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Constitution Making and Citizenship Practice -
Bridging the Democracy Gap in the EU?

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CONSTITUTION MAKING AND CITIZENSHIP PRACTICE - BRIDGING THE DEMOCRACY GAP IN THE EU?

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ABSTRACT

The paper identifies the democracy gap in the European Union as the tension between demands for participatory constitutionalism and the limited capacity of constitutional engineering to meet them. It uses the notion of citizenship practice to illustrate the process by which rights, access to rights and belonging have generated a sense of European citizenship that demands participation in the constitution-building process. The paper 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.

INTRODUCTION¹

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. Carefully crafted agreements, that enshrine principles and procedures securing limited government, representative institutions and so on, have faced popular opposition in varied settings such as Canada and the European Union (EU). 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 who lacked the vision of their eighteenth century American counterparts (Siedentop, 1992). The vision, it continues, is to 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 article reveals that the underlying objective of constitution-making in high modern times — and of a great deal of the literature on the 'democracy deficit' in Europe — is to find the right form of institutional architecture (hence the search for an architect such as Madison) to ensure that the procedural test of legitimacy put to all forms of liberal democratic polities will be passed.²

¹This paper was first presented at the Tenth International Conference of Europeanists, Chicago, March 14-16, 1996, then at the Anglo-Spanish workshop on citizenship at the Sussex European Institute, University of Sussex, March 1996 and at the workshop *European Community Law and the Claims of Justice* at the Critical Legal Conference, University of East London, 6-8 September 1996. For comments on earlier versions, we thank the panel participants at Chicago and the workshop participants at the Sussex European Institute and at the Critical Legal Conference.

² The problem at hand, the 'democracy deficit', has been defined as a 'gap between formal legitimation and material democratic deficiency' (Weiler, 1995: 11). To address the deficits conceptually or politically requires some framework of reference which defines the core normative, instrumental, functional and/or ideal characteristics. Finding such a framework is made exceptionally difficult by the undefined character of the EU's polity. Thus, Closa argues for example that, '[t]he diagnosis, on which disagreement is hardly possible, is that the prerequisites for EU democracy are largely lacking' (Closa, 1996: 10). This led some students of the democracy deficit to conclude that 'the problems of democracy, legitimacy and effectiveness in the EU can never be solved within the present set of constraints placed upon it by the member states. The only logical solution from a strict democratic point of view is to strengthen the European Parliament at the expense of member states, which implies moving towards some form of federal system.' (Andersen and Eliassen, 1996: 11) These remarks about efforts to address the democracy deficit in the EU polity suggest that the real analytical challenge in addressing the problem lies in the question of how to establish democracy in non-state contexts? Others have, however, begun to wonder about alternative ways of thinking about this polity (Diez, 1995; Jachtenfuchs and Kohler-Koch, 1996; Jachtenfuchs *et al.*, 1996; Marks *et al.*, 1996). For more far-reaching and extensive elaborations about possible democratic organisation in the EU non-national non-state, see Philippe Schmitter's work (1996a; 1996b).

What is most interesting in 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.³ 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 they will 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 aim of this paper is to present a different perspective on the issues that emerge in this tension between constitutional engineering and participatory constitutionalism.⁴ Using the example of the European Community/Union (EC/EU), it will argue 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 emphasises 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 processes that contribute to the establishment of citizenship rights, access and belonging (Wiener, 1995: Ch. 3). It will be argued that, although a great deal of the literature and the debate on constitutional politics have focused on procedural elements, the much more fundamental question of what are the terms of citizenship has yet to be addressed.

A constitution, as Alec Stone argues, defines what 'constitutes' a polity (Stone, 1994: 444). We will argue that 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 EC/EU is not simply 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 and how.⁵ This leads us to shift the focus of constitutional political analysis to the practice of constitutional politics. 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

³ For an emergent debate on the relationship between democracy and citizenship, see: Preuss (1995, 1996), Closa (1996), Grimm (1995) and, in particular, Schmitter (1996a, 1996b). However, amongst those who acknowledge the link between citizenship and the democratic deficit, arguments about how to establish conditions for more democratic style politics in the EU differ among procedural, normative and/or participatory perspectives. We contend here that the normative/participatory perspective has been underestimated, and that this becomes most apparent when looking at constitution-building.

⁴ This tension has also been identified as the core problem of democratic politics today by authors who do not explicitly focus on constitutional politics. See for example, Walker (1993), Green (1993), Kaldor and Vejvoda (1996), Dunn (c.f. Walker, 1993), Lister (1996), Unger (1986). The policy challenge posed lies in developing a link between formal and substantive democracy (Kaldor and Vejvoda, 1996). Theoretically, the social construction of the gap has been characterised as isolating the classic democratic ideal from the messy political reality on the ground (Walker, 1993; Green, 1993).

⁵ As Closa (1996: 3) writes '[o]bviously, a procedural description of democracy does not exhaust its epistemological significance because certain sociological conditions or elements are required for its operation. And it is in this site where identity seems to have a constitutive role'.

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.

The paper is divided into four basic sections. The first provides a brief look at the renewed interest in constitution-building and constitutionalism as a result of a series of developments in a number of very different settings. It focuses 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 will they consent to it. The paper goes on to introduce the notion of citizenship practice, as an essential element for understanding constitution-building in high modern times. The second section introduces the notion of the EU's 'democracy deficit'. It argues that this deficit stems from a conceptual gap between democratic theory and practice and advances a way of bridging this gap by applying the concept of citizenship practice. The third section shows how the forthcoming revision of the Treaty on European Union (TEU) — referred to here as 'Maastricht II' — reflects 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 social forces. The final section will look at the tension between emerging forms of citizenship practice and European constitution-building.

1. 'Old' and 'New' Constitutionalism

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 the same concern with the basic elements of modern constitutionalism that was central to the work of the American constitutional architects.⁶ There is a significant degree of consensus on what should be the main objectives of a liberal democratic constitution — that is, constraining the power of institutions and protection of fundamental rights; and on the key features of a constitution: the organisation of the machinery of government, a mechanism for entrenching rights and an amending formula. In addition, 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 legitimises the 'constitution' of political authority.⁷ The roots of liberal democratic constitutionalism, whether they are found in Hobbes, Locke, Madison or Montesquieu, rest in trying to place limits on executive power. This has led to two sets of related institutional debates: first, over the relative 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.

⁶ For instance, see: Russell and Galligan (forthcoming); Rosenfeld (1994); Elster and Slagstad (1988).

⁷ For a recent example see Sartori (1994: xi) who states that, 'At bottom the problem is to combine effective parliamentary control with efficient government'.

There has been a continuing debate about the relative merits of either a presidential or parliamentary form of government; and within each of these models, whether the emphasis should be on an executive-dominated system such as the Westminster-model or a more diffuse decision-making structure, such as the American congressional model (Lijphart, 1992). In both cases, the use of executive power is legitimised by an institutionalised set of norms that ensure accountability, the rule of law and transparency in decision-making. A second debate, about the division of powers between levels of government, is one that is at the heart of constitutional debate, not only in federal systems or emerging federal systems such as the EC/EU; as the cases of Spain, France and recent discussion in Italy demonstrate, not even unitary constitutions provide finality to the territorial dimension (Wright, 1987).

The resurgence of interest in constitutionalism in the 1990s has been dictated in no small part by the collapse of authoritarian, totalitarian and, in one case, racist, regimes. It is not surprising that the debate in the literature and amongst constitution-makers has focused largely on the liberal democratic concern with limiting the powers of government and entrenching basic rights. However, in doing so, it has not paid as much attention to the basis on which a group of people define themselves as citizens and accept the rights and duties that go along with it. This brings us to a paradoxical situation.

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 although the consensus around these principles is widespread, constitution-making has proven to be extremely difficult in advanced industrialised societies. The roots of this dilemma may rest with the fact that contemporary constitution-building, while finding fertile ground in the eighteenth and nineteenth century 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, or demand and recognise reciprocal rights and duties, or look for ways to gain access to those rights. This historical dimension of citizenship practice is fundamentally different in advanced industrialised societies at the end twentieth century from the context for Madison and his contemporaries. This change in citizenship practice creates the challenge of how to understand, explain and analyse constitutional politics in high modern times.

There are three sets of challenges that conventional modern constitutionalism faces in advanced industrialised societies.⁸ First, it is not entirely clear who, as opposed to what, 'constitutes' the polity, or as Weiler *et al.* (1995) say, 'who is the Demos?'; or 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 some indivisibility and unity of the

⁸ The EC/EU may seem an atypical example, given that we are dealing with a non-state. However, the recent cases of attempts at constitutional change in a wide range of countries, such as Canada, Italy and South Africa, suggest that the challenges listed below may be found in most contemporary constitutional politics. See Russell and Galligan (forthcoming).

nation that stemmed from some identifiable trait.⁹ John Jay, writing in number 2 of the Federalist Papers, justified the presence of a central government partly on the basis of the 'unity' of the American people. He makes the link between unity and political authority when he says:

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, *The Federalist Papers*, No.2).

Clearly it is hard to imagine that any constitution in an advanced industrialised country could speak with such certainty about its 'people' and its political authority being 'made for each other'. For instance, in Canada a first attempt at constitutional change in the late 1980s included a very short preamble that described the basis for the existence of the country. A great deal of the objection to this settlement was based on the fact that the preamble was clearly seen as excluding many different interpretations of the very basis of the meaning of being Canadian. The second attempt was expanded to include eight sections and it did not meet any greater success.

It would seem, then, that 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. As the struggle over shaping social cleavages emerged with industrialisation, identity patterns changed; that is, people who participated in the political struggles for access to participation developed a sense of belonging different from nationality: they belonged to a group. These groups (i.e. class, trade unions, social movements) often were not considered as being part of the polity, yet, their struggle contributed to the creation of identities. It is, therefore, important to point out that, while these groups were not directly related to the process of constitution-building, they created types of belongingness that challenged constitutional politics. When political opportunity structures are presented, groups will struggle to ensure that constitutions do not exclude their claims; this means inclusion in the constitution-making process. In addition, it may be argued that the territory of government has been 're-figured' so that we can no longer conceive of a 'systematically integrated' population within its territorial jurisdictions (Rose, 1996: 329-330). The emphasis is not on 'social' objects of government but on individuals who are to be active in managing the affairs that affect their lives, including government. Any constitution that does not take into account active individuals, concerned with constructing the terms of their identity and of governance, will face a serious gap between the structures of government and the ways that individuals conceive of the terms of belonging.

A second approach to the question of who constitutes the polity begins with the assumption that there is not a common basis for recognising a sense of belonging; rather, the view is that the creation of a liberal constitution, with its representative institutions,

⁹ See Kratochwil's (1994) argument about 'communities of fate'.

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. One can take exception and claim that liberal Italy was anything but that in the nineteenth century. However, there are many more contemporary examples of such an attempt to create a sense of belonging through liberal democratic structures. Pierre Trudeau, the Canadian Prime Minister responsible for the repatriation and reform of the Canadian constitution in the early 1980s, saw the entrenchment of a charter of rights and freedoms as essential for the creation of a sense of national 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 assumes that the constitutive elements of a polity are what its blueprints say it is.

This leads to the second challenge faced by conventional constitutionalism. It is reasonable to take as given a consensus on basic political and civil rights. However, this 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 one begins to argue that what defines belonging is the protection of rights, and that the constitution that gives expression to citizenship will guarantee those rights, it is to be expected that every time that 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 just as important as, if not more important than, the right to freedom of expression. Tensions may result as emerging rights claims may not be reconcilable with conventional constitutional protection. Any architect recognises that she works with the materials that are at hand; today's constitution-makers have a very different and much expanded set of materials compared with those of their predecessors.

The third, and perhaps the most difficult, challenge for conventional constitutionalism is that an existing process of constitution-building does not give expression to emerging forms of citizenship practice. On the one hand, the historical basis of citizenship is thrown open to discussion, construction, reconstruction and widespread participation; on the other hand, the constitution-making process that will give expression to this citizenship remains a largely exclusionary process. This illustrates the tension between the view that constitutions codify and entrench meta-norms and values, and the continuing discussion about the terms and meaning of belonging and citizenship. The latter involves much wider participation and is an endless activity, while the former implies finality. The result is that there will be questions about the process that arrives at this final blue-print, 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', which emphasises that greater attention needs to be given to the relationship between

individuals, societies and constitutions (Elkin and Solton: 1993).¹⁰ It begins with the premise that constitutional thought has not taken into account that there has been an extensive expansion of the politically active demos, partly as a result of existing liberal constitutional principles. As Elkin (1993: 131) argues, 'Constitutional theory needs to accommodate the rise of the demos — with its preference for an active state, the activities of which blur the line between the public and the private — on to the political stage'. Constitutionalism 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.¹¹

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 will expect that this will be mirrored in, and encouraged by, their constitution-building process and constitutional regime. Second, the 'new' constitutionalism gives an important role to how political institutions shape individuals and how they relate to each other: constitution-makers must recognise 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: constitution-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, potentially, 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, '[C]onstitutional politics, due to its extraordinary nature, has the potential to promote public participation of individuals otherwise dedicated to private happiness' (Arato, 1994: 173-174). The potential for demands for extensive citizenship participation challenges the view that focuses simply on constitutional architects and engineering.

A useful contribution to the 'new' constitutionalism comes from a recent work by James Tully (1995), called *Strange Multiplicity: Constitutionalism in an age of diversity*. He argues that the two forms of recognition that characterised modern constitutionalism —

¹⁰ The same label has been used by Stephen Gill (1993) to refer to the transfer of public policy-making and governance powers to the private sphere.

¹¹ For the input of institutional change on the politicisation of issues via social movements in Canada, see, for example, Alan Cairns' work (1991) which has been challenged among others by Jane Jenson (1994), who emphasises the importance of an interdependent process of constitution-building in which social movements raise claims and policy-makers in state institutions identify issues of constitutional change.

those of the equality of nation states and of the equality of individual citizens — seem ill-equipped to deal with the broad range of demands for constitutional recognition in high modern times. In describing the Canadian context, he identifies at least six sources of demands for cultural recognition in contemporary constitutionalism: supranational associations; nationalism and federalism; linguistic and ethnic minorities; feminism; multiculturalism; and Aboriginal self-government. Tully argues that these claims are often seen as competing and presented as intractable demands on the constitutional process. The solution of recognising the claims to cultural diversity rests with redefining the constitution as a 'form of accommodation'; the constitution should be seen as a continuing process in which '[C]itizens of contemporary societies negotiate agreements on their forms of association over time in accordance with the three conventions of mutual recognition, consent and cultural continuity' (Tully, 1995: 30). The usefulness of this approach is that constitutionalism becomes more than an exercise in calibrating the right institutional and procedural features deemed necessary in a liberal democracy. It alerts us to the fact that there are a wide range of demands that may not be accommodated by simply putting in place the conventional structures of representation and accountability.

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 (1995: 6) points out, '[T]hose who share a constitution must first agree to be a people'. 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 elements form the historical dimension of what is referred to as 'citizenship practice'. If members of a polity are engaged in a continuing, inclusionary discussion about what constitutes the terms of belonging, then it is likely that they will place demands on the process by which they will be recognised in a constitution so that it provides room for a 'politics from below'. 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 forms of citizenship practice; that is, the process by which belonging, rights and access to rights are determined. We therefore advance a theoretical framework for including citizens in the constitution-making process, so as to provide a perspective on the interdependence of top-down and bottom-up politics of constitution-making. To that end, we first introduce the concept of citizenship practice and then proceed to discuss the current constitutional politics within the context of the emerging Euro-polity.

2. Citizenship Practice

As we will show in this section, EU citizenship practice provides valuable and at times astonishing insight for assessing the democracy gap. For an analysis of the *gap* — not the democracy *deficit*¹² — between the social forces' participation in constitution-building and the exercise of citizenship practice it is helpful to recall the meaning that citizenship has acquired during the short period of EC/EU citizenship practice.

Speaking of a deficit always includes a comparison with something else. From the literature on the EU's democratic deficit we can conclude that the state of EU democracy is usually measured against perceptions of democracy which have been formed based on either the experience or the philosophically formed expectations of frameworks of democracy defined nationally. That is both the ideal and the existing democracy on the ground 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.¹³ If this understanding of democracy (as the sum of experience and expectation of democratic elements) is the yardstick for measuring the democracy deficit in the EU, then any measurement to overcome the deficit is implicitly directed towards the establishment of democratic elements similar to the national experience (and expectation). Speaking of a democracy gap in the EU therefore means, addressing the deficit between the supranational and the national layers of democracy. The *democracy deficit* then indicates European shortcomings *vis-à-vis* national models. This gap is perceived as something which the EU is lacking, such as for example 'the lack of a responsible EU parliament and the lack of a European polity' (Andersen and Eliassen, 1996: 3).

This way of approaching the EU's democracy deficit is often accompanied by two caveats. The first caveat is based on the observation that national democracy has become a largely contested concept. Thus it has been pointed out that the material appearance of democracy on the ground has long differed from the classical ideal of people governing themselves in the Greek city (Habermas, 1991; Andersen and Eliassen, 1996). Instead, the relationship between the 'normative although impossible ideal' and the 'concrete, yet quite different, contemporary reality' (Green, 1993: 30) has been found to develop into a growing tension between the two poles of the democratic ideal and democratic practice (Walker, 1993; Dunn, 1993; Green, 1993; Unger, 1986). With the changing real grounds of popular sovereignty becoming increasingly fragmented, access to democratic participation has become diffused too (Habermas, 1991; Linklater, 1996). One result of

¹²Note that the democracy deficit is widely perceived from the basis of comparing the EU polity with an ideal nation-state-based polity. It is therefore understood as the missing institutional structures and the lack of a demos which would legitimate those institutions. Our paper delinks the perception of democracy from national contexts and focuses on the extent to which societal participation and constitutional engineering proceed interdependently.

¹³ A good example of this perspective is given by Andersen and Eliassen who write '[f]rom a normative democratic point of view the lack of a unified polity is the most serious democratic deficit, since the legitimacy of the parliamentary institution as such is based upon voters having at least a common frame of political reference. The formation of such a common identity is at best a long term project' (1996: 7).

this fragmentation of democratic discourse is that democracy has become a contested concept. Work on the EU democracy deficit must therefore take pains to include the aspect of democracy as a thoroughly contested concept. While this contestation does not set up an insurmountable hurdle for discussing the EU democracy deficit, it does influence the parameters for approaching the democracy gap both in the EU and in nationally defined democracies.

Secondly, recent research on the EU has found that a state-like development of its polity seems rather unlikely. The EU polity develops on the basis of pooled sovereignty, which is constructed through sovereignty transfers from the member states to the EU level (i.e. in areas such as financial policy, transport policy, agricultural policy, environmental policy, social policy, visa policy, consumer policy that is, those policy areas which are included in the EU's first pillar). We need to develop a reading of this polity as based on diffused sovereignty. After Maastricht, the integrationists' federal option seems quite unlikely and so does the more loosely defined intergovernmentalists' model of the EU as an international organisation.¹⁴ Still, the EU's *acquis communautaire*, i.e. its shared properties, 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 neither of those two models fits the existing Euro-polity, and that this new political entity does indeed conform with characteristics of an emergent polity (Mancini, 1989), then crucial political issues must be addressed to overcome the lack of that political substance in the EU which is considered to be crucial for national politics.

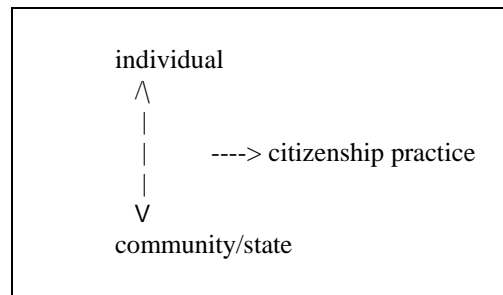
With state-based blueprints of EU integration becoming fading possibilities, approaches to overcome the democracy gap in the EU would need to include a conceptual possibility for a polity that is different from the nation-state or, for that matter, from the Westphalian polity. The second caveat as regards the democratic gap therefore arises from the application of state-focused analyses to a polity that will not develop into a state. Again, once recognised as such, this caveat does not necessarily prohibit insightful work on the democracy gap. Quite the contrary, as this paper will proceed to show; to overcome the democracy gap precisely requires finding ways to overcome state-focused analyses of democracy. After all, the conceptualisation of democracy as a concept, which ranges between the ideal (vision of a community in which the citizen-regime relationship is situated) and the concrete parameters of existing (nationally defined) democracies, poses problems for an assessment of democracy other than in the meaning of the *democracy deficit* approach that draws from comparisons of state-informed perspectives. To

¹⁴ The federal model was found to be more of an option at times when the emergent EU polity was able to drawing on a concept of 'Community discipline', building on 'a set of norms governing many of the relations between Community and Member State legal (and political) orders' (Weiler, 1994: 134), and able to produce a 'force of stealth' (Laffan, 1994) towards the establishment of a federal union. As Weiler (1994: 134) observes, '[m]aking a federal type constitutional framework involved an aggressive and radical doctrinal jurisprudence, a veritable 'revolution' often in the face of the flailing 'political will' of other Community actors. At times it seemed even at the expense of the power of other actors'. This paper addresses the fact that the democracy gap has been building up despite a constitutional framework.

overcome the democracy *gap* we therefore propose to work with a concept of citizenship practice as elaborated in the remainder of this section.

In the broadest terms citizenship defines a relation between the individual and the political community.¹⁵ 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.¹⁶ It follows from these observations that at least three elements need to be considered in the conceptualisation of citizenship. These are the individual, the community, and the relation between the two.¹⁷ Since all studies of citizenship have so far referred to these three elements in one way or other, they may be termed the three *constitutive elements of citizenship* (see Figure 1).

Figure 1 The Constitutive Elements of Citizenship



Whereas the first two elements, namely the individual and the community, have received broad attention in the debate over citizenship, so far the third — relational — element has not received much attention.¹⁸ There is an increasing awareness of the fact that

¹⁵With few revisions the following paragraphs are taken from Wiener (1996).

¹⁶ As Evans and Oliveira (1989: 2) point out, citizenship is 'a concept denoting the legal consequences which attach to the existence of a special connection between a defined category of individuals and a state' and thus essentially 'a provision which is made for participation by a defined category of individuals in the life of a state'.

¹⁷ Similar elements have been identified by Charles Tilly (1975: 32) as basic criteria for state-making. He writes, '[i]n its simplest version the problem [of state-making] has only three elements. First, there is the *population* which carries on some collective political life — if only by virtue of being nominally subject to the same central authority. Second, there is a *governmental organisation* which exercises control over the principal concentrated means of coercion within the population. Third, there are *routinized relations* between the governmental organisation and the population'.

¹⁸ More recent contributions to the citizenship debate point to this informal link between citizens and the state as a problem for the study of citizenship. Accordingly much of the new debate on citizenship aims at an assessment of this theoretical problem which focuses on the question of how informal aspects of citizenship, rather than formal criteria, may be included

citizenship cannot be dealt with on the basis of formal criteria alone. Instead, citizenship always represents more, and at the same time less, than the sum of its parts. Citizens contribute to the creation of a community, yet not all persons who reside within the same geographical spaces enjoy the same citizenship privileges. This creates tensions and potentially leads to political mobilisation, as, for example an emergent political discourse on the constitutional position of third country nationals shows. The approach advanced here is to assess such potential tensions, by introducing a focus on the dynamic aspect of citizenship. It argues that this dynamic develops from the interplay of the constitutive elements across time and spaces and contributes layers of historically derived meaning to the concept. Both citizens' action expressed as political struggles, and state policies have contributed to changes in political organisation within and among communities.¹⁹

Three *historical elements* of citizenship allow for such a conceptualisation of citizenship. These are rights, access to participation and belonging. *Rights* refer to the legal entitlements of an individual towards the community.²⁰ This element comprises various types of rights, for example civil, political, and social.²¹ *Access*, as the second element of citizenship, is about the conditions for citizenship practice, understood as access to political participation. Conditions of access are set by regulatory policies, including, for example, social policy, market policy and visa policy. They are crucial determinants of whether or not individuals are deemed fit to participate politically. Access therefore hinges on socio-cultural, economic and political mechanisms of inclusion and exclusion.²² That is, while rights may have been stipulated, access may be denied, because the means to use citizenship rights, such as proper education, communication and 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 the law either

in citizenship analysis (Young, 1989; Kymlicka and Norman, 1994; Habermas, 1991; Meehan, 1993; Somers, 1994).

¹⁹ Republican approaches to civic citizenship address community-building aspects based on the introduction of political citizenship rights (for an overview see Beiner, 1994). However, it has been critically observed that this polity-centered approach crucially neglects social identity-building processes. Thus Christodoulidis (1995: 178) argues, for example that 'the republican recourse of law often inhibits instead of enabling the politics of civil society and often obscures instead of facilitating the acquisition of social and political identity'. This paper agrees with this crucial observation and attempts to open an analytical perspective on precisely the process of identity mobilisation and its interdependence with the process of constitution-making.

²⁰ As David Held (1991: 20) states '[c]itizenship rights are entitlements. Such entitlements are public and social [...] They are 'of right' and can only be abrogated by the state under clearly delimited circumstances'.

²¹ The perspective of citizenship, as the incremental addition of rights, has been most prominently associated with T.H. Marshall. Civil rights comprised the right to liberty of the person, freedom of speech, thought and faith, to own property, to conclude valid contracts. Political rights included the right to participate in the exercise of political power. Social rights amounted to the right to a modicum of social welfare and security, to share in social heritage and live the life of a civilised being (T.H. Marshall, 1950: 10-11).

²² Jenson (1991: 3) summarises, for example, 'any definition of citizenship establishes the boundaries of social inclusion and exclusion. Citizenship, in other words, is in its most fundamental sense about access'.

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. These identities may be created through participation at the work place, in cultural matters, or other spaces of the community. Accordingly, residence is the crucial, but constrained, prerequisite for participation, if participation depends on *ius sanguinis*. Apart from the residence criterion, the definition of a person's legal status defines whether or not a person is considered a full citizen. This status has always been exclusive mostly according to the criteria of gender, age and nationality. This dimension of belonging is therefore also about borders, as citizens derive certain rights and opportunities for access based on their belonging to a bounded sphere. More specifically this feeling of belonging depends on a previous process of 'drawing boundaries' around the terrains which are designed for those citizens who belong.

While it is helpful for analytical reasons to single out the three historical elements, it is important to keep in mind that they are always interrelated. The three aspects bear a process-oriented or dynamic notion of citizenship. They add contextualized meaning to the concept of ideal citizenship, defining citizenship as stipulating rights, providing access, and creating a feeling of belonging and identity. Beyond the creation of a specific style of citizenship practice that is particular to each community, these elements contribute to the crafting of distinct institutional networks. They are hence important factors for the successful performance of governance within and among communities. Figure 2 provides a scheme for such a constructive approach to citizenship practice.

Figure 2 Citizenship Practice: Rights, Access, Belonging

Citizenship Practice	(1) rights	civil political social	
	(2) access to	polity welfare state	
	(3) belonging	(a) identity (b) legal (in/out)	-participation in economic, social and cultural spaces; -duty to pay taxes -nationality

In sum, we propose a concept of citizenship practice which conceptualises citizenship as the practice leading to the establishment of rights, access and belonging as three interrelated historical elements of citizenship. In principle this concept does not follow either a state-centric (top down) or a society-centric (bottom up) perspective. It encompasses both policy-making and politics towards the establishment and/or change of

citizenship.²³ The prevalence of one mode of action over the other varies according to different contexts. Both modes of citizenship practice are always potentially possible. However, we might hypothesise that often one prevails over the other at particular times and places.

3. Citizenship Practice and Maastricht II

The imminent renegotiation of the Maastricht Treaty by the 1996 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. An increasing number of social movements, interest groups and committees of the European Parliament have argued for a different path for the Europe that will emerge in the wake of the IGC: one that would create a more democratic Europe in which citizens would be able to participate in the 'construction and expansion of the EU' (Eurotopia, 1995: 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. However, it has been found that the emergent model of supranational citizenship in the EC/EU does conform to the ideal-type of citizenship in that it includes aspects of rights, access and belonging (Meehan, 1993; Wiener, 1995: 317). Work that pursues a socially constructive research agenda has facilitated a view on the process of citizenship-making in the EC/EU. It has observed the emergence of social, legal and economic spaces within the EC/EU, particularly in the aftermath of the 1985 and the 1991 IGCs (Meehan, 1993; Ross, 1993). These new spatially grounded relations have been detected outside the politically defined (republican) public sphere. From that perspective, the EU may be seen as a community of communities. While having taken a long time in evolving, this phenomenon of community construction has remained until recently largely unremarked except by some critical scholars. That a feeling of belonging may possibly be created in a non-state raises serious questions about the classical democratic idea of nationally derived belonging and identity which is attached to a demos.

It seems that this post-national framework of citizenship practice poses both an opportunity and a threat for democratic participation. As Ulrich Preuss (1994: 280) summarises, '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?' Is there not a democracy gap which cannot be overcome in a non-state policy?²⁴ In this section we address the European case of post-national constitutional politics, currently being tested by demands from social forces for citizenship rights.

²³ Turner (1990) suggests an approach which includes active (society-centred) and passive (state-centred) citizenship. According to his model the French revolution is considered as the prime example of active citizenship politics, whereas the Bismarckian citizenship policy would be considered as inactive.

²⁴See, for instance, Dehousse (1995: 120) who notes a 'political deficit' in the EU as stemming from the lack of substance that national states derive, for example, from societal debate over national political issues.

This story of citizenship practice began during a period in the 1970s, when some Community politicians voiced the need for a European identity. Two policy objectives were generated out of the debates which ensued: 'special rights' for European citizens; and a 'passport union'. Both aimed at the creation of identity based on a feeling of belonging. In the approach to citizenship adopted in this paper identity is one of two historical elements of belonging, the other hinging on the rules of membership. The next relevant stage of Community development in the 1980s was the trend to encourage more movement of worker-citizens as a basic condition for economic flexibility. This led to increased demand for greater social and political equality for 'foreigners' and 'nationals'. In line with democratic expectations, thus evoking a shared — European — history of democratic experience, more democracy was sought; and an increasingly public awareness of a 'democratic deficit', in both procedural and normative terms, emerged. These demands for greater access to participation, in both 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 in Article 8 (EC), as well as the stipulation of the rights of free movement and residence, not only for the employed and their families (an original entitlement of the 1957 Treaty of Rome), but also for other persons, subject to conditions of economic security and nationality.

The citizenship story of the EU evolved then from the early 1970s from the history of special rights and passport policy towards the establishment of a European identity and a feeling of belonging to the EC. That process shows how policy-makers had aimed at creating an identity for the EC/EU and its citizens long before political citizenship rights were inserted into the Treaty. As citizenship policy developed over the decades, a social construction of Euro-(Union)citizenship can be discerned. It suggests that a new type of belongingness to the EU has been created, based on every day practices of groups of citizens. These practices include shared participation of workers, employees, employers, students and academics within a newly created European space. By crossing borders, creating burgundy coloured passports, sharing new voting practices in European and municipal elections, residing in other member states than that of their nationality, and experiencing a variety of 'European' cultures these groups have given substance to a notion of Europeanness. In the 1970s the policy of special rights was developed from the objective of EC policy-makers of creating an identity for Europe (akin to national identities). In the 1980s 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 different spaces within the EU (Garcia, 1993; Meehan, 1993; Wiener, 1995; 1996).

The emergence of this political dimension of citizenship, as expressed by a policy of special rights, suggests a republican framework of citizenship policy-making.²⁵ Yet, 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

²⁵ For approaches which debate the possibilities for identity creation in such a republican sense see, for example, Preuss's work (1996).

concept, which had been crucial for modern state-building successes in Western Europe, in the 1970s these policy-makers aimed at creating a European identity (Wiener, 1996). As socially constructive research found, the EC/EU citizenship policy that evolved from the idea of special rights and passport policy, in order to create a European identity, has evolved over two decades into a fragmented citizenship policy. This established special rights, not for Europeans as a people, but for special groups of Europeans. Rights were thus specialised, not special, as policy makers had planned when they spoke of 'Special Rights for European Citizens' within a 'Europe of Citizens' as unifying inside and outside as programmes which stemmed from the idea of modern citizenship. This fragmented citizenship policy did two things. On the one hand, it enforced boundaries between 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 do 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. That is the citizen-polity bond was changed. Both developments contributed to differentiated patterns of access to the polity and its welfare institutions (Ross, 1993; Falkner, 1996; Meehan, 1993). From this perspective, the problem of the democracy gap is better addressed as the problem of citizens' full *access* to participation the EU as polity *and as a community of communities*. Consequently, the democracy gap does not stem only from outdated constitutionalist assumptions about popular sovereignty in a national-state, but it is also in part a consequence of crumbling welfare-state regimes (Jenson and Philipps, 1996); this factor has added a crucial normative dimension to the perception of democracy as both formal and substantive.

In summary, a discursive analysis of EC/EU citizenship practice indicates that Union citizenship means much more than a simple compilation of rights.²⁶ It is also about identities which are mobilised through participation, for example, in economic, cultural, social and political spaces. The multiple-layered identities of EC/EU citizens have proved a valuable resource to those 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 mobilised by policy makers. This identity was, however, not understood as national identity, that is as one that distinguished Community citizens according to nationalities, nor did it aim at replacing 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 Community borders as travellers,²⁷ exchanging knowledge as scholars and students, voting commonly

²⁶ For similar observations see Meehan (1993) and Everson and Preuss (1995).

²⁷ The idea of creating a shared European identity through passport policy was supported by Article 8A EC Treaty which stipulates 'the right to move and reside freely within the territory of the Member States' for 'every citizen of the Union'. The success of the policy was, however, threatened by the EC/EU's new internal frontier between Schengen and non-Schengen countries. British border controls at internal EC/EU frontiers were strictly speaking against Article 8A EC Treaty and thus influential towards negative public opinion. To soften these internal borders, it was suggested to 'wave' closed passports at these borders in order to allow British customs to reduce their checks to non-EC/EU citizens.

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, 1995: 324). 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', until Maastricht citizenship practice was performed more clearly from above than from below. This pattern seems to have undergone a seachange once citizenship was institutionalised in the 1993/TEU and subsequently became a theme of much concern for non-governmental organisations (NGO)s, interest groups and political parties (Curtin, 1996). Indeed, Maastricht is viewed as the 'starting point, not the end point, for negotiation among interested parties' (Marks, 1993: 394).²⁸ For post-Maastricht citizenship, it is nevertheless crucial to note that previous citizenship practice created shifts in the political opportunity structure which 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 from social forces, such as social movements and interest groups, implies that constitutional practice now includes many 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: 10).

Within this framework, new opportunities (and incentives) for citizen action were created. As the EP's first draft report on citizenship stated, 'The 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: 3). The report goes on to emphasise 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 changes, 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: .7).

²⁸ See also O'Keefe (1994: 106) who observes, '[t]he importance of TEU citizenship provisions lies not in their content but rather in the promise they hold out for the future. The concept is a dynamic one, capable of being added or strengthened but not diminished'.

This statement points to the fact that the newly created institutions are functional, in the sense of being responses to 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, as a corollary, new supranational practices, it also generated political tensions. The normative demand for more access to democratic institutions such as via 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'. More importantly, this focus on institutions and practices highlights the problem of the so-called 'democratic deficit' in the EC/EU as one that actually 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. All of this 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 tabled address citizenship claims. Citizenship practice has become a central aspect of constitutional politics from below.

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

The discussion of citizenship practice illustrates 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. In different terms, can European constitutionalism accommodate a constitutional politics that generates Arato's 'democratic surplus'? 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 a process and mechanism have been found that will allow 'Europeans' a role in constituting their polity.

Much has been written about the difficulties faced in the ratification process of the TEU, ascribing the growing resistance to a range of factors from the plans for economic and monetary union, through doubts about the procedural deficiencies of the EU, to dissatisfaction with some of the governments responsible for the agreement (Cafruny and Rosenthal, 1993; Duff, Pinder and Pryce, 1994; Bulmer and Scott, 1994). Resistance to the TEU created broad and sometimes strange coalitions of forces opposed to the agreement, because it went either too far, or not far enough, in creating a new constitutional and political order for Europe. What all critics could point to was a

process that, on the one hand, claimed to introduce the concept of citizenship, with its attendant rights of political participation, and, on the other hand, lacked public involvement. This debate raised questions about who was making decisions, about who would be citizens, about what rights they could expect, and what were the terms on which they related to each other as citizens.²⁹

There is little evidence that the flawed process of 'mega-constitutional' politics (Dehousse, 1995) that characterised the Maastricht treaty will be replaced in the near future; nor is there any immediate possibility that some other constitution-making process will be put into operation. The draft constitution of the EU presented by the European Parliament in 1994 is a good place to examine the dilemma faced by constitution-builders. The motion for the resolution on this constitution states quite clearly that the 'Constitution 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'.³⁰ 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; the assumption here is that, 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 it is the means by which constitutional decisions are restricted to closed discussions between executives. Second, citizens must recognise themselves in the constitution. While complex trade agreements, treaties, and 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. Both these points illustrate faults in the Maastricht I process, problems which have not been addressed entirely.

A much more fundamental problem emerged from the ratification process for the TEU. The process by which the constitution is arrived at is just as important as the substance of the agreement. Indeed, it forms part of the 'substantive' democracy which includes the dimension of societal participation (Kaldor and Vejvoda, 1996: 3). The forms of citizenship practice that have emerged within the EC/EU ensure that elite accommodation to produce mega constitutional agreements, but without popular input, will face serious challenges. The Maastricht difficulties indicate that it is not enough to present an agreement as a *fait accompli*, to be accepted without revision by more representative institutions and referenda. Citizenship practice that aims to be inclusionary and participatory dictates that citizens must take part in the process that defines the terms of belonging and how they will relate to each other; to paraphrase Stephen Elkin (1993: 118), it is difficult to put the democratic genie back in the bottle once it has been let out.

²⁹ One critic of the 1987 constitutional agreement (eventually rejected) in Canada between the federal prime minister and the ten provincial premiers claimed that the secretive process that produced it was 'eleven white men in a back room playing with rights as if in a poker game'. The same criticism could be applied to the Maastricht process.

³⁰European Parliament, *Session Documents*, A3-0063/94, 9 February 1994: 5.

The EP report on the draft constitution does contain a section on the constitution-building process. It points out the drafting of a constitution as an element of 'progress' on the path towards gaining democratic legitimacy, and that the central focus for Parliament must be to gain the support of the member states.³¹ It does not totally exclude citizens from the process, and in fact, claims that they are to be 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 over a draft presented by the EP with the national parliaments to an Interinstitutional Conference. No mention was made of the creation of a constituent assembly or of 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 EP. 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 how an institution, albeit directly elected, with which few people are familiar, 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 organisation 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 strengthening the instruments of accountability and transparency within EC/EU decision-making.³² This 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 the rights associated with it. 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 organisation 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.³³

The 1996 IGC has presented an opportunity to open up avenues for more participatory constitutionalism that could more closely match 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, *'Reinforcing Political Union and Preparing for Enlargement'* (February 1996),

³¹ European Parliament, *Session Documents*, A3-0063/94, 9 February 1994: 14.

³² Commission of the European Communities, *Report on the Operation of the Treaty on European Union*, Brussels, 10 May 1995, SEC (95) 731.

³³ This was the position taken by the German Constitutional Court in its ruling on the challenge to the TEU on the basis of questions about democratic legitimacy. It recognised that the TEU organises governmental institutions and bestows rights on European citizens, yet it is not a constitution but a treaty. See *International Legal Materials*, 33 (March 1994: 388-444).

stated that this was the 'last and only' opportunity for the fifteen 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 whereby substance is given to the 'social model'. An indication comes later in the document, where a more 'open' Europe is defined as one that sees greater involvement of national parliaments and more information made available by EU institutions. There is no mention of a continuous discussion about how to engage in such debate about the terms of 'being European', or of how to enshrine that in a constitution.

An overview of the preparatory work done for the IGC provides some insight into an 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 is also an emerging argument that the IGC process requires greater transparency. However, no explicit argument, in the briefs prepared either within EU or member state institutions, makes 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.³⁴

The initial stages of the IGC process, have, then, demonstrated a greater sensitivity to more extensive 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.

³⁴ A very useful collection of the various positions on the IGC process has been prepared by the European Parliament. It may be found on the EP's web page at: URL:<http://www.europal.eu.int/>. See *'Intergovernmental Conference — Briefing no. 10: The IGC and Transparency'*, *'Intergovernmental Conference — Briefing no. 18: European Citizenship'*.

CONCLUSION

Our 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 which they encounter is the democratic deficit of 'old' constitutionalism; that is procedures and principles based on constitutional engineering, which seeks 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 recognises 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 has been mainly concerned with the interests of member states and of Euro-policy-makers and hence has followed either integrationist or intergovernmentalist research agendas, with vision also blocked by positive jurisprudence. A new angle was introduced to the discussion on democratic governance by bringing in citizens. The socially constructive approach advanced in this paper 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* is applied, since as one constitutive element of citizenship, citizenship practice conceptualises the changing relationship between citizens and their community of belonging and membership. In sum, this paper has argued that to study the democracy gap, i.e. the tension between constitutional engineering and participatory constitutionalism, we need to reconfigure the concept of citizenship.

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