Constitution-making and Citizenship Practice – Bridging the Democracy Gap in the EU?*

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Abstract

The article identifies the democracy gap as the tension in the European Union (EU) between demands for participatory constitutionalism and the limited capacity of constitutional engineering to meet them. It works with the concept of citizenship practice as the process that establishes the institutionalized terms of citizenship within a polity. The article argues that conventional views of constitutionalism have not accounted for a process that will bridge this gap; and uses the case of citizenship and constitutionalism to illustrate the paradox that, while there is a widespread consensus in favour of liberal democratic constitutional objectives and principles, constitutional agreements have faced significant opposition.

I. Introduction

After the optimism for closer integration generated in the late 1980s by the Single European Act (SEA), the Treaty on European Union (TEU) has led to an

unsteady and sometimes crumbling picture in 1990s; one that is often presented as a series of deficits such as the democracy, legitimacy, authority, and political deficits (Wallace, 1994; Dehousse, 1995; Weiler *et al.,* 1995). Our concern, the *democracy deficit*, has been defined as a 'gap between formal legitimation and material democratic deficiency' (Weiler *et al.,* 1995, p. 11). It is measured against perceptions of democracy based either on the experience or the conceptual expectations of nationally defined frameworks. Both ideal and existing democracy are firmly linked with the assumption of a national state. Democracy thus usually implicates the government of the people within the institutional arrangements of the modern nation-state. If this is the yardstick for measuring the democracy deficit in the European Community, and now Union (EC/EU), then any measurement to overcome the deficit is implicitly directed towards the establishment of democratic elements similar to the national experience. The democracy deficit, then, indicates European shortcomings *vis-à-vis* national models.

This approach to the EU's democracy deficit faces two challenges. First, national democracy has become a largely contested concept itself. That is, the relationship between the 'normative although impossible ideal' and the 'concrete, yet quite different, contemporary reality' (Green, 1993, p. 30) has been found to develop into a growing tension between the two poles of the democratic ideal and democratic practice, not only in the non-state polity of the EU, but also in national polities (Habermas, 1991; Walker, 1993; Green, 1993; Unger, 1986). With the grounds of popular sovereignty becoming increasingly fragmented, access to democratic participation also has become diffused (Habermas, 1991; Linklater, 1996). Second, a state-like development of the EU polity seems rather unlikely. After Maastricht, the integrationists' federal option seems unlikely, as does the more loosely defined intergovernmentalists' model of the EU as an international organization. Nonetheless, the EU's *acquis communautaire*, includes a shared constitutional framework to which the 15 Member States have referred part of their sovereignty. This quasi-constitutional basis substantiates the view that a new polity is taking shape. If one shares the observation that none of the familiar two models fits the Euro polity, and that this new political entity does indeed conform with characteristics of an emergent polity, then it is important to identify political issues to overcome the lack of political substance in the EU which is considered to be crucial for national politics (Dehousse, 1995, p. 120).

The article proceeds in four steps. The first section discusses the gap between principles and practices as the paradox in contemporary constitution-making. To that end, it provides a brief look at the renewed interest in constitution-building and constitutionalism. It will focus on how much of it is rooted in conventional liberal democratic constitutional thought and has not addressed one of the classic

questions raised by any liberal democratic constitution; that is, who is to be governed, what defines them as 'citizens', and why they will consent to it. The next section introduces the concept of citizenship practice, with a view to linking the social construction of identity to the process of constitution-making. The following section illustrates that the revision of the TEU – referred to during the negotiations of the 1996–97 Intergovernmental Conference (IGC) as 'Maastricht II', and now after the final meeting of the IGC on 16–17 June 1997 in Amsterdam, as the 'Amsterdam Treaty' – reflects the fact that there is a developing process in which the definition of the boundaries of belonging and citizenship rights in Europe includes politics from below; that is, the struggle for citizens' rights by interest groups. The final section will look at the tension between emerging forms of citizenship practice and European constitution-building.

II. 'Old' and 'New' Constitutionalism

There is a paradox in contemporary constitution-making. While there is an emerging, and perhaps unprecedented, consensus around the principles and features of what will be referred to as 'old constitutionalism', there is not the same degree of support for constitution-making processes and what they may or may not produce. The incongruity is captured by a *Financial Times* headline in October 1992, which asked, 'Where are our Madisons?', in an attempt to argue that what stood in the way of the construction of the new Europe were leaders that lacked the vision of their eighteenth-century American counterparts (Siedentop, 1992). The vision may be found in the heart of eighteenth and nineteenth-century liberal constitutional theory, with its emphasis on the separation of powers and entrenched rights. The underlying objective of constitution-making in high modern times is to find the right form of institutional architecture to ensure that the procedural test of legitimacy put to all forms of liberal democratic polities will be passed.

What is most interesting about this discussion about constitution-building and the democracy deficit, is that it has taken place almost completely isolated from another raging debate, that of citizenship. There has been, in the literature on constitutionalism, less regard for the debate as to who will be governed by this new structure, on what basis will they be defined as members of the political community, what role they will play in defining the basis for political authority, the rights they will have entrenched, and why they would accept the legitimate authority of the polity even if it passed the liberal democratic procedural test. The example of the EU illustrates that the challenge is not simply a procedural one of finding the right mix of liberal democratic institutions, procedures and principles. Rather, there is a tension between an approach to constitutionalism

that may be described as 'constitutional engineering' and one that emphasizes what James Tully has called the 'politics of cultural recognition' in constitution building (Tully, 1995). Moreover, this tension may be understood as a product of emerging forms of what will be referred to as 'citizenship practice'; that is, the process that contributes to institutionalize the terms of citizenship. Although a great deal of the literature and debate on constitutional politics has focused on procedural elements, the much more fundamental question of what are the terms of citizenship in such a non-state polity as the EU, has yet to be addressed.

A constitution, as Alec Stone argues, defines what 'constitutes' a polity (Stone, 1994, p. 444). This implies 'who' constitutes the polity as well, and the process by which they define themselves as members of that polity. The constitutional dilemma faced by the EU is not simply of finding a Madison who will solve the procedural shortcomings but also a means to determine and accommodate in the constitutional process who has legitimate claims to make, how to make them, and to which institutions (where) to address demands. If the definition of the polity depends not only on what constitutes a polity but also on how this polity is constituted and reconstituted through practice, then an analysis of constitutional politics needs to take account of citizenship. To that end we bring citizens (back) into the constitutional debate. We examine citizenship practice as interrelated with the process by which citizens define themselves as legitimate claim-makers in the polity, thus resulting in demands for a role in the constitution-making process.

In varying degrees, the contemporary Madisons, commenting upon emerging and changing constitutions in settings as different as Canada, South Africa, the European Union, and eastern Europe, share a concern with the basic elements of modern constitutionalism that was central to the work of the American consti-tutional architects (Rosenfeld, 1994; Elster and Slagstad, 1988). There is a significant degree of consensus on the main objectives – that is, constraining the power of institutions and protection of fundamental rights – and on the key features of a constitution: the organization of the machinery of government, a mechanism for entrenching rights and an amending formula. Liberal democratic constitutional thought has sought to find some formula that strikes a balance between the need to place limits on the powers of government, guaranteeing basic political and civil rights for citizens and maintaining the capacity for effective decision-making that legitimizes the 'constitution' of political author-ity (Sartori, 1994). This has led to two sets of related institutional debates: first, over the weight to be given to various branches of government when separating powers; second, over the relative strength of different levels of government in the division of powers. In both cases, the use of government power is legitimized by an institutionalized set of norms that ensure accountability, the rule of law and transparency in decision-making.

Despite the consensus around constitutional objectives, a paradoxical situation seems to be emerging. While very few challenge the basic elements of liberal democratic constitutional thought – that is, limits on the powers of government and the entrenchment of basic individual rights - and the consensus around these principles is widespread, constitution-making has proved to be extremely difficult in advanced industrialized societies. The roots of this dilemma may rest in the fact that contemporary constitution-building, while finding fertile ground in the eighteenth and nineteenth centuries for the basic institutional and structural features that will 'constitute' a polity, may not have found a basis for understanding how individuals come together and create a sense of belonging, demand and recognize reciprocal rights and duties, and look for ways to gain access to those rights.

There are three sets of challenges that conventional modern constitutionalism faces when trying to understand contemporary constitution-building in advanced industrialized societies. First, it is not entirely clear who, as opposed to what, 'constitutes' the polity, or as Weiler (1995) says, 'who is the Demos'; on what basis will individuals see themselves as fellow citizens, with reciprocal rights and duties. Conventional liberal constitution-makers dealt with this in two ways that do not seem appropriate today. One approach was to assume the indivisibility and unity of the nation that stemmed from an identifiable trait. John Jay, writing in No. 2 of the *Federalist Papers*, justified the presence of a central government partly on the basis of the 'unity' of the American people. He claimed that:

> This country and this people seem to have been made for each other, and it appears as it was the design of Providence that an inheritance so proper and convenient for a band of brethren, united to each other by the strongest ties, should never be split into a number of social, jealous and alien sovereignties. (Jay, *Federalist Papers*, No. 2)

Clearly it is hard to imagine that any constitution in an advanced industrialized country could speak with such certainty about its 'people' and its political authority being 'made for each other'. Belonging is something that citizens see themselves as constructing and they are reluctant to assume that a constitution, by simply assuming that there is some natural unity, will create it.

Another approach to the question of who constitutes the polity begins with the assumption that there is no common basis for recognizing a sense of belonging; rather, the creation of a liberal constitution, with its representative institutions, limited government and entrenched rights will create a sense of belonging to the same political community. The classic expression of this in the nineteenth century is the statement by Massimo D'Azeglio, one of the architects of a unified Italy, who is reported to have said that the Risorgimento, after creating Italy, had to create Italians. There are many more contemporary examples of the attempt

to use the liberal state as a source of identity, cohesion and unity. The problem with this approach is that it presupposes that a sense of belonging is the result of the work of a constitutional architect and that the constitutive elements of a polity are what are mapped out in its blueprints.

A second challenge faced by conventional constitutionalism is that the consensus on basic political and civil rights leaves little room for the consideration of other types of rights – social, economic, reproductive and environmental – that may be seen as equally important (Held, 1991). If what defines belonging is the protection of rights, and the constitution that gives expression to citizenship will guarantee those rights, it is to be expected that every time the constitution is open to debate, there will be a discussion of what rights deserve recognition. For instance, any contemporary attempt to change or build a constitution will have to deal with the fact that gender equality may be seen to be as important as the right to freedom of expression (Tully, 1995). The third, and perhaps the most difficult challenge for conventional constitutionalism is that the existing process of constitution-building does not give expression to emerging forms of citizenship practice. There is a tension between the view that constitutions codify and entrench procedures and structures, and the ongoing discussion about the terms and meaning of citizenship. The latter involves much wider participation and is an endless activity, while the former implies finality. The result is questions about the process that achieves this final blueprint, about how it is interpreted and who were its architects.

Conventional constitutional thought has not gone completely uncontested in the recent literature. There is an emergent school of thought, labelled the 'new constitutionalism', that begins with the premise that constitutional thought has not taken into account the extensive expansion of the politically active demos, partly as a result of existing liberal constitutional principles (Elkin and Solton, 1993). It also needs to take into consideration the policy-making needs of contemporary polities; and that political institutions shape individuals and the nature of their belonging to a political community (Elkin, 1993). This approach makes two valuable contributions to the discussion of constitution-building. First, it is sensitive to the fact that the political nature of the demos is lacking in the 'old' constitutionalism; and that the success of any constitutional regime rests on the extent to which it reflects how those governed by it see their political role. If citizens define themselves as part of a participatory, inclusive political process, they expect this will be mirrored in, and encouraged by, their constitution-building process. Second, the 'new' constitutionalism gives an important role to how political institutions shape individuals and how they relate to each other: constitution-makers must recognize that institutions are formative.

The major weakness with the 'new' constitutionalism is that it does not give enough attention to the possibility that individuals shape constitutions: constitu-

tion-building is not only a top-down process. In a politically expansive demos, it must also have elements of popular participation in the construction of the terms that will decide how individuals will relate to each other as, possibly, citizens and members of a political community. This leads to another shortcoming that the 'new' constitutionalism shares with the 'old'; that is, it says very little on the process of constitution-making. Who will take part?; on what basis and in what capacity?; how will decisions that 'form' individuals be made? These are not merely procedural issues but normative questions about what type of democracy a polity will strive to achieve. The search for answers to these questions becomes more challenging if the potential for a 'democratic surplus' in constitutional politics is achieved. This 'surplus' refers to the notion that, 'constitutional politics, due to its extraordinary nature, has the potential to promote public participation of individuals otherwise dedicated to private happiness' (Arato, 1994, pp. 173–4).

The 'engineering' approach to constitutionalism does not entirely dismiss the notion of the people; most of its supporters would argue that the consent of the 'people' is necessary for a liberal democratic order to be considered legitimate. However, as Russell points out, 'those who share a constitution must first agree to be a people' (Russell, 1992, p. 6). This means some broad acceptance of the terms of belonging, the rights conferred with that belonging and access to them. As we will see shortly, these are the constitutive elements of what is referred to as 'citizenship practice'. If members of a polity are engaged in an ongoing, inclusionary discussion about what constitutes the terms of belonging, then it is likely that they will place demands for a similar constitutional process. Constitution-building that does not account for these demands will have a difficult time imposing final outcomes. We can argue, then, that the issue is not where are our Madisons to provide direction to constitution-making. Rather, it is what sort of constitution-making process can reflect the liberal democratic principles of limiting the powers of government and the entrenchment of basic rights, while accommodating changing processes by which belonging, rights and access to rights are determined. The next section focuses on citizenship practice as one way of addressing the democracy gap in contemporary constitution-making.

III. Citizenship Practice

The concept of citizenship practice provides insight into the democracy *gap* as it offers the opportunity to include the process of institutionalization in the debates over the philosophical terms of citizenship on the one hand, and functional procedures on the other. In the broadest terms, citizenship defines a relation between the individual and the political community (Wiener, 1997a, b). It concerns the entitlement to belong to a political community, the latter having

the right and the duty to represent community interests as a sovereign *vis-à-vis* other communities and *vis-à-vis* the citizens. This model of a relationship between two entities, namely the individual on one side, and the representative of a larger community on the other, has provided modern history with a basic pattern of citizenship (Tilly, 1975, p. 32). These three elements (individual, polity/community, and citizenship practice as the relation between the two) are crucial for the analysis of citizenship practice. Since any study of citizenship has referred to these three elements in one way or other, they are termed the three *constitutive elements of citizenship*. The first two elements, namely the individual and the community, have been stressed, especially by contractual approaches to citizenship. However, the third – relational – element has not received much attention. Yet, there is an increasing awareness of the fact that citizenship cannot be dealt with on the basis of formal criteria alone. Citizenship always represents more and at the same time less than the sum of its parts. That is, citizens contribute to the creation of a community, yet, not all persons who reside within the same geographical spaces enjoy the same citizenship privileges; the discussion of so-called third-country nationals in the European Union is a case in point (ARNE, 1995: Geddes, 1995; European Parliament, 1996; Alternative Summit Papers, 1996; ECAS, 1996; Justice, 1997; Peers, 1996).

To assess these underlying processes, the focus shifts to the dynamic aspect of citizenship which develops from the interplay of the constitutive elements over time and contributes layers of historically derived meaning to the concept. Three historical elements of citizenship allow for a conceptualization that takes account of historical variability, and thus avoids presupposing a specific situatedness of the constitutive elements. These are rights, access to participation and belonging. *Rights* refer to the legal entitlements of an individual towards the community (Marshall, 1950; Held, 1991, p. 20). *Access* as the second element of citizenship is about the conditions for practising the relationship between citizen and community. This perspective of citizenship may be understood as access to political participation. Conditions of access are set by regulative policies including, for instance, social, market and visa policies. Access, therefore, hinges on socio-cultural, economic and political mechanisms of inclusion and exclusion; that is, access may be denied because the means to use citizenship rights, such as proper education, communication, or transportation may not have been sufficiently established. The third historical element encompasses two modes of *belonging* to a community. One is identity-based, the other hinges upon legal linkages to an entity which are currently based on either the law of soil or of blood (*ius solis* and *ius sanguinis* respectively); or, as in the EU, on nationality of one of the Member States. Every person residing within a particular area has potentially the opportunity to participate in the creation of collective identities through participation in the work place, in cultural matters, or other spaces of the
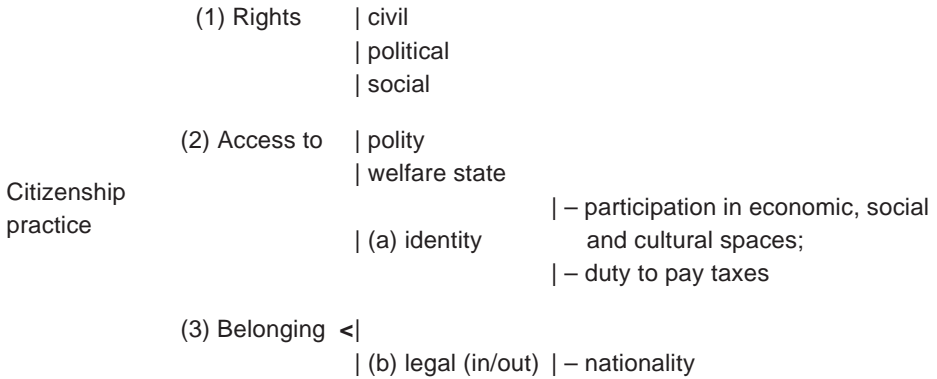
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                  (1) Rights      | civil
                                  | political
                                  | social

                  (2) Access to   | polity
                                  | welfare state
Citizenship                                        | – participation in economic, social
practice                          | (a) identity       and cultural spaces;
                                                   | – duty to pay taxes

                  (3) Belonging  <|
                                  | (b) legal (in/out)  | – nationality
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Figure 1: Citizenship Practice.

Source: Wiener, 1997a (in press).

community. As residence is the crucial aspect for participation, belonging is, therefore, about borders as citizens derive certain rights and opportunities of access based on their belonging to a bounded sphere.

While it is possible to single out the three historical elements, it is important to note that they are interrelated. They reflect a process-oriented or dynamic notion of citizenship; and add contextualized meaning to the concept of ideal citizenship, defining citizenship as stipulating rights, providing access, and creating a feeling of belonging and identity. They contribute to create a 'concrete' citizenship that is particular to each community and are hence central to an assessment of the institutionalization of the terms of citizenship which, in turn, define the democratic character of a polity. Figure 1 provides a scheme for such a constructive approach to citizenship practice.

As this scheme demonstrates, citizenship is seen as the practice which contributes to institutionalize rights, access and belonging as the terms which give it substance. This practice encompasses both policy-making and politics. The approach is not based on a narrow legal definition of citizenship, nor does it seek to assess the potential of European citizenship to develop a European national identity. Rather, it aims at an understanding of characteristic features of European citizenship as one aspect of constitution-building. It assumes citizenship to be constructed in a practice particular to time, place, actors and institutions.

IV. Citizenship Practice and Maastricht II

The renegotiation of the Maastricht Treaty at the 1996–97 Intergovernmental Conference (IGC) has brought to the surface once again many of the frustrations

and hopes for the EU that emerged in the ratification process for the initial Treaty. In preparation for the final IGC meetings, an increasing number of interest groups and committees of the European Parliament have sought a path for a Europe in which citizens would be able to participate in the 'construction and expansion of the EU' (Eurotopia, 1995, p. 2). The fear is of a process of constitution-building that denies participation to European citizens in the construction of the norms, institutions and visions that will define citizens' rights, access and a sense of belonging in the new Europe. It seems possible that a feeling of belonging may be created based on participation of groups of citizens in various areas of the European non-state polity. Such a fragmented creation of belonging raises questions about the classical democratic idea of nationally derived belonging and identity attached to a demos. It challenges assumptions about the democracy deficit and constitutional politics to counter its effects not only in the EU but also in industrialized countries in general.

Consequently, the EU's non-state and post-national framework of citizenship practice poses an opportunity and a threat for democratic participation. Thus, 'European citizenship can be regarded as a step towards a new concept of politics inside and simultaneously beyond the framework of the traditional notion of politics defined by the nation-state. Here however, a large problem looms: how could one define the concept of democracy in such a framework?' (Preuss, 1995, p. 280). Is there not a democracy gap which cannot be overcome in a non-state policy? In the remainder of this section we address the European case of post-national constitutional politics as it is brought to the fore by post-Maastricht social forces' demands of citizenship rights. The section begins with a brief summary of pre-Maastricht citizenship practice which contributed to the state of the citizenship *acquis communautaire*.

The story of citizenship practice began during a period in the 1970s when Community politicians voiced the need to develop a European identity. The debates over identity which ensued generated the policy objectives of 'special rights' for European citizens and a 'passport union'. Both aimed at the creation of identity based on a feeling of belonging. According to the approach to citizenship pursued in this article, identity is one aspect of the twofold historical element of belonging. It hinges on the rules of membership on the one hand, and a feeling of belonging on the other. The next stage of Community development in the 1980s involved the need for an increasing movement of worker-citizens as one basic condition for economic flexibility. With this movement, the demand for greater social and political equality among 'foreigners' and 'nationals' arose. This led to demands for greater democracy and an increasingly public awareness of a democratic deficit, both in procedural and normative terms, emerged. These demands for greater access to participation both in political and socio-economic terms were renewed in the changed political opportunity structure of the 1990s.

They resulted in the adoption of political citizenship rights with Article 8 EC Treaty, as well as the stipulation of the rights of free movement and residence not only for the employed and their families, but also for other persons, under the condition of economic security and nationality.

EU citizenship practice was thus based on the development of special rights and passport policy with the objective of creating a European identity. Policy-makers then had pursued citizenship policy long before political citizenship rights were inserted into the Maastricht Treaty. As citizenship policy developed over the decades, a social construction of 'European' citizenship can be discerned. It suggests that a new type of belongingness to the EU has been created based on everyday practices of groups of citizens targeted by EC/EU policy programmes, including workers, employees, employers, students and academics. By crossing borders, carrying burgundy coloured passports at external borders, sharing new voting practices in European and municipal elections, residing in other Member States, and experiencing a variety of European cultures, these groups have contributed to substantiate a notion of Europeanness. To summarize, in the 1970s a special rights policy aimed to create an identity for Europe as an actor in international politics (akin to national identities); in the 1980s, a passport policy established new opportunities to practise civil rights (of movement, establishment and residence); and in the 1990s political rights were introduced to provide access for those who had developed new feelings of belonging to new areas within the EU.

The argument about the political dimension of citizenship as expressed by a special rights policy suggests a republican framework of citizenship policy-making. Passport policy brings in the policy-makers' belief in the communitarian idea of belongingness and identity, drawing on the modern idea of national identity as a unifying concept that was crucial for modern state-building successes in Western Europe. EC/EU citizenship policy that evolved from the idea of special rights and passport policy in order to create a European identity, has developed a fragmented citizenship policy establishing special rights, not for Europeans as a people, but for special groups of Europeans in the process. Rights were thus literally specialized, not special as policy-makers had planned when they spoke of 'Special Rights for European Citizens' within a 'Europe of Citizens' but as programmes that stemmed from the unifying inside/outside idea of modern citizenship. This fragmented citizenship policy did two things. On the one hand, it enforced boundaries among groups within the Euro polity. For example, while workers and their families, students and academics are encouraged to move, change their residence and vote in new spaces, other Europeans did not have that opportunity. On the other hand, it increased movement across the borders of national polities and contributed to the creation of distance between citizens and their polity of origin, changing the citizen–polity bond.

Both developments contributed to a changing situation of access to the polity and its welfare institutions (Meehan, 1993). From the perspective of this research, the problem of the democracy gap is better addressed once it is posed as one of citizens' full access to participation in the EU as polity and as a community of communities. Consequently, the democracy gap does not only stem from outdated constitutionalist assumptions about popular sovereignty in a nation-state, but it is also in part a consequence of crumbling welfare state regimes (Jenson and Philipps, 1996) which added a crucial normative dimension to the perception of democracy as both formal and substantive.

A discursive analysis of EU citizenship practice indicates that Union citizenship means much more than a simple compilation of rights. It is also about identities which are mobilized through participation in, for example, economic, cultural, social and political spaces. The multiple-layered identities of EC/EU citizens have proved a valuable resource to policy-makers who were interested in creating a political union. While two 'types of belonging (legal and identity-based) have been the target of EC/EU policy, it was the question of belonging in the meaning of 'identity' that was first mobilized by policy-makers. This was, however, not understood as national identity, that is as one that distinguished Community citizens according to nationalities, nor did it aim to replace national identity with a European one. Instead, belongingness to the EC/EU emerged according to what individuals did or might aspire to do with reference to economic and political participation. Crossing national borders as economically active citizens, carrying burgundy coloured passports across external Community borders as travellers, exchanging knowledge as scholars and students, voting commonly for the European Parliament and sharing municipal governance as Union citizens were aspects of this process. Indeed, belongingness was generated step-by-step and area-by-area (Wiener, 1997b, Ch. 12). The short history of EC/EU citizenship practice reveals how citizens' identities were targeted by various Community policies (i.e. in the area of student and academic exchange, travel and consumer policies). However, it is important to keep in mind that, despite frequent references to the EC/EU's democratic deficit, citizenship practice was performed more clearly from above than from below.

This pattern seems to have undergone a sea change once citizenship was institutionalized in the Maastricht Treaty and subsequently became a theme of much concern of non-governmental organizations (NGOs), interest groups and political parties (Curtin, 1993). Indeed, Maastricht is viewed as the 'starting point, not the end point, for negotiation among interested parties' (Marks, 1993, p. 394). For post-Maastricht citizenship, it is nevertheless crucial to note that previous citizenship practice created shifts in the political opportunity structure that contributed to the emergence of new actors in constitutional politics. More specifically, with the establishment of formal citizenship rights, citizenship

practice seems to have ceased to be a top-down practice derived solely from Community institutions. Instead an emerging interest of social forces, such as social movements and interest groups, implies that constitutional practice now includes more actors. As the Imbeni Report to the EP indicates, 'Now that the Treaty has been ratified, consideration must be given to the new legal framework for improving it' (PE 206.762 and PE 206.250, 20 October 1993, p. 10).

Within this framework, new opportunities (and incentives) for citizen action were created. As the EP's first draft report on citizenship stated, '[t]he concept of citizenship of the Union as defined in Article 8 of the Treaty represents an important stage in the democratic construction of the political union of the European Community in that it postulates an active role for citizens of the Member States within the Community system' (PE 206272, p. 3). The report goes on to emphasize the political content of the citizenship clause, stating that while the 'nature and aims of the [EEC] articles [2,7,48,51,42-66,119,173,177] are purely economic', the TEU gives formal recognition for the first time to 'citizenship of the Union', and makes a definite commitment to a change in direction in the definition of 'European citizenship'. In practice, this signals a change in the subjective legal position of the individual in the Community legal system. Beyond these legal issues, the report observed political changes in the relation between the individual and the Union which influenced the meaning of citizenship on a daily basis. For instance, it claimed that:

> [I]n political terms, 'European citizenship' has to be interpreted as abandonment of purely economic European integration in that citizens are no longer merely subject to Community rules but become involved in the dynamic process of European integration and Community activities that affect and will increasingly affect their daily lives. (PE 206.272, B: Explanatory Statement, p. 7)

This statement points to the fact that the newly-created institutions are functional at the request of market flexibility and competitiveness. At the same time, they facilitate a step-by-step narrowing of the gap between economically included and politically excluded Europeans. While citizenship practice thus enabled inclusion based on new institutions and, relatedly, new supranational practices, it also generated political tensions. The normative demand for more access to democratic institutions, such as the right to vote, clearly brought to the fore the problem of inclusion and exclusion among Member State nationals and 'other' European residents, namely the so-called third-country nationals. Moreover, this focus on institutions and practices highlights the problem of the democratic deficit in the EC/EU as one that has two dimensions. It comprises both a procedural aspect - that is, a problem of supranational decision-making – and a normative element – that is, a problem of equality. While Maastricht has thus created a new institutional background for constitutional politics, it also presents

a challenge for European citizens, and demonstrates an increasing interest in the creation of an institutional framework for political participation in the EU. Indeed, there was a virtual explosion of public interest in Union politics as the 1996 IGC was convened. Many of the proposals put forward address citizenship claims. Citizenship practice has turned into one central aspect of constitutional politics from below.

V. Constitutionalism, Citizenship Practice and Maastricht II: From Democratic Surplus to Deficit

The discussion of citizenship practice illustrated a dynamic process by which citizenship became an important part of the construction of a European polity. The question is whether European constitutionalism can accommodate an active role for citizens of the Member States in the process that will define who they are and how they will be governed. Can European constitutionalism accommodate citizenship practice that has generated Arato's 'democratic surplus'?; that is, can it find ways to deal with demands for a more participatory, inclusive constitutional process? As we will see shortly, while citizenship practice has involved a dynamic between social forces and European elites, only half of the equation applies in the construction of a European constitution. There is the growing recognition that a European constitution will help create 'Europeans' (Preuss, 1995; Habermas, 1994); however, there is little evidence that some process and mechanism has been arrived at that will allow 'Europeans' a role in constituting their polity.[1]

Much has been written about the difficulties faced in the ratification process by the TEU, tracing the growing resistance to a range of factors from the plans for economic and monetary union, to doubts about the procedural deficiencies of the EU to dissatisfaction with some of the governments responsible for the agreement (Duff *et al.*, 1994; Bulmer and Scott, 1994). Resistance to the Maastricht Treaty created broad and sometimes strange coalitions of forces opposed to the agreement because it either went too far and not far enough in creating a new constitutional and political order for Europe. What they could all point to was a process that, on the one hand claimed to introduce the concept of citizenship with its attendant rights to political participation and, on the other hand, was secretive and final. This raised questions about who was making decisions about who would be citizens, about what rights they could expect and what were the terms of how they related to each other as citizens.

There is little evidence that the flawed process of 'mega-constitutional' politics (Dehousse, 1995) that characterized the Maastricht Treaty will be

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[1] Importantly with a view to the ongoing enlargement process there is a large group of potential 'European' citizens who have remained excluded from participating in the process of constitution-making.

replaced in the near future; nor is there any immediate possibility that some other constitution-making process will be implemented. The draft constitution of the European Union presented by the European Parliament in 1994 is a good place to examine the dilemma faced by constitution-builders. It states quite clearly that the, '[c]onstitution must be accessible and readily comprehensible to the citizens of the Union and must constitute the democratic alternative for revision of the Treaty as opposed to intergovernmental negotiation' (European Parliament, 1994, p. 5). This statement reveals two important points about the role of constitutions in the integration process; and the tensions that may result. First, a constitution implies moving away from intergovernmentalism. While intergovernmentalism may be justified in the treaty-making process, it raises a number of questions about the legitimacy of the entire European polity if the means to arrive at a constitution are restricted to closed discussions between executives. Second, citizens must recognize themselves in the constitution. While complex trade agreements, treaties or ordinary legislation may be inaccessible to the members of a political community, the document that enshrines the basic values and norms, and shapes how they relate to each other must be something that citizens can grasp.

There is a much more fundamental problem that emerged from the ratification process of the TEU. The process by which the constitution is arrived at is just as important as the substance of the agreement. It forms part of the aspect of substantive democracy which includes the societal participatory dimension. The forms of citizenship practice that have emerged within the EU ensure that elite accommodation that produces mega constitutional agreements without popular input will face serious challenges. The Maastricht difficulties indicate that it is not enough to present an agreement as a *fait accompli* that must be accepted without revision by more representative institutions and referendums. Citizenship practice that aims to be inclusionary and participatory dictates that citizens will take part in the process that defines the terms of belonging and how they will relate to each other; to paraphrase Stephen Elkin, it is difficult to put the democratic genie back in the bottle once it has been let out (Elkin, 1993, p. 118).

The EP report on the draft constitution does contain a section on the constitution-building process. It points out that the drafting of a constitution is an element of 'progress' on the path to gaining democratic legitimacy, and that the central focus for Parliament must be to gain the support of the Member States (European Parliament, February 1994, p. 14). It does not totally exclude citizens from the process and, in fact, claims that they are to be one of the protagonists in the process. However, their participation is to be channelled through their national parliaments and institutions. A number of options are spelled out for a European constitution-making process, ranging from deliberation on a draft presented by the EP to the national parliaments, to an Interinstitutional Confer-

ence. It does not mention the creation of a constituent assembly nor the establishment of public fora to discuss and deliberate upon Europe's constitutional future: citizens are protagonists only through their national institutions or through the European Parliament. This also may be problematic as relatively few people are aware of what the EP does or who are their MEPs. If the constitution of a European Union must be something that is accessible to all its citizens, it is difficult to see why an institution, albeit directly elected but that few people are familiar with, can gain significantly more consent than the Council or the Commission. Merely filling in the procedural gaps does not necessarily mean that the process for defining the terms of citizenship and the organization of political power will gain widespread acceptance.

The EP position on a draft constitution far exceeds the ambitions of the Commission or of some of the Member States. For instance, the Commission report on the implementation of the TEU expressed a clear desire for the continued evolution of European citizenship, and the strengthening of the instruments of accountability and transparency within EU decision-making (CEC, 1995). The first section of the report is dedicated entirely to democracy and transparency in the Union; and it opens with a discussion of Union citizenship and its associated rights. However, despite the fact that the report goes to great lengths to describe the rights ensured through Union citizenship, the importance of creating a sense of attachment between European citizens and institutions, the organization of the machinery of government and the limits to be placed on European institutions, nowhere does it mention that what is being discussed is a constitution let alone a constitution-making process.

The 1996–97 IGC presented an opportunity to open up avenues for more participatory constitutionalism that more closely matched emerging forms of citizenship practice. The preliminary positions taken by the Commission and the Council reveal a sensitivity to a more open and accessible process but there is no hint that the IGC will produce innovations in the constitution-building process or that it will be anything more than another round of constitutional engineering. For instance, the Commission's document to the IGC entitled, 'Reinforcing Political Union and Preparing for Enlargement', stated in February 1996 that this was the 'last and only' opportunity for the 15 Member States to reflect upon the future of a wider EU. It does go on to argue that 'ordinary' people will feel actively involved in a 'people's' Europe through a sense of European citizenship based on what is referred to as a European 'social model'; that is, the basic liberal democratic tenets of rule of law, protection of human rights, social rights (including employment) and sustainable rights. Clearly, this is a step forward in the articulation of citizenship, but it says very little about the process by which substance is given to the 'social model'. An indication comes later in the document where a more 'open' Europe is one that sees greater involvement of

national parliaments and more information made available by EU institutions. There is no mention of a discussion of how to engage in an ongoing debate about the terms of 'being European' or of how to enshrine that in a constitution.

The broad selection of preparatory work done for the IGC does provide some insight into the acknowledgement that 'European' citizenship is not simply about the granting of legal rights in the TEU. There is a great deal of attention given, especially in the Reflection Group report and the EP documents, to ensuring that European citizenship has a social dimension. There also seems to be an emerging argument that the IGC process requires greater transparency. However, there is no explicit argument found, either in the briefs prepared within EU or Member State institutions, that make the link between the lack of participation in the constitutional process and the needs of emerging citizenship practice. While all the interested parties point to the problems of a lack of openness faced in the Maastricht ratification process, almost all of them respond by addressing some procedural shortfall. This usually means providing public fora through the EP or national legislatures. The initial stages of the IGC process, then, have demonstrated a greater sensitivity to greater forms of participatory constitutionalism. However, the question is still viewed in terms of constitutional engineering, and of calibrating European and domestic institutional arrangements to create a more open process. There is little attempt to seek out new definitions of who will take part in the process, on what basis and towards what objectives.

VI. Conclusions

The discussion of citizenship practice and Maastricht II reveals that citizens have begun to engage with their political elites in a process that seeks to define their rights, access to them and who they are as citizens. European citizens have identified in Maastricht II a process that may enshrine the constitutive elements of citizenship practice. The result is a democratic surplus as citizens seek ways to be part of the constitution-building process. The problem they run into is the democratic deficit of 'old' constitutionalism; that is procedures and principles based on constitutional engineering that seek to find the right mix to pass the procedural test for liberal democracies. The discussion of citizenship practice reveals that constitution-building cannot simply create Europeans because it creates Europe. This must be part of a dynamic process that recognizes cultural diversity from many different social, economic and political spaces, not all of which are defined by territory.

Constructive work on citizenship had a relatively low-key reputation in the field of European studies which was mainly concerned with Member States' and Euro policy-makers' interests, following either integrationist or intergovern-

mentalist research agendas. A new angle was introduced to the discussion on democratic governance by bringing in citizens. The socially constructive approach advanced in this article focuses on the substantive elements of democracy. Importantly, it addresses questions about how rights are practised beyond the formal establishment of the citizen–polity relationship that lies at the core of 'old' constitutionalist approaches. This involves an assessment of citizens' access to the practice of voting as well as citizens' expectations as members of a community, that is, their sense of belonging and identity. Analyses of EU citizenship practice show, that the dimensions of belonging and access were always considered as interrelated with the rights dimension of citizenship.

The dimensions of access and belonging become assessable once the concept of citizenship practice which conceptualizes the relationship between the individual citizen and the community/polity is applied. As one constitutive element of citizenship, citizenship practice conceptualizes the changing relationship between citizens and their community of belonging and membership. In order to study the democracy gap, i.e. the tension between constitutional engineering and participatory constitutionalism, we need to reconfigure the concept of citizenship.

References

Alternative Summit (1996) 'Collected Pamphlets and Papers'. Florence, June. Unpublished ms.

Antiracist Network For Equality in Europe (ARNE) (1995) 'Modifications to the Maastricht Treaty in Sight of the 1996 Inter-Governmental Conference'. Rome, 14–15 July. Unpublished ms.

Arato, A. (1994) 'Dilemmas From the Power to Create Constitutions in Eastern Europe'. In Rosenfeld, M. (ed.), *Constitutionalism: Identity, Difference and Legitimacy* (Durham, N.C.: Duke University Press).

Bulmer, S. and Scott, A. (eds), (1994) *Economic and Political Integration in Europe: International Dynamics and Global Context* (Oxford: Blackwell).

Commission des Communautés Européennes (1995) *Rapport sur le fonctionnement du Traité sur L'Union Européenne*, SEC (95) 731, 10 May.

Curtin, D. (1993) 'The Constitutional Structure of the Union: A Europe of Bits and Pieces'. *Common Market Law Review,* Vol. 30, No. 1, pp. 17–69.

Dehousse, R. (1995) 'Constitutional Reform in the European Community: Are there Alternatives to the Majoritarian Avenue?'. *West European Politics,* Vol. 18, No. 2, pp. 118–36.

Duff, A., Pinder, J. and Pryce, R. (eds) (1994) *Maastricht and Beyond: Building the European Union* (London: Routledge).

ECAS (European Citizen Action Service) (1996) Citizenship of the Union. Revision of Part 2 of the Treaty (draft 15/03/96), Brussels.

Elkin, S. (1993) 'Constitutionalism's Successor'. In Elkin, S. and Solton, K. (eds) *A New Constitutionalism: Designing Political Institutions* (Chicago: University of Chicago Press).

Elkin, S. and Solton, K. (eds) (1993) *A New Constitutionalism: Designing Political Institutions* (Chicago: University of Chicago Press).

Elster, J. and Slagstad, R. (eds) (1988) *Constitutionalism and Democracy* (New York: Cambridge University Press).

European Parliament (1994) Session Documents, A3-0063/94 (Luxembourg: EP), 9 February.

European Parliament (1996) 'No. 10 Briefing on European Citizenship'. Task-Force on the Intergovernmental Conference, PE 165.893 (Luxembourg: EP).

Eurotopia (1995) 'Preparatory Conference of the Social Movements Towards the 1996 IGC'. *Newsletter* No. X, June.

Geddes, A. (1995) 'Immigrant and Ethnic Minorities and the EU's 'Democratic Deficit' '. *Journal of Common Market Studies,* Vol. 33, No. 2, pp. 197–217.

Green, P. (1993) 'Democracy as a Contested Idea'. In Green, P. (ed.), *Key Concepts in Critical Theory* (Democracy. N.J.: Humanities Press), pp. 2–18.

Habermas, J. (1991) 'Staatsbürgerschaft und nationale Identität'. In Habermas, J. (ed.), *Faktizität und Geltung* (Frankfurt/M.: Suhrkamp).

Habermas, J. (1994) 'Über den internen Zusammenhang von Rechtsstaat und Demokratie'. In Preuss, U.K. (ed.), *Zum Begriff der Verfassung* (Frankfurt/Main: Fischer), pp. 83–94.

Held, D. (1991 'Between State and Civil Society: Citizenship'. In Andrews, G. (ed.), *Citizenship* (London: Lawrence & Wishart).

Jenson, J. and Phillips, S. (1996) 'Citizenship Regimes: From Equity to Marketisation'. Paper presented at the conference on Social and Political Citizenship in a World of Migration, European Forum, European University Institute, Florence, 22–24 February.

Justice (1997) *The Union Divided. Race Discrimination and Third Country Nationals in the European Union (*London: Justice).

Linklater, A. (1996) 'Citizenship and Sovereignty in the Post-Westphalian State'. *European Journal of International Relations* , Vol. 2, No. 1, pp. 77–103.

Marks, G. (1993) 'Structural Policy and Multilevel Governance in the EEC'. In Cafruny, A.W. and Rosenthal, G.G. (eds)*, The State of the European Community, Vol.2, The Maastricht Debates and Beyond*. (Boulder: Lynne Rienner).

Marshall, T.H. (1950) *Citizenship and Social Class* (Cambridge: Cambridge University Press).

Meehan, E. (1993) *Citizenship and the European Community* (London: Sage).

Peers, S. (1996) 'Towards Equality: Actual and Potential Rights of Third-Country Nationals in the European Union'. *Common Market Law Review,* Vol. 33, pp. 7–50.

Preuss, U.K. (1995) 'Citizenship and Identity: Aspects of a Political Theory of Citizenship'. In Bellamy, R., Bufacchi, V. and Castiglione, D. (eds), *Democracy and Constitutional Culture in the Union of Europe* (London: Lothian Free Press).

Rosenfeld, M. (ed.) (1994) *Constitutionalism, Identity, Difference, and Legitimacy* (Durham, N.C.: Duke University Press).

Russell, P. (1992) *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (Toronto: University of Toronto Press).

Sartori, G. (1994) *Comparative Constitutional Engineering* (New York: New York University Press).

Siedentop, L. (1992) 'Where are our Madisons?'. *Financial Times,* 16 October, p. 21.

Stone, A. (1994) 'What is a Supranational Constitution? An Essay in International Relations Theory'. *Review of Politics*, Vol. 56, No. 3, Summer, pp. 441–74.

Tarrow, S. (1995). 'The Europeanisation of Conflict: Reflections from a Social Movement Perspective'. *West European Politics,* Vol. 8, No. 2, pp. 223–51.

Tilly, C. (ed.) (1975) *The Formation of National States in Western Europe* (Princeton, N.J.: Princeton University Press).

Tully, J. (1995) *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press).

Turner, B. S. (1990) 'Outline of a Theory of Citizenship'. *Sociology,* Vol. 24, No. 2, pp. 189–217.

Unger, R. M. (1986) [1983] *The Critical Legal Studies Movement* (Cambridge, Mass.: Harvard University Press).

Walker, R.B.J. (1993) *Inside/Outside: International Relations as Political Theory* (Cambridge: Cambridge University Press).

Wallace, H. (1994) 'European Governance in Turbulent Times'. In Bulmer, S. and Scott, A. (eds), *Economic and Political Integration in Europe* (Oxford: Blackwell), pp. 87–96.

Weiler. J.H.H. (1996) 'Legitimacy and Democracy of Union Governance: The 1996 Intergovernmental Agenda and Beyond'. ARENA Working Paper No. 22, Oslo.

Weiler, J.H.H., Haltern, U. and Mayer, C. (1995) 'European Democracy and its Critique'. *West European Politics*, Vol. 18, No. 3, July, pp. 4–39.

Wiener, A. (1997a) 'Making Sense of the New Geography of Citizenship – Fragmented Citizenship in the European Union'. *Theory and Society* (forthcoming).

Wiener, A. (1997b) European' Citizenship Practice – Building Institutions of a Non-State (Boulder, Col.: Westview Press) (forthcoming)