

**On the technology of collective identity:
Normative Reconstructions of the Concept of EU Citizenship**

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Introduction

The theatre of tension between multicultural sensitivities and national consciousness, in an era of fractured individual and state sovereignties(selves), hosts the play of European Union citizenship. The myth begins on 1 November 1993 when, upon entry into force of the Treaty of European Union, Member States nationals were bestowed with the august title of EU citizens. Its introduction caused optimism in the side of those envisaging a European (super)state who saw the establishment of yet another symbolic element of statehood. But, reality has moderated their ambitions. The lives of only a few Europeans have changed because of their new attribute, while, for most of the others, Union citizenship is either a rhetoric device or a suspicious effort to undermine their national affiliations.

And it is not only from the '*interna*' that Union citizenship has disappointed its proponents. It seems that in the effort to create an identifiable European 'We', third-country nationals are denied some of the most fundamental aspects of Union citizenship, while many more are kept out of "Fortress Europe".

If EU citizenship can do no more than replicate and magnify, at European level, national problems of citizenship and exclusion, why introduce it? If, as the formal citizenship provisions demonstrate, there was no real intention to enlarge the

scope of (pre-existing) citizenship-associated rights, why take the risk? There are more profound riddles. Ours is an age obsessed with questions of identity. Modernity and its persistence on categorization through reason has left open the question of “otherness”, the treatment of the other, be it in ourselves or at our borders. Derrida says we are all ‘others’¹, but how do we (legally) face that? Amidst this identity quest, the idea of nation retains part of its mythical allure, despite the attack of post-modernity and its celebration of multiculturalism. It is within this context that Union citizenship, notwithstanding its past and present, offers the possibility of new self-perceptions in a post-national environment.

Reality

EU citizenship as articulated in the Treaty is a weak concept. Its first and fundamental deficiency is lack of independence. The condition upon which Union citizenship is acquired, nationality of a Member State, refers to a legal status different from it and beyond its reach, because nationality rules remain within the normative province of Member States. Paradoxically, the common status of EU citizenship is the result of fifteen diverse procedures. It is, then, an additional, complementary status as Art.17EC affirms.

Deficits also arise from the content of Union citizenship. The latter can be summarized as comprising three types of rights: freedom of movement and residence, passive and active political rights, and certain procedural rights. Arguably, the first

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¹ See I.Ward, *The Law and Other Europeans*, 1997 35 *JCMS* p.87

two are the most important; in fact, the rights of the third type are not conferred solely upon Union citizens².

Freedom of movement and residence largely pre-existed as a corollary to Community economic freedoms, although it is now established independently of economic activity. In reality, it remains relevant only to economic Union migrants, since those who usually move, do so in order to undertake economic activity. The right is substantially circumscribed due to its subjection to limitations imposed by earlier secondary legislation and, notably, is a right exercised against Member States, not the Union. Political rights to European Parliament and municipal elections create a direct link with the EU, but are superficial. The European Parliament still lacks substantial powers, thus the right to participate in its decisions does not amount to a right of participation in the shaping of the Union's collective will³. More importantly, EU citizens' political rights do not concern national legislatures, the political bodies bestowed with the exercise of sovereignty, including determination of the norms of citizenship acquisition. Finally, social rights appear to be excluded from the Union perception of citizenship. Yet, beyond the much advocated need for a coherent European social policy, it is argued that, given the current perception of social rights as attributes of individuals of citizens and the sharp distinction between EC and third-country nationals, attaching social rights to citizenship, thus limiting them to EU citizens, would have adverse effects⁴.

² With the exception of the right to write to and receive reply from Community institutions in one's own language in Art.21(3) introduced by the Amsterdam Treaty. See also M.La Torre, *Citizenship: A European Wager*, 1995 8 *Ratio Juris* p.120

³ M.La Torre, *op.cit.* 1995 p.121

⁴ *ibid* p.122

Union citizenship is an intermediate status between qualified legal subjectivity and full membership⁵ accompanied with a striking absence of rights which could trigger a more active concept of citizenship⁶. Ironically, it is a concept primarily relevant to economic migrants, yet excludes third-country nationals, a significant part of this category. Non-EU citizens enjoy a limited, incoherent bundle of rights, because they are not nationals of a Member State. But, if citizenship is about solidarity and allegiance, mere possession of nationality of another Member State is hardly adequate to create it, whereas long term residence could. The existing inequalities are enhanced by the diverse nationality rules, which entail unequal access to Union citizenship, and the transformation of the traditional citizens-aliens dichotomy to a citizens-other EU citizens-aliens trichotomy. The formal articulation of EU citizenship, aimed at strengthening the integration process, seems to have disintegrating effects at the level of Member States societies.

Even the ECJ, the Community's historical pro-integration throttle, has thus far been unwilling to construe the citizenship provisos broadly. In *Skanavi*⁷, *Boukhalfa*⁸ and *Konstandinidis*⁹ the right seems to be fettered by its economic legacy, as the Court's rejection of more innovative interpretations of the citizenship provisions demonstrates. In the latter case AG Jacobs had stated in his Opinion that wherever an EC national goes to work in the Community "he is entitled to say *civis europeus sum*

⁵ *ibid.* R.Bauböck describes it as a watered-down version of external citizenship and denizenship, *Citizenship and National Identities in the European Union*, Harvard Jean Monnet Working Papers 4/97 <http://www.law.harvard.edu/Programs/JeanMonnet>

⁶ See J.H.H.Weiler, *Citizenship and Human Rights in Reforming the TEU: The Legal Debate*, J.Winter et als.(eds) 1996

⁷ C-193/94 Criminal proceedings against Sofia Skanavi and Konstantin Chryssanthakopoulos, 1996 ECR I-929

⁸ C-214/94 *Boukhalfa vs. Germany*, 1996 ECR I-2253

⁹ C-168/91 *Konstandinidis v. Stadt Altensteig, Standensamt, and Landratsamt Calw, Ordnungsamt* 1993 ECR I-1191, 1993 3 CMLR 401

and invoke that status in order to oppose any violation of his fundamental rights”¹⁰, but the Court did not rule the case on fundamental rights or citizenship.

A recent case was *Martinez Sala*¹¹ on the payment of educational benefits to the child of a Spanish national working on an irregular basis in Germany and intermittently in possession of a residence permit. The benefit was payable to EC nationals with residence permits which, at the time, Mrs Sala did not possess. AG Pergola’s Opinion¹² contained elements of an expansive interpretation of citizenship, but the Court evaded a ruling on the “hidden marvels”¹³ of Union citizenship. It did not find it necessary to examine whether Mrs Sala could rely on Art.8a[now18(1)] to fall *rationae personae* within the scope of EC law, because she was already authorized to reside in Germany, although she was not issued a residence permit¹⁴. However, it ruled that as a Member State national lawfully resident in another State, she fell *rationae materiae* within EU citizenship provisions, even though that had already been established because the case involved a child-raising allowance. *Bickel*¹⁵ also indicated a step forward still, the two cases cannot be said to provide tangible evidence of an actual shift in the Court’s standing.

AG Cosmas’ Opinion in *Wijsenbeek*¹⁶ presented the ECJ with another opportunity to proceed to a more ambitious interpretation of Art.18(1), but the factual side of the case was not helpful and the Court did not instrument his arguments or, even more so, phraseology in deciding the case.

¹⁰ *ibid*, 1996 ECR I-1211

¹¹ C-85/96, judgment of 12 May 1998, <http://www.curia.eu.int>

¹² 1 July 1997, *ibid*

¹³ C.Lyons, *A Voyage around Article 8: An Historical and Comparative Evaluation of the Fate of European Union Citizenship*, 1997 YBEL p.163

¹⁴ para.60

¹⁵ C-247/96, judgment of 24 November 1998, <http://www.curia.eu.int>

¹⁶ C-378/97 Opinion of 16.3.99 and judgment of 21.9.1999 <http://www.curia.eu.int>,

Mythos and Heritage

Abandoning formal citizenship provisions let us turn to the “psychic” element. It is no secret that the Union has not forged allegiance with its citizens, that no European Demos, in the classic sense, exists¹⁷. The question is why. Is it because there is no common European identity to support it? Or is it the novelty of the concept and its penury of rights?

To answer, one must consider the Union citizen’s (influential) ancestor, the European Market citizen¹⁸, born out of the Community strategy of negative integration and brought up by the ECJ’s pro-integration jurisprudence.

Yet, while in national surroundings market citizenship comprises only subsidiary part of full citizenship, the European *Economic* Community had invested a major part of its project in the development of the European Market citizen. As market citizenship does not itself create allegiance, the scattered rights granted to that citizen were only viewed as means to promote individual welfare. In the absence of a European society and the subsequent solidarity mechanisms of such society, the European Market citizen participated in the common market for his own, not European, interest¹⁹. The EC Market citizen “instrumented” the Community just as the Community “instrumented” him to promote economic integration. Therefore, the direct link between Community institutions and EC nationals is epitomized in the face of a self-interested citizen whose allegiance to the Union may evaporate should it cease to serve his interests.

¹⁷ See the famous Maastricht judgment of the German Federal Constitutional Court, *Brunner v. EU Treaty*, 1994 1 CMLR 57

¹⁸ M.Everson, *The Legacy of the Market Citizen* in J.Shaw,G.More(eds), *New Legal Dynamics of European Union*, 1995 p.73 etseq

¹⁹ *ibid* p.88

To be fair, Union citizenship does include mechanisms of a would-be allegiance (hybrid political rights, non-economic freedom of movement) but they appear too weak compared to national identity myths.

There are deeper flaws. EU citizenship is, especially in the eyes of those who envisage a future European State, the political expression of a common European identity; one based on supposedly shared cultural and historical myths. A European (nation)state would inevitably attempt to draw from such shared identity, but in vain; it does not exist. Europe is a Babylon of cultures as well as a marvel of cultural “cross-fertilization”²⁰. Indeed, there are partially shared European heritages²¹, but the pre-modern past of nation-states forbade the creation of a trans-European identity. No European equivalent to national myths can be found²².

Apathy towards the Union construct has another root: The European Union is regarded as a bureaucratic, power-concentrating beast that depersonalized the market, all features identified with modernity. In philosophical terms, modernity is an effort to categorize our environment into intelligible concepts and understand the world through Reason. Modernity values Reason and its ability to place everything into abstract categories under abstract, universal rules. This element of transcendence to globality seems to lie in the very foundations of the European Union. As Weiler states “...the very transnationalism of the Community, which earlier on as celebrated as a reinvention of Enlightenment, is just that: universal, rational, transcendent, and wholly modernist”²³.

²⁰ A.Smith, National Identity and the Idea of European Unity, 1992 68 International Affairs p.71

²¹ Roman law, parliamentary institutions, Christian ethics and rationalism are some

²² see A.Smith, op.cit.

²³ J.H.H.Weiler, To Be a European Citizen: Eros and Civilization, in J.H.H.Weiler, The Constitution of Europe, 1999 p.330

The pressure caused by modernity is strengthened by the challenge of post-modernism and its deconstructive mania. It's hard enough to find one universal truth, but what happens when there are as many truths as are believers? Post-modernism considers our perceptions as just competing narratives and crowns subjectivity queen in the place of objectivity. This perception has already penetrated social reality²⁴, placing the individual in a fragmented (politically, socially, scientifically), incomprehensible world.

Naturally, this has caused a quest for meaningful concepts and, where collective identity is concerned, the nation-state and its mythology of destiny offer reassuring answers. The European Union, torn between supranational aspirations and its state-like vocabulary appears unable to provide satisfactory answers.

The Official Conception

If citizenship was introduced as more than a decorative addition in the Union architecture, and surely it was, what is the architects' vision? What lies behind a citizenship of few rights and no duties, of hardly any real nation-constructing element accompanied by the rhetoric of national perceptions of citizenship? It seems that Community institutions perceive a rights-based citizenship as the most appropriate vehicle for securing Europeans' sentiment of belonging to the Union²⁵. Acknowledging the integrative effects of citizenship, the official conception views citizenship-associated rights as a way to "tie" citizens to the Union, or perhaps, make it more attractive to them.

²⁴ *ibid* p.331

²⁵ at least, that is what the language of the introduction of the Commission's 2nd Report on Union Citizenship reveals, COM(97) 230 p.6

Reality is more complex. Human rights do have integrative effects, but their disintegrative side is equally important. Human rights reflect fundamental values of a society, and within Europe there are sharp differences which make the creation of a common Union concept of fundamental rights difficult, if not unachievable. The *Grogan* case²⁶ illustrated the potentially divisive nature of human rights in the Union framework. Moreover, the rights culture has, historically, an anti-state psychology; rights were created to protect the individual against state authority. Thus, to seek allegiance by admitting lack of adequate human rights protection - because that is what a suspicious mind would infer from the declarations on the need to confer more rights to individuals as part of their citizenship status - seems noble but paradoxical.

Post-market citizenship

Drawing upon the historical evolution of the concept of citizenship, an interpretative stream attempts to formulate a post-market citizenship, where the progress of free movement rules and an EC conception of individual rights merge. The authoritative statement of this vision can be found in AG Jacobs' Opinion in *Konstandinidis*, mentioned earlier. His is a thesis between a conception of 'universal' European human rights and the functions of an EC labour market. The EC worker/entrepreneur is elevated to *civis europeus* and citizenship rights are the natural consequence of the principle that Single Market freedoms give rise to justiciable directly effective rights for individuals. With the entry into force of the Amsterdam

²⁶ SPUC v. Grogan, C-159/90 1991 ECR I-4685, 1991 3 CMLR 849

Treaty which for the first time creates a formal ECJ jurisdiction over fundamental rights²⁷, work within this tendency will receive a considerable boost²⁸.

Though realistically ambitious at the current stage of the integration process, this conception is burdened with the 'self-centered' legacy of the Market Citizen, one that human rights cannot fully override, and seems to ignore the enormous potential of more ambitious (re)constructions of Union citizenship and ethos.

Utopia

Normative (re)constructions of European citizenship

If indeed post-market citizenship underestimates the full practical and conceptual potential of Union citizenship, and the classic citizenship vocabulary is the vocabulary of state and nation, the introduction of the concept in the Union's legal world is problematic because it seems to run contrary to the ideological cornerstone of the EU which was to lay the foundations for an ever closer union among the peoples of Europe. The peoples, not the (one) people. Is, then, EU citizenship the hallmark of a novel integration telos? Is a European people the end? An alternative would be to conceptualize EU citizenship as a change not of the integration objectives, but of the understanding of national citizenship. The latter would be changing due to "a change in our understanding of the state and the nation as well as a change in our self-understanding and understanding of the self"²⁹. And how would a

²⁷ Arts F(2)[now 6(2)] and L(d)[now 46(9)] of the Treaty

²⁸ J.Shaw, *The Interpretation of European Union Citizenship*, 1998 61 MLR p.304

²⁹ J.H.H.Weiler, *To Be a European Citizen: Eros and Civilization* in J.H.H.Weiler, *The Constitution of Europe*, 1999 p.328

classic notion of citizenship fit into the reality of what MacCormick terms “Post-sovereign Europe”³⁰ to describe an era when sovereignty has become fragmented and European states gradually lose control of some of their most classical functions?

Europe needs a new understanding of citizenship in a theatre of fragmented state sovereignty and the deconstructed self of individuals. As the referents of identity increase and persons enjoy multiple identities, a conception of citizenship embracing difference can be consonant with EU architecture.

Constitutional Patriotism

Introduced by Van Steenbergen, the idea of constitutional patriotism (Verfassungspatriotismus) was put to the fore of European integration by Habermas. Departing from a thesis about the decline of nation-states and instrumenting his own work on communicative reasoning, Habermas articulates his conception on the basis of a model of deliberative democracy.

Sovereignty is, in this view, a procedure of discursive opinion and will formation. His normative assumption is “a networking of different communication flows... organized in such a way that they can be supposed to bind the public administration to more or less rational premises and in this way to enforce social and ecological discipline on the economic system without impinging on its intrinsic logic”³¹. Thus, emerges “a model of deliberative democracy that no longer hinges on the assumption of macro-subjects like the ‘people’ of ‘the’ community but on

³⁰ N. MacCormick, *Democracy, Subsidiarity and Citizenship in the ‘European Commonwealth’*, 1997
16 *Law and Philosophy* p.333

³¹ J. Habermas, *Citizenship and National Identity* in B. Van Steenbergen (ed), *The Condition of Citizenship*, 1994, p.32

anonymously interlinked discourses or flows of communication”³². To complete the model, deliberations within the formal circuits of decision-making institutions should allow the contributing intrusion of informal public communication networks. Only an interaction between “institutionalized processes of opinion and will formation and those informal networks of public communication”³³ can make citizenship today “more than an aggregation of pre-political individual interests and the passive enjoyment of rights bestowed upon the individual by the paternalistic authority of the state”³⁴.

Habermas’ vision can be summarized in the expectation of citizens’ loyalty to the principles of a constitution in a liberal democracy and not to a common culture. Concerned with the task to “develop a new political self-confidence” commensurate with Europe’s new role at the dawn of the millennium, constitutional patriotism is biased against ethnic nationalism³⁵, but receptive of the republican and liberal traditions informing Member States political culture.

The lack of a European nation-building myth for the Union to claim, along with the latter’s progress on the assumption of national diversities make it an appropriate theatre for the application of constitutional patriotism. Proponents of the latter consider the Union project as an opportunity to create post-national membership in a political community free of the burden of cultural homogenization, within the framework of modernity. Even the supporters of a European nationhood can accept constitutional patriotism as a “second-best” solution³⁶ constituting a step beyond Member States’ nationhood. However, those favouring a ‘Europe of Fatherlands’, EU

³² *ibid*

³³ *ibid*

³⁴³⁴ *ibid*

³⁵ R.Bauböck, *Citizenship and National Identities in the European Union*, Harvard Jean Monnet Working Papers 4/97, <http://www.law.harvard.edu/Programs/JeanMonnet>

³⁶ *ibid*

as a union of nations, would be very sceptical with the post-national core of constitutional patriotism.

Characteristic of the concept is its ability to include third-country nationals since it only requires loyalty to liberal constitutional principles and not cultural assimilation. So, it should not exclude the possibility of dual citizenship and would favour a simple residence criterion for acquisition of citizenship.

Critics of constitutional patriotism don't see a European constitution and argue that one cannot be loyal to a phantom. It is true that the Union does not have a formal constitution, still the Court's jurisprudence has constitutionalized the fundamental aspects of the integration project and created an informal constitutional charter, however imperfect and not always coherent. There are legal rules, constituting and empowering Union institutions, as well as doctrines and principles, which, as MacCormick rightfully writes, amount to "a fairly thick body of law that is thoroughly and fully constitutional in any reasonable interpretation of constitution"³⁷.

A more serious concern is that the idea is too thin to forge collective identity. Individual rights, a major part of the constitutional culture to which allegiance is owed, are insufficient to integrate a political community. The European human rights legacy has contributed to a sense of shared identity, yet "it has reached the point of diminishing returns"³⁸. Rights are somewhat taken for granted. Moreover, the intellectual vein of social contract theory, which forms another pillar of constitutional patriotism, appears dry in Community context. Rights and duties of citizenship defined by a constitution are, under the social contract metaphor, the agreement of a free association of citizens. According to Bauböck, this metaphor is only functional

³⁷ N. MacCormick, *op.cit.* 1997, p.337

when applied to a polity with shaped (territorial and population) boundaries as a result of historical process rather than of a single act of consenting individuals. It is exactly these historical boundaries that the EU lacks and, in this view, the mere practice of citizenship cannot determine the boundaries of this new political entity. The truth is that it is difficult to answer the question whether citizenship constitutes communities or vice versa, and it is doubtful whether citizenship itself can build collective identities, although its significance should not be underestimated.

The procedural nature of Habermas' model (citizenship is enacted through compliance with the procedural rationality of political will formation, discursive in nature) is also criticized. Its strength, which lies in its neutrality towards diverse cultural orientations and allows the possibility of post-national membership leaving national identities unaffected, is also its weakness. Precisely because such neutrality is indispensable to the process of constitutionalization, it is not a solid foundation for constitutional patriotism. Its results can only be neutral and artificial, whilst identification with the Union project would require more substantial shared legacies. Without resonant fiction of relatedness through memory, myth and/or real kinship membership is hard to substantiate³⁹.

An allied consideration is that constitutional patriotism cannot determine which community is the appropriate object of loyalty, for its criteria are too wide and, ironically, too common. Why not identify with every other similar constitutional culture? The issue does not arise at national level, because constitutional patriotism only subtracts moral particularism from national loyalties, without affecting the ascriptive relation between individuals and their political community. This presupposition is nullified at European level, where such relation does not exist, and

³⁸ J.H.H.Weiler, op.cit. 1999, p.335

the construction of EU citizenship on the basis of Member State nationality further substantiates this deficit. Of course, such arguments do not lend support to a revitalization of nationalist patterns, although they can be useful to proponents of a European nationhood and to nationalists. It should be bore in mind that a democratic multicultural environment should welcome loyalties towards ethnic, linguistic or religious communities. What is objectionable, is to base the collective identity of a polity and the citizens' obligation of allegiance on such particular affiliations.

The objections advanced should not serve to mask the influence of constitutional patriotism in the quest for a meaningful normative reconstruction of the concept of Union citizenship. Adherence to Community constitutional tradition, as a narrative of the integration project's fundamental structural values, should underlie such reconstruction. Indispensable as it may be, it is not sufficient; some form of positive, rather than neutral, ideal should accompany constitutional patriotism in order to cultivate allegiance towards the Union.

Bauböck offers an alternative vision. He favours a more "sensitive" version of constitutional patriotism enriched with the teachings of differentiated citizenship. Citizens' identity in contemporary polities is formulated by multiple (often overlapping) affiliations to different social groups on the basis of diverse factors such as gender, political conviction, ethnic and/or cultural particularities. Such collective identities are subsequently transformed to demands for autonomy, collective representation, partial self-determination, special exemptions, and, more generally, acknowledgment of their particularities in the public sphere.

At the level of EU citizenship, Bauböck proposes to go beyond mere acknowledgment of national identities and put to the fore the specificities of

³⁹ A.Smith, National Identity and the Idea of European Unity, 1992 68 International Affairs p.55

subnational and transnational minorities⁴⁰. This pluralist conception can be linked to the shared European past, which is more than the history of its various nation-states⁴¹, and facilitates enlargement of the Union and inclusion of immigrants. Bauböck asserts that such conception will support Union policies exceeding the non-discrimination rule and allocating powers and resources directly to disadvantaged groups; group-differentiated rights are to substantiate Union citizenship.

‘Group-sensitive’ constitutional patriotism shares the same normative spirit that characterizes a “democratic” reading of the principle of subsidiarity. Under such reading, subnational bodies form part of the EU’s communicative circuit and demand a role in the decision-making process; national authorities are not the Union’s only interlocutors. Recognition, within the framework of citizenship, of the legal and participatory capacity of subnational structures could strengthen the appeal of Union citizenship, and, perhaps, offer viable proposals to reduce EU’s democratic deficit.

However, it is not devoid of the disadvantages of “differentiated citizenship”. In the realm of symbolic, group-differentiated rights may promote division instead of unity through diversity, and this could prove damaging, in light of the lack of any Union-wide unifying symbol. The link to European past may very well be a link to segregation, rather than appreciation of historical differences. At political level, there’s a danger of self-interest motivated “lobbying” if minority groups conceive their rights as “assets” to hold on to, instead of a way to overcome existing inequalities. Group-sensitive constitutional patriotism cannot offer guarantees of a public-spirited mentality of subnational bodies.

European political public sphere

⁴⁰ R.Bauböck, op.cit. 1997, <http://www.law.harvard.edu/Programs/JeanMonnet>

The deliberative dynamics of Habermas' model inform the idea of a European political public sphere put forward by Curtin⁴². Addressing the issue of post-national democracy and the notion of a European demos, Curtin is not so much concerned with the 'traditional' democratic deficit argument, that the shift in the locus of decision-making, from national to EU level, has not been followed by a shift in democratic control mechanisms, as with an imbalance at the level of separation of powers⁴³. The integration process has favoured the empowerment of the executive both at national and Union level, permitting the development of a bureaucratic network extending from the Council's doors to national administrative authorities. The argument that efficiency considerations and the operation of the Council as a quasi-diplomatic forum have rendered such imbalance necessary, is far from convincing and, in any case, cannot justify the information vacuum which covers many aspects of EU decision-making.

Curtin's answer to the problem is a political public sphere which hosts European-wide public communication⁴⁴, and the emergence of a European civil society "interconnected with but with some separate existence from the national public spheres"⁴⁵. The two will constitute a non-governmental civic space⁴⁶ aiming to "establish a viable political arena at the level where decisions are actually taken"⁴⁷. The proper operation of such space requires the institutionalization of the

⁴¹ *ibid*

⁴² See D.Curtin, *Postnational Democracy, The European Union in Search of a Political Philosophy*, 1997

⁴³ *ibid* p.45

⁴⁴ *ibid* pp.56-57

⁴⁵ *ibid* p.57; see also J.Habermas, *Remarks on D.Grimm's "Does Europe Need a Constitution"* 1995 *ELJ* p.306

⁴⁶ D.Curtin, *op.cit.* 1997 p.57. Curtin feels that such space can already be witnessed by the involvement of non-governmental actors in the 1996/97 IGC, *ibid*

⁴⁷ *ibid* p.62

participation of European civil society in the decision-making process, be it via formal consultation rights or easier access to relevant information in order to formulate public opinion on given issues. The aid of information technology to this end is crucial, although it is acknowledged that at this phase it remains largely elitist⁴⁸.

The European public sphere is envisaged as the locus of transcendence of the organic-cultural idea of collective identity formation, emanating from the nation-state legacy. Democracy and identity at European level, post-national, but also subnational, is premised on the separation of nationality and citizenship. Curtin's post-national idea is to extract the nation from the state and shape it into a more flexible cultural process independent of political institutions⁴⁹. The 'psychic' shortcomings of procedure-based efforts to establish European identity have already been mentioned. Deliberative models can definitely improve democracy at European level, but some sort of post-national idea(1) is needed to create a European 'We'. European civil society can be useful to this purpose, but it too must feed from a positive ideal to avoid becoming an arena of self-interest lobbying.

European Commonwealth

Idea(1)s very similar to those underlying constitutional patriotism formulate MacCormick's conception of a European Commonwealth. The term 'commonwealth' emerges from the need to baptize the Union as a political entity. The EU is not a classic international organization, for it constitutes a legal order⁵⁰ the norms of which

⁴⁸ *ibid* p.61

⁴⁹ See E.Hobsbawm, *Nations and Nationalism since 1780*, 1990

⁵⁰ See as locus classicus Case 26/62 *Van Gend en Loos* 1963 ECR 1, 1963 CMLR 105

have direct effect on individuals and corporations as well as on states; nor is it a classic sovereign state. In fact, not many things are classic about the EU, so MacCormick rediscovers Hume's 'Idea of a Perfect Commonwealth'⁵¹ and instruments it to term "a group of people to whom can reasonably be imputed some consciousness that they have a 'common weal'... and who are able to envisage themselves or their political representatives and governing authorities realizing this or striving after it through some form of organized political structure, embodied in some common constitutional arrangements"⁵². To address the issue of democracy within the EU as a commonwealth, he suggests the possibility of a civic demos and a European civic identity. Given the existence of a "lawfully constituted commonwealth of Europe" whichever its deficiencies, Union citizens are given the opportunity to orient themselves towards it and regard it as a "common possession and achievement of the peoples of the states that participate in the commonwealth"⁵³. The formal introduction of Union citizenship has in itself, it is argued, the potential for the realization of this European civic identity and, consequently, of a European civic demos.

The similarities of MacCormick's conception with the Habermasian model are evident: both perceive loyalty to the Union as having civic rather than ethnic or ethnic-cultural character. Moreover, MacCormick also places emphasis on the deliberative dynamics of the European Commonwealth, more emphasis than on will-formation and decision-making⁵⁴. Channels of discourse between institutions can generate the common weal, or a shared icon of it, which is itself valuable and capable of mobilizing individuals to fulfill the common weal. The deliberative constitution of

⁵¹ D.Hume, *Essays Moral Political and Literary*, 1963ed pp.499-516

⁵² N.MacCorimick, *op.cit.* 1997, p.339

⁵³ *ibid* p.342

a common good and, thus, the very ideal of a 'commonwealth' are prerequisites of a notion of a European civic demos⁵⁵.

However, as MacCormick himself admits, his conception of EU citizenship is too thin, since it does not cancel but depends upon pre-existing statehood and membership of the Union only through Member States⁵⁶. Still, so long as EU citizens consider, to a certain extent, the integration project as a precondition for peace and decent prosperity, the European civic demos will prove enough of a demos.

'European Commonwealth' is a positive, not neutral, idea(l), however 'thin' it may be, and that is its greatest merit. It seeks to forge allegiance not on the basis of established (constitutional) principles, but on the basis of a common goal within a post-national context. The European common weal is, understandably, vague, yet it seems like a very concrete starting point.

Supranational Citizenship

Weiler (re)constructs his own vision of EU citizenship in an effort to explain public apathy and suspicion towards the Union. This crisis in the integration telos was sharpened after the Maastricht decision of the German Federal Constitutional Court⁵⁷ which may not have set any barriers to the German ratification of the TEU, but adopted the position (largely simplified) that no European demos exists and, since democracy is rule by the demos, the people(Volk), and where there is no demos there

⁵⁴ *ibid* p.352

⁵⁵ *ibid*

⁵⁶ *ibid* p.342

⁵⁷ see 1994 1 CMLR 57

can be no democracy, the Union is a non-democratic constitutional order⁵⁸. Thus, transfer of vital state powers to the European Union would be unlawful.

Weiler accepts that there can be no European demos in the ethnic-cultural sense and advances the notion of supranationalism in order to address the question of citizenship.

If it is considered that the central plank of the European integration project was an attempt to mitigate the excesses of the modern European nation-state, two competing perceptions of European integration have arisen: the ‘United States of Europe’ vision with its ideal of a federal Europe, and the historically prevalent vision of a supranational Europe. The latter “is about affirming the values of the liberal nation-state by policing the boundaries against abuse”⁵⁹, while the former is trapped into the paradox of being a polity established to counter the excesses of statism, yet ultimately becoming itself a (super)state. Weiler’s is a conservative modernist vision, for it does not reject boundaries, but it is also radical because it “seeks to redefine the very notion of boundaries of the state, between the nation and state, and within the nation itself”⁶⁰.

His thesis is that “in the curtailment of the totalistic claim of the nation-state and the reduction of nationality as the principal referent for transnational human intercourse, the Community ideal of supranationalism is evocative of, and resonates with a different aspect of liberalism which has as its current progeny our modern notions of human rights... Supranationalism assumes a new, additional meaning

⁵⁸ For various analyses of the decision see 1995 1 ELJ issue dedicated to the Maastricht decision of the German Federal Constitutional Court

⁵⁹ J.H.H.Weiler, op.cit.1999 p.341

⁶⁰ *ibid*

which refers not to the relations among nations but to the ability of the individual to rise above his or her national closet”⁶¹.

But it is these values that form part of the (modern and post-modern) agony of European belongingness. How does this paradox fit into the (re)construction of Union citizenship? According to Weiler, Art.17EC can be understood as a conceptual decoupling of nationality from citizenship and the conception of a polity, the demos of which is conceived in civic rather than ethnic-cultural terms⁶². The essence of Union citizenship is those features that transcend the differences of “organic ethno-culturalism”⁶³.

Decoupling nationality from citizenship allows the conceptualization of co-existing multiple demoi. This is not a “concentric cycles” approach, according to which identity stems from the same source(s) of affiliation, albeit at different levels of intensity, with the more intense level prevailing in case of conflict. It is also more than a view which, as an or alternative to the “concentric cycles” concept, understands individuals as belonging simultaneously to two demoi on the grounds of different subjective factors of identification. One can be a Member State national in the sense of organic-ethnic identification and an EU citizen in the sense of transnational affiliation to a different set of values: those transcending ethno-culturalism. This vision is problematic in another way: it is not evident how the values supporting European affinities would be qualitatively different from the normal artifacts of nation-states’ constitutional democracy⁶⁴. The ‘European community’ of values may paint a picture common to European eyes, thus permitting loyalty at European level, yet it is this very community which convolutes the grounds

⁶¹ *ibid* p.343

⁶² *ibid* p.344

⁶³ *ibid*

for identification and the operation of multiple *demos*. Further, it provides a thin, though laudable, content to the notion of citizenship⁶⁵.

To correct the fallacies of this second view of multiple *demos*, Weiler offers a third model which recouples nationality and citizenship within European geometry. It too postulates simultaneous membership to two *demos* based, critically, on different subjective factors of identification; national belongingness is described in ethnic-cultural terms and European in terms of transnational affinities. Still, there are two differences.

First, in this model, Union citizenship and Member States nationality are totally interdependent. One cannot be a Union citizen without being a Member State national, not only legally, but also conceptually and psychologically. It is in this respect that Weiler's supranationalism guards the nation-states' boundaries.

Second, besides the values also characteristic of the modern liberal constitutional state, another dimension is added to the value matrix of multiple *demos*: the acknowledgement that "in a range of areas of public life, one will accept the legitimacy and authority of decisions adopted by fellow European citizens in the realization that in these areas preference is given to the choices made by the out-reaching, non-organic *demos*"⁶⁶. It is an educational value urging the Self to accept the Other in a profound interventionist two-fold manner. It subordinates national societies both to substantive values and decision-making procedures extended to interests and sensitivities beyond national polities.

The supranational construct is not faultless. Weiler himself notes that the EC Treaty does not entail full decoupling of nationality from citizenship. Member States

⁶⁴ *ibid* p.345

⁶⁵ see K.-H.Lauder, *Towards a Legal Theory of Supranationality - The Viability of the Network Concept*, 1997 3 *ELJ* p.33etseq

retain competence to determine the conditions of national citizenship and may do so in national(ist) terms. If those terms embrace multiculturalism, then Weiler's model has a fair chance; if not, 'Eros', the national pole of the construct cannot be tamed by 'Civilization', the supranational pole⁶⁷.

In practical terms, acceptance of the legitimacy of the European non-organic demos demands a sort of transcendent self-image on the part of national demoi, which the understanding of shared potential does not suffice to generate. The idea that others not sharing our (national) bundle of values, sensitivities and myths have a say in a series of issues important to 'us' is difficult to accept, in spite of its merits and the fact that such issues are important to a wider 'us'. A strong impetus to accept such authority should come through reinforcement of democracy at European level. Weiler makes four proposals⁶⁸:(a) the possibility, under certain conditions, to introduce legislative initiatives to be voted by EU citizens in order to support direct democracy;(b) the placing, with few exceptions, of the entire Community decision-making process on the internet;(c) the creation of a European Constitutional Council, comprising the president of the ECJ and judges from the Member States' constitutional courts or equivalent organs, to resolve issues of competence;(d) finally, the imposition of direct European taxation, as means to instill accountability and provoke citizens' interest⁶⁹, along with the strengthening of horizontal human rights.

Broadly within the same line of thinking, Preuß considers the opportunity given to EU citizens to engage in manifold economic, social, scholarly, even political activities transnationally helpful "to abolish the hierarchy between the different loyalties... and to allow the individuals a multiplicity of associative relations without

⁶⁶ Weiler, *op.cit.* 1999 p.346

⁶⁷ *ibid* p.347

⁶⁸ *ibid* p.350-356

binding them to a specific nationality”⁷⁰. Thus, Union citizenship “is more an amplified bundle of options within a physically broadened and functionally more differentiated space than a definitive legal status”⁷¹. This conception takes a more functional(rights) than psychological(identity) view of EU citizenship, but it too needs to offer an accepted model of democracy to be complete.

Social Citizenship

Reactions against the liberal market ideology of the integration project, the Union’s ‘social deficit’, and the alienating potential of the formal provisions of EU citizenship have given rise to an alternative (re)construction of social citizenship. The possibility of a Union social citizenship is of particular importance in light of the Economic and Monetary Union and its far-reaching effect on national economic policy and, consequently, welfare systems. Moreover, the inclusion of a social imperative in the understanding of EU citizenship can affect the quality of social policy legislation, perhaps even the competence of Community institutions on related issues in the form of a constitutional order to be considered in case of doubted legal bases.

The emphasis on social rights by the influential Marshallian conception of citizenship as well as the neo-liberal challenges to it have been stressed previously. Two points, however, deserve attention.

Social citizenship shifts discussion from belonging to a community(identity) to full membership of such community(scope of rights). But its ability to promote

⁶⁹ although it seems more probable that it will create citizens’ reaction

⁷⁰ U.Preuß, Problems of a Concept of European Citizenship, 1995 1 ELJ p.280

⁷¹ *ibid*

social cohesion makes it a potential building block of post-national identification and sense of belongingness, for it offers an alternative, not necessarily dilemmatic, of a European social, rather than civic, identity. Citizenship is also related to social policy in that it offers a normative frame in support of those claiming that treatment of the unprivileged on an egalitarian basis is morally superior to a *laissez faire* posture⁷². The two points are interwoven under the conceptual umbrella of solidarity, which informs the social policy of Member States with Catholic social tradition⁷³. Solidarity is about “seeing welfare as a form of collective activity and so the responsibility of the wider society rather than of individuals”⁷⁴.

Close supports a model of EU social citizenship based on democratic socialist thinking and the Scandinavian social policy experience. The cornerstone of Close’s conception is the right to welfare provision as opposed to welfare in the gift of the state⁷⁵. However, EU social citizenship is more likely to emerge as twin-pillar, drawing in part from the Scandinavian and in part from the conservative-corporatist model of France and Germany, which is occupationally linked, instead of purely employment linked⁷⁶.

Such conception remains partly vulnerable to the ‘culture of dependency’ and the demise of active citizenship brought about by the ‘passive’ nature of social citizenship. Interestingly, the opposite fear of EU social citizenship being too occupationally linked, and, thus, approaching neo-liberal workfare strategies, has been expressed⁷⁷. There’s also a danger of it being “too nationality based”⁷⁸.

⁷² J.Shaw, *op.cit.* 1997, <http://www.law.harvard.edu/Programs/JeanMonnet>

⁷³ eg France and Germany

⁷⁴ Spicker, *Social Policy. Themes and Approaches*, 1995 p.60

⁷⁵ P.Close, *Citizenship of the Union and Nationality of Member States* in D.O’Keeffe,P.Twomey(eds) *Legal Issues of the Maastricht Treaty*, 1994 p. 193-195

⁷⁶ *ibis* p.203-222

⁷⁷ I.Ward, (Pre)conceptions in European Law, 1996 23 *Journal of Law and Society* p.207

⁷⁸ *ibid*

Advocates of social citizenship link it with the idea of participatory democracy⁷⁹, a central plank of pluralist thinking. If citizenship means to govern and be governed, then, in order for the latter to be legitimate, in order for the citizen to be subject to law, he must be the law-maker. That is all trivial, but participatory democrats favour immediate, direct participation instead of the ‘remoteness’ and complexities of representative government. Ward considers the identification of representative government improvement at European level with the solution to the Union’s ‘democratic deficit’ as one of the false (pre)conceptions of European law⁸⁰ and argues for the instrumentalization of the principle of subsidiarity to support a pluralist model of democracy. Of course, subsidiarity can be read both in a centripetal and a centrifugal manner, and its formulation in the Treaty is notoriously ambiguous⁸¹. Still, a centrifugal pluralist interpretation is sustainable, if Art.1(exA)TEU and its imperative for decision-making as close as possible to the citizens are given proper normative attention.

The interaction of social citizenship and participatory democracy is, in this view, so important that “where... denied, the state clearly destroys whatever claims it has upon loyalty of men”⁸².

If Europe is not to become a European state, an alternative model of democracy and a new conception of citizenship are necessary to the ‘new’ European identity. Bearing in mind that such identity cannot and should not replace existing identities, the Union can become the political complement to a Europe identified by

⁷⁹ *ibid*, P.Close, 1994 *op.cit.*, p.242-68

⁸⁰ I.Ward, *op.cit* 1996 p.199-204

⁸¹ For analyses of the doctrine of subsidiarity, see N.Emiliou, *Subidiarity: Panacea or Fig Leaf?*, J.Steiner, *Subsidiarity Under the Maastricht Treaty*, A.G.Toth, *A Legal Analysis of Subsidiarity in D’O’Keeffe, P.Twomey(eds) Legal Issues of the Maastricht Treaty 1994*. Also G.DeBurca, *The Principle of Subsidiarity and the Court of Justice as an Institutional Actor*, 1998 *JCMS* 217

⁸² H.J.Laski, *The Foundations of Sovereignty in P.Hirst(ed) The Pluralist Theory of the State*, 1993 p.19

its heterogeneity. In the words of Ward, a “participatory and pluralist model of Union citizenship might provide a means towards creating such an identity, but... only... if we rid ourselves of the preconception which dictate our present understanding of how identities must be shaped”⁸³.

The ideas expressed bear certain similarities with the visions mentioned earlier, since they state the urgency for (re)construction of European ethos and note the significance of political participation mechanisms in the process, although their articulation is aimed at distancing them from the other conceptions that retain a nexus with modernist notions of boundaries. Ward describes his model as post-modern rooted in a comparable post-modern conception of human rights placing emphasis on ‘human’ rather than on ‘right’⁸⁴. However, Weiler’s modernist model is by no means contrary to a foundation of human rights on the value of man/woman. The problem with social citizenship is that, given the limited Community competence in social policy, its reality may prove too thin to promote social cohesion and ‘social’ collective identity, despite the impetus inclusion of social understanding in the concept of EU citizenship might provide.

Institutional post-nationalism

Favouring social citizenship, but under a different methodological prism, Shaw instruments both integration and citizenship theory for her conception. As regards the relationship between tangible citizenship rights and identity, she denotes that rights can be experienced in different ways by different individuals depending on

⁸³ I. Ward, op.cit 1996 p.210

⁸⁴ I. Ward, op.cit.1997 p.92

that aspect of their multiple identity a given right touches upon⁸⁵. Under an institutionalist perspective, it is not historically or sociologically necessary for such identity to operate at any given level, while the process of creating it forms part of the establishment and development of new social systems, including those of transnational character, as the European Union. This means that, in parallel with its core objectives, the policy-making activities of the Union, which include the evolving approach to citizenship, contribute to the formulation of identity in various manners. Breton singles out three⁸⁶: utilitarian identities, based on mutual interests, identities of pragmatic solidarity generated by de facto interdependencies, and, finally, identities of common socio-historical legacies creating a 'sense of peoplehood'. The latter can, evidently, develop at all levels of a collective social organization, national, subnational, or transnational and its operation at one level does not necessarily exclude its operation at another; in terms of identity, these levels are not mutually exclusive. In fact, multiple identities are essential to the proper functioning of multi-level polities like the European Union. "If social identities... operate entirely at one level, the overall structure is likely to be unstable"⁸⁷. This approach rejects the totalistic identity claims of nationalism as well as the idea of an all-consuming European identity. Similarly it offers no support to a 'concentric cycles' exegesis of identity formation in the multiple *demos* within the Union.

Among the factors affecting identity formation in transnational polities, special attention is paid to the exercise of citizenship. Within the EU framework, while the exclusivity of state-citizen relation may progressively be disintegrating

⁸⁵ J.Shaw, *The Interpretation of Union Citizenship*, 1998 61 MLR p.310

⁸⁶ R.Breton, *Identification in Transnational Political Communities* in K.Knop, S.Ostry, R.Simeon and K.Swinton(eds), *Rethinking Federalism: Citizens, Markets, and Governments in a Changing World*, 1995

⁸⁷ *ibid* p.52

because of the evolution of transnational political structures challenging it, the equally significant nexus between the practice of citizenship and polity formation retains its vitality⁸⁸. It is, then, necessary to study citizenship practice in light of the particularities of European integration, and the more appropriate vehicle is a combination of constitution-making approaches in the 1996/97 IGC and day-to-day policy activities of Union institutions that constitute a tangible expression of citizenship policy. The latter include legal instruments, soft-law outputs, such as recommendations or non-binding decisions, even inputs in the shape of policy ideas. Shaw concentrates on “citizenship as a policy issue in a historical contextualized sense, as well as a constitutional novelty”⁸⁹ and prefers an institutionalist instead of a neo-functionalist or intergovernmentalist perspective. The reason is the former’s ability to take into account the partial autonomy of Community institutions⁹⁰, the discounting of long term policy choices, even the occurrence of unexpected outcomes of those choices⁹¹. It does not deny the centrality of member States in policy elaboration, but emphasizes that they function within a framework they don’t fully control.

What is the scope of the policy context within which the exercise of citizenship takes place? In the nucleus of the Community project lies its ability to draw from “the enormous moral prestige of markets”⁹². Completion of the Single Market, under the imperatives of a market ethos, has been the prevalent policy orientation of the EC/EU since the mid 80s and various legal instruments have been

⁸⁸ J.Shaw, *op.cit* 1998 p.312

⁸⁹ *ibid* p.313. Both her normative and her descriptive approach to EU citizenship are influenced by the Marshallian model of analysis. See also J.Shaw, *op.cit.* 1997, <http://www.law.harvard.edu/Programs/JeanMonnet>

⁹⁰ mainly the ECJ and the Commission

⁹¹ See P.Pierson, *The Path to European integration. A Historical Institutional Analysis*, 1996 29 *Comparative Political Studies* pp.158-159

⁹² M.Ignatieff, *The Myth of Citizenship* in R.Beiner(ed), *Theorizing Citizenship*, 1995 p.71

adopted in numerous fields of EC law within given institutional environments. In light of the socio-economic preoccupations of the EU, Shaw uses the Marshallian triad of civil, political and social rights to review how policies are shaped into legal instruments and how institutional environments influence law-making⁹³, thus disagreeing with La Torre's suggestion that the absence of a welfare dimension in the current corpus of Union citizenship matters less than the urgency to develop certain political rights⁹⁴.

What such institutionalist socio-historical approach suggests is that Member States' choice to constitutionalize largely pre-existing citizenship rights in the Maastricht Treaty is not surprising. However, the limited constitutionalization of citizenship and the few policy innovations in the arena of political rights do not necessarily signify a halt to citizenship progress. Under this model, it is not only the decisions of an IGC that affect the future of EU citizenship, but also day-to-day policy reality that may enrich and strengthen the concept. The Amsterdam Treaty amendments⁹⁵ demonstrate no real progress, but, at policy level, entail a risk of legislative stagnation, especially if they are accompanied with a demise of the ECJ's pro-integration role. In fact, it is already argued that the formal introduction of subsidiarity has signaled a less pro-active shift of the Court⁹⁶, and its up to date approach on citizenship, mainly articulated in its jurisprudence on free movement and residence, offers evidence in support of this view. However, the recent *Martinez Sala*⁹⁷⁹⁸ and *Bickel* judgments bear the seeds of a potential re-emergence of a bolder

⁹³ J.Shaw, op.cit. 1998 p.314

⁹⁴ See M.La Torre, op.cit. 1995 p.113

⁹⁵ affirmation of the complementary nature of Union citizenship and addition of the procedural right to write to and receive reply from Community institutions in one's own language.

⁹⁶ See J.H.H.Weiler, Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration, 1993 31 JCMS p.437

⁹⁷ C-85/96 12.5.98, <http://www.curia.eu.int>

⁹⁸ C-274/96 24.11.98, <http://www.curia.eu.int>

ECJ. Times call for a brave reading of Union citizenship, one that can be found in AG Cosmas' Opinion in *Wijsenbeek*⁹⁹, and if the concept is not to wither, the Court must seize the day.

Studying citizenship both as material practice and normative figure, Shaw's ideal is "an active conception of social citizenship based on a politically defined community"¹⁰⁰. The question of the causal relationship between citizenship as an institution and the existence of identified communities finds no definite answer. One cannot say whether it is citizenship that constitutes communities or vice versa, but, as an alternative, the idea of a reciprocal reinforcement between such communities and a conception of democratic citizenship (both as a sense of membership and a body of substantial rights) seems logical and is supported by institutionalist thinking. The latter, perceiving EU citizenship not only as a symbolic flag but as a facet of day-to-day Union policy, aspires to bridge the gap between rights of EU citizens and an emerging European identity. Thus, a balance sheet of citizenship rights, stemming from Treaty provisions and other legal instruments (including soft law)¹⁰¹ recognizes citizenship as "an integral part of the EU polity understood as a dynamic governance structure"¹⁰² which includes perception of political participation rights as an aspect of citizenship in an active sense. Concluding her balance sheet of rights and duties, Shaw addresses the issue of boundaries. While Member States nationality is required for the acquisition of Union citizenship, third-country nationals enjoy certain rights which are actual adjuncts to citizenship¹⁰³. So is citizenship constituted by the formalism of Art 17(ex 8) EC or the contours of rights conferred upon individuals?

⁹⁹ C-378/97, Opinion of 16.3.99, <http://www.curia.eu.int>

¹⁰⁰ J. Shaw, op.cit. 1998 p.316

¹⁰¹ even Second and Third Pillar measures where appropriate

¹⁰² J. Shaw, op.cit. 1998 p.316

¹⁰³ J. Shaw, op.cit. 1997, <http://www.law.harvard.edu/Programs/JeanMonnet>; eg the right to petition the European Parliament, or the right to apply to the Ombudsman

Shaw's post-national model claims to possess the ability to face the potential conflicts between citizen and individual interests. The need for a bolder ECJ is highlighted since, in this view, effective legal protection of citizenship rights is a medium for the development of post-national identity. What this version of post-nationalism also requires is Union citizenship to outgrow its market legacy, although it seems premature to be optimistic about that. Regarding the development of social rights, the Union's deficiencies are well known but Shaw asserts that there is "cause for tempered optimism"¹⁰⁴.

Is the post-nationalist conception excessively idealistic in light of the above and the fact that it understands the integration project as broadly inclusive and coherent in terms of purpose, at a time of mounting criticism over a "Fortress Europe" vis-a-vis third-country nationals? The exclusionary reality of current citizenship practice should not be disregarded, although all (re)constructions of citizenship analysed have the conceptual capacity to overturn such reality as well as the argument that the creation of a European identity is a necessarily, though temporarily, exclusionary process. This would be so, were we to accept a future all-consuming European identity; but that can and should be resisted because it would deprive Europe of its cultural armoury located precisely on its diversity of traditions and their cross-fertilization.

The definition in political terms of the community Union citizenship is to include, seen in almost all models discussed, is part of Shaw's model as well, although it is not considered more important than the social elements informing her vision. The novelty of 'institutionalist post-nationalism' lies in its emphasis on day-to-day policy-making as a medium of enhancing rights and strengthening identities.

¹⁰⁴ *ibid*

Communities are not only built conceptually, but also at practical level. This point is particularly important, because part of the evolution of the integration project has emerged through the quasi-revolutionary, in the sense of proceeding beyond (even contra) formal constitutional decisions, course followed during certain periods by Community actors. Such 'subversive' tendencies can contribute to the evolution of a meaningful concept of EU citizenship, as well as to its demise, and this side of the coin should not be overlooked.

A Proposal: Post-national particularism

None of the theoretical models discussed can claim to be infallible; none does. Yet, though imperfect, they all make significant contributions to an alternative perception of the concept of Union citizenship both in terms of collective identity and democracy. I wish to bring together elements of those models in order to 'narrate' my own (derivative) normative tale.

I conceive the European demos as primarily a civic demos. As such it operates concurrently with national and subnational affiliations, based, however, on different subjective factors of identification. It is for different reasons that one is loyal to one's nation or colleagues or friends. Moral bonds approximate us with friends and organic-cultural with our nation. What sort of bonds bring us close to fellow Europeans?

The absence of a European unifying cultural myth, and 'European culture' as a celebration of diversity and cultural discourse attest to the impossibility of a European nation, in an ethnic-organic sense. Some may dream of creating such nation, but their aspirations should and would be resisted, as no more than an artificial attempt to mask centuries of diversity.

The European unifying myth is a political one. My point of departure is MacCormick's 'European Commonwealth'. The imperfect European Constitution is constitution enough for Union citizens to consider it as their own legal and political 'fundamental narrative' similar to and different from national constitutions. Similar, because it shares many of the values of the European legal culture, different because it operates at a totally new level of political structure, aiming at peace and decent prosperity, the European 'common weal'. Peace and decent prosperity are national constitutional goals, as well; does that mean that the only difference between the icon of EU and Member State citizens is one of geographical space? No, for there is another difference eloquently described by Weiler's model. The European demos is constructed around an additional educational value: acceptance of the fact that in certain aspects of public life, the EU demos has the legitimacy to decide on relevant issues. Even though, the decisions to be taken are important to the national 'us', preference will be given to the will of a wider, out-reaching, European 'us'. This value fractures national understandings in two ways: It 'imposes' a different set of substantive values, based on which decisions will be adopted; fellow Europeans will not always share our sensitivities, perhaps, even in matters we feel we are in a 'better position' to decide. Moreover, this value subordinates us to another decision-making procedure located far from us. Both the procedural and the substantive intrusion are hard to accept. Is this, then, the end of my tale?

I hope not and offer two guarantees, one procedural and one substantive, to counter the problem. My procedural guarantee stems from the increasingly important¹⁰⁵ idea of deliberative democracy and is essentially based on Habermas' conception. A system of formal and informal public communication networks that

¹⁰⁵ even at national level

restrain public administration to more or less rational premises lies at the heart of such conception¹⁰⁶. The discursive process does not only include policy inputs, but also elements of direct democracy. Citizens should take part, even limited, in the law-making process, be it through legislative initiatives, such as those described by Weiler¹⁰⁷, or through referenda on certain issues¹⁰⁸. In any event, citizens' participation requires institutionalization, so that a direct link between the Union and its citizens can be forged and the latter develop active interest in the activities of the EU. The procedural guarantee includes two further elements: One is emphasis on openness and transparency in the legislative process. The current situation, especially within the Council, is unsatisfactory even after the 1993 Code of Conduct on access to information obtained official status¹⁰⁹. Art.255 ToA provides that general rules on access to documents have to be adopted under the co-decision procedure within two years¹¹⁰. Special attention should be paid to that, since information is "the currency of democracy"¹¹¹. The second element is the creation of a European public opinion forum, on the ideal of ancient Greek *Agora*, operating as a European-wide locus of political discourse¹¹². Its implementation rests heavily on information technology for obvious practical reasons. For the purposes of monitoring and elaborating the procedural guarantee, Shaw's institutionalist approach would prove very useful because of its focus on day-to-day activities of the Union. Thus, the fallacies of the

¹⁰⁶ See supra, section on constitutional patriotism

¹⁰⁷ See supra, section on supranational citizenship

¹⁰⁸ Further elaboration of this proposal exceeds the aim of this paper. Its main feature is that after a number of signatures are collected in a number of States (less than half), a European-wide referendum should take place. For the proposal to pass it should, at least at an original phase, be voted for by the majority in each Member State, but the referendum's outcome shall be binding upon Community legislators

¹⁰⁹ OJ 1993 L 340/41 (Council Decision approving Code); OJ 1994 L 46/58 (Commission approving Code). See also Commission Communication on Transparency (OJ 1993 C 63/8), Access to Documents (COM(93) 191, 2.6.93, OJ 1993 C 156/4) and Openness (COM(93) 256 8.6.93, OJ 1993 C 166/4)

¹¹⁰ See also Art.207 ToA with regard to the Council's Rules of Procedure

¹¹¹ D.Curtin, op.cit. 1997 p.47

deliberative circuits can be identified and corrected. Finally, it is stressed that civil society, as a non-governmental civic space¹¹³, is important under this model, but only to a certain extent. The conception I am proposing is individual- not group-oriented and assumes liberal, not communitarian, understanding of collective identity technology.

Let me now turn to my substantive guarantee. The neutrality of procedural devices needs to be counter-balanced by a European ethos providing philosophical foundations for acceptance of the legitimacy of the EU demos. The notion put forward from this premise is that of post-national particularism, originating conceptually from Derrida's thesis that the essence of jurisprudence, and of ethics, is the deconstruction of universalism and the recognition of universal particularism¹¹⁴. Post-national particularism is opposed to national particularism and its exclusionary abuses, and to Pan-Europeanism, as an all-consuming process of European identity formation. But its contours are not only drawn negatively.

What's in two words, then? The suggested European ethos is post-national because it invites individuals to construct a self-image transcending the classic relationship between nation and state, nationality and citizenship. The post-national ethos questions the interdependence between the two and seeks to nullify citizenship as a statal legal code of nationality. The national is to be liberated from the statal. This way, national(and subnational) differentiation goes beyond state boundaries and, in that sense, becomes more 'authentic'. Further, at subnational level, it deconstructs artificial, state-imposed, affinities, and permits individuals to realize their

¹¹² see also Curtin's idea of a European Political Public Sphere, *supra*

¹¹³ *ibid*

¹¹⁴ J.Derrida, *The Force of Law: "The Mystical Foundations of Authority"*, 1990 11 *Cardozo Law Review* as cited by I.Ward, *op.cit.* 1997 p.87

“otherness”. Within European geometry, this can be the value side of the principle of non-discrimination on grounds of nationality¹¹⁵.

Still, the interaction between differentiation and commonality is not negated. That’s where particularism comes into play; deconstruction entails reconstruction. After the individual has come to terms with his/her fragmented self, particularism provides the knowledge that multiple identities are not mutually exclusive, but operate within different frames and contexts. The Individual, as an expression of the Other and constituted by various loyalties, is celebrated. Hence, totalistic identity claims on the part of the nation-state or a European (super)state are devoid of meaning. Human value is the foundation of respect, not state membership. In this sense, my substantive guarantee is also liberal-individualistic.

It is with deliberative, participatory democracy and post-national particularism, then, that fear of the legitimacy of the Other can be battled. Ideally, this conception creates political allegiance towards a Union possessing democratic dynamics, while at the same time respecting (redefined) national sensitivities. It also improves the situation of third-country nationals, both because of its potential philosophical impact on nationality and naturalization rules and its emphasis on human value. In practical terms, its conceptual armoury presupposes and allows a notion of EU citizenship free from the functional character of its past legal construction, dependent on the economic internal market ethos, and understood as self-aim.

The conception advanced borders with Utopia, to that I attest. Union reality remains very distant from all the theories discussed. Yet, when AG Cosmas speaks of

¹¹⁵ J.H.H.Weiler, op.cit. 1999, p.343

the anthropocentric philosophy of citizenship provisions¹¹⁶, one has to wonder about the future of the concept of EU citizenship.

Epilogue

F.S.Fitzgerald finishes 'Great Gatsby' with the following words: "So we beat on, boats against the current, borne back ceaselessly into the past." The myth of nation-state is a tempting and reassuring locus of rebirth in an age of post-sovereign states and fragmented, in terms of identity, individuals. "Tempt not a desperate man" says Romeo in Shakespeare's Romeo and Juliet. Between a fragmented reality and a nebulous, bureaucratic and non-democratic European future, Europeans prefer their past. It does not have to be so; the concept of EU citizenship offers a new technology of collective identity, of loyalty to a polis, of Eros. It offers an exodus from the self-perpetuating circle of nation-state mirrors into a new normative order where post-national democracy is feasible. But more than anything, it possesses the dynamic of a new self-perception incorporating the Other to the Self.

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¹¹⁶ in his Opinion on Wijsenbeek, C-378/97, 16.3.99, <http://www.curia.eu.int>

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