

# Multiple allegiance, democratic accountability and federal citizenship - some comparison between the EU and USA

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*This paper begins with a reminder of the constitutional and institutional frameworks of allegiances, identification and citizenship rights. Then it argues that there are grounds for questioning the customary conceptual and political overlap between nationality and citizenship. Some decoupling has taken place in the EU and the paper considers competing assessments as to how well these specific supranational institutions are protecting rights. In conclusion, Carlos Closa's idea is drawn on that supranational citizenship has more potential than national citizenship to be democratic. His claim that civil society in the European Union (EU) is too weak to take advantage of this potentiality may be reinforced by enlargement. This is not because of the introduction of a further set of nationalities into a supranational citizenship system but because of a new complexity in the principled norms which Closa says have to be present in a site of democratic citizenship. In view of this, there are lessons to be learned from American theories of republican federalism which, as expounded by Sam Beer, have much in common with a modern interest among radical democrats in deliberative or dialogic democracy.*

**Key words:** USA, EU, democratic accountability, federal citizenship

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## 1. Introduction

In this respect, the EU experience is considerably different from that of the United States of America (USA). First, the authority of states that formed or joined the EU was incomparably more entrenched than those of the young ex-colonies which came together to make the constitution of the United States (Meehan, 1996). Thus, they had the power and legitimacy to do what the Anti-Federalists argued for in the debate about the American Constitution. They created a system in which the apex of the 'government' of the EU and the governments of the member states are not separated. The European Council; which discusses intergovernmental strategy, is composed of the heads of governments and the Council of Ministers, which makes the final decisions about

common policies, is made up of relevant ministers from member state cabinets. Thus, the EU is regulated by its own members - notwithstanding the fact that the Commission has more powers than national bureaucracies. This confederal characteristic of the EU is bolstered by a state-based system of elections to the European Parliament and by the absence of union-wide parties - though there are increasingly coherent transnational groupings of 'party families'

This structure of European government reflects a view about the protection of popular rights and interests similar to that of the Anti-Federalists. The views of the latter that these were best protected through foci of allegiance and channels of accountability that already existed in the states has an echo in the two main understandings of subsidiarity. One of these is that it protects state sovereignty [and thus, indirectly, popular sovereignty] by requiring the

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Commission to demonstrate convincingly that proposed actions cannot be carried out by states acting alone. The other understanding is that subsidiarity directly enhances popular sovereignty by requiring decision to be taken 'as close to the people as possible'.

However, the free choice of states to found or join the EU becomes more constrained when it comes to determining its development. As Carlos Closa (1998(a) and 1998(b)) points out, member states do not remain 'the masters of the contract' because of a vigorous EU legal doctrine that 'the Treaties are a kind of constitution'. These have led to 'a body of legislation and principles' whose future cannot be predicted and from which member states cannot exit. They cannot exit because they all subscribe to the principle of the rule of law and, hence, to the obligation of compliance. Political decisions taken by the member states themselves have similar consequences.

Member states do control explicit 'constitutional' reform of the EU through the procedure of unanimous decision-making in the Council of Ministers - though this does not mean much for control by national citizens, given the difficulties of parliamentary scrutiny. This is the same for some 'ordinary' policy decisions. But other 'ordinary' policy decisions are made by qualified or simple majority voting which are binding on all, whether or not national democratic procedures have resulted in a government with a contrary conception of its interests. But, as Closa also argues, there is a further twist to this problem. This is that, if the EU lacks popular democratic legitimacy in an institutional or procedural sense, it has a social legitimacy in its delivery of policies that meet peoples' essentially private interests in a European market economy. The stagnation induced by a long period up to 1985 of insistence on unanimity about everything put integration at risk sufficiently for member states to agree to more frequent use of majority voting so that policies could be delivered more effectively and efficiently. Paradoxically, then, weak national control is functional to the maintenance of the EU's social legitimacy.

The question arises, therefore, as to whether supranational democratic citizenship can grow in a context in which current national conceptions of it seem inconsistent with what is needed for EU legitimacy. More will be said about this in the conclusion. Before that, it should be suggested that the EU is not the aberration that it is sometimes taken to be in decoupling, to some extent, nationality and citizenship.

## 2. Citizenship and Nationality

As it has been suggested elsewhere (Meehan, 1993, 1996, where the author's gratitude to many other scholars are cited), there are good grounds for treating the overlap of citizenship and nationality as a matter of historical contingency and not as an analytically necessary connection. In short, nationality is a legal identity from which no rights need arise, though obligations might - as is obvious when nationals are called 'subjects'. Conversely, citizenship is a practice, or a form of belonging, resting on a set of legal, social and participatory entitlements which may be conferred, and sometimes are, irrespective of nationality - or denied, as in the case of women, regardless of nationality.

While borders had been porous in the Middle and Late-Middle Ages and migration normal, the strategic interests of new states lay in impregnability and control of persons with or without leave to cross frontiers. Nationality was an obvious criterion and proof of nationality a simple method of verification. The process of modernization in the new states went hand in hand with the construction of the nation. This served external and internal purposes. It created a sense of the 'Otherness' of those who were a threat to the strategic interests of political elites. And it fostered the loyalty or allegiance that induced willingness to be taxed to fund the defence of the state and to be enlisted into military service. Since 1945, allegiance is relevant less to military purposes than to the legitimacy of redistribution and the funding of welfare systems (Miller, 1993).

The construction of the nation was promoted through the dismantling of feudal bonds and their replacement by a gradual extension of legal and political rights. So complete became the overlap between national identity and citizenship status that, in many political systems, even those with separate words [unlike Germany], 'citizenship' and 'nationality' became interchangeable. And, according to Raymond Aron, it was a contradiction in terms to see citizenship rights as capable of being guaranteed by anything other than the state, more particularly the nation-state, and certainly not by a regime - the EU - that was not a state at all.

But, using 'citizenship' as a synonym for 'nationality' can result in peculiar distortions of meaning. In late 19<sup>th</sup> century America, the Supreme Court ruled that a woman was, indeed, an American citizen but that being a citizen did not necessarily carry the right to vote. This empties the classical conception of 'citizen' of part of its core meaning and the ruling makes conceptual sense only if we substitute 'national' for 'citizen'; [that is, taking 'citizen' at its

face value and leaving aside, for present purposes, a feminist account of its 'deep structure']. In other systems, both terms are employed in legislation but as though 'nationality and citizenship' were all one word in which the first and last components were interchangeable. For example, except for one Article of the 1922 Constitution, it was not until 1962 that Irish official documents, began to be clear that there was a difference between citizenship as nationality and citizenship as the capacity to exercise rights. The current British passport still says 'Nationality: British citizen'.

However, from a longer historical perspective, it can be seen that citizenship is not the same as nationality but is about enabling people to participate in creating, maintaining and enjoying the good society, whether the people belonging to a society inhabited a citadel, a city-state, a locality, an empire, the world - and even, since John Stuart Mill and especially in Germany, the work-place. In the young United States of America, a century before the ruling, just mentioned, and at the time of the making of the Constitution, there was no overarching American national identity and this did not evolve for a very long time. But there were citizenship rights, even if undemocratic by today's standards, and the best way of protecting them was a passionate bone of contention between The Federalists and the Anti-Federalists. More recently, a survey of eleven European countries shows no wholly systematic pattern of attaching nationality restrictions to legal and social entitlements and rights to participate in politics (Gardner, 1997). For example, the British are aliens under Irish law but British nationals resident in Ireland now have most of the rights of citizenship. The Irish are neither alien nor British under United Kingdom (UK) law but, like resident Commonwealth nationals, have always been able to exercise all the rights of citizenship. Similar arrangements exist in the Nordic League. In the EU, rules about who a state's nationals are and how that nationality may be acquired or lost remain matters for national decision-making. It is that then activates their status of European citizen - though recently, the UK government was taken to task for denying the right to vote in European elections to Gibraltarians [not full nationals since 1981 but British Protected Persons; full nationality was restored to colonial citizens earlier this year]. For those who have been defined as nationals of member states, EU citizenship is about participation and the enjoyment of 'the good society' in the Union as a whole. As noted in conclusion, the European 'good society' is criticized as libertarian - offering private rights to individuals. But, it may be worth noting that the preambles to its di-

rectives on social policy often echo, if dimly, the classical conception of the 'good society' as a collective moral order of justice and conviviality. Now something will be said on how well the promise of supranational citizenship has been met in the EU.

### 3. Assessments of EU Citizenship

Assessments of EU citizenship are contradictory, possibly being determined by divergent general ideological and epistemological outlooks. Sometimes, they seem guided by whether the commentator favours or opposes European integration (Meehan, 199b).

Sometimes, they seem to depend on whether the analyst is a positivist who examines only what exists concretely and compares its slightness to national provisions - but overlooking the contrast between decades and centuries of evolution in the EU and national systems respectively (Meehan, 1993). Conversely, other analysts suggest that what is important is not the size but the dynamics of change; that is, the fact that established norms have been breached at all opens the possibility, though not the inevitability, of new paradigms.

The oldest criticism of EU citizenship starts from the limitations of the Treaty of Rome as a basis for rights. These being restricted to the freedom of movement of goods, capital, labour and services mean that European rights were restricted to the 'citizen-as-worker' instead of reflecting the normative principle that people are citizens because they are human beings. This makes it particularly defective for women, given the impact of conceptions of the public and private and the domestic division of labour, and; in practice, all those not in regular, conventional employment. Also, although jurisprudence in the European Court of Justice (ECJ) tended to expand the scope of rights and to limit anomalies within and across states, at least until the 1980s, the legal instruments and enforcement procedures can make it difficult to realize rights that are, in practice, common across the Community. It is also argued that the evolution of European citizenship replicates in a larger arena the physical and social exclusion of people without the right nationality. ['Third country' migrants within the Community, however, do have some protection under the original Treaty of Rome, if they are members of a migrant EU family or as a result of agreements between the Community and third countries.] Concerns about the narrowness of rights began to be acknowledged in the mid-1970s, grew with the momentum of discussion of an 'ever closer union' in the 1980s, and were reflected in the

Maastricht Treaty. Though there are positive assessments of Maastricht and prior developments, the 1991 Treaty has been criticized for not going far enough.

All critics note that the status and, hence, rights of EU citizens continue to rest upon nationality of a member state and that this remains a prerogative of member state governments (but see note above about Gibraltar and the UK). They also note the exclusion of General Elections, and potential derogations from provisions for municipal and European elections. These are possible where there are specific problems, especially questions of national identities, as in Luxembourg where the proportion of residents from other member states is larger than elsewhere (Closa, 1995). O'Leary (1995) argues that: the pre-existing direct legal link [*van Gend en Loos* - see above] between individuals and the centre is slight, a view reinforced by a German ruling about the 1991 Treaty [*Manfred Brunner and others v The European Union Treaty*, Cases 2 BvR 2134/92 and 2159/92 [1994] 1 CMLR 57; see also Harmsen, 1994]; the new voting rights are little more than reciprocal arrangements which could exist, and sometimes do, irrespective of union; and that it will be difficult in practice to use the right to diplomatic and consular protection by other member states. Curtin and Meijers (1995) identify hypocrisy on the part of member state governments, except Denmark and the Netherlands, in their ostensible intention to enhance rights to information. Member states' restrictive applications of these measures to information about border policies reinforce at a European level the 'closure' effects of citizenship on people from outside (see also Kostakopoulou, 1998, on the 'securitization' of immigration). In the social field, the Commission's capacity to expand a regulatory regime of rights is restricted to what it may opportunistically introduce in a context of a reluctant Council of Ministers (Mazey, 1996). Critics of Maastricht also stress the limitations of local partnership, regional subsidiarity and the status, powers and budget of the Committee of the Regions.

So far there has been a cautious welcome for the Amsterdam Treaty. Positive views (eg, Oreja, 18.6.97; Institute of European Affairs, 24.6.97) have been expressed about: the adoption of strong normative principles of rights; the new basis for combating more forms of discrimination; the procedures for dealing with infringements of rights; the inclusion of the Employment Chapter; the references to reducing exclusion; and the proposal to set standards for 'third country' nationals at work and in free

movement. The Treaty's references to national and Union representative bodies goes a little way towards Chrysochoou's (1996) insistence that 'democratic deficits' need to be addressed on both planes if the experience of citizenship is to be realized to its full. On the other hand, the Commission itself reflects some of the concerns of voluntary organisations by regretting the limitations of social policy (European Commission, 1997(b), p. 6). It also notes that 'the institutional system is not yet entirely equal to the challenges' and regrets the opaqueness of the Treaty's text (Oreja, 18.6.97). Moreover, 'under many ... headings, ... the provisions may be criticized as being general rather than specific and aspirational rather than tangible' (Institute of European Affairs, 24.6.97).

But, as a foil to criticisms of the limitations of Maastricht, there is an alternative assessment of EU developments which can be applied equally to Amsterdam. For example, Weiner (1995) argues that citizenship, including 'access' and 'belonging' as well as rights, has never been static or uniform. She identifies in the history of integration confluences of policy imperatives and the interests of key political actors which have created breaches in nation-state experiences of citizenship and opportunities for new paradigms and practices.

In her account, the regulation of social rights and relations between Community institutions and the 'social', local and regional 'partners' [pre-dating Maastricht] are part of 'access' and 'belonging'. The period of acceleration towards union is, in Weiner's account, a time of discernible movement in the paradigm of citizenship, containing the seeds of new practice in the activation of rights. In particular, markets and migration make 'place', as well as nationality, the conceptual and practical pre-condition for triggering legal, political and social entitlements. This could become significant not only for nationals of member states but also for lawfully resident 'third country' migrants, as seems to be beginning in Amsterdam.

Even if early reactions to the Amsterdam Treaty are guarded, the movement reflected in it seems to vindicate O'Keef's view that '[the] importance of the TEU [Maastricht] citizenship provisions lie 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 to or strengthened but not diminished' (cited in Chrysochoou, p. 30). The same can be said, in turn, about Amsterdam.

Moreover, the EU's ability to sustain its dual claim of being 'for its citizens' (European Commission, 1997(b)) while also 'respect[ing] the national identities of its Member States' (European Commission, 1997(a), p.5) depends upon such dynamism. As it is well known from the USA, however, all stories of rights depend on what people make of them. This requires us to consider the state of civil society.

#### 4. Conclusion

If rights are to be more than symbolic and result in real redistribution of power or influence, much depends on the ability of civil society 'to seize the day'. Closa (1998(a) and 1998(b)) sees more potential, in principle, in supranational than national arenas for democratic citizenship. In practice, he suggests however, European civil society may be too fragile to transform EU citizenship into an arena for democratic self-determination from what he calls an enhanced set of private rights to make the most of new market opportunities [or be sheltered a little from its threats].

His argument rests on a critique of the case that a shared national identity is a pre-condition for citizenship. For, by insisting that citizenship can be built only on such bonds, such theories propose that a democratic practice be based on a commonality that was formed under pre-democratic conditions. In contrast, a site of democratic citizenship is one in which people live together under a set of principled bonds, such as those identified by Robert Dahl as voting equality, effective participation, enlightened understanding, control of agendas and inclusiveness. In drawing this contrast, Closa suggests that supranational citizenship is less vulnerable than national citizenship to charges of exclusion and discrimination because, being unable to draw on comparable non-principled bonds, its success must depend on democratic and human rights norms.

Dahl, of course, is a citizen of the USA where democratic norms and ties [albeit defective] preceded national bonding. In contrast, Britishness was forged by elites, prior to democracy, to make bonds between peoples who had been enemies of one another. It worked for some centuries, in the context of different sub-state national identities, as principled bonds were grafted on to the pre-democratic unifications. But the fragility of the origins is re-emerging and there are claims, at least in Scotland, and to some extent, Wales, which support Closa's case; that is,

that, from a democratic basis, a new union of principled norms can be negotiated at the supranational level - the EU.

The idea that a multi-state supranational union may be preferable to unification with a single neighbour arises from experience among the component peoples of the UK in trying to make what Closa calls their private EU rights have public consequences. That is, people - not only nationalists but also advocates for their regions - whose material interests are enhanced by learning to use EU partnership opportunities are trying to redefine their relationship to the domestic state in a European context, to bring about new forms of mobilization and interaction, and to influence agendas. But, again in line with Closa's theoretical case, unification into the British state left pre-British civil society institutions intact, especially in Scotland and Northern Ireland and, hence, in a position to try either to improve the principled bonds of the British state or to negotiate new ones in a different arena.

Closa (1998(b)) is guarded about whether there is a strong enough civil society in the EU as a whole to transcend the defects of national citizenship in order to bring about the benefits of a regime based on principled bonds - without a willingness on the part of states themselves to agree to stop trying to maintain the impression that anxieties about national identities are well attended to in EU provisions. The changes which he suggests are necessary include the avoidance of derogations and exemptions which 'offer shelter to communitarian understandings of the relationship between individuals and the state premised on nationality'; 'the full constitutionalization of a European political status'; greater opportunities for direct citizenship participation in EU affairs; stronger commonality and reciprocity of rights in different member states; and willingness by states to respond to 'spill-over' pressures from EU citizenship status on to varying nationality laws, including greater willingness to acknowledge dual or multi-nationality. Something of the last is beginning to happen. The German government has just been forced by opponents to abandon a plan to make dual-citizenship legal but it is going ahead in allowing German citizenship to be acquired as of right instead of discretion, not only as before by ancestry alone, but also through residence and naturalization. The ECJ is playing a role.

The Gibraltar issue has been mentioned. Another case was about a person with dual nationality - of a member state and a third country. The ECJ re-

jected another member state's claim to be free to recognise only the third country dimension and, hence, to deny rights.

If Closa is right about the weakness of European civil society in combating a privatized, liberal or libertarian conception of citizenship, then enlargement may reinforce the challenge. The prospective member states, while having to subscribe to principles of liberty, democracy and human rights as a condition of entry are not well placed to do so in practice - emerging as they are from totalitarianism which suppressed civil society or bent it to the will of the state. At a conference during the 1998 UK presidency, harrowing tales were told of the vulnerability of emergent civil society associations in the Balkans and of discrimination against minorities in east and east-central Europe. With or without minority problems, the concept of liberty - perhaps necessitated by dire economic conditions - is, more libertarian than that which Closa sees in the EU. It is the nega-

tive one of 'freedom from' restraint - not the 'freedom to' which is implicit in Christian- and social democracy and still has some place in the link in the EU model between social inclusion and economic progress.

The point to be drawn here is not about the addition of more nationalities, either *per se* or in their further reduction of the overlap between nationality and citizenship. It is that growing mismatches amongst sets of principled bonds, not a more complex collection of pre-democratic identifications, may inhibit the transformation of EU citizenship along the lines aspired to by Closa. If this is so, there is a heavy burden on the political realm to democratize the public space so that the various associations of people can come face to face with their different interests and agendas (Tassin, 1992) and, through a process of dialogue, try to achieve outcomes that are, if not satisfactory to all, at least reasonable. ■

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