think that what happened was that we have been involved too much in creating services for businesses, for which we have received no funds from the government, and we simply have not spent enough on promoting ourselves. A big mistake, but I do not think we should pay such a drastic price for it. (Mohorovice 1999: 3)

In conclusion, this fuzzy domestic environment proved to be unsuitable for the kind of diffusion and learning processes that we have discussed in this section in relation to Europeanisation. The following section looks at the accession countries' repertoires of interest intermediation at both the national and transnational levels.

Lesson drawing at the national level

At the domestic level, Europeanisation is reflected on in the interaction between interest groups and their national governments and parliaments and on the adaptation of interest groups' structures and activities to the prospective EU membership. National governments are the interlocutors in the negotiations with the EU and enjoy the best communication networks. Consequently, it is essential for interest groups to strengthen their contacts with their national governments and parliaments to secure some degree of influence in the negotiation process with the European Union. In this context the President of the HCCI sees the association as an influential government partner in the preparation for European Union membership,

> Our current task is to co-operate with the Government as we prepare Hungarian entrepreneurs for membership of the European Union. The Government is counting on the contribution of the chambers, particularly the Hungarian Chamber of Commerce and Industry, to all the economic policy initiatives that are to have a decisive effect on the next ten years of Hungary's history. The Government looks to the Chamber as a partner, and believes that ongoing dialogue with the business world is crucial. (Parragh 2004)

Despite a decade of democratic experience, the fluidity of the consultation process between organised interests and decision-makers is not evident. As the CAPE[8] 2001, 2002 and 2003 Surveys on Corporate Readiness for the EU Single Market in the then ten Candidate Countries of Central Europe show,[9] communication between national governments and the business sector on enlargement-related issues is limited. Only 4.93 per cent of the companies surveyed are regularly consulted by their national governments and are confident that the governments will fully comply with EU regulations. Conversely, 68.58 per cent receive general information about the accession process through the media and feel that they do not influence their government's negotiating position at all. Only 11.34 per cent of the respondents declared that they receive information about areas that directly affect them (CAPE Survey 2003). Clearly, the business community in CEE is far from being fully involved in discussion regarding accession to the European Union. The limited consultation on EU accession has caused concerns amongst EU BIAs operating in Brussels. These have called on 'the political leaders and the Commission to introduce new awareness programmes and to consult much more with the business community in the accession countries on economic issues' (EUROCHAMBRES 2003a).

The intelligence, communication and representation requirements brought about by the accession process have demanded changes in the operations and structures of Central and Eastern European BIAs. Thus, as discussed above, national governments and parliaments have become

lobbying targets because they make decisions on EU accession policies. As observed by a senior representative of the HCCI, the Hungarian Chamber of Commerce and Industry has been actively supporting Hungary's European integration by passing on the views of business people and by representing their interests. The Chamber's policy reflects the fact that the opportunities open to Hungary on joining the European Union and the Single Market must be realised by members of the country's business community (Tolnay 2000).

Internal organisation of Eastern European BIAs has been transformed by creating committees specialised on EU matters and by establishing offices of representation in Brussels. The examples below illustrate some of these changes. Already in 1998, the HCCI prepared an Action Plan to encourage Hungary's accession to the European Union (Vadász 1998). Among the measures outlined, the HCCI committed itself to strengthening co-operation with the government in defining Hungary's position in view of the enlargement, while it organised a number of training seminars aimed to increase EU awareness among the staff of the regional chambers and entrepreneurs. The HCCI sees itself as an influential player in the Hungarian transformation process by promoting contacts with the executive on issues regarding the enlargement, thereby easing the disruption in EU-related policy making. The strategy for 2001–04 focuses on 'closing the gap between the Hungarian and European order of values, and enforcing the basic principles of the Charter of the Association of European Chambers'.[10]

The Polish Chamber of Commerce (PCC) performs the role of an adviser, but it is also an active agent in the Polish transformation process by fostering continuous communication with the government and state administration, while tabling legislative initiatives aimed at ameliorating the state of the Polish business sector. Additionally, the internal structure of the PCC has been adapted to the new European environment by creating a Committee for the European Union that focuses its activities on (i) preparation for negotiations of Poland's accession to the European Union, providing information on the functioning of the European Union; (ii) representation of the Polish business sector in Brussels; and (iii) co-operation with European business organisations.[11]

The Economic Chamber of the Czech Republic (ECCR) set up a Centre for European Integration. Since 1998 the Centre has developed training workshop as well as analytical papers aimed at informing the Czech business sector about the consequences of Czech membership in the European Union. In 1999 the Centre established a Euroclub as an informal association of enterprises and financial institutions to help companies adapt to the new business environment. The Euroclub meets with representatives of the Czech government, public administration, politicians and independent experts directly involved in the accession process to openly discuss and exchange opinions.[12]

The Bulgarian Industrial Association set up the International Projects and Programs Centre (IPPC) to manage relations with international institutions and organisations and regards itself as the initiator of

> a network between the employers federations of the applicant countries aiming to enhance their capability of full value participation in the accession process and negotiations and to foster cooperation between industries of these countries.[13]

The results of the CAPE Surveys suggest that Central and Eastern European business sector's preferences regarding the arena where their lobbying objectives should be directed, shows an atypical short-term planning of business interest in these countries. About 40 per cent of the companies surveyed regard EU lobbying as a 'very important' aspect of their representation activities. Within that group, the majority of companies (almost 45 per cent) rated lobbying at the domestic level higher than lobbying in Brussels. On the other hand, about 52 per cent of the companies polled believe EU lobbying not to be very important. Influencing the EU institutions and Member States is only a priority for about 30 per cent of the respondents at the domestic level and at the Brussels level. It is interesting to notice that objectives that are not deemed relevant to be acted upon at the domestic level are not considered relevant to the Brussels level either (CAPE Survey 2003).

Lesson drawing at the supranational level

At the supranational level BIAs from the accession countries have developed institutionalised and non-institutionalised contacts with EU institutions and wide European associations. These contacts have been managed through the national offices and/or by establishing an office of representation in Brussels. To improve their European profile, a number of interest groups from the accession countries have joined Europe-wide associations or Eurogroups based in Brussels. In this section, the analysis will focus on the interaction between BIAs from CEE and the most relevant business associations operating in Brussels.[14] These include EUROCHAMBRES (Association of European Chambers of Commerce and Industry), EUROCOMMERCE (European Federation of Retailing and Distribution), UEAPME (European Association of Craft, Small-and Medium-Sized Enterprises) and UNICE. The expanding transnational activity of interest groups from CEE and their exposure to the EU lobbying environment allows for the exchange of norms and ways of doing between partners (Pérez-Solórzano Borragán 1998, 2001a, 2001b). This process faces BIAs from CEE and their EU partners with a number of challenges in terms of identification of suitable partners, trust, dependency, political culture, and diversity of interests that shape the nature of their relationship (Pérez-Solórzano Borragán 2003). European BIAs have been supportive of the enlargement process since the early 1990s. This

support however, depends on a number of conditions being met: candidate countries should join the European Union as soon as they are ready in political, economic and administrative terms. At the time of accession the new members must have adopted the *acquis communautaire* and reached a satisfactory level of implementation and enforcement of EU rules. A viable financial framework for enlargement should be agreed. The EU institutions and decision-making procedures should be ready to include the new members (UNICE 2002b; Eurochambres 2003c).

The Europeanising effect derived form this partnership can be observed in the Eurogroups' willingness to transfer some of their sectoral information to the newcomers on subjects regarding (i) events concerning individual EU policy areas and EU Member States; (ii) the structure of European institutions and legislative procedures within the EU; (iii) reports elaborated by their policy analysis units; (iv) expert knowledge on the harmonisation of laws; and (v) potential European sources to co-finance projects in the candidate countries (Fink-Hafner 1994: 229). More specifically, in addition to opening their membership to BIAs from the accession countries, European BIAs are actively engaged in the transformation of domestic structures for interest intermediation in the accession countries. For instance, UNICE has set up a Task Force on Enlargement (UTFE) which asses the progress made by the business sectors in the candidate countries while making recommendations on how to overcome them (UNICE 2002b).

Since 2000 EUROCHAMBRES has been involved in CAPE Programme (Chambers Accession Programme for Eastern Europe), funded by the European Commission. As its predecessors (CAPE I and CAPE II), the third phase of the programme will assist Chambers of Commerce and enterprises from candidate countries to prepare for EU accession. The programme includes the elaboration of the CAPE Survey measuring the readiness of Central European companies for accession; the CAPE Acquis Audit for the external assessment of Central European companies on their level of compliance with relevant EU legislation; and the Central European Academies, a training benchmarking opportunity for Central European Chambers (EUROCHAMBRES 2003b).

This relationship is asymmetrical in nature, since BIAs from CEE rely on both the Eurogroups' know-how and their decision-making networks. Central and Eastern European organisations lag behind their European counterparts in terms of institutional organisation and efficiency. In the case of Hungary, for example, it has been argued that 'the self-organisation of the employers', and their ties at a pan-European level, represent the weakest points in the Europeanisation of Hungary's political system (Ágh 1994: 18). The Bulgarian Chamber of Commerce and Industry (BCCI) recognises the value of its relationship with EUROCHAMBRES. This provides useful contacts and conventions, helping the BCCI to support Bulgarian enterprises. The same is true for the relationship with the SMEs, which is valuable for

update information on participation in EU training sessions, seminars, projects and programmes.[15]

Equally, a representative of CEBRE[16] recognises

> That CEBRE cannot share its extensive experience in lobbying and persuade EU officials to change the draft EC directive in favour of Czech businesses. However, the fact that over 40 Czech companies requested advise and assistance (individually conducted analyses and studies, the monitoring of development of EU legislation, studies of impact), and that Czech managers and company euro-correspondents spent 11 weeks on short-term attachments at the CEBRE office can be considered a great success. (Šenarová 2003: 2)

Particularly during the accession period, the representative role of BIAs was limited since these countries were not yet full EU members. This limitation may explain why most of their own literature focuses on their role as information gatherers and distributors. For instance the BCCI 'receives and provides current information concerning the European legislation' concerning directives, amendments to policies and policy proposals.[17] There is never any indication regarding their ability to influence the policy making process as their EU counterparts do.

> The aim is to trace out the underlying purposes in improving the European legislation so that BCCI brought them to the knowledge of the Bulgarian competent institutions to suggest suitable solutions about the national legislation by providing this type of information.[18]

At the same time, BIAs operating in Brussels perceive themselves as agents of change in their own countries, as 'conveyor belts', transferring the knowledge and expertise they have acquired to domestic politics, in support of a more participative political culture (Cizelj 2000; Fink-Hafner 2000). In the words of the Vice-President of the Chamber of Commerce and Industry of Slovenia,

> We believe that [the Slovenian Business and Research Association] is going to be a step forward in acquiring and getting a qualified even more reliable, and what is important, independent source of information for our business community. (Stantič 2000)

This rhetoric is also functional to their own legitimisation vis-à-vis their domestic constituencies and politicians. As argued by the Secretary General of UNICE,

> The membership of the Hungarian business community in UNICE is a strong message: it is a guarantee that you not only fully share the values

> of free enterprise, competition, wealth creation, but also integration in a large internal market. (De Buck 2002)

As discussed earlier, membership has become over-dependent on the provision of selective membership incentives, hence securing an effective access to the European arena is essential in the provision of selective membership goods.

Organised interest from CEE have established offices of representation in Brussels. Nowadays, there are 38 offices operating in Brussels.[19] The overall number does not even reach 2 per cent of the Brussels-based lobbying community, but the number of offices has more than doubled since 1996 and there are plans for further expansion. The status and representation arrangements of these offices vary greatly. Most offices represent business interests, while others perform a wider function as research and development offices, public relations bureaux, territorial representations and cultural ambassadors. This is a reflection of the heterogeneity of their clientele and the recent development of interest group activities and legislation in their countries of origin.

The main tasks performed by the Central and Eastern European Offices of Representation (CEORs) are very similar to those performed by their counterparts from the other Member States: (i) to inform their members at the national level about EU legislation, funding opportunities, and relevant developments in EU Member States; (ii) to represent their members in large European associations; (iii) to provide members with specific services on request; (iv) to raise their members' profile at the European level; and (v) to design training seminars for their members in order to increase their awareness of the enlargement process. For instance, the Brussels office of the Polish Chamber of Commerce, the KIG Euroconsulting,[20] not only offers information and services concerning the EU to its members, but also regularly informs the Polish government on the attitude of Polish entrepreneurs to EU membership (Poland 2000). The Slovenian Business and Research Association (SBRA)[21] provides strategic advice to its member companies regarding their adaptation to EU legal and socio-economic requirements; and most importantly it enjoyed direct representation on the governmental working groups which were preparing the negotiation process for accession. The Czech Business Representation in Brussels (CEBRE) was set up by the main cross-sectoral economic actors in the Czech Republic, namely the Confederation of Employers' and Entrepreneurs' Associations of the Czech Republic, the Confederation of Industry of the Czech Republic and the Economic Chamber of the Czech Republic. This venture receives public support through the Ministry of Industry and Trade and CzechTrade, its trade promotion agency. The CEBRE employs three members of staff and its functions include: representation of the Czech business community; providing entrepreneurs and their organisations with information and services

facilitating their integration into the Single European Market; representation of various Czech entrepreneurial and employers' organisations at their pan-European counterparts based in Brussels; and promoting the interests of Czech businesses within the context of EU institutions and European associations.[22] Unsurprisingly, CEBRE's role focuses on the collection of transfer of information and know-how about the EU.

The examples presented in this section offer an important insight into the idiosyncrasy of Central and Eastern European structures for EU interest representation. Despite the lack of resources and the relative inexperience of the lobbying game, interest groups from the CEE are trying to find their own cluster in an overcrowded European lobbying arena. This search for their own space is accompanied by their increasingly important role not only as lobbyists and advisers, but also as agents in the transformation process that takes place in their countries. When providing services to their membership, they must address issues that are not only EU specific, but very often relate to the adaptation of the transforming democracies to the new international arena. The effectiveness of their role is clearly illustrated by the results of the CAPE 2003 survey, which shows how 74 per cent of the companies surveyed believe that it is important to be represented in Brussels through their branch association or Chamber of Commerce. Yet, only 2.3 per cent considers it important to have their own representation in Brussels.

Conclusion

This chapter has provided evidence of the Europeanisation of domestic structures for interest representation in the candidate countries of Central and Eastern Europe. The empirical data here reviewed shows two strands of Europeanisation. First, Europeanisation has taken place as the result of attempts by the Central and Eastern European interest groups to become actively involved in the domestic and transnational decision-making process regarding EU accession. Second, active involvement of Eurogroups in the establishment of structures for interest representation in the candidate countries has provided the benchmarks for the institutionalisation of a rather loosely defined 'European model'. The case-studies discussed illustrate the pattern of transfer of know-how and influence. Hence, the Europeanised activities of Central and Eastern European interest groups reproduce a model of interest mediation, where the exchange and ownership of information are more important than the actual impact on policy making.

It is in this context that the case for 'The Lesson-Drawing Model' is made as a theoretical tool to analyse the Europeanisation of interest politics in the accession countries. Unlike the more commonly applied conditionality model, the lesson-drawing model allows the study of non-state actors who exhibit a much more heterogeneous behaviour as a result of wider flexibility in terms of both the quality and level of rule adaptation, due to the lack of

coercive measures of any real significance. As the interaction between Central and Eastern European interest and their EU counterparts shows, the density of interactions with EU actors and EU-centred epistemic communities (i.e. the source of ideas involved in lesson-drawing) is at the core of the CEORs' Brussels experience, to the extent that Central and Eastern European 'lobbyists' working in Brussels regard themselves as 'conveyor belts', transferring the knowledge and experience acquired on consultative politics for the development of a more participative political culture in their countries of origin. Additionally, the perceived transferability of rules is illustrated by the extent to which the services offered by the CEORs are portrayed to their domestic constituencies as membership incentives. The minimisation of adoption costs is attempted through the participation in joint ventures with EU counterparts and the use of their structures and expertise for lobbying purposes.

BIAs from the candidate countries have taken up the role of communicating the benefits and challenges of enlargement to their domestic constituencies, while disseminating examples of good practice. The increasingly Europeanised role undertaken by organised economic interests from CEE reflects the development of an 'indirect' strategy for the construction of a local 'civil society of interests', which in a neo-functionalist fashion is developing a supranational EU identity.

Notes

1. Namely: the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities (political criterion); the existence of a functioning market economy as well as a capacity to cope with competitive pressures and market forces within the European Union (economic criterion); the ability to take on the obligations of membership, including the adherence to the aims of political, economic and monetary union (criterion on adoption of the *acquis communautaire*).
2. The empirical material utilised in this chapter refers only to some of the new Central and Eastern European Member States, particularly Hungary, Poland, Slovenia and the Czech Republic. Where relevant, comparisons have been established with other post-communist countries.
3. Before 1986 the neo-functionalist approach guided the scholarly debate on interest politics. The Single European Act and the Single Market programme shifted the focus on the analysis towards a less euro-centric approach that recognised the influence of domestic politics in interest group politics at the EU level.
4. These include Estonia, Latvia, Lithuania, Hungary, Poland, Slovenia, Czech Republic, Slovakia. The expression accession countries will also be used throughout the text implying the same number of countries.
5. EU membership was endorsed in all candidate countries as follows: Czech Republic Yes, 77.33 per cent, No 22.67 per cent; Estonia Yes 66.92 per cent, No 33.08 per cent; Hungary Yes 83.76 per cent, No 16.24 per cent; Latvia Yes 67 per cent, No 32.3 per cent; Lithuania Yes 91 per cent, No 8.96 per cent; Poland

Yes 77.45 per cent, No 22.55 per cent; Slovakia Yes 92.46 per cent, No 6.20 per cent; Slovenia Yes 89.61 per cent, No 10.39 per cent (Euractiv 2003).

6. The Joint Consultative Committees (JCC) set up by the European Economic and Social Committee (EESC) since 1995 have been fundamental in bringing EU issues to the agendas of economic and social organisations in the candidate countries, while channelling their opinions and expertise too national and EU decision-makers. This institutional arrangement has an advisory role. Bulgarian, Czech, Estonia, Hungarian, Lithuanian, Polish, Romanian, Slovakian, Slovenian and Turkish organisations meet twice a year with their EU counterparts in the context of their respective committee.
7. Interview with Mr Ivan Halasz, representative of the Hungarian Association of Craftsmen Corporations (IPOSZ) (1995) Brussels.
8. CAPE is a EUROCHAMBRES initiative (currently in its third phase) which is supported by the EU PHARE programme. It seeks to strengthen chambers of commerce and industry in Central and Eastern Europe while enhancing their participation in the accession process.
9. The survey included 1658 companies from Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia.
10. Hungarian Chamber of Commerce and Industry HCCI (2004) http://www.mkik.hu/eng/index.htm consulted on 13 February.
11. Polish Chamber of Commerce and Industry (2004) http://www.kig.pl/en/index_kig.html consulted on 12 February.
12. Economic Chamber of the Czech Republic (ECCR) (2004) http://www.komora.cz/dokumenty.aspx?jaz=2&obl=1&kat=389&dok=1260 consulted on 29 February.
13. *Bulgarian Industrial Association*, www.bia-bg.com
14. The degree of importance in based on the participation of this European associations in the EU policy-making process either through formal or informal consultation channels. UNICE is part of the consultation arrangements existing at the EU level, namely the European Economic and Social Committee (EESC), the Standing Committee on Employment (SCE), Tripartite Conferences, the Social Dialogue meetings with the Troika of Presidencies and the Macroeconomic Dialogue, that allow for the participation of social partners in collective bargaining, whilst displaying a more cohesive structure. EUROCHAMBRES and EUROCOMMERCE have a secondary status and thus are not always included in existing consultative procedures. According the Communication from the Commission to the Council, 'Adapting and Promoting the Social Dialogue at Community Level', COM (98) 322, Brussels, 20 May 1998, EUROCHAMBRES is a 'specific organisation' while UNICE, ETUC (European Trade Union Confederation) and CEEP (European Centre of Enterprises with Public Participation) are labelled as general cross-industry organisations; and UEAPME is classified as a cross-industry organisation representing certain categories of workers or undertakings.
15. Bulgarian Chamber of Commerce and Industry (BCCI) http://www.bcci.bg/ consulted on 13 February 2004.
16. The Czech Business Representation (CEBRE) in Brussels opened in March 2002.
17. BCCI (2004).
18. Ibid.
19. These include Association of Agricultural Co-operatives and Companies in the Czech Republic (AACC), AB Consultancy, Baltic Seven Islands:Saaremaa and Hiiumaa, BRETTSCHNEIDER-Region of Bratislava, Bulgarian Chamber of Commerce and Industry, Representation in Brussels, Czech Business

Representation (CEBRE), Central European Law Offices (a tripartite arrangement between the Czech firm Kocián Šolc Balaštík, Wardinksi & Partners of Poland and Cechova Rakovsky of Slovakia), CEZ Power Company – EU office, City of Tallinn – EU office, Confederation of Hungarian Employers and Industrialists (MGYOSZ), Eastern Poland Euro Office, Estonian Farmers Organisation and Chamber of Agriculture, EU Consulting Hungary, European Landowners Organisation (ELO), HETA Law Offices, HunOR-Hungarian Office for Research and Development, IKV-Economic Development Foundation, Hungarian Association of Craftsmen Corporations (IPOSZ), ITDH-Hu (Hungarian Investment and Trade Development Agency), Turkish Textile Exporters Association (ITKIB), Josef Zieleniec & Partners (Czech consultancy firm), Malta Business Bureau, Hungarian Development.Bank Representation Office (MFB), Lithuanian Office for Technology Development, Presov Region Representation, Slovenske Elektrarne (Slovenian electricity supplier), The Union of Chambers of Commerce Industry Maritime Trade and Commodity Exchanges of Turkey (TOBB), Young Businessmen Association of Turkey (TUGIAD), Turkish Industrialists (TURBO), Turkish Business, Industry and Employers' Association (TUSIAD-TISK). The Network of Interest Representation Offices from Candidate Countries (NIROC) (2004) http://www.sbra.be/Niroc.htm

20. Established in January 2000.
21. SBRA is a cross-sectoral organisation, whose members comprise the Chamber of Commerce and Industry of Slovenia, the Universities of Ljubljana and Maribor, the Jozef Stefan Institute, and the Co-operative Union of Slovenia as its founding partners. In addition, its associate members include the Port of Koper, pharmaceutical companies such as Krka, Novo Mesto and Lek and the Insurance Union of Slovenia among others.
22. CEBRE (2004) http://www.cebre.cz/main_eng.asp consulted on 29 February.

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9

Local Mobilisation and Supranational Standards

Carl F. Stychin

Introduction

This chapter analyses how a group of activists within Romania – one of the European Union accession countries – have engaged with a concept of European *sexual* citizenship over a period of several years.[1] The arena in which this form of citizenship has been activated has been the criminal law, which has rigorously criminalised same sex sexual practices for decades in Romania. After years of social struggle, Romania finally repealed this criminal law on 14 January 2002. On the same day, the Parliament enacted a law preventing and punishing all forms of discrimination based on a series of enumerated grounds including sexual orientation. These developments are the result of the carefully orchestrated and organised efforts of the Romanian activists (with financial and other assistance from abroad, including from the institutions of the European Union). They skilfully developed an argument based on universal human rights, which was located squarely within a set of claims regarding rights as *European* citizens. The overwhelming desire by the state for membership in the European Union, in turn, created the conditions by which such citizenship claims became politically effective.

This chapter provides a genealogical study of the ways in which the supranational EU standards (human rights) were deployed 'on the ground' by local activists who, in engaging in social struggle, saw themselves as making claims to European sexual citizenship. The ultimate legal success of those claims underscores as well how citizenship in this context cannot be interpreted simply in terms of a top-down or bottom-up social struggle. Rather, it is the particular juxtaposition of the supranational and the local, within the specific context of the politics of accession in Romania, that produced a successful claim both to the status of human rights as Europeans, but also to a right to active citizenship participation within the process of Romanian accession to the European Union.

Creating and recreating homosexuality in Romania

Struggles over the decriminalisation of homosexuality, and the role of social movement actors in the process, require an understanding of the history of same sex relations and their legal and political status. The classification of sexualities in law can be traced to the Penal Code of 1936, when the Kingdom of Romania enacted Article 431, which criminalised 'acts of sexual inversion committed between men or between women, if provoking public scandal', with a penalty of six months to two years imprisonment (Human Rights Watch 1998: 6). The framing of the law through the use of the public/private distinction is significant (and 'public scandal' is highly ambiguous in the way in which it can cut across public and private space). The law also was noteworthy in criminalising relations between women (unlike many other national contexts), and also for *potentially* creating a private sphere free of legal regulation for both men and women. The 1936 Penal Code would not be revisited comprehensively until well into the Ceausescu era in 1968. Ceausescu, a relatively unknown Communist Party apparatchik, assumed power in 1964. The 1968 Penal Code revision can be viewed as an opportunity taken to reinforce what would be – by any comparison – a totalitarian regime of surveillance and intense regulation achieved through an invasive state and the annihilation of the private sphere (Human Rights Watch 1998: 11–12). Thus, the 1968 Penal Code saw the enactment of Articles 200–2:

> Article 200: Sexual relations between persons of the same sex are punishable by imprisonment of one to five years.
> Article 201: 'Acts of sexual perversion which cause public scandal' are punishable with one to five years imprisonment.
> Article 202: dealt with 'sexual corruption' of a minor.
> Sexual perversion was defined as 'any unnatural act in connection with sexual life, other than those provided in Article 200'.
>
> (Human Rights Watch 1998: 11)

Thus, by virtue of Article 200, homosexuality was made illegal with no requirement of public scandal, and with increased penalties. This legal invasion of the private sphere must be placed in a wider context of sex/gender regulation in Romania, particularly the brutal invasiveness and surveillance of women's bodies through harsh anti-abortion laws enforced in large measure through routine gynecological examinations, in combination with severe prison sentences for performing or obtaining an abortion (see generally Kligman 1998). Under the Ceausescu regime, there was no realm beyond the interest of the state.

Article 200 served two purposes. First, extensive testimonial evidence establishes that it was regularly and rigorously enforced against those

accused of same sex sexual relations, 'amid virtual indifference abroad' (Human Rights Watch 1998: 13). Second, particularly in the final years of the Ceausescu era, Article 200 could usefully be used 'against ideological non-conformists' (Human Rights Watch 1998: 13). In the 1980s, when western attention began to focus on human rights abuses in Romania, 'the dubious and disloyal could be charged under Article 200 without attracting international attention – allowing Ceausescu's human-rights record to remain cosmetically clear' (Human Rights Watch 1998: 12).

The (arguably inaccurately described) 'fall of Communism' in Romania in December 1989, is engrained on most western memories with one image: the execution of Nicolae and Elena Ceausescu. Less widely known is the extent to which the National Salvation Front which assumed power, later to win election, represented a high degree of continuity with the Communist regime, both in terms of who governed, and in terms of policy. The absence of civil society in Ceausescu's Romania (surveillance was routinely carried out by citizens on each other, leading to the distrust of any group) left a gap for a post-1989 state apparatus devoid of the ideological anchor of Ceausescu's brand of Communism. The vacuum was filled by a reliance on ethnic national politics; a discourse which had also served Ceausescu very well (see generally Gallagher 1995).

Thus, although the 'new' government repealed the laws prohibiting abortion, and did so very quickly, it showed no similar desire to repeal Article 200. Indeed, the early years of the Iliescu government were not characterised by a 'progressive' approach in this or other areas, nor was there a particular concern with Romania's image in the west (Phinnemore 2001: 252). With time, this intransigence dissipated, as it became increasingly clear that Romania's future lay westward (Gallagher 2001: 108). It also became apparent that any invitations to join the institutions of the west would come with both political and economic conditions attached. With respect to homosexuality, this was true as early as 1993, when *rapporteurs* from the Council of Europe, visiting Romania following its application for admission, began raising the issue of Article 200 (Human Rights Watch 1998: 30). The response from then Minister of Justice, Petre Ninosu, was far from accommodating: 'if we let homosexuals do as they please, it would mean entering Europe from behind' (Human Rights Watch 1998: 31–2). Little did Ninosu realise the conditions that would be demanded by other institutions – the EU, IMF, World Bank – throughout the 1990s. It would also become clear that pressure from the European Union, rather than the Council of Europe, would prove to be the effective force for legal change.

The brand of social conservatism exemplified by Ninosu's statement characterised the attitude of many Romanian politicians, and this made it extremely difficult even for those governments prepared to repeal Article 200 to achieve the political backing for such a measure. It was also an attitude strongly fostered by the Romanian Orthodox Church, a central player in

politics and society, which seized upon the issue in the name of the defence of a Romanian (Orthodox-Christian) way of life (Human Rights Watch 1998: 33).

In September 1993, the assembly of the Council of Europe called on Romania to repeal Article 200, despite also admitting Romania to the Council. Additional pressure for reform came from a decision of the Romanian Constitutional Court in July 1994, which found that Article 200 violated privacy rights guaranteed by Romania's Constitution, to the extent that it criminalised acts committed in private (Human Rights Watch 1998: 32). However, the Court also (highly problematically) reintroduced the concept of 'public scandal' into the law. In response to these developments, the Romanian government and Parliament, in November 1996, brought into force a 'new' Article 200, which echoed the earlier formulation of criminal regulation found in the 1936 Penal Code. The new Article 200 relied again on the public/private distinction to criminalise 'sexual relations between persons of the same sex, if producing public scandal' (para 1) with a penalty of one to five years imprisonment. Paragraph 5 of Article 200 punished 'inciting or encouraging a person, in public, to commit the acts', again with a penalty of one to five years (Human Rights Watch 1998: 2). In fact, paragraph 5 amounted to a ban on any form of homosexual association. A reliance on public scandal was deployed in order to claim compliance with human rights jurisprudence, which itself has relied heavily on protecting a private sphere, but which historically has done little to protect the expression of sexuality in public life.

The legal change, part of an omnibus penal law reform package, despite providing only a limited decriminalisation of homosexuality, took two years and two defeats in Parliament to enact. This can be explained by the opposition of many nationalist Members of Parliament (upon whom the government relied), as well as a hostile press, and an Orthodox Church asserting its role in the political life of Romania. For all of these forces, resistance to change would be characterised consistently in terms of the protection of a religious-cultural way of life, against outside influences and conspiracies seeking to undermine traditional Romanian values. These tropes have a long history in Romania, and have been consistently deployed in the name of ethnic nationalism. As well, for the Church, the issue of homosexuality provided a device through which it could reassert its authority in public, political life (and other issues, such as abortion, were not politically 'saleable', given the association of abortion regulation with Communism). The Church, in this way, could assert an independent role, which also enabled it, to some extent, to draw attention away from its own dubious past associations with the Ceausescu regime (Gallagher 1996).

The 'reform' of 1996 – brought in shortly before a general election the ruling party would lose – was a far from satisfactory solution from a human rights perspective. In a country in which the private sphere had little history as a zone free from state intrusion, and in which civil society in the public

sphere remained extremely weak to nonexistent, there was little 'freedom' either for sexual acts in 'private' (which might well be found to cause public scandal), or for sexual expression of an identity in 'public' through lesbian and gay civil society or commercialised actors (which *definitely* would be interpreted as causing public scandal). The effect was to close down virtually all homosexual expression. Add to this legislative double bind an extremely homophobic police force, and the results are predictable. Human rights organisations have documented extensive use of the law, resulting in arrests and convictions, as well as police and prison brutality (Human Rights Watch 1998: 47). Perhaps most famously, Amnesty International took up the case of the only woman convicted under Article 200, in a culture where lesbian women's sexuality has been largely erased. It was within this environment that ACCEPT was formed.

Any analysis of the impact of European integration and other transnational and international forces on the decriminalisation of homosexuality in Romania must place the Bucharest-based human rights NGO, ACCEPT, at the centre. The history of ACCEPT can be traced to 1994, when a group of Romanians and members of the expatriate community formed the 'Bucharest Acceptance Group', a small collection of volunteers also associated with the Romanian Helsinki Committee. Their major success was the organisation of a symposium entitled 'Homosexuality – A Human Right?' in Sinaia, Romania in May 1995. From that conference, a permanent organisation and important civil society actor – ACCEPT – was born, which was officially registered as a human rights NGO on 25 October 1996. Because of the presence of Article 200, ACCEPT activists chose to register as a human rights organisation rather than as a gay and lesbian rights organisation. The latter certainly would have been refused registration by the state, pursuant to the explicit wording of paragraph 5 of Article 200, which bans association.

Of importance to note in this period was that the founding of ACCEPT cannot be separated from the securing of funding to set up and develop the organisation and its infrastructure. At the outset, funding was made available, first, by the Embassy of the Netherlands (for the Sinaia Conference), and then by the Dutch Ministry of Foreign Affairs, as part of a programme (called 'MATRA') designed to strengthen institutions in the target countries of central and eastern Europe through their 'twinning' with institutions in the Netherlands. The Romanian activists were twinned with the COC – 'the federation of Dutch associations for the integration of homosexualities' – and this partnership would continue, formally and informally, into the future. The COC-ACCEPT project funding and expertise were crucial in the setting up of an organisational infrastructure, the opening of office space, developing programmes and activities, etc. ACCEPT now provides a community centre in Bucharest for cultural, social and recreational activities, a medical and psychological counselling office, library and reading room, and administrative office.

Despite a limited role as a service provider, however, ACCEPT's primary mission from the outset was as a human rights NGO centred upon the repeal of Article 200, and more generally, on the advancement of the human rights of sexual minorities. Importantly, ACCEPT was not established with the *primary* intent of providing social, recreational and cultural support (despite its obvious importance to lesbians and gays in Romania). Rather, as a relatively small group of activists, its main agenda has been as a law reform project, which was to be advanced, not through grass roots mobilisation (an unlikely strategy for success in Romania), but through carefully planned strategic lobbying by a small and dedicated group of activists with an array of supporters from abroad.[2] At the same time, ACCEPT located itself domestically within the human rights NGO community, often working to develop links between human rights struggles (aided by the fact that many who worked for ACCEPT had long credentials in the human rights field). Following its official registration, ACCEPT embarked upon a sustained human rights campaign domestically through lobbying, media exposure, swaying public opinion and challenging stereotypes through more positive images at every opportunity. ACCEPT has sought to develop, throughout its lifetime, 'a different and new discourse that was based on fundamental values, appealing to anyone irrespective of sexual orientation' (Coman 2001).

In terms of the development of pressure from abroad, this had several tracks. First, the twinning with the COC Netherlands – which included a Dutch project coordinator based for a time in Bucharest – not only assisted with the development of infrastructure, but also provided a link back to a (liberal) EU member state (and one that had invested money in an NGO challenging state law in Romania).[3] This aspect of the history of the decriminalisation campaign significant pressure from EU institutions (particularly the EU Parliament, but also the Commission), as well as the Council of Europe, national governments from within and outside the European Union, interested individual politicians, NGOs, and the general public (including demonstrations against Romanian politicians when they travelled abroad, which forced them to respond publicly). Without question, pressure from abroad – but particularly from EU institutions – forced legal change, and activists will readily admit that without that pressure, the chances of achieving reform would have been remote (Coman 2001).

Thus, ACCEPT, from its inception, worked tirelessly to raise the issue of Article 200 on the agenda of the European Union and to keep it on the agenda of the Council of Europe, which was continuing to monitor the Romanian human rights record in this period (and which included the treatment of the Roma and the Hungarian ethnic minority). Although it did play an early role in law reform, it is fair to say that the influence of the Council of Europe declined during the mid-late 1990s, and the influence of the institutions of the European Union increased in that same period. Any pressure that was exerted by the Council of Europe was resisted successfully by

the state. And it would be to the institutions of the European Union that ACCEPT would turn its attention in the drive for the elimination of Article 200. Although other avenues were also pursued, such as encouraging pressure from national governments (particularly the Netherlands and Sweden), and lobbying individual politicians and other NGOs, Adrian Coman (2001), then executive director of ACCEPT concludes, 'I think the repeal of Article 200 is strictly the result of EU pressure'. This pressure would last over several years, and represents a key moment in the move towards EU accession in Romania.

The time which the struggle would take, and the ferocity of feelings amongst actors within the state, church, and large sections of the general public which the issue aroused, points to a second dynamic that fervently resisted the movement towards decriminalisation as a form of Europeanisation. This dynamic was summed up by the view of Archbishop Bartolomeu Anania, that 'we want to join Europe, not Sodom' (Dascalu 2000). In other words, it is the dynamic of ethnic nationalism in which outside challenges to a vision of community are resisted and repelled. The Article 200 controversy, I argue in the next section, can be located on this wider terrain on which the forces of modernisation and tradition are engaged in social struggle.[4]

In a weakened state

The legacy of Communism post-1989 has been the continuation of a highly conservative gender/sex discourse, grounded in the close nexus between church and post-Communist state, and accentuated by the weakness of civil society actors, as well as by the ongoing use of conspiracy theories as a 'pseudo-reasoning method' (Roman 2001: 59). Only by understanding that socio-political context can the dynamics of transnationalism and globalisation in Romania be fully comprehended.

The history of post-Communist Romania underscores a profound tension around the meaning of Romanian identity, which plays itself out on the terrain of homosexuality, representing not so much a break with the past, as continuity with it. The economic catastrophe that befell Romania in the 1980s was largely a product of Ceausescu's obsession with clearing the foreign debt load at any social cost, as a means of ensuring Romanian political sovereignty. And throughout the history of Romania, examples can be found of constructions of foreigners and outsider powers as trying to undermine Romanian sovereignty. This historical trajectory, combined with the relative lack of any meaningful civil society in the transition to post-Communism, not surprisingly produced a highly nationalist discourse:

> The central place of nationalism in political life means that from 1881 to the present day, rulers have shared a number of reflexes even if they

> adhere to contrasting ideologies. First, the state must govern in the name of the ethnic majority … Second, state laws must not be subject to external interference or regulation as this will encroach upon Romanian sovereignty in unacceptable ways … Third, freedom from foreign rule is more important than upholding of freedom against domestic tyranny … Fourth, native traditions are the best ones to shape Romanian government. (Gallagher 2001: 105–6)

Thus, we find 'the replacement of a totalitarian state which monopolised expressions of chauvinism by a relatively weak state prepared to exploit nationalism in order to boost its credibility but unable or unwilling to prevent others going to even more extreme lengths to exploit nationalism for their own ends' (Gallagher 1995: 93). Robert Weiner (1997: 5) argues that this state of affairs results from the absence of 'a civic community or a sense of civic engagement or involvement in public life'. As a consequence, he claims that 'the post-Communist regime in Romania could only mobilize support for itself on the basis of nationalism and ethnicity' manifested most strongly in prejudice against minorities (Weiner 1997: 9).

As a consequence of this mobilisation, it has been far from easy for the post-Communist state and nation to come to terms with international pressures that have been exerted on Romania from numerous quarters since 1989 (see Phinnemore 2001). These pressures frequently have stemmed from international concerns over minority issues. Although certainly not the most corrosive pressure on national sovereignty, minority rights lobbying from abroad has often been perceived by the state and the media as the clearest example of foreign interference, which must be resisted at all costs. Yet it is here that the quandary for Romania has arisen, since it was not long after the fall of Ceausescu that it became clear that isolation from the outside world – or, alternatively, an alignment with Russia – was not a desirable option, particularly in terms of economic development (Phinnemore 2001). This has manifested itself most strongly in the desire to join the European Union, a consensus widely shared by the population; spurred on by both the perception of economic self-interest, as well as by the historical identity as 'European' (as standing in for 'civilisation'), which had to be rebuilt following 1989 (Batt 2001). What was also apparent, however, is that 'when Romania formally applied to join the EU in 1995, there was probably little awareness that it was embracing a political project hostile to many of the core values of Romanian nationalism' (Gallagher 2001: 115).

For example, Romania found first that progress towards full membership of the Council of Europe was made subject to periodic human rights review, and it accepted that associate status with the EU required 'respect for the democratic principles and human rights established by the Helsinki Final Act and the [1991] Charter of Paris for a New Europe' (Gallagher 2001: 108). Moreover, the EU was given a 'right of regard' over human rights in Romania

by the Iliescu regime. Yet, at the same time, for many Romanians (as elsewhere), the treatment of national minorities is the quintessential issue of national sovereignty.

Human rights are only a small part of this difficult transition to a transnational and globalised world order. Post-Communist Romania is best characterised by the degree to which transition has been far from easy, and in terms of how pressure from outside and above becomes the most effective counter to a state that has strongly ethnic nationalist and inward-looking impulses. As a consequence, minority groups come to be blamed for slowing the accession process. But this popular perception is far from an accurate description of Romania's slow and difficult path into multilateral and transnational bodies, particularly the European Union and the Council of Europe, as well as its often strained relations with the IMF and World Bank. The 1990s have been described as a 'decade of frustration' with respect to the difficulty of integration (Phinnemore 2001). Council of Europe membership was delayed because of concerns over Romania's human rights record (Gallagher 1995: 130).

In terms of EU membership, however, Romania has benefited from the decision of the European Council at the Luxembourg Summit in December 1997 to adopt an 'all-inclusive' accession process, even though Romania – by all accounts – lagged far behind other accession countries in meeting the EU accession criteria (the Copenhagen criteria adopted by the 1993 Copenhagen European Council) of political and economic reforms (Phinnemore 2001). The accession criteria comprised 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities'; the existence of a functioning market economy as well as the capacity to cope with competitive pressures and market forces within the Union; 'the ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union'. In addition, the candidate state must also have created 'the conditions for its integration through the adjustment of its administrative structures, so that European Community legislation transposed into national legislation is implemented effectively through appropriate administrative and judicial structures' (Bell 2001: 83, citing Bulletin-EC, 6–1993). The first report of the European Commission, published in July 1997, set the tone for future annual reports on Romania's readiness for membership, pointing out both progress in meeting the Copenhagen political criteria for membership, while also recognising that Romania 'would face serious difficulties to cope with the competitive pressure and market forces within the Union in the medium-term' (Commission of the EC 1997). Subsequent annual reports have echoed those concerns, and the EU perception has been that Romania has been extremely slow in delivering the political, market, and institutional reforms demanded by the European Union, and agreed in the accession negotiations (Quinn 2002).

The Union notes with concern that Romania has made relatively little progress in meeting the Copenhagen economic criteria. There is a need to accelerate and deepen reforms if Romania is not to fall behind in its preparations for accession. Priority areas are: privatising/liquidating the large loss-making enterprises; stabilising macroeconomic conditions (reducing inflation, setting a prudent fiscal deficit); improving the business environment, reforming the banking sector, notably by reducing state ownership and improving supervision.

One can see, in this moment, the manifestation of Romania's paradoxical identity. The official government position – taken by governments of both the right and centre – has been in favour of EU membership (Chiriac 2001). But, in practice, despite agreements and promises, Romania has often been unable to meet the standards of discipline imposed upon it by the European Union, leaving it in the slow track towards membership, (Quinn 2002). Much press and popular attention has focussed on EU demands – emanating from the European Parliament especially – concerning institutionalised children, the Roma, the Hungarian minority, and Article 200. But, in fact, the most serious challenges to membership come, not from the political criteria, but from the Copenhagen economic criteria, underlined by Romania's slowness in achieving market reforms, privatisation, and fiscal and monetary stability. And it has been the failure of governments to achieve these standards of economic and political discipline – to implement them – which in turn has undermined the goal of integration, which can then fuel an inward looking ethnic nationalism, resistant to a more cosmopolitan, civic notion of citizenship.[5] Combined with the presence of fascist political parties with a substantial following throughout the post-Communist period – particularly the Greater Romania Party – the tension between acceptance of international demands and resistance to them, is acute. As well, it must be remembered that past and present post-1989 Romanian governments include many ex-Communists with little commitment to a reform agenda, and that Romania has had to deal with an economy and bureaucracy in a far worse state than was the case in many neighbouring countries (Stan 1997). The result was expressed in the November 2000 European Commission report that 'Romania cannot be regarded as a functioning market economy and is not able to cope with competitive pressure and market forces within the European Union'. (Commission of the EC 2000).

For that matter, similar patterns of discipline and resistance can be seen in the relationship between Romania and the IMF and World Bank throughout the post-1989 period. The conditions for financial support have included privatisation and industrial restructuring; the creation of a climate conducive to foreign investment; the elimination of government price controls and industrial subsidies; and the liberalising of the foreign exchange market (Jones 1997: 41). Loans from both the IMF and World Bank

(as well as from the G24 countries, the International Finance Corporation, the European Bank for Reconstruction & Development, and others) have been conditioned upon a range of neo-liberal economic reforms such as these, following frustration at the slow pace at which Romania has carried out promised reforms in the past. The making of future loans conditional upon reform provides a strongly neo-liberal disciplinary force, particularly given Romania's considerable foreign debt reservice payments, its downgrading by the nine international credit rating agencies in the late 1990s, and the relative paucity of foreign direct investment since 1989 (see Jones 1999: 48).[6]

My purpose in raising the range of pressures for reform is not to document a score sheet by which to blame the Romanian state for its failure to achieve an economic agenda set by the institutions of the European Union, World Bank and IMF. Others routinely construct such scoresheets, which are then deployed as ammunition to further discipline the state. Nor should the historical role of the west in manipulating Romania and supporting the Ceausescu state be forgotten. In the post-Communist era, one can argue that the way in which, for example, the European Union has demanded an extensive reform agenda covering all areas of Romania's economy, bureaucracy and legal system – which Romania has responded to by creating a Ministry of European Integration which does nothing except attempt to meet the criteria for accession – having had no promise or guarantees of membership, helps to fuel ethnic nationalism and anti-western interventionist sentiment; thereby reinforcing Romania's 'victim complex' (Gallagher 1995: 53).[7] As Tom Gallagher (2001: 115–16) pointed out, the west

> makes obtaining a visa to travel to EU states extremely difficult for most Romanians, often entailing waits for days outside foreign embassies [while EU citizens require no visa to enter Romania]. Many Romanians contrast the fact that tariff barriers have been lowered (in line with Romania's Europe Agreement with the EU), allowing west European goods to flood the country, thus jeopardizing local agriculture and industry, while Romanian citizens are effectively blockaded from travelling westwards.[8]

So too, IMF and World Bank conditions often exacerbate already austere living conditions through the lifting of price controls on staple items and the privatisation of industries which survived only under an extremely disjointed centrally planned economy, protected from market forces. My point here is to underscore how the state has been weakened, battered by international pressure from above, as well as pressure from below, from the forces of ethnic nationalism (or fascism), orthodoxy, rampant consumerism by those

with resources (achieved through 'a system based on corruption and patronage networks' (Craiutu 2000: 182)), and with relatively little sense of civic engagement. It is this context which makes the struggle for the repeal of Article 200 unique and noteworthy for what it suggests about transnational European activism and the institutions of the EU and beyond. And it is to that story that I now return.

ACCEPT-ing accession

One of the successes of ACCEPT has been its ability to mobilise internationally around the repeal of Article 200. The explanations for this success are multifaceted. First and foremost, ACCEPT has been a human rights NGO and not a grassroots organisation. Its executive possess a high degree of political sophistication and experience in the human rights sector. Moreover, the lack of a history and experience of strong civil society actors has meant a relative absence of involvement by most lesbian and gay Romanians in the organisation, combined with a Romanian fear and scepticism of 'community'. This, in turn, left space for professionalised human rights activists who were not always themselves lesbian or gay to assume leadership positions. As a consequence, discourses of professionalism and managerialism have come to predominate, as has an agenda of international lobbying, rather than one of social services or cultural development (although there has been some space – and increasingly so – for both).[9]

Moreover, the link with the Netherlands government was a fortuitous development, as it opened the way to successful funding applications to other international and transnational bodies, including the European Commission. That funding has allowed for the development and support of an infrastructure that could carry on sophisticated international lobbying, and which could follow up with constant pressure on the state, as well as media campaigns aimed at changing perceptions at home. As well, the link with the Netherlands government provided a political acknowledgement that lesbian and gay issues were on the political agenda generally, and on the EU accession agenda specifically (van der Veur 2001).

But despite the pressure which ACCEPT has exerted on the state internally (and it managed to achieve a considerable degree of access to a number of government ministries), and the savvy way in which it has used the media, it is clear that it was EU institutional pressure – rather than pressure from the Council of Europe, the UN, Amnesty International, Human Rights Watch, international human rights NGOs, or foreign governments such as the Netherlands or Sweden – which forced decriminalisation, as well as the inclusion of sexual orientation in anti-discrimination legislation. The European Parliament for some years had passed continuous resolutions calling for an end to Article 200. Furthermore, an informal group of sympathetic Members of the European Parliament (MEPs) (called the 'Intergroup on Gay

and Lesbian Rights'),[10] as well as other MEPs interested in Romanian accession (such as Baroness Emma Nicholson), pushed this issue forward with lobbying from ACCEPT and, more broadly, with backing from the International Lesbian and Gay Association Europe (of which ACCEPT is a member organisation) (ILGA-Europe), and from the International Gay and Lesbian Human Rights Commission (Coman 2001).[11]

However, it was when the conditions of accession, in the form of the Copenhagen political and economic criteria, were announced, that the potential for using accession as a lever with which to push for gay rights became clear to ACCEPT. As Adrian Coman (2001), former Executive Director of ACCEPT, described to me, 'when the Commission started to put the issue on the agenda with Romanian officials, at the same time ACCEPT succeeded in meeting basically with all the important people – including the Minister of European Integration, the Minister of Justice, the Romanian mission in Brussels'. At this point, one finds in the Reports of the European Parliament on Romania's application for EU membership, and in the Council of the European Union recommendations, as well as in the views of the Commission and in other EU documents, a continual reference to the repeal of Article 200 as a condition for accesssion, along with, of course, numerous other demands.

Article 200 would be raised by the Commission, as well as by EU Parliamentarians, on innumerable occasions. For example, in a letter of 29 May 2001, from eight MEPs to Prime Minister Nastase concerning Article 200: 'we look forward to welcoming Romania into the European Union, but an essential prerequisite is that *we must share the same values*. Discrimination on whatever ground may never be permitted' (van der Laan *et al*. 2001, emphasis added). Similarly, another protest from Parliamentarians states, 'Romania's commitments within the EU accession process imply both observing the EU values and principles, as well as passing legislation in accordance with EU standards' (European Parliament 2001). Or, to take a further example, in answer to a parliamentary question, Mr Verheugen (2001) on behalf of the Commission states,

> [T]he criteria for accession to the European Union, as set out at the 1993 Copenhagen meeting of the European Council, make explicit reference to the need for stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities. The Commission is fully committed to ensuring that this condition for accession is respected and will take up cases of human rights abuse in its regular reports on candidate countries' progress towards accession and in its bilateral relations with them.

The two central lesbian and gay law reform issues in Romania – decriminalisation and anti-discrimination legislation – have quite different

bases in European law, and Mark Bell (2001) has incisively explained how EU law can provide a source of rights for citizens in the accession countries. As ILGA-Europe (2001: 7) explains in its report on the accession countries,

> A precondition for accession, as set out in the Copenhagen criteria, is the establishment of respect for human rights, including the protection of minorities. Moreover, Article 6(2) EU provides that: 'the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms'. It is clear that, as a minimum, the accession countries must bring their laws and practices into line with the jurisprudence of the European Convention.

Yet, interestingly, the Romania desk officer at the Commission describes how, despite pressure that might be exerted by the European Union, from the Commission perspective, 'you are playing a little bit of a bluff game on all human rights issues' in the accession process, particularly given that so-called 'European values' may not always appear to be shared by all *existing* member states (Quinn 2002).[12] The anti-discrimination law issue has a much more explicit legal basis than decriminalisation, given the Council Framework Directive establishing a general framework for equal treatment in employment, which Romania is keen to show that it has enacted (although not implemented) in an attempt to meet this element of the *acquis communitaire* (and the anti-discrimination law appeared on the official political agenda before full decriminalisation) (Bell 2001: 83).[13] This is typical of the Romanian approach, which is to focus on the enactment of legislation, even when there is no mechanism for implementation (an approach which Commission officials find problematic and dismaying) (Quinn 2002).

In 2002, Romania (and the European Union) finally witnessed the repeal of Article 200 and the inclusion of sexual orientation in national anti-discrimination legislation (after its earlier exclusion by a Parliamentary committee, which was followed by informal pressure from the European Commission to include it). In the end, these successes were somewhat anti-climactic, achieved without much official fanfare, and after so much struggle. As the Commission of the EC (2001) (earlier) described the significance of this legal move, 'this represents a major and positive development in human rights legislation that brings Romania into line with European standards'. How should this culmination of years of lobbying and struggle be understood? My answer in this chapter is to suggest that it should be read as a cautionary, indeterminate, yet fascinating genealogical tale of the making of European citizens. As I have tried to emphasise, sexual citizenship claims in Romania have not been a 'bottom-up' social movement process. Rather, they have been effectively backed up by external pressure, although with a strong sense of 'ownership' of the agenda domestically by ACCEPT. In such a context, the relationship between legal and social change may be even

more tenuous than in other national contexts, but ACCEPT would be the first to admit this. However, neither should the significance of legal change be underestimated. Criminal law concerning homosexuality was not merely of symbolic importance in Romanian society. It had a brutally material impact. But it is unlikely that most Romanians will feel any sense of 'ownership' of law reform. Instead, for some, it may reinforce their scepticism and bewilderment at 'European values' of citizenship, and reinforce Romania's historically paradoxical relationship with 'Europe', in terms of its own national identity.

Conclusions

In conclusion, the analysis of a citizenship rights campaign raised in this chapter – with the relationship between pressure exerted from above, and the politics of social change within Romania domestically – raises wider questions for future study. First, to what extent are we witnessing the emergence of Romanians who embrace a different conception of citizenship – who may identify as lesbian or gay – and who, as a result, express a more cosmopolitan, European sense of identity, based on plural allegiances (Gallagher 2001: 121)? Could this law reform campaign be seen to contribute to this end? That would potentially represent an enormous shift, which might include the creation of a 'rights based conception of civil society' (Haddock and Caraiani 1999: 274), rather than the traditionally highly collectivist and communitarian notion of identity through which, as Roman (2001: 55) argues, 'a "minimalist citizen" mentality is created, with low self-esteem, distrust for institutions and the law, fear of public servants, and a tendency to suffer from a persecution complex regarding hierarchical inferiority'. Perhaps, alternatively, we may see emerging some hybrid notion of communitarian and cosmopolitan identities, leaving us to consider what such an identity might actually *look like*. How might the European Union contribute to that process, while mindful of the dangers of imposing a vision of citizenship from above (and bearing in mind the ignoble role which the west has played in Romania in the past)? Can the idea/l of 'civilisation', which many Romanians (including many ACCEPT members) embrace through the language of human rights, be reclaimed, so as to bypass the historical resonances identified by critics of the European Union, such as Fitzpatrick (2001) and others? Can law reform actually contribute to the development of civil society, and how will lesbian and gay identities emerge in this context, in which law reform around homosexuality has been so transnationally driven? And is 'civil society' the panacea that European institutions assume it to be? Is the discourse of human rights cynically deployed by EU actors so as to mask an underlying neo-liberal agenda imposed unquestioningly on the accession countries? To what extent will an emerging gay identity be cosmopolitan and globalised, or will it retain some communitarian

roots? To what extent can European actors avoid the colonial impulse? COC Netherlands is moved on to work actively on a lesbian and gay empowerment project in the Republic of Moldova. Is this a force for 'liberation', or should it be seen as an example of the colonisation of sexuality by the west?

Finally, in the Romanian context, legal recognition issues are starkly inseparable from the economic. Issues of recognition and redistribution can be seen to merge. To what extent can a cosmopolitan, or globalised, identity be meaningful, given the standard of living of the majority in Romania today? For many, a westernised identity can be little more than a dream; one which is linked to migration and a relationship with a westerner who might act as an immigration sponsor. This underscores how an analysis of sexual identities and social change must be linked to existing economic inequalities.

In closing, an anecdote perhaps best encapsulates the paradox of Romanian gay politics. In the autumn of 2001, the new American ambassador to Romania, Michael Guest, arrived. A Bush appointment, and NATO expert, the openly gay ambassador arrived with his partner in Bucharest to much press attention, and was duly received by the government (Gall 2001). Should this event be read as a capitulation of the weakened state to international pressure; underscoring the inequality in the relationship between 'west' and 'east'? Alternatively, does it provide evidence of a movement of social change, which marks a historical shift? My answer in this chapter has been to suggest that both readings provide partial truths about the emerging politics of sexuality and citizenship in a European legal and political order; and it is in the years ahead, as the drive for European accession continues, that the implications of sexual citizenship in this dynamic region will become increasingly apparent.

Notes

1. The financial assistance of a British Academy Small Research Grant is gratefully acknowledged by the author.
2. With its legal victories now achieved, the future role of ACCEPT will be an interesting issue. As former Executive Director Adrian Coman (2001) predicted to me: 'in five years, ACCEPT will have specialised services for lesbian and gay people; it will be a resource for any initiative targeted at lesbian, gay, bisexual and transgendered people in Romania, and that would include, for example, strategies of the Ministry for Labour and Social Protection'.
3. The COC has continued to collaborate with ACCEPT with the support of the MATRA programme. The focus has been on reaching out to local lesbian and gay organisations in Romania, and to assist with the development of the Bulgarian lesbian and gay movement (by drawing upon the experience and expertise of ACCEPT).
4. See Haddock and Caraiani (1999: 258): 'Modernizers have sought to adopt (something like) the western conception of civil society, with a stress on human rights, the rule of law, economic liberalism and association with pan-European

institutions. They have found themselves confronted not only by hard-line nationalists, for whom cosmopolitan language is a betrayal of Romanian national identity, but by traditionalists intent upon reconciling a distinctive Romanian inheritance with a wider *Europe des patries*.'

5. Gallagher (2001: 114) suggests, in this regard, that 'perhaps … mainstream parties and indeed much of public opinion in Romania are in the process of acquiring dual identities based on pro-Europeanism and nationalism – the dominant element depending on the degree of national security or insecurity felt at a given moment'.
6. A review of the past decade of volumes of *The Banker* and *Euromoney* magazines provides a useful introduction to this history. See for example *Euromoney* (1997: 128).
7. Although, at the same time, 'between 1990 and 1999 the European Union provided assistance to Romania under the PHARE programme totalling 1203 million [Euros] and … as part of the pre-accession strategy Romania will receive some 630 million per year from 2000 to 2002' European Parliament (2000: 11).
8. As of 1 January 2002, the EU travel visa requirement was lifted for Romanians; however, proof of health insurance and adequate funds is still required (and prevents many Romanians from travelling easily).
9. Not surprisingly, there has been a fair amount of dissent amongst some segments of the Romanian gay population around issues of representation ('can ACCEPT speak for gays?'), as well as over the relative roles and merits of grassroots activism and professionalism. The professionalism of ACCEPT is confirmed by those with whom the organisation has dealt; see for example, the comments of Martijn Quinn, Romania Desk Officer at the European Commission (2002): 'they were the best organised lobby I've come across. … ACCEPT knew the system; were able to use more institutions to put pressure on. … If I had to give advice to any NGO in any areas, I would say that that would be a model of how to get your case across. To present your arguments and present your case successfully.'
10. For example, on 28 June 2001, the Intergroup on Gay and Lesbian Rights held a public hearing on lesbian and gay rights in the EU accession countries, entitled 'EU Enlargement: A Gay Perspective' (2001), which was held in the European Parliament.
11. In fact, ACCEPT organised the 22nd Annual Conference of ILGA-Europe, entitled 'Accepting Diversity', which was held in Bucharest on 4–8 October 2000. Participants included EU politicians, embassy representatives, and included an impromptu speech by the then US Ambassador to Romania.
12. Although, as Bell (2001: 86) points out, in the context of decriminalisation (and given the findings of the European Court of Human Rights against those signatory states who have criminalised same sex relationships in private), 'all applicant states, like all existing EU states, are signatories of the ECHR [European Convention on Human Rights]. Therefore, requiring new EU Member States to respect the rights set out in the Convention goes no further than the obligations the applicant states have already assumed towards the Council of Europe.'
13. The term *acquis communitaire* refers to the existing body of EU law which an accession country needs to incorporate into domestic legislation as a condition for accession. For example, as Bell (2001: 83–4) explains, 'wherever EU law already imposes anti-discrimination requirements, then applicant states' domestic law must be brought into line with these obligations. Second, any state wishing to accede must establish respect for human rights and fundamental freedoms,

including protection of minorities'. The *acquis* has been divided into 31 chapters. The Romanian Ministry of European Integration has responsibility for ensuring – chapter by chapter – that Romanian law is in compliance. Not surprisingly, it is a mammoth task.

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10

Local Strategies for Civic Inclusion in a European Context: The Roma in the Czech Republic

Mita Castle-Kanerova and Bill Jordan

Introduction

This chapter reports on an investigation of local strategies for civic inclusion in municipalities in the Czech Republic, with special reference to the Roma community. It also draws on a parallel study of the reasons why Roma individuals and families emigrate, mainly as asylum seekers, to Western Europe and beyond (Gabal Analysis and Consulting 2000), which was commissioned by the International Organisation for Migration in the Czech Republic.

Underpinning this research is the view of citizenship as a struggle for 'the right to have rights' (Bellamy and Castiglione 2002). In the case of the Roma, this struggle has been spread over centuries; paradoxically, the communist period was one in which they gained some formal rights, which have had to be won all over again since 1989. The chapter aims to locate these new struggles in the context of strategies by local authorities within the new Czech polity, and the constitutional process of EU enlargement.

This chapter also addresses the issue of how the 'weakness' of civil society in the post-communist countries contributes to the dynamic of integration and fragmentation. We will argue that, in the case of the Czech Republic, civil society is not so much 'weak' as poorly linked with democratic institutions, and hence that the connections between civic values and behaviour and the goals of associations and community groups are often difficult to establish. Participation in civil society therefore does not always contribute to membership, rights or inclusion in the political sphere.

However, this is only one dilemma facing all the actors – the European Union, the Czech authorities and the Roma themselves – in the present situation. On the one hand, it is well recognised that, all over Central Europe, the Roma have suffered social and economic exclusion. As the OSCE High Commissioner on National Minorities has reported, in many countries,

the Roma have been decreed illegal residents on their own property, banished beyond municipal boundaries, and left outside the community of common concern (Van der Stoel 2000: 1). But – as one of the foremost new members of the European Union – the Czech Republic has strong reasons for demonstrating its commitment to combating the exclusion of its Roma communities, and especially for countering the reproach to its progress towards democratic transformation that is constituted by high numbers of asylum applications to EU Member States by its citizens.

On the other hand, the Roma community in the Czech Republic has begun to organise itself and to have a voice, both locally and (to a lesser extent) nationally. In this, it is in part sustained by EU funding and support, and it has increasingly developed the identity of a transnational ethnic minority, in which longstanding informal cross-border links are now being supplemented by formal, organisational connections. At the local level, Roma organisations are engaged with state and NGO structures to advance their interests, while at the same time promoting international activities and support networks.

The project involved interviews with the municipal authorities, and NGOs in three cities – Karlovy Vary, Olomouc and Pardubice. In each of these, the Roma Adviser to the local authority was one of the interviewees, together with a senior officer of the council to whom he or she was accountable. This allowed local strategies to be described, both by a policy-maker and by the specialist officer responsible for direct liaison with the Roma community; it enabled us to compare these accounts, and the different versions of civic inclusion that they revealed. In addition, we interviewed a number of officials who deal with NGOs, and representatives of those NGOs themselves, including some Roma organisations, in each city.

The research by Gabal Analysis and Consulting was conducted in nine other municipalities (including two districts of Prague). It involved interviews with 3 Roma Advisors, 8 Roma activists, 16 representatives of local governments, 5 Labour Office staff and 7 police officers. In addition a total of 18 Roma citizens who had emigrated once and 14 who had emigrated more than once were also interviewed.

This is therefore a case study with many of the familiar elements of present-day European social relations, but some unusual ones. Apart from immigrant communities, what distinguishes the most disadvantaged and marginal citizens of West European (and other First World) polities is their lack of mobility, and particularly their lack of access to advantageous transnational networks. By contrast, the Roma in Central and Eastern Europe increasingly identify as an international community, and see the option of emigration westwards as a possible solution to their exclusion from the national mainstream and from the rights of citizenship. Hence their associations are required to find a balance between struggling for local recognition and inclusion, maintaining national and transnational links, and involving members

whose best individual short-term strategy may be exit rather than voice (Hirschmann 1970).

But this migration has had a considerable impact on the European Union's emerging strategy for regulating immigration and asylum, and on the policies in these matters of Member States. At the present time, the European Union is attempting to bring together issues of economic migration (especially the recruitment of outside workers to meet labour shortages) and those of asylum, within a single framework (European Commission 2000). This indicates that – in the wake of the Amsterdam Treaty's provision (1997) for these issues to become a Community competence, as part of the programme for 'freedom, security and justice' (Articles 61–3) – the EU is moving from an almost entirely restrictive approach, based on securing external borders and limiting asylum applications, to one of 'accepting that immigration will continue and should be properly regulated, and working together to try to maximise its positive effects on the Union, for the migrants themselves and for the countries of origin' (European Commission 2000: summary).

However, the opening up of legal channels for economic migration is seen as legitimating tough measures, both in relation to clandestine entries and trafficking, and through 'fast-track' asylum procedures, dispersing applicants to camps, giving only 'in-kind' support, and imposing 'safe third-country' rules (Düvell and Jordan 2002). Thus EU policy distinguishes strongly between wanted recruits (who meet labour-market and demographic requirements), and unwanted migrants (who come through their own decisions, with or without good humanitarian reasons). For many Member States, this distinction is even more strongly upheld; for instance in the United Kingdom, where the first small party of Czech Roma asylum seekers sparked the 'moral panic' about asylum issues in 1999–2000.

But the EU has a delicate balancing act in relation to Roma asylum seeking, especially from what was a first-wave applicant country in the enlargement process, like the Czech Republic. Accession required harmonisation of standards in relation to human rights; the flight of Roma to EU Member States pointed the finger of accusation at the Czech government for colluding in human rights abuses. Hence strategies for integration became relevant to the accession process.

Furthermore, the case study illustrates a special instance of the dilemmas of policies for social cohesion in a globalising economic context. In the Czech Republic as in the other post-communist countries of Central and Eastern Europe, the fall in living standards after 1989 was fairly evenly shared by all classes (outside a few prosperous international cities like Prague.) The exceptions to this rule were the overlapping old political and new business élites, together with the mafia, who suddenly became very rich, and the Roma, who lost their economic role and many of their social rights. Partly because the lack of affordable housing precluded residential polarisation, partly because of continuing low salaries together with rising

living costs, a kind of equal misery prevailed among the mainstream, with little evidence of an emerging white underclass (Götting 1997). Citizenship-as-belonging re-inforces the exclusion of Roma.

In the case of the Roma in Central Europe, processes of blame and rejection build on very longstanding prejudices and conflicts, and allow the remobilisation of racist stereotypes. Hence local policies for civic inclusion are required to counter pervasive resentments and moral assumptions. While some of the restraints of the socialist era continue to operate both institutionally and informally among mainstream citizens, the Roma community bears the brunt of economic and social change.

Background: state and the civil society

It is an often-repeated truism of the democratisation process in Central and Eastern Europe that this involves the construction of a civil society that was absent under communism (Tilly 1997). In the Czech Republic, this largely mistakes the problem; what was absent was a public space for critical dialogue between organisations of citizens and the state, for interest-group representation and for mobilisation and new activities around new issues. What did exist were numerous associations of many kinds, only some of which were directly sponsored by the state or the Communist Party; and even the latter varied greatly from one locality to the next in the extent to which they reflected official orthodoxies.

As a result of extermination policies during the Second World War, there were very few Roma left in the Czech lands when the Communists came to power. Roma were compulsorily resettled from Slovakia in the 1950s and 60s, implementing a decision to spread their population as thinly and evenly as possible over the whole of Czechoslovakia (Van der Stoel 2000: 21–2). This was part of a programme for forced assimilation, within the forced industrialisation and urbanisation of the Republic, and especially of the backward Slovak lands. In 1958, the law decreed that the Roma were not an ethnic group, but people 'maintaining a markedly different demographic structure', and enforced school attendance, settlement and employment in a fixed location (Fraser 1995: 277). But such policies were not wholly inconsistent with state support for development of a distinctive cultural identity, and Roma associations both existed and received resources for pursuing cultural activities and links. Hence the bonds of community organisation and kinship with Slovak extended families were not lost, even though Roma were compulsorily recast as miners and factory workers and as dwellers in socialist-style tower blocks during this era. Roma families continued to migrate from the Slovak to the Czech lands during the Communist period. The Roma had formal political representation in order for the regime to claim that equality at the economic and other levels had been achieved.

Since 1989, the transformation of Czech civil society reflects many aspects of the legacy. On the one hand, the relationship between the state (both central and local government) and the NGOs has continued to be characterised by formalism and legal regulation. Law and proclamation rather than detailed engagement have characterised the attempt to change attitudes and increase participation and the sense of civic responsibility. On the other hand, there has been a vigorous growth of new associations, both those partly funded by the European Union or West European NGOs, and those reflecting local mobilisations around particular issues. In part this reflects the retreat of the central state from its former controlling and providing role, and illustrates the international trend towards involving NGOs as service providers filling this vacuum (Deacon 2000). But the Czech pattern of these developments (as elsewhere in Central and Eastern Europe) is of fragmented, localised organisations, ill-informed about each other's activities, and with little networking or concerted action (partly due to shortages in resources).

For the Roma, the context for self-organisation and group representation is one of extreme disadvantage and discrimination. In the Czech Republic, government estimates in 1999 suggested that unemployment rates among Roma were 70 per cent, compared with 10 per cent in the population as a whole (Van der Stoel 2000: 32). The previous year, the government recognised that this reflected endemic racial discrimination, introduced a new anti-discriminatory clause in employment law, initiated training schemes for Roma (Van der Stoel 2000: 34), and appointed a new Roma Adviser to the Director General of the Employment Services Administration of the Ministry of Labour and Social Affairs. Roma are routinely refused service in cafes and restaurants, and access to clubs – a survey in five Bohemian towns found that well-dressed Roma citizens were turned away from over half of such facilities (Petrova 1998). International NGOs have claimed that the Czech Republic has the highest rate of racially motivated murders of Roma in Central and Eastern Europe, though the Czech Ministry of Justice has not recorded any death in this category (Van der Stoel 2000: 37); light sentences have been given to Czech skinheads who caused the deaths of Roma (Van der Stoel 2000: 39). Housing has been a particularly contentious issue in exclusionary policies at the local level, with Roma confined to the least sanitary accommodation, with fewest amenities, sometimes through forced relocation, or exclusion from municipalities (Van der Stoel 2000: 99–105). Education is another focus for conflict, with Roma children systematically classified as in need of special schooling and therefore losing opportunities of getting better qualifications or skills training.

The collapse of the Roma's economic role happened very quickly and its social and political consequences were exacerbated by government inaction. Ethnic tension and racist violence were ignored, and the situation of the Roma was seen purely as a 'social problem', left to local authorities. By the

time a government report was commissioned on the overall plight of the Roma (1997), 'the majority perceived Roma as not willing to share either the basic values of Czech Society … or even the basic rules required for coexistence' (Gabal Analysis and Consulting 2000: 5).

Hence the Czech situation presented a rather different combination of civility and civil associations on the one hand, and civicness and civic organisation on the other, from what existed in Western Europe. The democratisation process seemed to require a transition between the first pair of concepts, and the second. Czech society was characterised by rather good manners, considerateness and obedience to the rules, at least in its public and visible aspects, and outside the political elite, during the Communist era. We have argued that civil associations were relatively numerous and healthy though they lacked the opportunity and will to participate in the realm of politics, or to influence policy at national or local levels. The Czech transition to democracy would – on this account – require something more than a growth in participation in, or formation of, civil associations. It would demand an active engagement between public-sector agencies and policy-makers and organisations in the non-government sector, in which the missing links are forged, the capacity and desire of citizens to participate in public affairs is promoted, and concern for the common good fostered. In the case of the Roma, the requirement is obviously strongest, because of the combined impact of economic marginalisation and racial discrimination and oppression.

Yet the context of socio-economic change in the Czech Republic is unfavourable to any of these developments. On the one hand, the withdrawal of the state from its controlling and providing role has required civil society organisations (both old and new) to step into social service roles. Hence local and national government agencies come to substitute financial for political controls, as the main source of funding for such activities. Although there may be more interactions between public authorities and NGOs, the former are little more accountable to the latter than before and dependency stifles real dialogue. This situation is by no means unique to the post-communist countries, and can be seen as part of global tendency in social policy (Deacon 2000).

As far as the Roma are concerned, the dramatic deterioration in their economic circumstances since 1989 has been accompanied by a growth in exclusionary practices of all kinds, not only within the public sector, but in civil society organisations, in businesses and in the informal actions of citizens. Greater activism and political awareness are thus a response to far more explicit forms of disadvantage and exclusion, and in this the Roma community draw on resources (both material and cultural) from outside the Czech Republic to mobilise resistance, and thus are involved in transnational collective mobilisation. In a sense, the Roma might be seen as more involved in civic activity than the mainstream Czech community – but from such a

disadvantageous situation that their participation is balanced by incentives or pressures to leave the field altogether, by emigrating as asylum seekers. The transnational context therefore both feeds the voice option (resources for mobilising as a politically aware ethnic minority) and the exit option (emigration).

Exit or voice? issues of social capital

The dilemma of the Roma over whether to take action as individuals and/or families (migration, exit) or to participate in collective action, in dialogue with local authorities (participation, voice) raises important issues about social capital, and its relevance for civic inclusion. Specifically, it focuses attention on the legacy of communism in the polity and civil society, and on how the cultural capital of Roma communities bears on the new requirements of civic values and behaviour in the democratisation process. Since de Toqueville (1836), mainstream liberal political theory has tended to perceive civil-society networks and associations to contribute to reciprocity, trust *and* civic competence, a tradition that fed into Putnam's (1993) work, and through this into the present literature. However, globalisation and transnational governance cast doubt on assumptions about the virtuous circle between both civil and civic competence, and reciprocity and political legitimacy (Jordan 1998). In particular, the networks and associations used by poor people to survive and resist the consequences of their economic marginalisation and social exclusion do not feed into democratic practice, and give rise to enforcement action, through the criminal justice system and other regulatory agencies (Jordan 1996: chs. 4–5). This in turn can be seen as contributing to social division, polarisation and conflict.

Both the special conditions of post-communist political cultures, and the cultural traditions of the Roma themselves, add dimensions to these issues. Social capital is beneficial for some socially desirable ends, and harmful for others (Solow 2000); when there is a sudden shift in both normative and structural institutions, as happened in 1989, what is seen as socially desirable behaviour changes, and hence the consequences of social capital are changed. Part of the legacy of communism was organisational failure. The authorities behaved in ways that were not accountable or predictable; rules were bent or broken, and things were done through bribes or personal contacts. Hence informal networks were involved in protecting their members from the intrusion of state agencies, or exploiting these agencies, in substituting for the functions of formal organisations, or subverting them (Rose 2000: 149).

The Czech Republic was not a country in which things were done through bribes and corruption to the same degree as in other parts of East Central Europe. Rose's research on how citizens acted to get their wages paid, benefits and pensions, access to universities, hospitals and child care, found that

around half of the Russians surveyed relied on such 'anti-modern' methods, compared with about a quarter of Czechs:

> Czechs tend to be less likely to think that nothing can be done than former Soviet citizens. Big differences arise because Czechs are more likely to rely on markets or personalise and plead with bureaucrats to expedite their demands. (Rose 2000: 164–5)

What was missing under the old regime was any form of interest-group politics arising from civil society, or many connections between the associational life that did flourish (around many different activities, cultural and recreational) and the structures of political authority. What did exist, however, were informal networks that crossed boundaries and enabled people to get things done without overt reliance on corruption. Civil-society organisations were not training grounds for local or national politics; the norms of trust and co-operation generated by associations did not spill over into political culture; and there were few overt linkages between associational and political networks. This helps explain our finding that new NGOs in the field of social provision were isolated from each other, and that the local authorities sought to organise them, rather than draw on their social capital for increased citizenship participation and inclusion.

Indeed, under communism the Roma were one of the few groups in Czech society with formally representative institutions; hence they were (albeit hierarchically) linked into the political system under that system. However, they were by no means socially integrated (despite being housed and employed), and their lack of access to decent education meant that they, because of their unskilled roles, were very vulnerable to the shock effect of markets on the economy. Hence it is possible to understand the recent attempts by local authorities to engage directly with Roma associations as a revival of the communist system, as much as a move towards greater partnership with civil-society organisations. It also recognised the Roma organisations as 'enterprises' in an economic sense, rather than NGOs (non-profit organisations, as well as non-governmental, and hence not civic in the communist tradition).

Although these innovations have therefore reopened the voice option for the Roma, their associations start from a very disadvantaged position, in relation to their own potential membership's capacities for mobilisation, as well as in relation to the authorities. In the time between 1989 and the beginning of these initiatives (1997), the economic and social exclusion of Roma populations had led to cultural practices characteristic of other groups to experience such treatment. Roma resorted to the 'weapons of the weak' – covert action consisting of informal economic activity, petty crime, and maximising welfare claims, based on underground networks of co-operation, information and subversion (Scott 1985, 1990; Jordan 1994). All these

practices had been 'perfected' under communism by the general population, and are common to groups in similar structural situations in Western Europe (Jordan 1996: ch. 6). They also represent an alternative to overt political action, because they are based around the perception of higher returns to informal methods, secrecy and covert rule-breaking (Jordan 1998). This perception was clearly realistic in the Czech Republic during those years, since the government insisted their difficulties were 'social problems' requiring no structural remedies, and racist groups used any occasion that made them visible as opportunities to attack them.

In addition to this, the Roma tradition of mobility and withdrawal from any such threat represented another alternative to collective engagement with the political authorities. The exit option through migration was doubly attractive, especially to better-educated and better-off Roma. On the one hand, travel was regarded as a benefit rather than a cost, and Roma families could call on cultural resources for mobility from many generations. On the other, most West European societies were more attractive than the hostile environment they faced in the Czech Republic – they found the 'greater ethnic diversity and openness' (Gabal Analysis and Consulting 2000: 31) congenial by contrast. When they were rejected on asylum applications, they simply found strategies for keeping return options open, and then for setting off to apply somewhere else.

Local strategies for civic inclusion

The context of the interviews that informed our case study was the appointment of Roma advisers (liaison officers) by municipal authorities since 1998, as the main measure taken under the central government's programme for addressing Roma exclusion. But the political climate for our case study was made more explosive by the emigration of large numbers of Roma families seeking asylum in the European Union and Canada. This was a response to, but in turn also generated, a series of local crises, such as the one in Usti nad Labem, where a dividing wall was built to segregate Roma from white population. The Maticni wall became not only a symbol of resentment towards the Roma but represented a clash between the central government and the municipal self-government. Hence the issues of exclusion/inclusion were at the forefront of Czech local politics at the time.

All the local authority staff were keen to emphasise that they were not biased against the Roma, and that mechanisms for dialogue with Roma organisations were in place. But all the white officials interviewed made it clear that their strategy for preventing any new crises was to stay in control of such interactions. This reflected their relationship with the NGO sector, which was still relatively weak, inexperienced, depoliticised and in a state of competition with other organisations. The common ground for all the local actors in each municipality was a desire to attract EU funding for

improvements and 'good causes', including Roma inclusion. But this could contribute to the competitive environment, because many grassroots organisations were too small and isolated to qualify for grants.

The three municipalities comprised Karlovy Vary, medium-sized town in Western Bohemia, relatively prosperous because of its proximity to Germany, with a tradition of glass making and world-famous spa; Olomouc, the second-most historic city in the Czech Republic, just re-emerging from obscurity, with signs of economic and architectural rejuvenation, and the relocation of some central governmental institutions, and Pardubice, a spa in Northern Bohemia, semi-industrial, with above-average percentage of Roma population. Each had a local strategy that had evolved from recent responses to its social and economic conditions. These variations took place within a set of common features, which can be summarised as follows:

- First, there was a deep level of fragmentation and even alienation between the local authority's structures and the NGO sector at the municipal level;
- Second, both the mainstream organisations and those of the Roma, had begun to develop forms of communication and co-operation through engaging in the non-state sector joint local activities, yet this was still marked by past political practices, particularly paternalistic and centralist decision making;
- Third, pressure from the European Union, appeared to be filtering down to the municipal level, especially concerning social inclusion, citizenship rights and minority representation; this, however, was usually reflected in token actions in search of local funding;
- Fourth, there was continued denial of problems such as social conflict, discrimination and racism, and shying away from social responsibility to tackle these by the municipal authorities;
- Fifth, in times of difficulties, the local authorities relied on solutions from the state; the NGO sector was left with very thin back-up support.
- Last, policies of civic inclusion were in their beginnings, often interpreted in a formalistic way, with the NGO sector itself lacking in networking skills, political strength and influence.

The interviews in *Karlovy Vary* indicated a tacit co-operation between the municipal authorities and the Roma community. The Roma adviser, a rather strong personality, was expected to inform the local authority of any 'problems'. The local authorities wanted to be seen to be doing the 'right' thing in terms of meeting the needs of the excluded minority. This, however, can be related to the apparent prestige that the town can bargain with elsewhere, when it comes to proving itself to be progressive.

What was evident was that the municipal authorities act in a semi-authoritarian manner, calling upon the Roma adviser when needed, but

keeping the rank and file of the Roma community out in the cold. The Roma adviser reported a case of a proposed community centre for the Roma that was being promised, a building and even money was found (externally through the Know How Fund), yet the city council imposed a 'dictat' on the way of disposing of the money. The municipal authorities 'grant and approve', rather than engage. The council was also insensitive to where the community centre should be, not taking on board the local hostilities among the residents, and dissociating itself from the present or potential future conflict. The Roma adviser seemed to be battling alone for the Roma ethnic minority's rights as equal citizens at the municipal level as far as housing and employment. He was prepared to argue cases in the court, yet even the courts were 'deaf' to Roma rights, sticking to their traditional attitude of 'don't tell us how we should make decisions; everyone is equal here'.

The local authority was unable to tackle the issues of racism, discrimination and prejudice. 'There is a general lack of political will.' Some of the 'rank and file' members of the Roma community that were also interviewed confirmed that when it comes to crucial meetings with the municipal authorities, they are not invited, and worse, are being treated with a derisory attitude. 'They (the municipal authorities) are the big bosses. They let us wait for hours, don't inform us. … They have written us off. The council does not want to solve the Roma issues. Often, the authorities themselves want to send us away, suggest that we emigrate, force us to leave.'

The local authorities representatives, on the other hand, reported their increased efforts to meet the Roma community's needs, with added comments such as, 'The Roma organisations are being privileged at the moment', and claiming that they have 'excellent relationship with the local Roma NGO's', and 'We don't have any major local problems here'. At the same time, one of the social assistance officers reported that to deal with the Roma families is difficult because 'They are often abusive'. This is a clear legacy of the past attitudes and approaches, with little effort being made to bridge the years' old social gulf. There seemed to be no recognition of the potential civic and political role that the Roma community wished to play.

In the city of *Olomouc*, the pattern of paternalistic attitudes, particularly between the city council representatives and the Roma adviser was even more clearly visible and expressed. He was being appointed as a protégé of the head of the social services. She placed 'personal confidence' in him, expecting that he would become her 'right hand man'. When he asserted his independence, he was being charged with disobedience and embezzlement, and eventually (after the completion of these interviews), he was forced to resign. The Roma adviser admitted that his post was 'without any real bite'. 'We cannot implement any changes. The essence of the job lies in the informal communication with my fellow Romas.' However, when he did this, providing the link between the authorities and the Roma community, that was when he was charged with disobedience, because he was seen to be

standing 'too much' on the side of the Roma minority. His links were perceived as a threat:

> I got involved too directly with some of the local issues. … A Roma adviser is really an alien element in this (institutional) setting. … I am a thorn in their sides. … I have got good relationship with the community, and think that I have some respect out there. … (But) nothing can happen without 'their' knowledge and supervision. … I can't solve people's situations. … They often come to me and ask me 'you should do this or that for me', (but) if a Rom does not go along with the majority society, he will not find help.

He also added that, 'the trouble is that the town's authorities and the regional authorities are united by old friendship networks'. This was a reference to the lack of independence between the two tiers of local government, the supposedly autonomous local municipal council and the regional state-related authorities. Hence, the scope for lobbying or finding allies in the battle for extending the Roma citizenship participation seemed to be limited by this factor.

However, the Roma adviser also pointed out that his post was really a product of a 'governmental decree', passed under the pressure from the European Union. This is an interesting area for further investigation about the impact of EU recommendations and legislation (on equal rights) on the regional and local authorities in the newly developing democracies. The view from the municipal authorities side was one of self-satisfaction. 'We co-operate with NGOs on a large number of projects. … They are indispensable. … The NGO sector is doing an invaluable work that the state cannot do.' This admission was self-serving, as the key areas cited where the non-governmental sector was most valued were crime prevention and youth work. There was also a clearly expressed reliance on funding for projects on the European Union. At the same time it was admitted that funding for smaller scale projects was difficult to secure, and small towns like Olomouc were inexperienced in getting the right funding where applicants must have an EU partner. Thus, connections to the European Union were seen more in terms of money rather than developing networks. This in some ways confirms the actual isolationism of the municipal authorities from grass roots activities, where, if the right support was given, flourishing of new contacts and connections from 'bottom-up' could be the best way of breaking down the traditional centralism as well as enhancing the civic participation all around. At present, the NGOs activities were thus limited to the areas where the local authorities needed help to deal with the officially identified 'hot spots' of social tension.

The interviews in the town of *Pardubice* were set up in a more formal way, as Pardubice aimed to live up to its claim that they are a 'trouble-free' town

and a 'success story' as far as inclusion of the Roma ethnic minority into the mainstream of the city's life was concerned. Thus, the meeting with the council representatives and the Roma advisor took place jointly in the same municipal building room, and the local press was informed of the meeting with the 'EU person'. The meeting was a well-structured PR exercise. The initial claim was that 'there is no racial problem here'. The background to that is that the town's authorities as early as 1995 made an approach to the Roma community, appealing for calm after a riot involving extremist right-wing group that fuelled racial hatred. From that time, formal communication channels were established between the town's authorities and the Roma community. Clearly, this strategy has worked. Yet, the formal role of the Roma adviser in Pardubice, as in the other two locations, was riddled with ambiguities. He was a well-respected figure in the official circles, whilst he gave the impression that he has also gained respect among the Roma community at large. Through the interviews, however, it became perceptible that he 'played the game', and the trust among the Roma was not as solid as claimed. This ambivalence of 'marrying' the official role with the community grass roots role was, in many respects, at the centre of future questions about the direction the civil society in the Czech Republic will take.

The Roma adviser testified to Roma being included in some respect in the local affairs. He specifically mentioned the contract between the municipal authorities and Roma firms who do cleaning jobs for the council. 'We can do public works', he stated, but in the next sentence he betrayed his own allegiance by saying 'There is work everywhere, but not many want to work'. This could have been a replica of a statement from a Labour Exchange official. The additional comment, however, pointed out at the changes that the local community experiences since the market economy took hold of the local and central economy. 'Previously, we worked. Today, we are not even allowed to work. Then, we are labelled as bad. There is a real struggle for work nowadays, and this leads to prejudice. … People will go on strike rather than work alongside of Roma. … Now, there is an escalation of conflict between the "whites" and us, Roma.' The contrast between the two statements and the contradiction as far as the content of these two pictures of reality, one the 'official', and the other in defence of his 'own people', never occurred to him. The statements, more clearly than the other interviews, revealed the split role that the Roma adviser carried.

Further to that, the Roma adviser commented on the generally good co-operation with the municipal authorities, once more showing the two sides of his ambivalent position. 'I am tough on people. I want sanctions imposed. It is not popular with the Roma. … I keep an eye on things'; hence his own popularity with the council.

Another insight was gained when the Roma adviser commented on the increasing fragmentation of the Roma community itself, and the erosion of family structures that takes place under pressure from the new economic

reality. 'Now, the Roma are registering for places in old age pensioners' homes', the Roma advisor stated. 'This never happened before. Now, we are simply unable to keep our parents with us anymore. … The family can't afford things, many are economically too weak.'

The case of Pardubice also strongly pointed in the direction of the Roma organisations themselves being fragmented, isolated and often rivalling with each other. Reference was made to the national Roma umbrella organisation that was being accused of embezzling money, making false claims to success, or simply keeping its information secret. 'They let us down. … It failed all the way. … Three people from the original organisation now work higher up', were the comments about the national Roma NGO. Distrust at the level of Roma community itself clearly relates to the fragmentation experienced by virtually all grass roots Roma groups as far as their full inclusion in the local or national decision-making process is concerned. Their attitudes are a reflection of wider social context in which they operate. Thus, to mobilise local civic resources will take time and further confidence-building on all sides.

One striking missing feature from the interviewers was the notion that any of these interactions relate to democratisation or contribute to that process. As far as accession to the EU, which was seen as a source of funding for local initiatives, rather than as providing a set of standards or aspirations for good practice, the only reference made was in connection to pressure exercised by the EU in establishing Roma representation in the role of Roma advisors. For the Roma, local engagement was perceived as an alternative to migration; while they derived collective identity and cultural resources from the pan-European nature of their links as an ethnic minority, they did not draw on these for claims for inclusion, participation and citizenship at the local level. Similarly, the white local authority staff did not refer to the EU as a source for ideas about inclusionary practices, or use references to EU standards in their attempts to justify the particular strategies that they were adopting.

In order to understand these omissions, we need to consider how the EU has responded to the Roma issue in the overall context of the enlargement process, under which countries like the Czech Republic are required to accept the whole package of the Acquis Communitaire, and postpone negotiations until granted membership.

Enlargement and the European Union's immigration strategy

The 'missing' actor in these strategic interactions was the European Union. Roma asylum seeking raised dilemmas of EU policy of an acute form in relation to three domains – enlargement, immigration and social protection. Enlargement implied harmonisation with EU law and administrative regulation for the applicant countries, but it also involved issues of political culture and practice – the spirit in which such rules are implemented, including

equal opportunities and anti-discriminatory measures (Castle-Kanerova and Jordan 2001). When an interviewee in the Gabal study reported that officials in the United Kingdom did not shout at Roma like officials in the Czech Republic did, he was saying that – even though his application for asylum had been refused – he recognised an important qualitative difference in administrative cultures that was relevant for human rights (Gabal Analysis and Consulting 2000: 31). Yet it is difficult for the European Union to draw attention to all the implications of this requirement in relation to Roma migration, since this could seem to validate asylum seekers' allegations about conditions in the Czech Republic. Hence EU policy strikes an uneasy balance between emphasis on the formal requirements of minority rights (a formalism which is in line with Czech traditions, including the traditions of the communist regime), and funding demonstration projects – such as the one for Roma municipal employment and regeneration in Brno – which attempt to model best practice for the rest of the country.

Enlargement also, of course, implies agreement between the present Member States over the terms of accession of the post-communist countries, and the constitutional implications of a much larger membership. Germany and Austria in particular have made no secret of their concerns about the implications of the free movement of labour from the Central European states into their labour markets. This involves issues of both migration and social protection policies. Roma asylum seeking tests out attempts to harmonise policy on migration, and avoid 'secondary migration' between Member States. It also involves a balancing act between attempts to allow a more flexible use of labour power through 'modernising' social protection, and measures to eliminate economic incentives for migration by those seen as unlikely to fill vacancies in skills-shortage occupations (Düvell and Jordan 2002).

Since 1989, EU policy has turned the Central European applicant states into an involuntary 'buffer zone' against mass migrations from the former Yugoslavia and Soviet Union, by restricting immigration to the 'humanitarian heading' yet casting them as 'safe countries' (Lavenex 1999). This has required them to establish appropriate border control regimes, and reception facilities for asylum seekers – a specially onerous task for Hungary, because of its proximity to the conflicts in the former Yugoslavia. But for the Czech Republic, this has also included the need to provide for Roma from Slovakia seeking asylum in their country, and for Roma being returned ('voluntarily' or involuntarily) from EU Member States. Enlargement implies a new focus on Central Europe as part of a more ambiguous and complex strategy for both restriction and recruitment.

The basis for the new common approach under the proposed Concerted EU Strategy on Immigration and Asylum was 'a shared assessment of the economic and demographic developments within the Union, as well as the situation in the countries of origin' (European Commission 2000: 20). The first

Communication from the Commission on the strategy declared the aim of opening up new channels for legal immigration, while maintaining control over migratory flows, in the light of 'growing shortages of labour at both skilled and unskilled levels' (European Commission 2000: 3.2).

> Admission policies for economic migrants must enable the EU to respond quickly and efficiently to labour market requirements at national, regional and local level, recognising the complex and rapidly changing nature of these requirements and consequently of the need for greater mobility between Member States for incoming migrants. (sec. 3.3)

However, the same Communication made it clear that the EU gave priority to flexibility, mobility and the 'economic, social and cultural' needs of Member States.

> EU legislation should therefore provide a *flexible* overall scheme based on a limited number of statuses designed so as to *facilitate* rather than create barriers to the admission of economic migrants. The aim should be to give a secure legal status for temporary workers who intend to return to their countries of origin, while at the same time providing a pathway eventually to a permanent status for those who risk to stay and who meet certain criteria. (sec. 3.4.2)

The Roma clearly do not meet these criteria; part of the rationale for opening up legal channels for those recruited to EU labour markets was to justify tougher measures being taken in the field of asylum. The gradual emergence (through 'benchmarking' among Member States) of a 'European model' for asylum procedures, reception facilities and 'fast tracking' of decisions, can be seen as the evolution of restrictive solutions to the 'crisis' of the 1990s. This consists of dispersed accommodation (often in camps), restriction of social benefits, in-kind assistance and abbreviated adjudications. Dispersal to highly visible institutions in peripheral regions without ethnic minority settlements, exposing them to xenophobic attacks, had failed to deter applications, as long as asylum was the only channel for legal migration. But none of the new measures to accommodate labour recruitment will apply to Roma seeking to migrate, so they continue to challenge EU common policies. The most that is offered in the concerted strategy is the undertaking to combat discrimination, racism and xenophobia more energetically in the European Union (European Commission 2000: 2).

Suspicion of Roma migrants links with the third theme, the attempt to 'modernise social protection' in the European Union. Here the goal is to overcome the barriers to labour-market participation that have bedevilled the European welfare states, and given rise to regimes of 'welfare without

work' (Esping-Andersen 1996). The goal of 'making work pay' and drawing larger proportions of the population into employment has preoccupied the Third Way governments of the United States of America, United Kingdom and Australia (Jordan 1998; Lister 2000); but it has also led to policies for 'activation' and 'inclusion' that have been comparatively successful in Denmark (Cox 1998; Jordan and Loftager 2001), the Netherlands (Visser and Hemerijck 1997; Hemerijck 2001), and Ireland (Jordan *et al.* 2000). The EU Concerted Strategy on Modernising Social Protection is an attempt to balance the security provided by high replacement rates (requiring high social insurance contributions) with the expansion of low-paid, low-productivity, labour-intensive employment (European Commission 1999). In the wider context, it can be seen as part of the same project – to transform regulatory systems in line with the requirements of a globalised economy, in which individual autonomy and responsibility, mobility and enterprise, are all promoted, yet order and managed efficiency are maintained (Düvell and Jordan 2002).

The Roma are a challenge to this project, because their version of mobility and enterprise does not fit into the EU's version of order and managed efficiency. They have many of the characteristics of the domestic populations that the strategy is aiming to activate (high rates of unemployment and benefits claims), and they expose a fundamental contradiction in the strategy. Expenditure on 'making work pay' and investing in training for claimants (DM 45 billion per year in Germany) has failed to mobilise the 18 million unemployed claimants in the European Union, and the recruitment drive reveals the extent of continuing demand for willing workers. Yet this recruitment is to be highly selective, and at the discretion of the EU Member States' governments. Roma are perceived as unsuitable candidates, and in their case discrimination against them as would-be migrants is based on their race (Young 2001).

The European Union wants to use migration to introduce elements of labour-market flexibility into its 'modernisation' programme that its efforts to transform social protection systems are failing to achieve. In the Communication on a Concerted Strategy for Immigration, and in other EC documents, there are frequent references to 'flexible social policy' and mobility, but these are not intended to apply to Roma migrants. Instead, applicant governments are to be encouraged to provide policies for integrating them at home. This could be an excellent opportunity for the European Union to take a more proactive and positive stance in linking such integration to demands that the human rights and anti-discrimination practices in East Central Europe are put into place as part of this integration.

Conclusions

The issues of civic inclusion are often presented as if what is at stake is either improving democratic participation and accountability (Putnam 1993), or

strengthening social cohesion and reducing wasteful conflicts (Giddens 1998). Advocates of greater civic activism emphasise the benefits in terms of social capital and good governance; those who emphasise community and inclusion point to the lost potentialities and hidden costs of excessive individualism and competition. Both accounts tend to underestimate the extent to which globalisation now offers attractive alternatives to strategies of collective action in national polities which were advantageous in the era of Keynesianism and welfare states. What is unusual about the Czech situation is that the most disadvantaged group, the Roma, have such an option, along with the most privileged (young graduates with language skills) who can move abroad. Both our project and the research by Gabal Analysis and Consulting reveal that Roma communities actively engage in discussion and debate about the relative merits of collective action in the local polity, and emigration as asylum seekers. Furthermore, they are able to switch between them strategically; and because travelling is seen as a benefit rather than a cost in their lifestyle, they are able to endure what others might see as hardship and insecurity in search of better conditions.

The report by Gabal Analysis and Consulting shows that substantial numbers of Roma families are still emigrating, even though about half return, either because they are refused asylum, or for family reasons. It is significant that they interpret their experiences positively, and those who return plan to go again, or have already done so. The costs and risks of leaving are reduced by concealing their exit, thus keeping the option of return (and eligibility for housing and benefits) still open. Networks of information and expertise on emigration sustain these strategies within Roma communities.

The Gabal report found that the main factors driving emigration were high unemployment, poor housing, insecurity and hostility to Roma by Czech people, and the rising cost of living. The context of all this is a political culture of 'colour blindness', in which officials and citizens claim to be neutral, but practice forms of discrimination and separation based on racist assumptions. Surveys suggest that the majority of Czechs think that Roma people cannot reach acceptable standards of activity and discipline. They condemn violent attacks and the politics of hatred, but practice segregation and fear contact, seeing the Roma as threats to the stability and security of neighbourhoods, and even of Czech society (Gabal Analysis and Consulting 2000: 30). Although many Roma are committed to the long-term struggle for political and economic inclusion, often the existence of the exit option and the xenophobic, hostile or indifferent mainstream attitude weaken the prospects of this strategy, and they are attracted to the greater diversity and openness of societies in the European Union and beyond (Gabal Analysis and Consulting 2000: 31).

This in turn gives rise to dilemmas for the European Union as a collective actor, responding to the consequences of strategic interactions between public authorities and Roma communities in the Czech Republic. Responses of

the European Union can be understood in terms of the need for concerted strategies for enlargement, immigration policy and modernising welfare states. The latter two projects are framed in terms of greater flexibility, with migration and mobility seen as ways of overcoming barriers to enterprise and participation. But the Roma are perceived as unsuitable recruits, and potential abusers of generous social provision. Hence the European Union plays down the possibility that the exclusion of the Roma in the Czech Republic constitutes a violation of their human rights, and continues to play a low-key role in supporting efforts to promote their economic and civic inclusion.

But the aspect of these efforts that is never directly addressed, in any of the localities studied, is the Roma's civility and civicness in their day-to-day transactions with white Czech citizens, and conversely the civility and civicness of the white majority. If these have the characteristics of a stand-off punctuated by occasional violent incidents, with each side blaming the other for provoking violence, then the prospects for inclusion are unpromising. Furthermore, engagement between organised Roma groups and local authorities can only have the status of 'special measures', so long as the latter do not engage with non-Roma civil society organisations and NGOs, other than to organise and regulate them. Hence the everyday political culture is a vital component of attempts to democratise the Czech polity, and what is perceived as lack of civil and civic values and behaviour by the Roma is used to legitimate forms of privatism, withdrawal and passivity by the majority.

The paradox, of course, is that what white citizens resent about Roma behaviour relates closely to their tightly knit community, based on strong clan and kinship bonds, organised for survival and resistance in a hostile social environment. It is these 'familial' forms of social capital that constitute part of their deficit in civil and civic competences; the white majority's deficit is as much in generalised trust (in each other, as well as the Roma), and in politicians, officials and the civic processes of participation and decision making. The Roma cannot be forced to give up this part of their heritage, as the communist years demonstrated. They will only willingly give up the less acceptable parts of it if the white majority create a more actively inclusive political culture.

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Part IV

Democratic Citizenship in a Democratic Europe?

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11

Civic Competence and Identity in the European Polity

Dimitris N. Chryssochoou

Introduction

Given its profound novelty and complexity, it is hardly surprising that the European Union (EU) has been attributed so many different neologisms over the years (Chryssochoou 2001). Whether these attributes are 'trapped in a state-oriented mode of thinking' (Jachtenfuchs *et al*. 1998: 417), they only capture part of a more complicated reality. Hence, EU scholarship is still in search of a reliable theory for the future of 'the most complex polity that human agency has ever devised' (Schmitter 2000: 75). Underlying the difficulties for a conceptual consensus is that the process of conceptualising the EU rests on competing normative orders that account for different 'structures of meaning' (Jachtenfuchs *et al*. 1998: 411). The most challenging question today remains that posed by Puchala (1972): 'where do we go from here?' This question is of immediate relevance to the democratisation of the EU. In this chapter, it will be examined in relation to the concept of 'civic competence' and the prospects for a European civic space.[1] Such a civic dimension is important for a republican view of Europe and European citizenship, and it is to this that we shall first turn.

Republican readings

A *res publica* fulfills three fundamental ends: justice through the rule of law; the common good (or public interest) through a mixed and balanced constitution; and liberty (or civic freedom) through active citizenship. Such features continue to mark their impact in the search for the good polity. Of recent, republicanism managed to infiltrate the disorderly universe of EU theorising, by yielding new insights into an already voluminous *aquis académique* on how best to conceptualise the EU. Such theories have become more than simply 'trendy'. *Pace* Engeman's view that 'the addition of "republicanism" to the title of any scholarly work makes the work appear both more relevant and respectable' (1993: 331; quoted in Brugger 1999: 1),

new republican perspectives sought not only to revive, but also to nurture a paradigm of social and political organisation for the EU, founded on a new 'civic partnership' among distinct historically constituted, culturally defined and politically organised demoi.

Republican conceptions of Europe are part of an intellectual current linked with the search for a reliable and at the same time democratic theory of European integration. Such a theory aims at capturing the dialectic between strengthening the viability of national public spheres through the institutionalisation of a mixed sovereignty regime. Absent a formal European constitution, and given the inchoateness of a European demos, there is urgent need for a substantive restructuring of the EU's civic arenas with a view to engaging its citizens in its governance. This view accords with a civic conception of the EU that aims to assess its relationship with 'the civic'. Such normative explorations were recently brought into focus by the likes of MacCormick, Craig, Bellamy, Castiglione, and Lavdas. By employing the language of a 'second-order discourse' in the sphere of collective norm-orientation and political constitutionalism, they have signalled a 'normative turn' in EU studies: a paradigm shift from 'policy to polity', or from 'diplomacy to democracy'. From this post-statist angle, the EU is taken as 'an entity of interlocking normative spheres with no particular one being privileged' (Bañkowski *et al*. 1999). In a similar vein, following Walker's analysis, the EU is seen as a 'heterarchical political space' that combines unity and multiplicity, transcends pre-existing boundaries, and projects a multi-dimensional configuration of authority (1998: 357).

Pace Puchala's view that, for all the richness of recent normative investigations in the field, 'European integration will for the foreseeable future continue to be an ongoing social scientific puzzle' (Puchala, 1999: 330), Bellamy and Castiglione have attempted to capture the complexity and pluralism of the EU through a theory of 'democratic liberalism', founded on 'a pre-liberal conception of constitutionalism that identified the constitution with the social composition and form of government of the polity' (2000: 181). This amounts to 'a political system that disperses power within civil society [so that more people can have a say in its enactment] and encourages dialogue between the component parts of the body politic' (Bellamy and Castiglione 2000: 172). The point they make is that, '[i]nstead of the constitution being a precondition for politics, political debate becomes the medium through which a polity constitutes itself' (Bellamy and Castiglione 2000: 182). Being highly critical of territorial and hierarchical forms of power distribution, democratic liberalism brings the constituent groups of the polity into an equilibrium with one another, and aims 'to disperse power so as to encourage a process of controlled political conflict and deliberation [as a way of filtering and channeling preferences] … moving them thereby to construct and pursue the public good rather than narrow sectional interests' (Bellamy and Castiglione 2000: 181). Within this pluralist polity characterised by a

differentiated social context, there can be different forms of representation employed for different purposes. Differentiation is crucial to the kind of political constitutionalism advocated by democratic liberals, not least because it aims at linking together justice, the rule of law and the democratic dispersal and division of power, whilst providing a balanced mix of social forces and levels of governance.

From a similar perspective, by reviving the usage of an eighteenth-century term, MacCormick (1997) conceptualises the 'EU order' as a 'mixed commonwealth', within which the subjects of the 'constitution' are not homogeneous, but rather they represent a mixture of agents that share in the sovereignty of the larger unit. Bellamy and Castiglione explain: 'The polycentric polity … is a definite departure from the nation state, mainly because it implies a dissociation of the traditional elements that come with state sovereignty: a unified system of authority and representation controlling all functions of governance over a given territory' (1997: 443). MacCormick's conception of a lawfully constituted commonwealth of post-sovereign states, whose legal order is supported by foundational norms, basic doctrines, and general principles, allows the EU to conduct itself as a *Rechtsgemeinschaft*, but not as a *Rechtsstaat*. Within it, and in the absence of 'a single power-structure with a single normative frame' (MacCormick 1997: 338), authority is neither proportionately nor symmetrically vested in an overarching centre, but is distributed through overlapping arrangements. This pluralist depiction of the polity as a heterarchical order, where a 'balanced constitution' emerges as the ultimate protective mechanism against domination, is fully in line with Tarrow's definition of the EU as a 'composite polity': 'a system of shared sovereignty, partial and uncertain policy autonomy between levels of governance, and patterns of contention combining territorial with substantive issues' (1998: 1). Tarrow's conceptual category draws largely from the work of historian te Brake on the formation of composite states in early modern Europe, where people 'acted in the context of overlapping, intersecting, and changing political spaces' (1998: 278).

Republicanism embodies a normative commitment to free public deliberation for the promotion of the common good (as opposed to factional interests) and to the setting up of a particular kind of constitutional ordering based on the idea of 'balanced government'; that is, a constitutional state that provides for its citizens 'undominanted' (or quality) choice. But it is not choice that causes liberty; rather, liberty is constituted by the legal institutions of the republican state (Pettit 1997: 106–9). Brugger explains: 'whereas the liberal sees liberty as essentially pre-social, the republican sees liberty as constituted by the law which transforms customs and creates citizens' (1999: 7). Participation is not taken as an end-in-itself, but as a means of ensuring a dispensation of non-domination (or non-arbitrary rule). Another republican variation on the theme of *vita activa* (Barber 1984) takes democratic participation as 'a process of constructing politics, not merely one

means among others to secure something else. Non-domination, as a procedural norm, might be a condition of effective political discourse, not its object' (Brugger 1999: 12–13). In brief, the rule of law, opposition of arbitrariness and the republican constitution are constitutive of civic freedom.

Central to republicanism is the idea of 'balanced government'. This is forged, according to Craig, negatively: by associating the constitution of 'a proper institutional balance' with the prevention of tyranny; and positively, by ensuring a deliberative form of democracy, 'within which the different "constituencies" which made up civil society would be encouraged to treat their preferences not simply as givens, but rather as choices which were open to debate and alteration (1997: 114). But liberty was expected to be best preserved under 'a mixed form of republican governance' through certain constitutional practices, with no single branch of government being privileged over the others. Here, republicanism claims to strike a balance between participation and the attainment of the public good, by allowing for 'a stable form of political ordering for a society within which there are different interests or constituencies' (Craig 1997: 116). The idea of a 'balanced constitution' is reflected in the Commission's exclusive right to initiate legislation and its interaction with civil society, the co-decision rights of the European Parliament (EP) in fostering more deliberative outcomes, and the relationship between the indirect democratic mandate of the Council of Ministers and the fact that the 'constitution' of the EU rests on a dynamic system of treaty-based rules.

But there also exist other facets of republicanism relevant to the EU. Lavdas (2001) draws from Pettit's (1997) study on freedom as non-domination – as opposed to a negative conception as non-interference or to a positive one as self-mastery – to argue that the EU may develop the functions of institutionalised deliberation and a corresponding concern with active citizenship, taken as necessary, but not sufficient, conditions for a 'democentric' union. Given the absence of a European demos, republican governance emanates as an appropriate means of disentangling 'the issue of participation in an emerging polity from the cultural and emotional dimensions of citizenship as pre-existing affinity and a confirmation of belonging' (Lavdas 2001: 4). The point is that 'some elements of the real and symbolic *res publica*, may sustain a degree of political motivation *vis-à-vis* the EU and its relevance for peoples' lives while also allowing for other and more intense forms of motivation and involvement at other levels of participation' (Lavdas 2001: 5). But given the lack of unity among the member demoi, the republican challenge, in line with the dictates of multiculturalism, is how to institutionalise respect for difference and group rights, whilst sustaining 'a shared sense of the public good' (Bellamy 1999: 190). This is more likely to be achieved through Pettit's third concept of freedom, as it 'enables a view which aims to combine the recognition of the significance of the pluralism of cultural possibilities for meaningful choice and a framework based on a

minimal set of shared political values' (Lavdas 2001: 6). From these expositions, one could imagine a prototype European *res publica*, within which a multitude of public commitments generate higher levels of civic engagement through a deliberative model of governance.

The state-centric alternative and its limits

Although republicanism captures the civic imagination of a composite European polity – and even though the European Court of Justice (ECJ) has ruled that the founding treaties already represent a 'Constitutional Charter' – the EU still rests on the separate constitutional orders of states. Moreover, consensual practices in the Council are often employed even when the treaties allow for majority rule. Similarly, the EP performs functions that the national legislatures would be jealous of, and yet its lack of controlling and legislative powers over the EU's executive branches support the thesis of a 'democratic deficit'. Union citizenship has been hailed by some as a step towards the formation of a transnational demos, but many associate it with the free movement of people within a single economic space, rather than with the construction of a common civic identity. Whereas an increasing array of competences are brought into the general system, their *locus decidendi* is closer to the domain of state agents. Lastly, enshrined in the Treaty on European Union (TEU) as a mechanism for the vertical allocation of competences, subsidiarity has opened the way both for the protection of national autonomy against excessive centralisation, and the extension of transnational legislative authority itself.

Arguably, changes in the workings of the EU in the early 2000s have not affected its character as 'a many turned into one without ceasing to be many'. The EU maintains a balance between the whole and its parts, by relying on a system of political co-determination. This is the key to understanding the changing conventions of sovereignty, which may now be interpreted as the right to be involved in the joint exercise of competences, or in other words, sovereignty as 'a unit of participation' (Taylor 1999: 560). When disconnected from a Weberian understanding of the polity, the EU 'is too complex and too amorphous to be presented as emerging from a new abstract constituent power' (de Areilza 1995: 9). Instead, responsibility for EU polity-building rests with the member states. And so does the right to publicly binding decisions. The EU represents a 'treaty-constituted political body' that is not 'the unilateral act of *one* people' (Forsyth 1995: 64). It does not derive its authority from its citizens but from the governments of the component states; it has not resulted in a complete fusion where the different segments of European society lose their respective identities; the states continue to hold together by way of 'mutual agreement' and are free to dissociate themselves from the association. Both the constitutional identity and legal personality of the EU are dependent on the component polities. Finally,

the EU does not challenge the authority of states to determine their own fate, although it represents a profound locking together of states regarding the joint exercise of fundamental powers (states may lose their functional autonomy but project their domination over EU constitutional change). All the above confirm a state-centric view of the 'EU order', as the attributes of sovereignty are confined to the segments, rather than to a new federal centre.

For state-centrists, the dominant model of EU politics is one in which states are the major actors in collective constitutional engineering. This is reflected in the capacity of state executives to shape the outcome of grand constitutional bargains and to safeguard their power through negotiated policy co-ordination based on the pooling of sovereignty (when strong functional reasons arise). But it would be wrong to equate EU state-centrism with the realist 'billiard-ball' image of international politics. For it perceives sovereignty as an integral part of statehood, attributing a normative content to it and distinguishing it from institutionalised rule (resulting from complex interdependence). Taylor notes: 'Having the right to participate in the management of common arrangements with other states was a much more important consideration in sovereignty than the traditional right to exclusive management' (1999: 564).

Thus many of its students regard the EU as an essentially state-led project, albeit with an open *finalité politique*: a polity ensemble of distinct features that 'has displaced the potential to alter the relative congruence between territory, identity and function which characterised the nation state' (Laffan 1998: 238). This refers to 'a system which is now "federative" in the old pre-American revolution sense or perhaps more than federative in the sense discussed by Rousseau in his "Summary" of Abbé Saint-Pierre's *Project for Perpetual Peace* or advocated by Kant in his "Perpetual Peace" ' (Bruggens 1999: 124). In brief, sovereignty as 'ultimate responsibility' has yet to become part of the EU's systemic properties. Likewise, the EU exceeds a Deutschian 'pluralistic security community' (1957) but has failed to meet either the socio-psychological conditions of Mitrany's functionalism (1943) or any substantive transfer of loyalties to a neofunctionalist 'political community' (Haas 1958). For all its validity in explaining the politics of treaty reform through a theory of consensus elite government, EU state-centrism has failed to account for a striking paradox. Although traditional notions of democracy are losing their normative appeal in the EU, the latter exhibits a notable potential for democratic self-development: a tendency to transcend issues of market integration and 'to democratize politics above the level of the state' (Laffan 1998: 249). As a result, the interplay between democracy and integration continues to cast doubt on 'the continuing adequacy of the conventional solution' (Dahl 1997: 37). In that sense, new normative investigations are imperative to addressing basic questions of democracy and legitimacy in the evolving EU.

Institutionalising European civic competence

To date, integration has not fostered the normative qualities needed for the nurturing of a European civicness 'that would demand and sustain further institutional and democratic transformations' (de Areilza 1995: 9). Recent reforms have not only failed to rectify this deficiency, but managed to consolidate a new regulatory aetiology of 'post-parliamentary governance' (Andersen and Burns 1996) based on technocratic elitism. Underlying this empirical pragmatism rests the idea of 'committee governance' (Kirchner and Christiansen 2000), evident in the existing 'comitology' structures. Like Maastricht's (top-down) polity-creation, Amsterdam and Nice failed to provide an independent sense of European civicness.

Before turning to the impact of recent treaty reforms on EU democracy, let us sketch a normative perspective on Union citizenship. In general, 'citizenship establishes an abstract, legally mediated solidarity between strangers', binding together a group of individuals with no pre-political ties into 'a highly artificial kind of civic solidarity' (Habermas 2001: 16). The latter takes the form of an 'internally oriented relationship' between citizenship-holders and the institutions of the polity to which they belong (Close 1995: 2–3). *Pace* its treaty-based character, Union citizenship carries an undisputed political weight with crucial implications for the embodiment of a stronger *Gemeinschaft* element at the grass roots. But the most celebrated property of citizenship, both as a social construct and as 'substantive public engagement', is the range and depth of opportunities it offers to fulfill the participative potential of the demos in the exercise of authority. Within this embracing civic space, a feature central to the democratic process is the idea of civic competence: the institutional capacity of citizens *qua* social equals to enter the realm of political influence with a view to sustaining a vital public sphere – that is, 'a network that gives citizens … an equal opportunity to take part in an encompassing process of focused political communication' (Habermas 2001: 17). Here, the pairing of 'civic' and 'competence' does not embody a category mistake, but acts in the interests of engaging the demos in the affairs of the polity, by empowering its members to direct their democratic claims to, and via, the central institutions. It thus institutionalises a normative commitment to core democratic values, whilst giving an institutional face to a central task of legitimate rule: large-scale democratic participation.

The democratic potential of Union citizenship is threefold. First, it sets up a transnational system of political rights giving access and voice to the constituent demoi; second, it further induces integrative popular sentiments by motivating greater civic participation; and third, it strengthens the democratic bonds of belonging to an 'active polity' by facilitating the process of positive EU awareness-formation at the grass roots (Chryssochoou 1998). The question is whether Union citizenship simply entails a re-arrangement

of existing civic entitlements, or whether it attributes effective civic competence based on a new 'civic contract' between peoples, states and the central authorities, generating the necessary levels of civicness for the making of a European demos *ab intra*. From a meta-institutional perspective on Union citizenship, the answer lies in the distribution of European civic competence. To the extent that the latter passes through the capacity of citizens to determine the functions of the polity, Union citizenship constitutes the foundation of the new civic contract. This is vital not only to the moral ontology of democracy, but also to the prevailing value spheres of civicness.

Union citizenship incorporates the separate civic contracts of the member polities into a transnational civic space, where the consent of citizens for the larger-scale of decisions is being organised 'from below'. This requires the evolution of the 'member-state citizen' from a 'fragmented citizen' to an 'indirect' one, and then to an 'interactive citizen' (Neunreither 1995: 10). Such transitions should come about as a conscious act of civic self-development–that is, an exercise in 'political self-identification' (Neunreither 1995: 13). Practical measures to build on a common civic identity involve the detachment of Union citizenship from the 'nationality requirement' and its placing upon an independent sphere of civic rights (and duties); the institutionalisation at EU-level of effective civic competence, which should now be added to the conventional ways of thinking about competences as statutory guarantees; the extension of the right to vote and to stand as a candidate at national elections for citizens residing in a member state other than their own; the institutionalisation of the citizens' right to information on all EU issues, whilst making all the official documents of the EU available to the public; the setting up of protective mechanisms against any infringement of fundamental liberties; the introduction of the citizens' right to hold public office within the EU; the recognition of the right of citizens to be informed when EU decisions impinge upon specific interests; the enrichment of the citizens' rights relating to the four freedoms of movement, social welfare, working conditions and labour–management relations; the introduction of the citizen's right to education; and the recognition of political rights to legally resident third-country nationals, which requires the transcendence of any liberal statist norms and practices of civic exclusion, and the rejection at EU-level of what Geddes (1995) calls 'dissociational-type democracy'.

Central to the above are the principles of additionality and non-regression, in that Union citizenship rights are established in addition to national ones, with Union citizenship thus being attached to a novel *status civitatis*, whilst ensuring that existing citizen rights will not be reduced (Duff 2000: 21) It is only then that these treaty-based entitlements may foster the bonds between the EU and its emerging civic body. But all the above proposals, which, if institutionalised, would bring about a 'proper' EU citizenship policy, are easier said than done, as they depend upon the political will of governments, rather than on a *volonté générale* of a European demos. The aim is for

the EU to allocate authoritatively, not just derivatively, rights and values within European civic society. In that sense, the outcome would not be the creation of a 'community of fate' or *Schicksalsgemeinschaft* shaped by common descent, language, culture and history, but to 'democratise' the criteria for the distribution of the citizenship status and to forge the horizontal integration of citizens within the larger polity.

In this way, the EU acquires a distinctive political subject, whose civic identity exists independently of national public spheres, but whose 'politics' extends to both EU and national civic arenas. Such a move would also signal a shift in the basis of legitimation from a largely functionalist-driven, if not segmentary-type of European citizenry to a political community of equals founded on more active and inclusionary virtues such as free public deliberation and institutionalised participation. As Bellamy notes, however, the only significant change to the common citizenship provisions brought about by recent treaty reforms amounted to a mere point of clarification: 'Citizenship of the Union shall complement and not replace national citizenship' (Bellamy 1999: 204). Recent reforms failed to incorporate any substantive civic rights in a 'constitutional' document addressed to the citizen directly, reflecting the insistence of states to codify existing trends in EU jurisprudence and legislation. The same can said of the Charter of Fundamental Rights (Chryssochoou *et al*. 2003), to which we now turn.

Chartering Europe

The distinction between an extra-treaty arrangement – that is, a Charter that only provides for a standard for fundamental rights – and a legally binding instrument that provides for a set of basic rights guarantees is crucial, for in the latter case, a Charter incorporated into the Treaty would also be made subject to the jurisdiction of the ECJ. It would also grant the latter a crucial interpretative function with regard to human rights respect and protection throughout the EU. With an internally justiciable Charter, the EU would make a positive and at the same time credible move towards what has been described as 'a more human rights-based constitutionalism'. Yet, a potential problem remains, succinctly put by Lord Russell-Johnston (2000) thus: were the ECJ to become the last instance of appeal in the EU for human rights issues, this might deprive European citizens of a final external appeal against violations of fundamental rights. The only sensible way to avoid this predicament, but also the possibility of two competing jurisdictions and jurisprudence and, therefore, two parallel human rights regimes in Europe, is for the EU to accede to the European Convention on Human Rights (ECHR). In that way also, ECJ rulings related to the ECHR would be made subject to the supervision of the Strasbourg Court, thus making the ECJ itself accountable to that Court the same way as the superior courts of the ECHR states are today (Cooper and Pillay 2000: 17).

Although the prospects for strengthening European civic competence rest as much on formal legal requirements and judicial procedures, as they do on social and political sources of legitimacy, including public responses themselves, the inclusion of the Charter into the Treaty would herald a more demos-oriented process of union. Institutionalising fundamental rights within the EU would strengthen the credibility of commitments taken by the member state polities to protect the fundamental rights of all persons residing within their territory; empower the ECJ to ensure that fundamental rights are indeed respected, whilst providing it with a firm textual guidance on the definition, nature and scope of such rights; lay the foundations for an EU-based human rights regime with which EU institutions and bodies are bound to comply; advance the fight against various forms of discrimination and protect the status of all civic associations within the EU; place the individual citizen at the heart of the EU's activities by further strengthening Union citizenship rights, including the right to good administration; make fundamental rights more visible to the citizen; codify so-called 'new rights' on bio-ethical, environmental and data protection issues; reinforce existing practices and institutions of European-wide civic inclusion; emphasise the importance of upholding the virtues of civility within an ever complex and politically diffuse transnational environment; and contribute to the preservation and development of shared values, whilst respecting and protecting the diversity embedded in constituent cultures, traditions and, crucially, identities.

Whether or not the incorporation of the Charter into the Treaty is seen as an exercise in regional constitution-making or indeed as a significant stage in large-scale state-building, its 'communitarisation' within a multilevel civic order aims at harnessing the democratic ethos of those who form the polity's *pouvoir constituant*. This brings us to a complex legal issue, with crucial implications, not only for the quality of human rights protection and enforcement standards within the EU, but also for transnational demos-formation. Would a legally binding Charter have general application throughout the Member States, or would it be restricted to fundamental rights protection only in the context of EU action? Put differently, would the Charter apply in cases of member state action (taken by central, regional or local authorities, or public organisations) that is not directly linked to the implementation of Union law, as Article 51(1) of the Charter currently provides for? Assuming that the prevalent interpretation is that the Charter is confined to EU action alone, and despite the drafters' *prima facie* intention to consolidate the current method of the ECJ to deal with questions of basic rights as 'general principles of Community law', given the nature and scope of the rights enshrined in the Charter, more positive action is needed. Such action could take the form of amending Article 51(1) with a view to extending the Charter's applicability to state action that is not linked directly to EU activities. Bold as this step may be, its case becomes even stronger if one links

fundamental rights protection with the free movement of people within a fully integrated economic space. Taking rights seriously ascribes to the process of 'Chartering Europe' its proper meaning, whilst endowing the EU with a political constitution 'proper'.

Despite the absence of any formal selection criteria, the Charter's drafting process has opened the way to a more visible, deliberative and inclusive method of EU polity-building: a European public process. The importance attributed to the composition of the drafting panel is that it linked the principles of transparency and institutional pluralism with a process of collective constitutional engineering that goes beyond the state-controlled nature of treaty reform, allowing for the inclusion of civil society agents. Thus, to ensure the pluralistic and participatory nature of the Charter's drafting formula, it would be desirable to use its template for future reforms. Should that prove too much for sovereignty-conscious states to digest, a more pragmatic alternative would be for the EP to be granted constitutional competence over formal treaty change through the assent procedure. The challenge lies in developing horizontal links among the member demoi, without damaging the existing ones among the elites. Tying the self-image of the elites to transnational demos-formation is crucial, for no common civic identity may come into being unless all major actors in European governance feel part of a polity-building exercise that evolves from the lower level 'upwards', thus enhancing the institutional capacity of citizens to act in an extended political space.

Although the EU exhibits clear signs of a transnational civil society composed of policy communities, structures of functional representation, networking activities, and a plethora of organised groups pursuing their interests beyond the nation-state, it has not reached the stage where a nascent civic identity meets the institutionalisation of civic competence. This mix of variables is crucial for the emergence of a European civic space composed of an interactive demos. But the EU has not yet met the conditions for institutionalising a composite public sphere based on the discursive qualities of public deliberation, through which the demos turns relevant democratic problems into topics of public debate. Here, the envisaged model of EU democracy refers to discourse-centred processes of civic engagement. Such processes serve the goal of a polycentric public sphere, for they direct the democratic claims of citizens to those centres of authoritative decision making that are entitled to commit the polity as a whole. Otherwise, a novel yet easily discernible form of political domination will determine the relationship between executive elites and the affected public. Absent a principled public discourse, it is naïve to expect the transformation of a shadowy political space into a *res publica*: a community of free and equal citizens – a *populus liber* driven by a *charitas civicum* – within which civic competence and 'the right to have rights' (Bellamy 2001) take precedence over territorially based interest aggregation. Instituting a multilevel civic space within

which the member publics are recognised as bearers of rights, freedoms and duties in relation to the EU can also act as an antidote to the growing impoverishment of national public life, where a decline in the quality of public discourse is met by a shrinking legitimacy of 'the political'. The section below examines the democratic impact of recent treaty reforms.

The limits of democratic reforms

The Amsterdam Treaty (AMT) came into force after a non-controversial ratification process – a reflection of the moderate reforms embedded in it. 'Rather than focusing on pre-emptive institutional spillover in preparation for enlargement', Devuyst writes, 'the Amsterdam negotiation was characterized by a "maintaining national control trend" ' (1998: 615). Underlying this incomplete outcome was a clear preference for a managerial type of reform to improve the effectiveness in policy-output: flexibility was partially elevated to a *modus operandi* of the system, whereas the deepening of integration was referred *ad calendas Graecas*. Indeed, those who linked the Amsterdam process with the making of a 'constitutive polity' based on symbiotic legitimation structures have no real grounds for celebration. For it failed to deliver a new democratic vision, offering instead a series of partial offsets to the EU's democratic pathology, without focusing on its socio-psychological aspects. The latter refer to the normative qualities embodying the construction of a European civic space, where citizens share among themselves a sense of public sphere (as a civic virtue element) and a regard for good governance (as a training ground for civic learning). Both elements are crucial for, as J. S. Mill asserts, '[p]olitical machinery does not act of itself' (quoted in Spragens 1999: 214). It has to be worked by the citizens themselves. This civic conception contributes to the making of a political order steered by an active community of citizens. The emphasis is not so much on the crystallisation of liberal-democratic norms in the political constitution of Europe, but on the search for a transnational civic space within which citizens mobilise their energies in the pursuit of a new democratic order. Thus democratic reform is not really the cause, but the consequence of popular aspirations to democratic shared-rule.

As in the case of Maastricht, so in Amsterdam, Lejeune's point that the states retain their sovereignty despite the creation of an 'integrated interstate area' remains valid (Lejeune 1995: 140). Treaty reform in the 1990s has made it clear that, preserving the 'constitutive autonomy' of states as *Herren der Verträge*, is part of the system's *modus operandi*. The joining together of diverse entities through an informal culture of consensus-building at the highest political level, and the way in which competences are exercised within the EU, have not eroded sovereign statehood, let alone nationhood. Instead, sovereignty has acquired a new co-operative dynamic of its own: it no longer refers to 'a private world into which the outside world was not

permitted to enter' (Taylor 1999: 538), nor for that matter is it subsumed by 'a new "hierarchy" ' based on authoritative rule (Keohane and Hoffmann 1990: 281). It emerges, through the practice of political co-determination, as a crucial link between national and EU polity dynamics: a point, where two different incentives of governance are brought together.

Even the phasing-in of questions of polity and democracy in the EU's public agenda has not transcended the anxiety of states to safeguard their own prerogatives, even when these questions became crucial to the political viability of the EU. Instead of focusing on issues that constitute the essence of any well-thought-out democratic reform, the unimaginative quality of proposals submitted to the IGC 2000 that was meant to deal with the so-called 'Amsterdam leftovers', highlighted the absence of a clear democratic vision to take the EU into the next millennium. Much like the AMT, the Treaty of Nice (NIT), signed on 26 February 2001, focused on 'distributive compromises' (Bellamy and Hollis 1998: 63) so as to embody the attitudes of self-interested actors into yet another asymmetrically negotiation outcome. It has thus inevitably invited a sacrifice in democratic input for greater efficiency in output.

In a high-stakes endgame, the NIT lacked a 'departure of substance' for the creation of 'norms of polity' centred on the specific constructions of legitimate rule. As *The Guardian* put it: 'At every stage of the prolonged negotiation, raw national interest has overshadowed the broader vision' (11 December 2000). The Nice process failed to discover 'a sense of process' (and purpose) over the transformation of a plurality of demoi into a pluralistic demos, as 'the ultimate legitimising referent of the [Euro-]polity' (Weiler 1997: 250). This is linked with yet another crucial transformation the EU ought to undertake, 'from an ethics of integration to an ethics of participation': 'a deliberative process whereby citizens reach mutually acceptable agreements that balance their various communitarian commitments in ways that reflect a cosmopolitan regard for fairness' (Bellamy and Warleigh 1998: 448). Mény asserts, 'There is a need for a new civic culture … which allows for multiple allegiances, which combines the "right to roots" with the "right to options" ' (1998: 9).

Let us now move on to the issue of transparency, for it has overlapping consequences on the relationship between the EU and its citizens. The term is linked to the idea of granting the latter a right of information as well as to the need for a simplified and comprehensible Treaty. Although Amsterdam succeeded in meeting the first requirement through a (conditional) right of public access to official EU documents, it did not achieve much on the latter: the simplification of codecision was coupled by the institutionalisation of other practices such as flexibility, exceptions, reservations, safeguards, protocols, etc. On balance, a formalisation of transparency rules has taken place: their de jure incorporation into the Treaty. Whereas before they were determined by interinstitutional agreements and rules of procedure, the ECJ

can now monitor the implementation of a norm of legislative openness as an operational principle of EU governance, as the new transparency rules are part of the EU's primary law.

Before turning to the concluding section, it is worth noting that Amsterdam's and Nice's largest deficiency was their emphasis on policy rather than polity, efficiency rather than democracy, distributive compromise rather than integrative accommodation. These reforms focused on the rationalisation and simplification of decision making, voting adjustments and, in general, measures concerning the effectiveness of joint decision making as a precondition for the future functioning, but not legitimation, of the EU. Ironically, this elaborate exercise in rationalised institutionalism originally aimed at rectifying a criticism of the Community as a 'joint decision-system' that is conducive to sub-optimal policy outputs (Scharpf 1988) and an inequitable status quo. The section below assesses the limits of constitutionalising the EU.

The search for a new constitutional order

The Constitutional Treaty – that is, the deliberative outcome of the Convention on the Future of Europe, as signed with a few amendments at the European council in Rome in October 2004 – has been described as a modest but positive step toward the full constitutionalisation of the Treaties. Be that as it may, the fact remains that the political system of the EU still rests on an international treaty which, by virtue of its integrative nature, has been assigned the task of establishing a new constitutional order in Europe, albeit of a less federalist kind than initially envisaged by its drafters. Did the Convention, however, act as a 'constituent assembly'? Has the outcome of deliberating on a Constitutional Treaty been legitimized by European public opinion? The answer to the above set of questions is closer to a 'no'. And that mainly for three reasons. First, the whole drafting process of the new Treaty was characterised by the lack of a genuine European constituent power; let us recall that the Convention was composed of appointed delegates, albeit drawn from a wider socio-political spectrum than has previously been the case in the history of EU treaty-making. Second, the outcome of the Convention was liable to – some significant – change by the IGC, which retained the right to a final say over the new constitutional arrangements. Third, following the argument about the lack of a European constituent power, the outcome reached at the IGC (assuming that this is finally ratified by all Member States) can only be another Treaty under the general principles of international public law, rather than a Constitution 'proper' or a new kind of constitutional ordering deriving its legitimacy directly from a European demos.

The agonizing search for a new kind of constitutional polity in Europe comes in direct contrast to the means available for creating it. State-centrism seems to be the order of the day when it comes to bestowing the 'EU order'

with a system of 'basic law' provisions. Nor does the integrative nature of a Constitutional Treaty suffice to transform a constellation of national democracies into a democratically organised polity in its own right. Thus the new Treaty would have to be based as much on the constitutional orders of the constituent units as on a new ordering of transnational political authority to retain its character as a 'sympolity' of both states and demoi. At best, the outcome of constitutionalising the Treaties can follow the logic of large-scale constitutional engineering – as opposed to formal constitution-making – which has been part and parcel of the EU's *acquis conferencielle*. Given the above, it follows that the general direction of present-day European constitutionalism follows the previous path of sovereign-conscious states wishing to bring about a relatively moderate re-ordering of the formal Treaty framework, which may well lead to a new, and perhaps more stable, constitutional equilibrium between the collectivity and the segments. This, however, should not be equated with a substantive transformation of the EU's constitutional physiognomy.

From the above, it also follows that the Constitutional Treaty may not endow the EU with 'a new base of sovereignty' able to transcend the sovereignty of its parts, contrary to federalist predictions during the (early) drafting stage. Instead, Article 5(1) of the Treaty states thus: 'The Union shall respect the national identities of its Member States, inherent in the fundamental structures, political or constitutional. … It shall respect their essential State functions, including those of ensuring the territorial integrity of the State, and for maintaining law and order and safeguarding internal security.' This provision epitomises the new dynamic, still though unstable, interplay between co-ordinated interdependencies and diffused public authority, suggesting that the present-day EU is not (as yet) part of a linear process towards an easily discernible federal end: a constitutional polity 'proper'. Rather, it is about the preservation of those state qualities that allow the participating collectivities to survive as distinct constitutionally organised polities, whilst at the same time engaging themselves in a polity-building exercise that transforms their traditional patterns of interaction. Although this amounts to the qualitative transformation of a community of states into the most advanced scheme of voluntary regional integration the world has ever witnessed, it should not carry with it the assumption of the end of the European nation-state.

The EU has not thus taken us 'beyond the nation-state' and toward a post-national state of play. Whether its logic of power-sharing may well be explained through a theory of institutional delegation based on the principle of conferral, the most compelling evidence for the lack of a European sovereignty per se is that EU citizens are still taken as 'sovereign' only within their national context. Thus the set of constitutional arrangements advanced by the Treaty faces the same old challenge: the level of support it will enjoy by the general public and the means through which the central

institutions will open up new participatory opportunities for civic governance. In that regard, then, effective governance for managing an integrated political order based on output-legitimacy – in turn determined by the system's problem-solving capacity (Scharpf 1999) – will be but a poor substitute to the democratic norms of good governance in relation to a demos. What is needed, therefore, is a democentric process of union as a platform from which a European constituent power can emerge.

Title IV of the Treaty entitled 'The Democratic Life of the Union' enlists a set of principles to guide the governance of the EU such as democratic equality, representative as well as participatory democracy. The latter, in particular, represents an interesting addition to the formal framework, in that the central institutions should 'give citizens and representative associations the opportunity to make known and publicly exchange their views on all areas of Union action'. Furthermore, an 'open, transparent and regular dialogue' is envisaged between the Union, representative associations and civil society, coupled by a citizens' initiative inviting the Commission 'to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Constitution'. These provisions chime well with the wider objective of bringing the EU closer to its citizens, without offering any concrete means for realising the citizens' sovereign rights at EU level. From a democratic standpoint, and given the level of institutional sophistication the EU already enjoys, much more was expected from a text – a Treaty – that claims to have the social and political legitimacy needed for the establishment of a European Constitution.

Conclusion

At a time when the EU retains its character as a *via media* between different forms of polity, recent constitutional developments have raised the expectations of further reforms to endow a fragmented European demos with a common civic identity. But such aspirations might not prove too realistic after all, in that recent treaty reforms managed to consolidate national autonomy, by acknowledging the innate need of states to retain ultimate control over system-wide constitutional change. In support of state-centrism comes the view that, even the new dialectic between sovereignty and integration, carrying the implication of an explicit right to political co-determination, has failed to produce a series of credible commitments to democratisation with a view to strengthening European civic competence. Another important implication was the perception that because the recent reforms carried a mandate for limited treaty change, the development of Union citizenship would be dealt with effectively at a later stage. Judging, however, from their end-products, it is highly doubtful that there will be a substantive 'deepening' of common citizenship rights and the granting to the EP of constitutional competence over treaty reform in the near future.

Amsterdam and Nice, far from representing a *cause célèbre* for a substantive re-ordering of civic spaces and public spheres, amount to a cautiously negotiated deal of 'partial offsets' to key democratic problems facing the EU and its constitutional future. For what both Treaties failed in the end to produce was not only a common democratic vision *per se*, but rather a belief that such a vision remains within reach, at least for the foreseeable future. This criticism is justified further by perceiving the Nice process and outcome as the product of a predominantly utilitarian, cost–benefit calculus among divergent and often ambivalent national interests, along the lines of an overall rationalist settlement. Thus the Nice endgame represents yet another managerial type of formal treaty reform, where affective/identitive politics remains without reach. Its core principles rest not on the need for cementing the constitutive features of a polycentric civic space patterned on the co-constitution of normative structures, but rather on a politics determined by sub-optimal exchanges within a complex negotiation system. The same, albeit to a different extent due to its more participatory drafting method, can be said of the Draft Constitutional Treaty, for it confirms the centrality of the component states in the political management and constitutional ordering of the EU.

The general assessment is that the exclusion of citizens from European governance is at the expense of better equipping citizens to become agents of civic change: a system-steering agency operating within a pluralist order of increasingly entangled arenas for action. The rejection of the constitutional treaty from the French and Dutch publics was partly a response to previous exclusionary practices. Like any other polity that aspires to becoming a democracy, the EU has to engage itself in a constitutive process based on a new framework of politics that embraces the virtues of civic freedom and public deliberation, by means of inventing a sense of *res publica*.

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12

Between Past and Future: The Democratic Limits of EU Citizenship

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Introduction: the context of EU citizenship

The late 1980s witnessed a renewed interest in citizenship by both academics and policy makers that has continued up to the present.[1] Various perceived dangers to social cohesion and democratic accountability prompted this return to the citizen (Kymlicka and Norman 1994; Beiner 1995). A number of observers feared the growth in multiculturalism would generate social conflicts and fuel the rise of the extreme right and religious fundamentalism. Commentators on the right as well as the left worried the contemporary emphasis on markets risks promoting self-interested behaviour and a decline in civic responsibility. Globalisation – the process many regard as defining the new century – appeared to reinforce both trends, rendering private and public power harder to control. It was no wonder, these analysts concluded, that citizens had become increasingly uninterested and disenchanted with politics. The crucial task was to reengage them in ways that promoted social integration. However, the resulting revival of citizenship theory and policy has taken two divergent and not entirely compatible directions – the one drawing inspiration from the past, the other pointing towards new kinds of citizenship supposedly more suited to the future.

Those who advocate a return to the past see the revitalizing of older types of citizenship as a way of fleshing out a commitment to justice by relating it to specific obligations to others within our local and national communities. Following an established tradition, many writers have sought inspiration in the ancient Greek or Roman meaning of citizenship for this purpose (Oldfield 1990). Others, while not uninterested in this classical heritage, have focused on later periods and explored the development of democratic citizenship within the state building projects of the eighteenth, nineteenth and twentieth centuries (Barbalet 1988; Janoski 1998; Miller 2000). By contrast, though, several political analysts have contended that the very

phenomena that prompted a revival of citizenship have made these past conceptions unsustainable (Ignatieff 1995). They claim multiculturalism undermines appeals to national communities, while global markets mean democratic control of economic and social processes cannot be plausibly obtained via the state without huge inefficiencies and a loss of freedom. Citizenship has to be reconceived, in part at least, in ways that transcend the confines of national political communities and the types of party-centred politics traditionally associated with them.

This proposed reconceptualisation of citizenship has also taken a number of forms. One strand, particularly popular among the social democratic left, looks to the universality of rights norms as a source of new, transnational, forms of political community (e.g. Habermas 1992; Soysal 1994; Linklater 1998). Adherents of this camp note how many political activists have channelled their civic action away from traditional political parties and into rights-based social movements. Several of these movements, such as those concerned with environmental protection, poverty and the condition of women, have a global dimension. They see international legal norms as a prime mechanism for pursuing their ends and challenging the self-interested policies of even democratic states and governments.

However, another strand, favoured mainly by the right, though similarly prioritising rights, emphasises economic over social and political liberties. Members of this group counter the criticism that markets encourage self-interested behaviour that corrode social and moral bonds by associating entrepreneurship and even consumption with notions of civic and ethical responsibility. The market freedoms to work, move and trade are held to advance individual liberty and prosperity more generally. By extension, global markets become the promoters of a cosmopolitan citizenship (Willett 1992: 182, 186; Saunders 1993: 85). They also note how parallel changes are occurring at the domestic level. They claim the inefficient, bureaucratic and paternalist character of state intervention has led to using private contractors and regulators to deliver public services. They link these methods to new notions of democratic accountability and responsiveness (Barry 1990). Among other mechanisms, consultation with user groups, cooperation with voluntary associations, rights of legal redress, and consumer pressure, repackaged as a civic right to choose, are all seen as offering greater democratic in put and control than a state-run system nominally overseen by elected politicians (Bellamy 1999: ch. 6). Indeed, extensive privatisation has led most social democrat governments to accept such mechanisms for much of the formerly state-owned public sector.

By and large, the first strategy of reviving the past seems premised on the nation state and its subunits. As we shall see, it is unclear how far it could be extended to a transnational body such as the European Union. The second, post-traditional, strategy, while adopted in part in most advanced industrial nations, supplements but also has a tendency to supplant and, on some

accounts (Crouch 2004), even subvert the more conventional modes of state-centred citizenly activity. The distinctiveness of EU citizenship lies in its main features and practices belonging more or less entirely to this new type (Harlow 1999; Bellamy and Warleigh 2001). Indeed, the European Union provides an exemplar of the novel post-statist politics of legal regulation, market pressure and voluntary coordination – of governance rather than government (Andersen and Burns 1996). The key rights enjoyed by EU citizens derive mainly from the market freedoms that provide the European Union with its principal raison d'être (Everson 1995). Meanwhile, the European Court of Justice, the EU Ombudsman and the vast array of pressure groups found in Brussels arguably offer more effective channels for protecting and voicing citizen's interests than an EU Parliament that fewer than 50 per cent of EU citizens bother to vote for.[2]

Though a growing body of commentators defend the effectiveness of these new kinds of citizenship at the EU level (e.g. Majone 1998; Héritier 1999; Moravscik 2002), there remain numerous critics who bemoan the European Union's democratic deficit (Decker 2002; Lord 2004; Føllesdal and Hix 2005). Some suggest overcoming these weaknesses by further elaborations of the new towards some form of post-national citizenship (Habermas 1992; Kostakopoulou 2001). Others believe the EU must adopt more elements of the old (Lord and Beetham 2001). Consequently, this chapter explores the adequacy of the new and the prospects for instituting the old within the EU context. I begin by looking at how traditional styles of democratic citizenship came to be established in nation states and compare their continuing strengths, weaknesses and complementarities with the emerging new varieties. I then turn to an assessment of the mix of old and new within the European Union. To anticipate my conclusion, I shall argue that governance only works when framed by government, and a governmental capacity possessing democratic endorsement is only possible at present within the Member States. As a result, the new types of citizenship offered by the European Union need to remain under the control of the older kinds provided by the Member States. The challenge is to devise mechanisms whereby this can be achieved.

The nature of modern democratic citizenship

The rise of modern democratic citizenship in Europe is typically related to the three-fold processes of state-building, the evolution of a commercial and industrial society, and nation-making (Marshall 1950; Rokkan 1974; Bellamy 2004; Weale 2006, ch. 1). Though analytically distinct, and to some degree historically phased, these processes fed into and promoted each other.

The first, state-building, phase established central political control over a given geographical territory. The resulting territorial borders demarcated the

legitimate sphere of operations of political authority and defined its subjects. The state became responsible for the physical security and economic welfare of those residing on its soil. For example, it aspired to hold the monopoly of violence within its realm, and to regulate the inward and outward flow of material and labour resources in ways necessary to promote the public welfare. It could also impose duties on its subjects, notably military service and the payment of taxes. The second phase, which saw the emergence of markets, undermined ascribed status. It established the need for a regular system of law in which individuals had equal rights freely to exchange their labour, goods and services, to hold property and amass capital. The third, nation-making, phase saw the creation of a common language and uniform systems in such areas as weights and measures, industrial standards and education. There was also considerable infrastructural investment, particularly in transport. These measures helped consolidate both a unitary market and a demos.

Democratic citizenship only emerged gradually from these three processes as states and their rulers came to depend on the voluntary cooperation of ever more of their subjects and they, in their turn, sought to ensure those governing them did so for the common rather any particular interests. However, all three played a mutually supportive role in constituting citizenship. This emerges when we consider the standard three criteria for inclusion as a citizen (e.g. as in Dahl 1989, ch. 9). The first is that one's interests are affected in a sustained and largely unavoidable way by the decisions of the political body concerned. In other words, one is not a temporary visitor to the state in question and unavoidably involved in schemes of social and economic cooperation with other persons within its sphere of authority. The second concerns possession of the requisite competence to be a citizen. At one level, this criterion simply involves an acknowledgement of equal status. Children are usually excluded from citizenship because in their case a degree of paternalism and guardianship is deemed justifiable. They are not yet fully autonomous. More controversially, adults with severe mental health problems are also often excluded. However, other aspects of this criterion relate to the possession of an appropriate national consciousness. Basic competence in one of the main national languages is often a requirement for naturalization, as is some knowledge of the political history and culture of the adopted country. Civic lessons also have a special place in the school and even university curriculum of an increasing number of counties. These factors play an even more important part in the third criterion for inclusion as a citizen – feelings of national solidarity and trust.

Solidarity and trust are required if citizens are to be committed to the welfare of the community and their fellow citizens (Offe 2000: 67–8). Solidarity leads citizens to feel certain obligations towards their fellows, while trust gives them faith that others will be as responsible as they are in fulfilling them. Without such sentiments, citizens are unlikely to recognise the

authority of the state – even a state they can control through the democratic process. To some degree, having a more or less permanent stake or interest in the polity is sufficient to generate such commitments and beliefs (Niada-Rümelin 1997). However, self-interest alone is unlikely to produce a fair or stable economic or political system (Galston 1991: 215–20). The temptation will always exist for individuals and groups to defect from, or free ride on, even mutually beneficial collective arrangements if they feel it is in their interest to do so. A sense of justice creates a more stable bond, perhaps (Rawls 1971: 457, 474; Føllesdal 2000). But the ties of justice apply to all human beings – not just one's fellow citizens – and are themselves deeply contested. As such, they are too thin and controversial to bind citizens to a specific state as the locus where disagreements about their collective interests and rights might be appropriately negotiated and decided.[3] The feeling of identification with co-nationals through sharing a common history and values – however artificial such a national identity may have been in origin – leads citizens to consider they possess a common fate and to internalise the demands of justice (Miller 1995: 83, 93). As a result, the cooperation and self-restraint needed for most public policies to succeed and societies to flourish become easier.

The importance of national solidarity and trust as well as interests and rights in defining citizenship is worth stressing because many theorists find notions of nationality and community controversial, even distasteful and redundant. Regrettably, jingoism and xenophobia are all too often the other side of patriotism and civic responsibility. Still, without those latter qualities, support for the political institutions that promote our interests and justice is likely to founder. After all, citizenship goes beyond those rights and interests we share with others simply by virtue of our common humanity. A citizen is a member of a particular political club. As such, citizens are entitled to more care and protection from their fellow citizens than would be accorded them simply as members of the human race. However, these additional entitlements also engender correspondingly heavier obligations. A sense of national belonging helps generate the commitment to fulfil these extra, and often onerous, responsibilities (Miller 1995: ch. 3). Thus, civic duty and pride, as well as mutual interest and a sense of fairness, lie behind such activities as voting, paying taxes, not dropping litter, driving carefully and so on (Galston 1991: 221–4). Coercing people to act civically is simply too costly and holds dangers of its own. Assuming all will always be convinced by the justice or justifiability of most public policies, even if they have no personal interest in them, overlooks the profound disagreements that often surround such measures (Waldron 1999: 151–3). Citizens have to believe they belong to a collectivity, the rules of which they are obliged to abide by – even when they think them wrong or misguided. They also need to feel a degree of responsibility for their fellow citizens as well as themselves. Otherwise, as studies of communities that lack such 'social capital' indicate, the public

sphere is likely to decline and many aspects of the public good go neglected (Putnam 1993).

For similar reasons, democracy will not work simply as a mechanism whereby different individual or group interests keep each other in check. People will also need to acknowledge the right of others to check them, be prepared to devote time to participating, show self-restraint when they fail to get their way, tolerate those with different views and be willing to work with them, and so on (Galston 1991: 227). Though we can specify certain generic liberal democratic principles and virtues that can serve to distinguish the arrangements and practices of liberal democracies from those of other regimes, these values do not in themselves indicate the language, borders or members of any given liberal democracy, or the precise forms in terms of electoral rules and so on it may take. It is these elements that are 'nationalised', so to speak, in order to create a 'demos'.

A fairly obvious objection to ascribing such solidaristic and trusting feelings to nationality arises at this point: namely, that very few countries do not contain substantial ethnic and national minorities. Multiculturalism and multinationalism are increasingly the norm rather than the exception. As is now commonly acknowledged, the two forms of pluralism need to be distinguished (Kymlicka 1995: ch. 2). However, neither need be incompatible with the existence of an overarching national identity for a single political unit.

Multiculturalism standardly results from immigrant communities, often arising from colonisation by the host country of their native land. Though usually indirectly related to ethnicity, the focus of a cultural minority may be culture rather than ethnicity. Take the case of Catholics and Muslims in Britain: many members of these two religious groups may be of Irish or Asian origin respectively, but not all – and in the case of the former not even the majority. Even when ethnicity is the focus, membership of a cultural minority need not be linked to a specific political identity with the aim of leading to a distinct, self-governing community. Not only are ethnic and cultural minorities frequently territorially dispersed, even if concentrated pockets of such groups may exist in certain regions or urban centres, but also they either identify with the homeland they chose or were forced to leave, and to which they hope to return, or seek to acquire acceptance as co-nationals of their adopted country. Normally, the second involves a degree of mutual accommodation on both sides (see Miller 1995: ch. 5). On the one hand, the immigrant group will have to accept elements of their adopted country's political culture, even if aspects of both the generic liberal democratic values and the particular national variation prove to be at odds with their culture. For example, the immigrant group will have to become reasonably fluent in the national language(s), accept liberal marriage laws and so on. On the other hand, the host nation will almost certainly need to remove discriminatory elements from the national culture. For example, it may need to re-evaluate its colonial past, and acknowledge its oppressiveness along with the positive

contribution of the colonised people to national life, making suitable changes were necessary. In general, areas within the core political settlement, such as gender equality, prove less negotiable than those that do not, such as religious holidays, but the distinction between the two is far from clear cut. Moreover, as we shall explore below, there is a certain cultural path dependency in the trajectory of such negotiations (Bellamy 2002). Nevertheless, over time an overarching national identity develops capable of being compatible with distinctive ethnic identities, as is the case today with British Jews and Italian Americans.

National minorities, particularly when nationality is associated with a distinct language, usually do make territorially based claims to self-government. However, such claims need not lead to secession (Miller 2000: ch. 8). Once again, an intertwined history often serves to bolster mutual interests, so that considerable degrees of regional autonomy can nonetheless be embedded in a broader political system and national identity. For example, David Miller has noted how the Scots share a common Reformation heritage with the English that gave the majority in both nations an interest in a Protestant monarch, that involvement in Imperialism helped shape a certain Britishness in Scotland and so on (Miller 2000: 132–6). Of course, there are asymmetries in the relationship – the English feel no such call for a dual English-British identity, or even for political institutions for England or its constituent parts. There is also a fairly consistent minority in Scotland who desire independence. Nevertheless, on the whole devolution has been a mechanism for keeping Scotland within the fold of British politics, not a means for leaving it. After all, it remains part of the heartland of the current ruling party, contributing several key ministers to the government.

These challenges to, and reworkings of, national identity are part of the practice of democratic citizenship itself (Bellamy 2004: 7–14). Common interests, a sense of national belonging and even many civil and social rights were established among the peoples of most industrial states long before their transformation into democracies. By and large, people became first subjects, then co-nationals and only in the late nineteenth and twentieth centuries finally obtained the right to participate as citizens. However, once full adult suffrage was established, the prevailing views of the collective interest and the nature of rights, as well as the character of belonging, all became the focus of political disagreement and contestation.

As Lipset and Rokkan (1967) famously argued, the party systems of European democracies developed around two main cleavages – left and right, on the one hand, and centre-periphery, on the other. The first arose out of the social divisions spawned by industrialisation between capital and labour, employer and employee, agriculture and manufacturing, town and country. The second reflected ethnic, linguistic and religious divisions that had been only partly overcome by state centralisation and the imposition of a national culture. The character of these divisions, along with their relative

importance and the degree and nature of the disagreements they provoked, has varied widely. The pace of industrialisation, the presence, size and composition of national or religious minorities, the impact of contingent events, notably war – these and other factors have all influenced how these cleavages have been configured and the types of conflicts to which they have given rise. Nevertheless, to a greater or lesser extent all states have witnessed debates over the functional and territorial spheres and interests they ought to secure, which rights all citizens require to be treated equally, and the character of the national public culture. So, left and right have debated the legitimacy of different degrees and kinds of intervention in the economy and other areas of civil society, such as the family; while conflicts between centre and periphery have generated debates over regional autonomy, language rights and multiculturalism.

These political divisions have produced considerable variation between the EU Member States in the construal of public and private and the organisation of the different levels and branches of government (Bellamy *et al*. 2004; Eder and Giesen 2001). Though all are liberal democracies, they have very different approaches to economic regulation, religious toleration, educational and welfare policy and so on, and distribute the powers of central and local government, the executive, legislature and the judiciary, in diverse ways. However, while in some states political disagreements on such matters have sparked quite severe conflicts, once democracies have been established they have rarely produced dictatorship or revolution, on the one hand, or secession, on the other. With the partial exception of some minority nationalist parties, rival political parties have attempted – either on their own or in coalition with others, to offer a vision of the collective interests and rights of citizens to which all can belong as equals, even if highly differentiated political arrangements might be necessary to achieve it. In other words, they remain committed to the ultimate integrity and fairness of the system as a whole and offer governmental programmes covering the whole range of concerns of citizens.

Commentators on citizenship often focus on its exclusions – workers and women in the past, immigrant groups in the present. However, the other side to this exclusionary aspect is the inclusive logic of the practice of democratic citizenship. In various ways, it can be seen as a struggle by the different ideological, social, ethnic, religious and other groups within the political society to be included on equal terms with others (Tully 1999; Bellamy 2001). In the process, they are often led to redefine the ways in which citizens are similar and dissimilar to each other, and hence the mechanisms required to ensure they are accorded equal concern and respect – not least the way the state and its regime are organised. Even when stressing differences or demanding special treatment, though, appeal is standardly made to strengthening inclusion by ensuring the parity of the aggrieved or hitherto excluded group with fellow citizens. Though policies and state structures

may become less centralised and more differentiated and complex, they belong to a national political system that seeks to integrate all these demands. As a result, there is a certain path dependency to the way new demands often develop. As Carens has noted, appeals to fairness in politics are often to some notion of even-handedness rather than liberal neutrality (Carens 1997). Excluded groups tend to look within the existing political culture for reasons justifying how they might be treated the same or differently to others in order to achieve equality of concern and respect with them.

The new forms of citizenship also conform to this pattern. Contracting out or even privatising public services is usually done in the name of rendering them more flexible and responsive to the diversity of citizens' needs. New social movements campaign to get certain interests and issues onto the political agenda. Moreover, these new forms are prevented from simply serving sectional interests through operating within the traditional political system. Even privatised services remain subject to public regulation, the effectiveness and scope of which continue to be publicly debated. Likewise, successful single issue campaigns get taken up by political parties and integrated into their programmes. Of course, it would be wrong to view this as a Whiggish story of ever greater inclusiveness. All groups will experience reversals as well as advances, with each new settlement excluding new groups as well as including certain others.

Some commentators have seen the European Union as simply the outgrowth of domestic politics – the response of governments to the transnational interests of particular industrial and political groups (Moravcsik 1999). Others, though, believe the European Union has grown beyond the purely intergovernmental stage and that it has taken on new state-like characteristics of its own (Christiansen *et al*. 1999). As I noted, the main characteristics of EU citizenship correspond to the new forms and, I shall argue, certain of the phases preceding the establishment of traditional democratic citizenship within the Member States. However, some of the attributes of democratic citizenship are also present, including EU wide elections for a Parliament – even if that body does not operate as the European Union's legislature. This mixture of old and new prompts a number of questions that I will seek to explore in the sections that follow. First, what are the prospects for establishing democratic citizenship at the EU level? Second, how adequate are the new forms – indeed, is the European Union transforming the character of citizenship away from the traditional notion of citizenship altogether? Finally, if (as I shall suggest) the answer to these questions is largely negative, how can an adequate mix of old and new be obtained in the European Union?

State, nation and democratic citizenship within the European Union

The last section argued that democratic citizenship emerged from, and then shaped, the three-fold processes of state-building, nation-making and the

emergence of a commercial and industrial civil society. If a pan-EU democratic citizenship depends on a parallel set of circumstances, as has been claimed (Munch 1996: 379, 384–5; Harlow 1999: 1–9), have these developments gone sufficiently far at the EU level?

If the definition of statehood is sovereignty over the key functions within a given territory, then the European Union can be regarded as only being at best state-like in certain areas (Schmitter 2000: 15–19). There is some uncertainty over, and a lack of congruence between, both the territorial and the functional spheres of the European Union's authority. The Union will almost certainly expand to include more states. Yet, as the controversy over Turkey's candidacy illustrates, which states, and when, are deeply disputed issues. Meanwhile, unlike a state the European Union does not have a monopoly of all functions within its territory. Indeed, some of those functions, notably EMU, only operate in certain zones of the European Union. Its tax raising powers are limited and indirect, it possesses only partial control over the movement of goods and persons within its domain, and lacks that hall mark of state sovereignty: a monopoly of legitimate violence within its borders and the power to defend itself against external enemies. Nevertheless, it can generate and allocate revenue, regulates wide areas of public and private behaviour, possesses diplomatic status, conducts and concludes binding international negotiations in certain trade and security matters and organises elections. Though even the new Constitution has the formal status of a treaty, so that its powers and competences are loaned it by the Member States, which will now possess a right to secede, the treaties form the basis for an independent legal system with a huge impact on domestic law.

Thus, the European Union conditionally represents and secures some of the collective interests of different groupings of Member State nationals. This partial and limited statehood is matched by a similarly selective attachment between EU citizens to both each other and to the European Union. There have been sporadic attempts to establish an EU wide sense of national identity. The EU anthem, flag and the European version of the national passport, along with the very status of EU citizenship, have given the European Union the symbolic trappings of nationhood. However, these symbols lack any deep resonance within a shared European culture, history or values. The dispute over whether to associate allegedly European political values with Christianity in the preambles to the Charter of Fundamental Rights and the Constitutional Treaty revealed the degree to which national differences are as important as any similarities in the cultural sphere. For parallel reasons, the Euro notes came to be decorated with fantasy bridges, any real bridges, individuals or artefacts having a primarily national significance. Discussions of Europeanness tend to be equally abstract. Though the Constitutional Treaty (Preamble) contains references to a shared European commitment to liberal democracy and the rule of law, these commitments are shared with all democracies worldwide. There are as many disparities and resemblances

between Member States as there are between any one of them and any non-EU liberal democracy.

While a majority of European citizens support membership of the European Union, such backing is lukewarm and fragile,[4] with only a small minority strongly committed to efforts to unify Europe. Moreover, the European Union is valued primarily for its importance in reinforcing national status and the benefits it offers to Member States. If around 50 per cent of European citizens have consistently declared that their countries benefit from membership of the European Union, with smaller countries being particularly favourable, far fewer have seen themselves as European. For example, among the old EU 15 only 3 per cent of citizens generally view themselves as 'Europeans' pure and simple, and only 7 per cent say a European identity is more important than their national one. By contrast, approximately 40 per cent will describe themselves as national only and 47 per cent place nationality first and Europeanness second. Indeed, though 89 per cent of these citizens usually declare themselves attached to their country and 87 per cent to their locality, only 58 per cent feel attached to the European Union.[5]

The absence of either statehood or nationhood at the EU level is also reflected in the relative lack of any EU wide public sphere. For example, there are no European wide newspapers, radio stations or TV channels. Despite the widespread knowledge of English, the one attempt at an English newspaper targeted at an EU audience, *The European*, proved a failure. The only English language newspapers with a readership across the European Union are probably the American *International Herald Tribune* and the London-based *Financial Times*. Both have a moderately Eurosceptic outlook and are largely read by a business and professional elite. Of course, EU issues are reported in the national and some of the regional media of the Member States. However, as a result it is always refracted through a national or regional lens. This domestic perspective is reflected in interest in EU politics more generally. Except in countries with compulsory voting, turn out in EU elections is lower than in national ones and is largely fought by national parties on domestic issues.[6]

It is sometimes argued that both the partial character of the EU's statehood and the selective character of identification it attracts are no more problematic than the division of functions and loyalties between local and national government within most of the Member States (Lehning and Weale 1997). Accordingly, a two-level form of national-EU citizenship ought to be no trickier to imagine than the regional-national forms of dual citizenship most Member State citizens already possess (Soysal 1994). However, the two situations are very different. As we saw, though semi-autonomous, local and regional government – and often identities too – are nested within national political systems. Of course, such nestedness lacks the neatness of a Russian doll. Different functions often map onto different territorial sub-units.

Asymmetries of power and identity can exist between similar sub-units within a country – so that the Scots enjoy more local powers and have a stronger regional identity than the residents of East Anglia, say. Groups also frequently contest the way levels are drawn. Even in such contestations, though, there is still an established hierarchy of decision making and identification, with the higher levels encompassing and being more inclusive than the lower. Consequently, the potentially adverse knock-on effects of sub-national decisions for either other regions or national policies are capable of being compensated for at the national level. Indeed, the allocation of powers to sub-national units forms part of national politics and is subject to nationwide trade-offs and compromises.[7]

By contrast, EU politics fails to fit into national politics in such a neat way, or vice versa. In fact, European citizens do seem to regard the EU in ways that are somewhat analogous to their attitudes towards local government. As we saw, most see it as a functionally useful level for dealing with certain problems, but one that in terms of its utility and their identification with it ought properly speaking to be nested within the domestic politics of their Member State. In other words, they see it as a legitimate solution for certain kinds of domestic problems. To a degree, the prominence of intergovernmental bargaining in EU decision making can allow national governments to portray it in these terms. For example, the adverse effects on a given region, such as the Western Isles of Scotland, of a generally beneficial EU wide policy, can be mitigated by the promotion of other policies that favour it, tailor-made opt-outs and so on. However, national governments will not always get their way. The very size and diversity of the European Union makes it harder to accommodate all demands – indeed, such accommodation can itself increase the costs and diminish the benefits of the policy overall. Infra-national bargaining will also often have to give way to inter-national bargains. Policies that it might be hard to push through in a purely domestic forum might succeed in an international arena because the issue has higher salience or greater support in the second compared to the first. The Common Agricultural Policy, for example, remains key to coalition building at the EU level even if such agricultural subsidies would be rejected at the national level by many of the Member States that feel obliged to support it. Moreover, because EU policy rarely has a significant influence on domestic elections, governments have relatively weak incentives to ensure that their EU voting always accords with the concerns of their domestic supporters.

The solution might seem to be to nest national politics within EU politics. Certainly, the self-image of EU institutions – most notably the ECJ – is that they are superior to national governments, parliaments and courts within their sphere of competence. [8] As we have seen, though, the competences of the European Union are not inclusive in anything like the manner of a state and there is little support for them becoming so. That makes it hard for either EU institutions or European citizens acting through them to ensure

EU policies operate in ways that are fair for all concerned. It is sometimes suggested that the superiority of the European Union over national law can be reconciled with this situation because EU matters operate in a discreet sphere to most other domestic concerns. However, this is not the case – EU regulations often have profound consequences for a whole range of domestic policies, many of which mainly effect locals and only indirectly or potentially citizens of other EU countries.

We seem faced with a quandary, therefore. On the one hand, the nation and state building preconditions for EU level democratic citizenship have yet to develop and seem unlikely to do so. Given the strength of national political cultures and their associated state structures, it is doubtful these will be superseded by a pan-European political identity and arrangements. Regional identities were absorbed within national ones in a pre-democratic era, at a period of huge social transformation and under the threat of war. If anything, the current trend is in the opposite direction, with minority nationalities reasserting themselves and demanding greater regional autonomy within the Member States. Moreover, the very size and diversity of the European Union poses problems for a pan-European democratic politics. As many commentators have noted, strengthening the power of the European Parliament in these circumstances risks deepening rather than assuaging the European Union's democratic deficit (Weiler 1996: 111). The multiplicity of languages and political cultures mean there is no EU wide public sphere or demos. The party blocks within the parliament fail to mirror these national differences. On the other hand, EU politics is only very imperfectly nested within the democratic systems of the Member States and while improvements, explored below, could be made, there are limits to how far this could ever be achieved. If the EU seems unsuited to old style democratic citizenship, though, many have argued that new styles might be more appropriate. It is to this issue that I now turn.

Post-national citizenship?

A number of commentators have argued that the European Union has promoted the emergence of a new and superior basis for citizenship: namely a post-national citizenship founded on rights and the rule of law (e.g. Habermas 1992; Soysal 1994; Føllesdal 2000; Kostakopoulou 2001). As I noted above, the development of a national civil society involving equality before the law provided one of the preconditions for traditional democratic citizenship. The economic and social transformations conventionally associated with globalisation, together with the construction of an EU wide legal system, have certainly helped create many of the key elements of a European civil society. Advocates of a new form of post-national citizenship argue these changes in themselves are sufficient and can substitute for the other components of democratic citizenship stemming from statehood and

nationality. Indeed, they take us beyond the need for the closed borders, overarching power and exclusiveness connected with state sovereignty and national identity.

The strongest advocate of this view, Jürgen Habermas, has argued that the new Charter of Rights and Constitution can provide the focus for a European constitutional patriotism (Habermas 2001). He and his followers also claim that by grounding the normative pre-requisites for the private and public autonomy needed for free and rational deliberation, the Charter and Constitution also offer the basis for an EU wide democracy (Eriksen *et al*. 2002; Fossum 2003). There is no need for either a sovereign demos or a sovereign state authority. Instead, what unites and binds people is a consensus on justice that is guaranteed by law. To the extent that European civil society can be viewed as a European Rechtsstaat, in which the peoples of Europe can formally relate to each other through the medium of law, then the requirements for a new (and superior) form of European citizenship have been satisfied. Though a European wide democratic legislature can be built on these foundations, it will necessarily be constrained by the legal constitution that continues to be rooted in civil society (Habermas 1992, 1996, 1997, 2001).

As I acknowledged above, a law-governed European civil sphere certainly exists. After all, the most tangible, transnational right offered by the European Union is the 'free movement of citizens' between Member States along with those rights associated with it, such as the right to reside. Though clearly of economic origin (Everson 1995), the ECJ has gradually extended these rights so that they refer not just to workers or other economic agents, including 'consumers' such as tourists, but persons more generally. For example, European law has played an important role in securing same sex couples a legal status equivalent to married heterosexual couples and in combating discrimination against women (Stychin 2001). Moreover, while EU citizenship can only be conferred on nationals of Member States, many of the entitlements associated with it can be enjoyed by third-country nationals working within the Union. Indeed, some commentators have seen the rights conferred by EU law as gradually undermining and supplanting all national distinctions. As one particularly lyrical judgement has put it, 'Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality'.[9]

These developments may seem to support the view that the rule of law offers a basis for a new style of denationalised and non-statist citizenship within the European Union. However, it should be noted that these rights are for the most part not the rights of political citizens but of private subjects acting within civil society. Such activity can be empowering, as in some kinds of public interest litigation (Harlow 1999: 49–52). However, legal avenues tend to be exploited disproportionately by corporate bodies

(Harding 1992). Used excessively, litigation can also stunt the evolution of democratic, collective problem solving, and divert attention to ultimately self-defeating forms of individual redress, particularly in the area of compensation and liability (Harlow 1996).

EU level decisions can also undermine the interpretation of rights that people have made as democratic citizens of the Member States. As Niamh Nic Shuibhne (2005) has neatly put it, though the Member States share roughly the same set of liberal democratic values, their valuations of them frequently diverge (see too de Witte 1991/92; Weiler 1999:102). These different valuations result from democratic citizenship shaping, as well as being shaped by, the character of the state and national culture (Bellamy 2001). They reflect the particular ways the conflicts over redistribution and recognition that animate modern politics have played out in the different contexts of each Member State (Bellamy 2004). If most Member States have written constitutions presided over by constitutional courts, national judicial decisions long-term follow majority public opinion and are themselves shaped by the prevailing political culture (Dahl 1957). After all, it was challenges from the constitutional courts of certain Member States, notably Italy and especially Germany, concerned about the ways EU law might conflict with various domestic constitutional principles, which first obliged the ECJ to develop a rights-based jurisprudence.[10] Though the ECJ asserted its competence to decide such conflicts, it has in practice usually done so in ways that make some form of compromise possible.[11] Nevertheless, even in such key areas as abortion,[12] the ECJ has a natural tendency to view rights through the prism of the fundamental freedoms of the Union (Phelan 1992). In other words, it establishes a form of market citizenship that, while justified within its own sphere and not without many positive effects outside it, risks creating a European version of the Lochner era in the United States (Coppel and O'Neill 1992; though see too Weiler and Lockhart 1995).

Does the Constitutional Treaty get over these problems? The Conventions, especially the one leading to the Charter, have been portrayed by some as deliberative democratic forums that provided a near ideal environment for producing a European consensus on fundamental rights and constitutional principles (Eriksen *et al*. 2002). However, both conventions reflected the main cleavages to be found within most of the Member States: namely, left and right, on the one hand, and centre-periphery (or in this case enthusiasm for the EU or a more moderate or sceptical stance) on the other (Bellamy and Schönlau 2004a,b; Magnette and Nicolaïdes 2004). Indeed, that these documents represent a compromise between the main democratic divisions within the Union, rather than a factitious supra-political consensus, largely adds to rather than detracting from their legitimacy. Yet, because there is neither a pan-European demos nor a public sphere, they cannot be regarded as reflecting a genuinely pan-European view. Instead, the issue of differing national valuations of the Charter rights was largely skirted around by

specifying them at such a high level of abstraction that they could be compatible with almost any reading of them. Meanwhile, the Constitution entrenches the European Court's ultimate authority to decide their bearing in any given case (Article I-6, III-365).

For various reasons, that authority is likely to be particularly unconstrained within the EU context (Shapiro 1999: 321–7). As I noted above, within domestic politics courts are influenced by national public opinion. Although they can resist ephemeral fluctuations in people's views, constitutional interpretations generally evolve in parallel with social and political change. Federalism undeniably weakens that influence. The strongest constitutional courts are in federal systems, such as the United States, where the executive and legislature are often weaker than in unitary ones and they rule on disputes over competence and jurisdiction as well as the compatibility of laws with rights. In the European Union, there is the additional problem of there being no EU wide public sphere. After all, the supremacy of the Supreme Court to be *the* authoritative interpreter of the US Constitution has often come under sustained democratic challenge, and it has shied away from federal adjudication for long periods (Devins and Fisher 2004). Potentially Article I-5 (1) gives lee-way for national constitutional courts to continue to assert their constitutional autonomy, but this power is relatively mooted (Shaw 2005: 142). If there were uncontroversial interpretations of rights that were obvious to all reasonable persons, then the isolation of courts from normal political pressures might be regarded as a good thing. However, as disagreements between judges in many key cases and the above mentioned clashes between the ECJ and national constitutional courts both testify, such incontrovertible agreement does not exist. Moreover, isolation from formal political influences merely lays the Court more open to the informal lobbying of those factions and special interests with the means and contacts to obtain access to it. Hitherto, the need to engage with national constitutional courts has in many respects helped generate a European jurisprudence that is sensitive to national legal and political traditions and opinion (Weiler 2003). In practice, that may continue to be the case. The risk, though, is that far from providing a new basis for democratic citizenship, the constitution replaces it with judicial discretion.

Constitutions can certainly be the symbolic focus of a polity as well as denoting a type of regime, whereby power is distributed and constrained according to certain specified rules and principles. The prime instance of such constitutional polity-making remains the United States, whereby the constitution partly brought into being the people who were its putative authors. However, the US constitution was embedded within old style nation and state building. As immigrants discovered, its significance was shaped by a particular national culture, and its sway defined by the power of the state to assert its sovereignty over a given territory, as the civil war all too dramatically revealed. The proposed constitution cannot of itself bind the

European people and define the Union. Its very abstraction makes that impossible. However, unless it becomes embedded within a European democratic culture that has rather different sources, there is a danger that it could undermine national democracy without offering the basis for any democratic compensation at the European level.

Delegated citizenship?

The delegation of human rights protection at the EU level to the ECJ is but one instance of a more general trend towards assigning key regulatory tasks to trusted experts (Majone 1996, 2001). Advocates of this policy claim that the regulation of much financial and economic activity has to be removed from democratic control because it is either too technical for politicians and citizens to understand, or prone to attracting rent seeking or other kinds of self-serving, or simply myopic, behaviour on their part. Take the judicial protection of rights against potentially tyrannous (or plain careless) majorities, or the setting of interest rates by independent banks to guard against their manipulation for electoral advantage by politicians. Supporters of these strategies argue one can assume that people want their rights upheld and sound money. However, given that democracy in these areas is allegedly more likely to jeopardise than secure these goals, government *for* the people is best promoted by removing them from control *by* the people or their representatives (Scharpf 1999: 2, 6, 23, 203).

A number of commentators have argued that because the European Union is chiefly concerned with regulatory policies of the kinds delegated to non-elected expert bodies even within the Member States, talk of a democratic deficit at the European level is misconceived (Majone 1998; Moravscik 2002). That aspect of the representative function of democracy that helps ensure policies attend to relevant differences between Member States and the groups within them to whom they apply, can be met by filling the various committees with national appointees, often from the relevant sectors, and consulting users. Meanwhile, the process by which regulations are formulated may also claim certain democratic credentials through being open and deliberative. Indeed, the procedural niceties can themselves be upheld through being challengeable in their turn via Ombudsmen or in the courts.

The aim is to produce an 'objective' consensus, unsullied by self-interest. To achieve that goal, they aspire to separate policy making from politics. Prior to formulating any policy, political considerations can get factored in and appropriate control achieved through its being a political decision to have such regulations in the first place. There is also the possibility of *post hoc* compensatory measures to alleviate any excessive burdens imposed on a given group by an otherwise fair and generally beneficial policy. However, policy making itself is conceived as a pure form of apolitical democracy.

In this scheme, democracy means a degree of representativeness among decision-makers, consultation, transparency, procedural correctness, and deliberation in order to produce an 'objective' assessment of the public interest in a given policy area (Héritier 1999). In other words, it offers a delegated form of democratic citizenship by expert proxies and civil society groups charged with defending putative collective interests. Citizens are supposedly not bothered who provides them with certain benefits just so long as they are provided in as efficient a manner as possible.[13] However, this proposal assumes that the collectivity and its interests are uncontroversial matters. Yet, people often disagree about where their interests lie, the appropriate measures to address them and the level at which such decisions should be taken. Indeed, we saw most political debate is about just these questions, with both the left-right and the centre-periphery divisions of contemporary politics raising the issues of who should do what, when, where and how. As we shall see, the failure to address these issues proves a major lacuna within the European Union where, in contrast to the Member States, these new modes of governance are not nested in systems of democratic government in which party competition offers a rough guide to the overall balance of national opinion.

Within the European Union, there are a range of expert regulatory systems – from those that put flesh on directives desired by the Council of Ministers via the comitology process, ultimately producing regulations that have the force of law, through to much softer forms of largely voluntary coordination and persuasion via the formulation of benchmarks by such mechanisms as the Open Method of Coordination. In all cases, Member State governments can exercise a degree of control prior to and following policy making, even being able to veto measures in certain areas or, with the 'softer' forms, only complying so far as they find it convenient to do so. However, their main claims to democratic legitimacy derive from the procedural norms governing their deliberations which are said to produce policies in the public interest (European Commission 2001: 10). How far do these two mechanisms of Member State control and procedural correctness satisfy democratic concerns?

For a start, as I noted above, the domestic analogy fails. At national levels, technocratic bureaucracies are subordinate to, and embedded within, electorally accountable national governments. In the United States, for example, they were very much the creatures of the Roosevelt Presidency, with its huge electoral mandate (Shapiro 2004: 5–6). Though still hard for democratically elected politicians to control, those difficulties are greatly exacerbated within the European Union, where unelected bureaucrats supply the executive. As I observed *a propos* courts, within the Member States delegated powers are also subject to national public opinion. For example, the national media can mobilise criticism of a given measure, agency or official in ways that place them under political scrutiny and can lead to changes. For the

reasons explored earlier regarding the absence of an EU wide public sphere, that is much harder to achieve at the European level.

In fact, the European Union employs technocratic governance in part to substitute for the absence of a European collective or public. The separation of policy making from politics is said to be possible because of a putative distinction between regulatory and redistributive measures. Unlike the latter, the former supposedly require little or no democratic endorsement because they do not involve transfers from one group to another, but rather consist of fair and mutually beneficial general rules that apply equally to all (Scharpf 1999). However, this distinction is too neat (Føllesdal and Hix 2005: 10–12). Well designed regulations may produce diffuse, long-term benefits, but even they are not costless to implement and often impose particular and immediate burdens on specific, geographically located groups, not all of whom were previously enjoying unjustified privileges. When these decisions form part of a programme of government within a unitary system, the additional burdens on specific groups and regions can be eased or off set by some form of log-rolling. Sometimes such compensation relates directly to the costs of the given policy, at other times to supporting a quite different initiative of greater concern to the group or region. In the international arena such trade-offs are harder to organise. For example, it may make sense within the overall scheme of British politics, say, to compensate Cornish farmers, but this trade-off proves less compelling for other states. As a result, no policy might get made, especially if a Member State can exercise a veto.

Technocratic governance supposedly overcomes this problem (Majone 2001; European Commission 2001: 29). Notionally, the fact that technocrats are national appointees, often from government-sponsored research departments, ensures Member State interests are protected. In reality, though, they have no electoral or other incentive to consult these concerns. Given that technocrats share a common professional interest and discourse, what actually emerges is a technocratic consensus. However, that does not make it necessarily 'objective' let alone 'efficient' or in the 'public interest'. The interests and concerns of experts may not be those of the population at large, while they are no more expert on the ethical and ideological context within which most policies have to be placed than ordinary citizens (Shapiro 2004: 9–10). For example, experts on nuclear power are likely to find its promotion a desirable matter and will no doubt offer a highly technical, and in their view satisfactory, evaluation of its costs and risks. But that does not mean an efficient nuclear energy policy is in the 'public interest', however deliberatively the experts concerned may have arrived at their views.

As in the United States, such expert consensus can be counter balanced by a requirement to consult and the ability of interest groups to contest the findings (Shapiro 2004: 10, 12–13). The EU appears to be gradually moving towards this scenario with its new emphasis on participation in the White Paper on European Governance (European Commission 2001: 11–19), the

development of administrative law and the probable adoption of something like the American Administrative Procedure Act (Shapiro 1994). However, despite the rhetoric about involving the 'general public' (European Commission 2001: 11), the main proposals for consultation refer to 'civil society organisations', 'interested parties', 'partners' and 'stakeholders' (European Commission 2001: 14, 15, 17, 21; Magnette 2003: 149–50). There is a single, ritually pious, reference to the importance of European political parties (European Commission 2001: 16) and none at all to their rather more substantial national counterparts. Although the White Paper recognises the dangers of consulting what are often self-selecting and unaccountable bodies, the proposals it offers for overcoming the resulting biases are largely superficial (Føllesdal 2003). Therefore, this policy still risks favouring well-funded special interest groups able to sponsor their own team of counter experts, whose own interest is often at variance with that of the public at large (Crouch 2004). None of these groups need be particularly democratic themselves and involve the citizens they allegedly speak for in their decisions. They too claim to act as proxy citizens. This tactic is even truer of most consumer and public interest organisations than of certain producer groups. After all, unions at least have a degree of internal democracy. Worse, the ability of many NGOs to criticise regulatory proposals is constrained by their reliance on EU funds, itself a sign of their low levels of membership (Warleigh 2001). Meanwhile, the focus remains on the particular policy and certain specific problems that might arise from it rather than policy making overall.

Throughout the document, the Commission styles itself the ultimate guardian of putative European interests. Yet, it provides no reasons for why it should be so regarded beyond an unsubstantiated claim to be above sectional interests (e.g. European Commission 2001: 29). In other words, it makes a virtue of its very lack of democratic accountability (Føllesdal 2003). The other potential people's tribunes within this scheme are unelected judges (European Commission 2001: 8, 25). Though portrayed as defenders of procedural rectitude, they will inevitably end up making substantive as well as procedural judgements, especially as the US experience suggests they will have to become themselves experts in the given field rather than legal generalists in order to cope with competing expert testimony (Shapiro 2004: 6). Certainly, the political dimensions of EU law will become ever more apparent, rendering the court's decisions open to contestation by rival political actors (Shapiro 1999; Harlow 1996: 224–5, 1999: 52).

These criticisms should not be taken as suggesting that transparency and consultation with NGOs and stakeholders can serve no democratic purpose (Héritier 1999; Magnette 2003: 150–1). Obviously, more active citizens can benefit others beside themselves and such scrutiny has increasingly played an important role in mature democracies. However, they cannot provide all the benefits of democracy. Nor can technocratic government be shown to render such democratic accountability unnecessary.

Technocrats and experts rarely possess the unquestioned legitimacy that the delegatory model assumes. At an everyday level, the public are all too aware that professionals, such as doctors, may for one reason or another make mistakes or be governed by professional codes or interests that are not necessarily in line with the concerns of those they purport to serve. Moreover, the high reliance of modern governments on technocratic advisors also means that they tend to be treated with much the same distrust as politicians. For example, the BSE scandal tarnished politicians and experts alike and led many to doubt the advice given in its aftermath. Though most modern democracies do delegate power to outside agencies, these are usually – however imperfectly – subject to greater democratic scrutiny and influence than can be the case in the European Union. Indeed, they are most widely used not as regulatory bodies but as service providers (Shapiro 2001: 14). In these cases, a managerial ethos seems more appropriate and government control less difficult to obtain – not least by being able to fire managers who become electoral liabilities.

Thus, delegation cannot substitute for traditional democracy at the EU level. The issues concerned can rarely be decided on technical criteria alone, which in any case may be contested among experts, and need to be placed within the broader context provided by democratic decision making. Nor do technocrats necessarily possess more legitimacy or prove less self-interested or prone to error than politicians. Here too, democratic accountability appears desirable. Though the new forms of citizenship provided by appeals to Ombudsmen or the courts, greater transparency, and consultation with stakeholders and NGOs partly fill this gap, they also suffer from some of the same problems. They too act as proxies for participation by citizens themselves and tend towards the technocratic and the particularistic.

Conclusion: between national and transnational citizenship

EU policies need a degree of old style democratic endorsement and accountability that the new forms of citizenship prove unable to provide. Neither rights nor interests alone can create or legitimise either a European demos or an EU wide public sphere. Yet, without such a people or sphere, there can be little hope of creating a truly collective democratic decision making procedure at the EU level, capable of aggregating citizens' interests in a fair manner. Taken on its own, therefore, the EU will always suffer a democratic deficit.

Fortunately, though, the European Union is not a stand-alone organisation but remains in certain crucial respects an intergovernmental and international body. Blending old and new forms of citizenship within the European Union is to a large degree a matter of so mixing the national and transnational that it is to the advantage of both. Though this chapter has

concentrated on the democratic weaknesses of the European Union, it is important to acknowledge those respects in which it supports democracy at the national level. The European Union assisted the transition to democracy in Greece, Spain and Portugal and will no doubt similarly bolster democracy in the new Member States from Central and Eastern Europe. The emphasis on human rights and the rule of law has also had beneficial effects in established democracies. Membership has given many of the smaller Member States an international status and influence they previously lacked, while all have gained some benefits through having a say in the management of certain processes and externalities associated with the other Member States that affect their domestic economies. EU law and regulations can also be a further resource whereby individuals and a whole variety of interest and citizen groups can challenge the actions of their national governments.

However, in other respects the European Union weakens the domestic democratic control of executive action. As we have seen, executives can often push through measures at the EU level that would be insufficiently supported or even bitterly opposed in the domestic context. Likewise, EU legal norms may clash with, and occasionally subvert, equally valid national legal norms that possess the additional legitimacy of democratic endorsement. Delegation within the EU goes beyond that at the domestic level and is freer from public sway or accountability. Though, as noted above, new forms of citizen action can make these agencies and the regulations they produce a democratic resource, they can also further advantage certain already privileged interest groups and deepen inequalities in traditional forms of participation and influence at the domestic level.

These considerations suggest there are democratic limits to the EU. Nor can the EU's weakening of certain forms of democratic accountability be simply traded off against the benefits it brings. For these very benefits are lessened and even turned into burdens through not being subjected to the democratic process, since they may fail to respond to relevant citizen concerns as a result. In part, these limits can be monitored and even partially overcome by strengthening the role of national democracies in EU policy making (Harlow 1999: 19–23). Governments can be made more accountable for their European policy before national parliaments and their committees, as is the case in Denmark. EU institutions, particularly the Council, can also be made more transparent in their negotiations, making it harder for Ministers to obscure their true position.

The Constitutional Treaty contains some moves in this direction – for example, by imposing an obligation on the Commission to keep national parliaments adequately informed of EU developments and giving them a limited role in policing infractions of subsidiarity (Protocol on the Role of National Parliaments in the EU). Of course, how far they become a real resource for more informed discussion of EU politics at the domestic level is a matter for national politicians themselves. Even such limited measures are

sometimes criticised for being largely negative – a way of constraining further integration. That need not be the case. They may also work to give integration greater legitimacy. By highlighting not just national but also ideological divisions over European policy, many of which cut across national borders, they could also help revitalise EU elections as reflecting European and not simply domestic policy concerns (Magnette 2003: 155–6). However, the fact remains that democratic legitimacy is largely lent to the European Union through the old forms of democratic citizenship that prevail in the Member States. Given that there is no prospect in the foreseeable future of the EU developing adequate comparable mechanisms of its own, European citizenship must continue to be but an adjunct to national citizenship. Bringing the one more firmly under the scrutiny of the other, particularly with regard to decisions by the Court and other unelected bodies, and to some degree limiting the scope for European integration itself, provides the only viable way to enhance democracy within the European Union.

Notes

1. An early version of this paper was given as a Public Lecture at the Institute for the Study of Europe, Columbia University on the 18 November 2004. I'm grateful to Giovanni Moro and the Active Citizenship Foundation for asking me to give this lecture, to Nadia Urbinati for chairing it, and to Jeremy Waldron for acting as a discussant. Research for this paper was undertaken as part of the 'Democracy Task Force' FP6 NEWGOV project (FP6506392) and the writing completed while a Visiting Fellow at the National Europe Centre, ANU. Helpful comments on an earlier draft were provided by Niamh Nic Shuibhne, Dario Castiglione, Jo Shaw, Neil Walker, Andreas Føllesdal and Alex Warleigh.
2. Turnout in the June 2004 election was 45.7 per cent. It should be remembered this was the first election following accession by the ten new members and that some countries have compulsory voting, for example Belgium, and turnouts of over 90 per cent.
3. Arguably Rawls himself partly acknowledges this fact when he explicitly assumes cultural attachments as undergirding agreement on the principles of justice in Rawls 1993: 277.
4. Although over 50 per cent of EU citizens support membership, other data – such as the question on feelings towards dissolution that has now been dropped from Eurobarometer surveys – suggest this support to be weak with Euroenthusiasm (like Euroscepticism) a minority pursuit, and apathy and ignorance the norm (Blondel *et al*. 1998: 62, 239–40).
5. These figures come from Eurobarometer 60 (published February 2004 and based on fieldwork October–November 2003), and the results of earlier studies reported there. I have used results based on the old 15 rather than the new 25 because these can be placed in the context of a general trend. Figures from Eurobarometer 62 (Field work October–November 2004, Publication December 2004) reveal the new members to be on average a little more positive about the benefits coming from the European Union. As a result, the slow decline in approval of the European Union from the high point reached in the early 1990s appears, temporarily at least, to have been slightly reversed. In fact, new members almost always boost average

support for the European Union, after which it declines slightly. The figures relating to identity have been remarkably stable over the past decade or so (see Blondel *et al*. 1998: 62–5).

6. For electoral trends in the European Union, see: http://www.elections2004.eu.int/epelection/sites/en/results1306/turnout_ep/turnout_table.html
7. Even arguments for secession by national minorities have to respect this nestedness to some extent. For, the knock-on effects for the larger entity have to be taken into account to some degree. If secession left the remainder unviable, say, or significantly less well-off, then most accounts would view it as unjust.
8. See in particular the assertions of the supremacy of EU law enunciated by the ECJ in the early 'federalising' cases, for example Case 6/64 *Costa* v. *ENEL* ([1964] ECR 585) and Case 11/70 *Internationale Handelsgesellschaft* ([1970] ECR 1125).
9. Case C-184/99 *Grzelczyk* v. *Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, para. 31.
10. In Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125, 1134. See also Case 29/69, *Stauder* v. *Ulm*, [1969] ECR 419, at 425 where the Court first stated that fundamental rights were 'enshrined in the general principles of Community law and protected by the Court'.
10. In Case 4/73, *Nold (II]*, [1974] ECR 491, 507.
11. For example, Case 362/88 *GB-INNO-BM* v. *Conféderation du commerce luxembourgeois* [1990] ECR I-667, Case C-384–93 *Alpine Investments BV* v. *Minister van Financièn* [1995] ECR I-1141 and commentary in Jorges 1997.
12. See especially Case C-159/90 *Society for the Protection of the Unborn Child (SPUC)* v. *Grogan* [1991] ECR I-4685.
13. As Romano Prodi put it in July 1999, 'at the end of the day, what interests them [citizens] is not who solves these problems, but the fact they are being solved'. (quoted in Magnette 2003: 148).

Legal Cases

Case 6/64 *Costa* v. *ENEL* [1964] ECR 585
Case 29/69, *Stauder* v. *Ulm* [1969] ECR 419
Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125
Case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR 1125, 1134
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