THE FEDERAL TRUST
for education & research

Constitution and Community
Social underpinnings of a legal order

SILVANA GLIGA

European Essay No.32

A Definition of Federalism

Federalism is defined as 'a system of government in which central and regional authorities are linked in an interdependent political relationship, in which powers and functions are distributed to achieve a substantial degree of autonomy and integrity in the regional units. In theory, a federal system seeks to maintain a balance such that neither level of government becomes sufficiently dominant to dictate the decision of the other, unlike in a unitary system, in which the central authorities hold primacy to the extent even of redesigning or abolishing regional and local units of government at will.'
(*New Fontana Dictionary of Modern Thought*)

THE FEDERAL TRUST
for education & research

Constitution and Community.
Social underpinnings
of a legal order

Sɪʟᴠᴀɴᴀ Gʟɪɢᴀ

Enlightening the Debate on Good Governance

European Essay No.32

Introduction

During 2004 The Federal Trust organised a Graduate Student Essay Competition, with support from the UACES Student Forum, the Jean Monnet Centre based at the University of Manchester, the Institute of German Studies at the University of Birmingham, the Jean Monnet Centre for European Studies at University of Leeds, and the European Parliament Office in London.

Graduate students were invited to submit essays on the broad topic of the 'Future of Europe'. Essays could focus on topics such as the evolution of European constitutionalism, EU reform, theories of integration, including federalism, or on policy issues, such as developments in defence or economic governance. Only original unpublished work in English could be considered.

All submitted essays were considered for online publication in the Federal Trust Constitution Project Online Paper series and, from those essays accepted as Online Papers, a winning essay was chosen. The winning essay would be printed and distributed as a Federal Trust European Essay. The winner would also receive £100.

A total of twenty-one Essays were submitted. Twelve came from students registered at UK universities, seven from universities in other EU Member States, plus one from the US and one from a non-EU state in Eastern Europe. The standard was generally very high, and the best essays combined a clear intellectual focus with an impressive grasp of contemporary events and the political nuances of the 'future of Europe'.

A jury comprising Dora Majoros (EU policy portal Euractiv), Brendan Donnelly (Director of The Federal Trust), and Prof. Jo Shaw (University of Manchester) unanimously chose as winner of the competition the essay submitted by Silvana Gliga, University of Newcastle. Gliga's essay comprises a clear presentation of many of the key debates on post-national citizenship in the EU context, linking this not only to established practices of citizenship to be found in the EU treaties, but also more widely to the question of participatory democracy as encouraged in particular by the Commission's White Paper on Governance.

We hope that readers will find this essay as stimulating and well-argued as we did.

J. Shaw
B. Donnelly
D. Majoros

Note on the author:

Silvana Gliga is currently a PhD student at the University of Newcastle. Her PhD thesis explores the social, political and cultural factors which made the European nation-state a successful form of organisation and attempts to draw conclusions and examine the consequences for wider transnational forms of organisation (e.g. the European Union).

Silvana completed a BA in Psychology and an MA in Social Communication and Public Relations in Bucharest, Romania. For two years she worked in the Protocol Office of the Minister's Cabinet, Ministry of National Defence of Romania. She went on to do an MA in International Relations as a Chevening scholar at the University of Kent.

Constitution and community.
Social underpinnings of a legal order.

Silvana Gliga

Abstract

A constitutional order represents more than the machinery of government and a mechanism for entrenching rights; it provides a normative framework, the basic values, principles and objectives which guide the common existence of a community of citizens. It is, however, meaningless unless it is 'enacted', transformed into social reality by the practice of its citizens. Within the nation-state, the fundamental values of the constitutional order were brought into existence through the progressive social struggles of citizens. A common citizenship practice emerged from the homogeneity of national communities. A post-national constitutional order encounters new challenges: it must accommodate different cultural communities and allow for the emergence of idiosyncratic forms of citizenship practice within these which would, nevertheless, remain permeated by EU-wide constitutional values.

As a unique form of post-national integration, the emerging European political union was and continues to be the focus of much debate and research. Amid a wealth of interpretations and perspectives it is nonetheless adequate to claim that the project of a political union enters centre stage at a moment of tremendous global change, when the old frames of reference seem to be losing ground. Indeed, the processes that came to be brought under the umbrella concept of 'globalization' seem to put serious strain on the old form of societal organization couched in the shelter of the nation-state (Featherstone, 1990: 2, Held, 1991: 143). Home and stage for bringing about Enlightenment ideals and values, the frame for realizing democracy and entrenching individual rights and freedoms, the nation-state seems to be fading (Habermas, 2001: 65-67).

In an increasingly global economy national polities have lost control over a gradually 'denationalized economy' under the pressure of international competitiveness and the international division of labour. The state is no longer able to control international financial flows or technological development, nor cushion the negative social and environmental effects of an increasingly global capitalism. The national shelter has become less comfortable (Habermas, 2001: 66): it is no longer able to uphold the socio-economic compromise of the welfare state which encompassed sustained economic growth and measures of social protection. A host of contemporary problems require solutions at an international level. As the city-state before it in European history, the nation-state has become too small to address many of the most pressing challenges we face today (Dahl, 1994: 25-7).

It is in this context that the EU emerges centre stage as a unique historical and contemporary political process, a unique moment of institutional innovation. Its novelty goes beyond nation-states as previously the building of nation-states went beyond particular frames of collective organization. The European Union is the highest achievement and the most advanced form of economic integration among sovereign states and goes well beyond a simple international framework for cooperation. Unlike such international frameworks for cooperation, it functions by pooled sovereignty and exercises a great degree of authority that previously rested at national level (Dinan, 1994: 353). At this post-national level, the EU promises to expand the national system of democratic governance through the establishment of supranational institutions, which would remedy the particular contemporary challenges associated with globalization (Eriksen and Fossum, 1999: 1-2).

As it seems, the Union finds itself in a unique position to achieve a form of integration transcending national borders and upholding a traditional democratic ideal on a post-national level. The challenge would be to uphold the values and achievements of the nation-state and translate them onto a wider post-national frame (Habermas, 2001: 61). It may well become a blueprint for the creation of a new order, expanded worldwide and able to answer problems which go beyond the territory of nation-states (Martin, 1991: 16). It is important for this reason, to notice the willingness to appropriate and deploy the European humanist and Enlightenment heritage (of human rights, democracy, freedom and justice) and a commitment to these values, principles and objectives, which informs European official documents.[1] In this endeavour, the EU is approaching its decisive point: the creation of a constitution which would affirm the birth of a new post-national political unit and provide a coherent and simplified legal basis for its functioning. The European project, and implicitly a European constitution, seem however to be increasingly lacking public support and witnessing a rise in Euro-scepticism.

This paper aims to look at constitutionalism in the EU and conceptualize the constitution as a legal order which gains existence through the praxis of citizens. The first part focuses on an analysis of constitutionalism and explores the social underpinnings which make it possible for a community to come together, accept and enact (give social reality to) a legal order. The paper then takes a short look at the national communities and how the constitutional order was fleshed out in these. Using the insights gained here, the last section explores what kind of community the EU needs, in order to bring about a constitutional order.

Social underpinnings of a constitution

Modern constitutions draw their roots from the American and French revolutions at the end of the eighteenth century and following the emergence of political modernity came to be understood as constitutive documents, outlining the basic legal order of a polity. Constitutionalism is a method of organizing governments that depends on and adheres to a set of fundamental guiding principles and laws (Lipset, 1995: 299). A constitution comprises a set of rights, powers and procedures that regulate the relationships between public authorities in any state, and between these and individual citizens. Historically, one of the greatest achievements of the nation-state was the legalization of rule: it is the role of the constitution to stand as a law to regulate rule, legally to bind state-power (Grimm, 1997: 244). By legally binding political rule, the constitution is established universally and comprehensively as a basic order, comprising not only the goals and framework for politics and the basic structure of the state but also, importantly, the legitimizing principle for political rule (Grimm, 1997: 245). Historical and contemporary framing of liberal democratic constitutions concerned with constraining the power of institutions - a concern expressed in the organization of the machinery of government - and the protection of fundamental rights - through various mechanisms for entrenching rights. The procedural side of constitution building deals with finding the right mix of liberal democratic institutions, procedures and principles (Della Sala and Wiener, 1996: 3).

Put shortly, a constitution outlines the basic order for the functioning of a polity - the rules and limits within which political authority is deployed together with the principles, objectives and values that the polity is to bring about. It is an enclosed legal order establishing the common political existence of a community of citizens. It is at this exact point that constitutionalism entered onto a slippery terrain (both in the historic and contemporary contexts)[2]: the essential element of a constitutional order is the political community, the individuals who agree to come together as citizens and realize or produce it (i.e. give it social existence). Beyond the legal issue of 'constitutional engineering', of finding the right mix of liberal democratic institutions,

procedures and principles, the issue of participation in constitution building is inescapable.[3] If we see the primary function of a liberal constitution as to constitute democracy (that is, to put democracy into effect) a constitution is an instrument of government, a way of organizing the people for self-rule (Lipset, 1995: 300). As a legal (written or unwritten) document, a constitution expresses the 'social contract' of citizens committed to a common existence.

The issue of 'who' constitutes the polity, the community of citizens who organize themselves and forge the constitution to set out the limits of their polity, has two implications. On the one hand, the constitution - the law to regulate rule - is inherently attributed to people; it is an act by which they attribute political capacity to themselves as sovereign individuals. The conditions of legitimate rule require the consent of society as to the content and form of its political unity (Grimm, 1997: 245). Thus, if a rule is to be legitimate (as is the requirement of a democratic order), the basic conditions of its own activity have to stem from the community itself, ultimately from the citizen. On the other hand, as a legal order, the constitution does not have existence in itself: it is an expression of will frozen into print (or legal tradition). In order to be transformed into social reality, the constitutional provisions need to be 'enacted', transformed into codes of conduct by the citizens themselves. A constitutional order as a social and political reality is the effect of continuous reproduction, a never ending process - as long as its provisions are perceived as legitimate by its citizens and they manifest the will to enact it.[4] This 'enactment' aspect of a constitution - the process by which it is transformed into social reality - takes place insofar as citizens obey the law (thereby creating the legal order), respect the duties implied to them (thereby creating the possibility for the existence of rights)[5] and participate in political life through whatever channels they have at their disposal (thereby creating a democratic order).[6]

The primary implication for the functioning of a constitutional order in a democratic society is that it requires a certain level of homogeneity of its citizens. On the one hand, homogeneity is required for the agreement on the common values, principles and objectives as well as the legitimate forms of organization of political rule upon which the community of citizens come together. Because its legitimacy is dependent on a rational agreement between individuals with equal rights, every community based on modern law is founded on the assumption of the moral accountability of all its members (Honneth, 1995: 114). On the other hand, there must also be an agreement on the common practices, codes of behaviour and conduct through which the constitutional order is actually transformed into social and political reality.

To conclude, as was previously pointed out (by analyses undertaken within the 'new constitutionalism' school of thought) theorizing the 'constitution' cannot limit itself to legal, formal, abstract formulations, but needs to be complemented with an

understanding of it as 'social reality', as a legal order socially enacted into existence. The point of connection between these two levels of existence of the constitutional order - from the formal codification to the substantive praxis of its social enactment - is legitimacy. Legitimacy binds the two levels together as acceptance of rule and a commitment to acting it out. The legal theorization of a constitutional order must be complemented with a conceptual analysis of the particular praxis which gives it social existence.[7] The next section explores how the abstract constitutional order was fleshed out within the boundaries of the nation-state and enacted by the national community.

The nation-state: constitutional order and struggle for rights.

The two successful 'revolutions' of the eighteenth century (the French and American) marked the beginning of political modernity - a new form of social and political organization in stark contrast to the previous, traditional one. Following the French Revolution, the Declaration on the Rights of Man and Citizen affirmed the individuals in their quality as citizens of the political association to be free, equal and sovereign. This required a tremendous conceptual innovation: legitimacy of rule would no longer lie with a religious-sacral (traditional) order but rather with a rational, secular order created by the people themselves. Article 3 of the Declaration proclaims this principle: 'The principle of all sovereignty resides essentially within the Nation'. All power and authority is to emanate from the 'Nation'. This modern political form of organization made possible a shift in the locus of authority, from the local rulers (power holders) to the people themselves organized as citizens in a secular, rational, legal association, which offered avenues for self-government.[8] Within this constitutional framework, individual standing is framed by the egalitarian principle: as members of the nation, the citizens were no longer concrete individuals characterized by particularistic attachments (religious, social status). Instead, they became equal citizens transcending individual particularities. Despite their differences in the reality of social life, within the political realm citizens are considered to be equal units within the system (Schnapper and Bachelier, 2000: 15).

The intellectual construction of the democratic constitutional state is that of a political order created by people themselves, which allows the addressees of law to regard themselves at the same time as the authors of law. The modern political community is a community of free and equal citizens who hold political and civil rights, actively engaged in the self-government of their own societies. The link between them, the social glue, what bounds them together, is not expressed by cultural or religious ties, but by universalistic loyalty to the community created in this way (Schnapper and Bachelier 2000: 22, Walzer, 1989: 218).

In spite of this enlightened normative order, the actual enactment and embodiment of citizenship rights in conditions of equality, was the result of social struggles over nearly two centuries. The progressive movement of expansion of basic individual rights is convincingly depicted by T.H. Marshall (1950) as a historical progression towards establishing the principle of equality of the modern legal order.

Marshall's historical formulation states that civil rights (negative rights that protect a person's life, liberty and property from unauthorized state interference) developed in the eighteenth century. Political rights (positive rights guaranteeing a person the opportunity to participate in processes of will formation) developed over the nineteenth century - while social rights (positive rights ensuring a person's fair share in the distribution of basic goods) were created in the twentieth century (Marshall, 1950: 28-29). Throughout history these rights-claims expanded in the sense of being made available to an increasing number of members of society (the previously excluded or disadvantaged) but also with regard to their content - by incorporating new claims. The idea of equality acquires for Marshall a sense of a 'full fledged' membership in the political community: independently of differences in the amount of economic power, every member of society is accorded all the rights that help to bring about the equal representation of his or her political interests. Equality allows citizens to 'share in the full social heritage and to live the life of a civilized being according to the standards prevailing in the society' (Marshall, 1950: 11) and to take part into 'civilization as a common possession' (Marshall, 1950: 41).

The expansion and deepening of these rights-claims were the result of successive social struggles and were framed by the normative principle which guided social organization. Each enrichment of the legal claims of individuals can be understood as a further step in fleshing out the moral idea that all members of society must have been able to agree to the established legal order on the basis of rational insight, if they are expected to obey the law (Honneth, 1995: 117). From this perspective, what the legal and constitutional order represented for the members of the political community was not instant achievement of rights and equality, but rather the guiding normative principle and the establishment of the channels by which these could be actually brought into existence. This intellectual construction has remained to our day the framework for organizing the political communities of nation-states and its Enlightenment values inform Western thinking on political community. These values are deeply entrenched and embodied in the constitutions of democratic nation-states.[9]

What this vision of human society seems to be lacking is that human communities are not only political (self-organizing) but also, importantly, they are perceived as cultural communities of destiny and belonging. As argued previously, for a legal and constitutional order to exist, the community of citizens needs to be 'homogeneous' in

the sense of the community having a common agreement on the values, principles and objectives outlined in the constitution, and knowledge of and agreement on a particular mode of political action. However, in the nation-state, this civic homogeneity was reinforced by cultural homogeneity. The 'nation' represents the political community of citizens but also a cultural and symbolic community of belonging;[10] it is a political association but also a cultural entity. This national cultural entity is underpinned by a common cultural heritage, a common history and a collective memory, thus by a common self-awareness of continuity expressed as national consciousness.[11] In concrete day to day existence this national culture is expressed in common habits, communication routines and modes of expression as well as particular ways of life. Nevertheless, cultural homogeneity of the nation - historically and spatially - was to a certain extent the result of conscious state institutional action. Genuine or 'invented' (Hobsbawm and Ranger, 1983:1) traditions, alongside national events and celebrations or national monumental art (Mosse, 1975: 8) have served to give a chronological coherence of the nation, sometimes going back to hundreds of years. Traditions that seem to strike a deep chord in the hearts and minds of many people are those that seek to build on the ethnic myths and national memories of a community of history and destiny (Hobsbawm and Ranger, 1983:263).

On a different level, the modern nation is self-defined through a 'high-culture' springing out of a mass, public, standardized and academy-supervised education. Requested by the industrial society, such a high culture provided the needed mobility, substitutability, literacy and competence in semantic and technical labour. The national identity played the cement and inspiration for citizens. On this view, the state is the protector of a culture and the maintainer of the inescapably homogeneous and standardizing educational system (Gellner, 1983: 34-5).

As previously in traditional societies, collective identity (and in this case national identity) is located in a community of culture and unity of meaning. Individuals are born within cultures that determine the way in which they view and organize themselves in relation to others and to nature. They are socialized and raised within a group located in time and space and receive a ready-made culture as values, beliefs, customs, conventions or habits. Nation-states united people through homogenization, creating a common culture as symbols, values, beliefs, reviving traditions and myths of origin, and developing a sense of community, thus creating a nation. This outer cultural world is emotionally charged by individuals and internalized to become part of their own identity. It is this emotional charge of a community of culture that gave the tremendous force of nationalisms (Guibernau, 2001: 79).

In human societies, the given cultural framework in which the individual is born into provides a relatively stable and coherent universe, predictable and familiar, offers

the sense of belonging and emotional comfort and allows the creation and continuous re-affirmation of identity in the course of day-to-day interactions and existence. As a relatively closed and finite universe of meaning, it is an existential shelter to the individual. Such a culture provides the individual with a world and a place in that world (Berger and Luckmann, 1979: 97-99). Recent ethnic revivals are often interpreted as responses to the loss of stability of collective identities (Melucci, 1988:109-110, Smith, 1992: 63); ethnicity is revived as a source of identity because it responds to a collective need, which assumes a particular importance in complex societies.

It is because of this interpenetration of a political system with a culture that a clear-cut distinction between citizenship and nationality cannot be drawn in nation-states. On the one hand, citizenship, as the form of belonging to a constitutional order, requires homogeneity in the common agreement and acceptance of a normative framework and the codes of conduct to achieving it. On the other, 'citizenship' was overlapped by a cultural, organic understanding of community.[12] As a form of collective identity the national identity shapes cognitive frameworks, establishes ways of communication and types of relations among actors and allows for emotional investments which enable individuals to recognize themselves in each others. Citizenship as a legal, abstract type of relation was blended, in concrete praxis, with a homogeneous organic culture which answers an existential need of belonging. What consequences would this situation have for the forging of a Europe-wide constitutional order which aims to transcend national particularities?

A post-national constitution calls for post-national practices: taming the beast by setting it free

The recent negotiations over the Treaty establishing a Constitution for Europe mark a new chapter in the development toward a European post-national order. The Constitutional Treaty[13] is a document that affirms and pledges to uphold and promote the host of Enlightenment values and humanist European heritage (values already proclaimed in the constitutions of nation-states): the centrality of the human person with inviolable and inalienable rights, respect for law and justice, freedom, democracy, equality in a society of pluralism, tolerance, solidarity and non-discrimination.[14]

EU powers vis-à-vis the member states and the principles governing these powers are laid out in the Constitution.[15] The Member States will have their essential State functions respected, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security.[16] The Union pledges to respect, protect and enhance its rich cultural and linguistic diversity[17] as well as the national identities inherent in the Member States' fundamental structures, political and

constitutional.[18] Thus, the European constitution reiterates and reaffirms some of the fundamental values already existing in the nation-states and also co-existing EU transnational values, objectives and principles.

This tremendous reiteration of the values underlying the social organization of the peoples of Europe was not, however, matched by enthusiasm on the part of the latter. Quite to the contrary, the reactions of the people - those who are to be its constitutive elements - displayed apathy, skepticism, fear and rejection of a European constitutional project. These reactions seem in stark contrast to the Constitution's language as 'reflecting the will of the citizens and States of Europe to build a common future'[19] and may put under doubt the success of the European project. As previously pointed out, in conditions of democratic political modernity a constitutional/legal order can only come about if it is legitimate and thus freely translated into social action by the citizens themselves. Such an 'enactment' of the constitutional order requires, on its part, homogeneity as common agreement on the shared values, attitudes and the patterns of conduct designed to bring them forth.

In this 'constitutional moment', an old dilemma re-emerged and the question of who the 'demos' is or how to create it has sparked debates which are still far from being closed (Grimm, 1997, Della Sala and Wiener, 1996, Weiler, 1997). The 'no demos' ruling of the German Constitutional Court furthered efforts to find ways of fostering a sense of belonging and Europeanness which would at once bring Europe's citizens closer together, while not interfering with their entrenched national/local identities (Weiler, 1997: 270-2). Institutional attempts at forging a European sphere of belonging through such common policies as the 'free movement' for certain categories of citizens or the creation of symbols of Europeanness (EU passport, standardized European driving licence, European anthem, European flag or cultural initiatives such as the European City of Culture project) even predate the Maastricht Treaty. The thinking underlying these policies is that there should not be a conflict between identification with national entities and supranational ones, as identity can develop in 'concentric circles' (Shore and Black, 1994: 294).

Starting from the assumption that there may not be any common grounds for recognizing a sense of belonging, some academics take the view that the creation of a liberal constitution, with its representative institutions, limited government and entrenched rights will create a sense of belonging to the political community (Della Sala and Wiener, 1996: 6). The thinking behind this assumption is that citizenship is constitutive of a community and it is in this way that a feeling of belonging may be forged. Identities are to be created through practice and not generated by state institutions (Wiener, 1997: 531). While this may be the case, some find it important to operate first a detachment of citizenship and nationality to allow the emergence of a

form of 'constitutional patriotism'.[20] This approach underlines a crucial difference between national citizenship and the European citizenship - the missing dimension of nationality - and renders problematic the myth of national identity which was central in forging the modern national polities.

Such a vision of a post-national European polity is to rely on a political community unburdened by any form of cultural attachment or a common cultural identity. Rather, the community is to be based on shared values and a commitment to the duties and rights of a civic society as expressed in its constituent documents, a political culture that can be shared by all EU citizens and a Europe-wide public sphere of political communication (Habermas, 2001: 74). In a similar way, G. Delanty supports the formation of a 'legal identity' as opposed to a cultural identity and the 'identification with democratic or constitutional norms and not with state, territory, national or cultural traditions' (Delanty, 2000: 114-5). Integration would consist of the legal system's neutrality vis-á-vis cultural communities, while at the same time recognizing the diversity of different forms of life. These are important steps towards an understanding of what a post-national community would be like. However, this vision does not explain how a concrete, emotionally charged and deeply entrenched local identity is to be reflected in its demos-reinforcing aspect.

An insightful approach into the possibility of this happening is that of 'normative supranationalism'(Weiler, 1997) which aims to theorize cultural identities as coexisting concomitantly within a legal framework. Without attempting to replace national cultural attachments (or nationalisms), Weiler admits them as answers to the human craving for belonging and destiny, a deeply felt need for cultural attachment which can easily degenerate into intolerance and xenophobia. Supranationalism would thus be a form of controlling the excesses of the modern nation-state by recognizing inter-group and intra-group level nationalisms. On the one hand, it would recognize inter-group level nationalism as 'an expression of cultural, political and/or other specificity underscoring differentiation; the uniqueness of a group as positioned vis-à-vis other groups, calling for respect and justifying the maintenance of inter-group boundaries.' On the other hand, the intra-group nationalism is 'an expression of cultural, political and/or other specificity, underscoring commonality, the 'sharedness' of the group vis-à-vis itself, calling for loyalty and justifying the elimination of intra-group boundaries' (Weiler, 1997: 284). By acknowledging and recognizing this interplay of differentiation and commonality rather than attempting to ignore or deny it, a supranational framework would allow their free expression in an 'authentic, spontaneous form, rather than the codified statal, legal forms'(Weiler, 1997: 285). Their recognition as particular cultural manifestations would thus free the emotional tensions and allow for a truly shared normative and legal framework to emerge, one in which these national communities

of belonging can coexist. It is in this context that the substance of membership can be thought of as commitment to the shared values of the Union, which transcends the ethno-national diversity, as expressed in its constituent documents.

This vision of a European post-national polity does not necessarily require a feeling of belonging, but rather the personal evolution of citizens as 'ethical subjects' - as individuals who can transcend their cultural particularities and local ties to take part in a common constitutional order transcending borders, in order to solve common problems. The coming together of the peoples of Europe should thus take place on a common normative framework and in conditions of equality and mutual cultural recognition and respect. Solidarity would emerge from the normative commitment of equal and free individuals (who are members of their own community of belonging, thus bearers of cultural particularities) to uphold the common civilisational framework which allows all their cultural particularities to coexist in conditions of mutual recognition and respect. This self-development of European citizens as 'ethical subjects' would require a step outside the emotional comfort of the community of belongingness and self re-creation into a legal, abstract post-national space regulated by an ethical framework. This would be a space created by the ethically-informed praxis of individuals concomitantly members of a community of origin and participants into a constitutional order which embeds and frames the coexistence of their different communities. It is in this sense and based on mutual cultural recognition and respect that European citizenship makes sense as a form of enacting the values and objectives outlined in the Constitution. The EU can thus be framed as a truly 'contractual' society in which individuals are committed to societal values and help bring forth a constitutional order. If the emotional need for belonging is to be strengthened and recognized at the local level, the European citizenship means stepping out of this local cultural framework to bring about wider societal values of coexistence. This vision offers a way of creating spaces for the deeply entrenched national identities in a wider post-national framework. Similarly, it may well offer an answer to the Eurosceptical discourses on the threat of a looming European super-state, discourses which strike a populist chord in some European countries picturing the inevitable loss of national identities.

Leaving aside for a moment this approach, it is worth looking into what the Constitution claims to be the 'demos'. As previously defined in the Maastricht Treaty, this puts it bluntly: 'Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship; it shall not replace it'.[21] From a strictly rational perspective, simple and plain as it is, this definition begs for a clear outline of the values on which the rights and duties of citizens are to be grounded and the patterns of conduct which bring about these rights and duties. This

is the case, of course, provided that the motivations - as briefly outlined in the introduction - are understood by the citizens and obviously, the values promoted in the Constitution are agreed upon. On a rational perspective and under ideal circumstances, these elements of a constitutional order should be enough to be agreed upon and brought into existence.

However, the greatest constitutional challenge seems to be to devise and agree upon codes of conduct and practice embedded in the European constitutional values which would not have a homogenizing and thus, disruptive effect on the local communities of belonging. Drawing upon a concept of citizenship framed as the relation between the individual and the political community, Wiener conceptualizes 'citizenship practice' 'as the practice leading to the establishment of rights, access and belonging as three interrelated historical elements of citizenship' (Wiener, 1997: 535). Thus, the establishment of access to rights through policy-making and politics contributes to the mobilization of identities toward the creation of a feeling of belonging; the focus of Wiener's analysis is the process through which access to rights has been established in the EU. Union citizenship-making is examined as a process proceeding according to the development of two policy packages of special rights and passport union over more than two decades and shaped by three major shifts of paradigms[22] in the acquis communautaire. A change of the acquis potentially involves two processes: the expansion of formal sources (changes of the Treaty, provisions, directives, regulations and a materialization of informal sources (ideas, shared principles, practices). 'Thus, crucial expansions of policy occur when we observe the addition of new ideas and practices on the one hand, and the transformation of ideas and practices into rules and procedures on the other'(Wiener, 1997: 537). This approach focuses on the development of citizenship policy in order to reconstruct the making of Union citizenship as a practice.

There are some observations to be made in relation to Wiener's concept of citizenship practice: firstly, 'citizenship practice' as 'policy-making' - as the emergence of rights out of the European institutional pooling of shared ideas and principles, debates, negotiation and bargaining - may be a rather narrow definition. As such, it is a form of 'citizenship practice' which is disconnected from the European public at large, who - apart from the various inputs realized by NGOs and other social movements - while benefiting from these rights, nevertheless remain external to the process of 'citizenship practice' itself which is carried on their behalf. Secondly, the rights emerging from 'citizenship practice' apply to a rather narrow category of the European public: it is directed mostly at migrant workers, students, academics - they are specialized rights in this sense.[23]Thirdly, given the ever increasing way in which European legislation affects the lives of citizens across Europe, with only very limited

possibility of effecting participating in the policy-making processes categorized by Wiener under 'citizenship practice' may well be argued to lack a democratic dimension.

A more comprehensive understanding of 'citizenship practice' would need to focus on how this practice helps bring about the agreed constitutional order at all levels of a polity. As outlined in the first section, 'practice' could be rather defined as 'enactment' - as a mode of conduct guided by a certain normative framework designed to bring about, realize or give social existence to an ideational (normative) content. In the case of a constitutional order, the guiding normative framework is expressed in the constitutive document. As argued, a constitutional and legal order can only be brought about as it is willingly and continuously 'enacted' by the people - its constitutive element[24] - and the democratic principle requires that people have participative channels of input to shape legislation which affects their lives. While agreeing with the conceptual definition of Wiener's 'citizenship practice', it is nonetheless true that similar informal vs. formal processes need to be replicated and brought into existence at all levels of the polity. It is only in this way that citizenship as practice can be constitutive of identities. The development of a common feeling of belonging based on common access to the rights outlined in Wiener's understanding of 'citizenship practice' and enjoyed by a limited group of citizens in limited circumstances of their lives seems a rather precarious enterprise. This is all the more relevant as the voiced fear of the people of Europe is to a large extent over the loss of national sovereignty on issues that affect their lives.[25] As such, developing a feeling of belonging to EU may not be merely a matter of access to rights but also a matter of participation (Weiler, 1996: 2).

Nevertheless, as was previously argued, given the cultural particularities in which national polities are embedded, 'democratic or constitutional norms' will need to be locally interpreted and negotiated in social interaction. The emergence of a 'legal identity' celebrating the fairness and neutrality of the European Union requires forms of social interactions embedded in the local material and cultural resources (Jamieson, 2002: 19). It would, thus, be inappropriate to attempt the promotion of standardized patterns of conduct (ways of giving life to agreed norms) from the central European institutions and into the national communities: this would be regarded as a foreign invasion into local/national cultural particularities and would be rejected. Instead, as a supranational constitutional order that deals with issues transcending national communities, the EU needs to define very well the different areas of citizenship participation in policy shaping. The Commission's White Paper on European Governance expresses this awareness and calls for strengthening of forms of participation in shaping policy at different levels: 'From the conception of policy to its implementation, the choice of the level at which action is taken (from EU to local) and

the selection of the instruments used must be in proportion to the objectives pursued' (Commission White Paper, 2001:11).

What this means is that 'citizenship practice' as the form of participation cannot be standardized at the EU-wide level; rather, according to the level of generality (relevance to the entire EU polity or to regional or local levels) 'citizenship practice' as patterns of conduct will take different forms on the different levels of EU polity, while nevertheless remaining embedded into EU wide constitutional principles. At a local level, citizenship practice - as participation in shaping local policies as well as their implementation - is to be fleshed out according to cultural particularities. At the level whereby decisions need to be taken regarding regional issues, the patterns of conduct and participation ('citizenship practice') are to be framed differently, according to the needs of transcending local particularities and networking with other regions to solve common problems in a transnational 'space' (White Paper, 2001:11). Citizenship practice on transnational networks will need to shape codes of conduct and rules of interaction at a higher level of generality. On issues to be solved at a European level, patterns of conduct will be detached from cultural particularities, as the outcome will be affecting all national communities. Nevertheless, national constitutional settings are to be respected, and the regional and local knowledge and conditions are to be taken into account by the Commission when developing policy proposals. In this dialogue the Member States have the responsibility to engage the local and regional agents. Even so, flexibility in the means provided for implementing legislation and programmes with a strong territorial impact is a desirable aim (White Paper, 2001:13).

Promoting geographical decentralization of European governance with a view to increasing the involvement of national, regional and local players in shaping and implementing European policies opens up the path for strengthening local communities and thus for the expression of their cultural particularities and interests. As interests or problems transcend local communities, there arises the need and opportunity for networking and for trans-regional interest formation and promotion. Accordingly, if 'citizenship practice' is to be fleshed out, this will take place at the different levels of policy making, according to the principle of subsidiarity and respecting the specificity of issues debated.

Beyond its current 'procedural' understanding, i.e. as applied by EU institutions (de Burca 1998, Scott, Carter and Burrows 2004), the principle of subsidiarity provides the framework for realizing the constitutional community of people 'united in their diversity'. It is, thus, one of the most important principles in European governance. Its implementation requires a continuing effort on the part of the Member States (which hold the responsibility of achieving stronger interaction with regional and local governments and civil society) and not least the need for strong political will. It is also

possible that the emergence of the wider European polity and the increased demand for local participation may have exposed the democratic weaknesses of national polities. The positive outcome of implementing the principle of subsidiarity and promoting the involvement of local and regional agents would be twofold: on the one hand, the community would remain the locus of belonging, cultural and emotional comfort while, on the other, individuals would be able to transcend their cultural frameworks to be part of a constitutional, legal order based on shared values, which makes possible the peaceful existence of their community among others.

The success of a European constitutional order depends on strengthening local communities and democratic participation on the different levels of the decision-making process. European citizenship would not need to foster a sense of belonging, which may be difficult and perhaps not a realistic aim to achieve; instead citizenship should be framed by participation and involvement on the different levels of policy shaping. The forging of the constitutional order can only happen if the citizens agree on the values, principles and objectives and also agree on the codes of conduct and channels of action to bring them about. These codes of conduct are to be devised according to various levels of generality, as long as they remain infused by constitutional values. If the European Union emerges as a constitutional polity infused by commonly accepted values it will provide the locus where social struggles for new types of rights-claims can be formulated and extended, perhaps in the same way they emerged in the nation-states according to Marshall's account.

Without the need for belonging, the creation of the 'European citizen' is that of an 'ethic' subject, who would produce and reproduce a constitutional order, a truly civic association which allows for the peaceful coexistence of various cultural communities. It is only when the cultural particularities of an individual are recognized, accepted and respected that the individual can thus step outside of it and engage in political association as a free and equal individual (Taylor, 1994: 36).

Conclusion: culture and citizenship in a constitutional order

This essay has attempted to look at and understand the main social underpinnings of a constitutional order at a post-national level. First, constitutional orders are brought about through 'citizenship practice' as enactment of the values and objectives outlined in the constitution. As a normative order, the constitution gains social existence through continuous 'enactment' by the citizens. This requires agreement and acceptance on the values and objectives but also on the codes of conduct by which these are to be brought about. As the experience of the nation-state has shown, constitutional values are not instantly brought into existence and it may take social struggles (which are

forms of 'citizenship practice') to give them substance.

Second, on a wider post-national level, forging a constitutional order encounters a new challenge in the existence of diverse cultural communities. Thus, the constitution needs to proclaim and protect the principle of mutual recognition and respect for cultural particularities. 'Citizenship practice' is then to be forged out of the local cultural resources and at different levels of generality, as long as these are informed by constitutional principles. The principle of subsidiarity is thus, a most valuable constitutional principle, as it guides citizenship participation in the EU-wide polity. The aim is to allow the development of the European citizen as an 'ethical subject' able to act both at the local level, but also to detach and take part in wider practices.

As such the European polity is in a unique position to start building up toward a genuine creation of an Enlightenment political framework: a universalistic association of equal, free and sovereign citizens who nevertheless retain and enhance their particularistic attachments. It may well be in a singular position to attempt to reformulate the old, unfulfilled Enlightenment ideal of reconciling universalism and particularism.

Notes:

[1] As these are expressed in the Draft Constitution, which emerged from the Convention on the Future of Europe.

[2] The issue of who belongs to the 'Nation' which constitutes the political community and how belongingness is to be defined had proved difficult for emerging nation-states over the eighteenth and nineteenth centuries, especially in Central and Eastern Europe. 'Who' is to constitute the political community of the European Union is equally a matter of contention. This will be analysed in the next section.

[3] This perspective is expounded by the proponents of an emergent school of thought, labelled 'new constitutionalism'. Underlying their view is a call for greater attention to the relationships between individuals, societies and constitutions. (Elkin and Solton, 1993)

[4] Constitutions codify and entrench meta-norms and values; as such they imply finality. The question of belonging and citizenship involves much wider participation and is an endless activity. (Della Sala and Wiener, 1996: 7)

[5] Following G.H.Mead, N. Crossley suggests that a system of rights is impossible to sustain socially, without the necessity of duties. Rights depend for their existence upon being recognized and respected by everyone in the community. Rights are thus, conditional upon duties as, in not fulfilling their duties, citizens effectively undermine the rights of everybody else. (Crossley, 2000: 34)

[6] Liberals like Rawls see political participation as a matter of personal choice, as long as the principles of justice commonly arrived at are respected. However, as Walzer put it, 'the passive enjoyment of politics requires at least intermittently the activist politics of citizens' (Walzer, 1989: 217).

[7] The work of the 'civic virtue' theorists gives a particular vision on how the formal expressions of a constitutional order is to be translated into informal 'enactment' on the day-to-day existence of its citizens. Galston considers that what citizenship requires are virtues: general virtues (courage, law-abidingness, loyalty); social virtues (independence, open-mindedness), economic virtues (work ethic, capacity to delay self-gratification, adaptability to economic and technological change) and political virtues (capacity to discern and respect the rights of others, ability to evaluate the performance of those in office, willingness to engage in public discourse) (Galston, 1991: 221-4).

[8] The traditional authority relations (which rested with local power holders) were transformed into administrative-bureaucratic, centralized authority relations. This change in authority relations demanded the breaking down of local solidarities and the creation of direct links between the territorial nation and its individual subjects through the development of universalistic criteria of citizenship (Axtmann, 1993: 23-4).

[9] Of course, these values have found different forms of expression in the different European nation-states; nevertheless, all European national polities would claim the basic values of legal equality, legitimate rule and citizen rights to political representation.

[10] J. Habermas claims that civil solidarity depends on a cultural substrate; 'only the symbolic construction of 'a people' makes the modern state into a nation-state' (Habermas, 2001: 64).

[11] On opposite positions, A. Smith argues for the pre-modern roots of contemporary national cultures and traditions, while E. Hobsbawm shows that such traditions, even the sustaining myths of the nations are borrowed, added or simply invented (Smith, 1986:153-4, Hobsbawm, 1983:1-4).

[12] P.Werbner and N. Yuval-Davis claim that citizenship is 'a complex, ambiguous imaginary', 'much more than simply the relationship between an individual and the state presented by an earlier liberal and political science literature. Our alternative approach defines citizenship as a more total relationship, inflected by identity, social positioning, cultural assumptions, institutional practices and a sense of belonging'. (Werbner and Yuval-Davis, 1999: 2-4).

[13] Conference of the Representatives of the Governments of the Member States, Draft Treaty establishing a Constitution for Europe, 6 August 2004 [CIG 87/04 and Addendum 1 and 2]

[14] Part I, Title I: Definition and objectives of the Union, Art. I-2, The Union's values; Art. I-3, The union's objectives.

[15] Part I, Title III: Union Competences, Art.I-9, Fundamental principles.

[16] Part I, Title I: Definition and objectives of the Union, Art.I-5: Relations between the Union and the Member States.

[17] Part I, Title I: Definition and objectives of the Union, Art. I-3, Union's objectives.

[18] Part I., Title I: Definition and objectives of the Union, Art.I-5: Relations between the Union and the Member States.

[19] Part I, Title I: Definition and objectives of the Union, Art. I-1: Establishment of the Union.

[20] Habermas, 2001; Delanty, 2000; Preuss, 1988.

[21] Part I, Title II: Fundamental Rights and Citizenship of the Union, Art. I-8, Citizenship of the Union.

[22] These major shifts of policy paradigms are: the Paris summit meetings in 1973 and 1974, the Fontainebleau summit meeting in 1984 and the Maastricht summit meeting in 1991. (Wiener, 1997)

[23] A. Wiener admits along with Meehan that rights related to 'citizens-as-workers, not citizens-as-human-beings'.

[24] A constitutional and legal framework can be brought about through coercion as well and against people's will, but that becomes, of course, authoritarian rule.

[25] J.H.H. Weiler voiced this concern over the emergence of a rights-based version of European citizenship and a 'culture of rights saturation', instead of a more meaningful debate over the channels and powers that citizens can have to influence the governance (Weiler, 1996:2).

References:

Axtmann, R. (1993). The formation of the modern state: the debate in the social sciences. In: Mary Fulbrook (ed.) *National Histories and European History*. UCL Press, London.

Berger, L.P and Luckmann, Th. (1979) *The Social Construction of Reality. A Treatise in the Construction of Social Reality*. Penguin, Harmondsworth.

Conference of the Representatives of the Governments of the Member States, Draft Treaty establishing a Constitution for Europe, 6 August 2004 [CIG 87/04]. http://ue.eu.int/showPage.ASP?id=251&lang=en

Commission of the European Communities. (2001) European Governance. A White Paper, COM(2001) 428 final, 25 July 2001. .http://europa.eu.int/comm/governance/white_paper/index_en.htm

Crossley, N. (2000). Citizenship, Intersubjectivity and the Lifeworld. In: Nick Stevenson, *Culture and Citizenship*. Sage, London.

Dahl, R. (1994) A Democratic Dilemma: System Effectiveness versus Citizen Participation. *Political Science Quarterly*. Spring, 109(1): 23-34.

Delanty, G (2000). *Citizenship in a Global Age: Society, Culture, Politics*. Open University Press, Buckingham.

Della Sala, V. and Wiener, A. (1996), Constitution Making and Citizenship Practice - Bridging the Democracy Gap in the EU? SEI Working Paper, Sussex European Institute.

Dinan, D. (1994). *Ever closer union? An introduction to the European Community*. Macmillan, Basingstoke.

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

Eriksen, E.O. and Fossum, J.E. (1999). The European Union and Post-national Integration. Arena Working Paper, http://eiop.or.at/

Featherstone, M. (1990). Global Culture. An Introduction. In: Mike Featherstone (ed.), *Global Culture. Nationalism, Globalization and Modernity.* Sage, London.

Galston, W. (1991). *Liberal purposes: goods, virtues and duties in the liberal state*. Cambridge, Cambridge University Press.

Gellner, E. (1983) *Nations and Nationalism*. Blackwell, Oxford.

Grimm, D. (1997), Does Europe Need a Constitution? In: Peter Gowan and Perry Anderson (eds.). *The Question of Europe*. Verso, London

Guibernau, M. (2001) National identity and modernity. In: Alain Dieckhoff and Natividad Gutierrez (eds.) *Modern Roots. Studies of national identity*. Aldershot, Ashgate.

Habermas, J. (2001). *The Postnational Constellation*. Political Essays. Polity, Cambridge.

Held, D. (1991). Democracy, the nation state and the global system. *Economy and Society*. 29: 138-172.

Hobsbawm, E. and Ranger T. (1983). *The Invention of Tradition*. Cambridge University Press, Cambridge.

Honneth, A. (1995). *The Struggle for Recognition. The Moral Grammar of Social Conflicts*. Polity Press, Cambridge.

Jamieson, L. (2002). Theorizing Identity, Nationality and Citizenship: Implications for European Citizenship Identity, *State of the Art Report: Orientations of Young Men and Women to Citizenship and European Identity*. European Commission funded project. http://www.sociology.ed.ac.uk/youth/research.html.

Lipset, S.M. (1995). *The Encyclopedia of Democracy*. Routledge, London.

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

Martin, D (1991). *Europe: an ever closer Union*. Spokesman, Nottingham.

Melucci, A. (1988). *Nomads of the Present. Social Movements and Individual Needs in Contemporary Society*. Radius, London.

Mosse, G. L. (1975). *The Nationalization of the Masses. Political Symbolism and Mass Movements in Germany from the Napoleonic Wars through the Third Reich*. H. Fertig. New York.

Preuss, U. (1998). Citizenship in the European Union: a Paradigm for Transnational Democracy? In: D Archibugi, D Held and M Kohler (eds.) *Re-imagining political community*. Polity Press, Cambridge.

Schnapper D., Bachelier. C (2000). *Qu'est-ce que la citoyennete?* Editions Galimard, Paris.

Shore, A. and Black, A. (1994). Citizens' in Europe and the Construction of European Identity. In: V A. Goddard, J R. Llobera and C Shore. *The Anthropology of Europe*. Berg, Oxford.

Smith, A. (1986). *The Ethnic Origins of Nations*. Basil Blackwell, Oxford

Smith, A, (1992). National identity and the idea of European unity. *International Affairs*, 68(1):55-76.

Taylor, Ch. (1994). Multiculturalism. Examining the Politics of Recognition. In Amy Gutmann (ed.) Princeton University Press, Princeton, Chichester.

Walzer, M. (1989). Citizenship. In Terence Ball, James Farr and Russell Hanson (eds.) *Political innovation and conceptual change.* Cambridge University Press, Cambridge.

Weiler, J.H.H (1996) The Selling of Europe: The Discourse of European Citizenship in the IGC 1996, Jean Monnet Working Papers, no 3. http:///www.jeanmonnetprogram.org/papers/index.html

Weiler, J.H.H, (1997). Does Europe Need a Constitution? Reflections on Demos, Telos and Ethos in the German Maastricht Decision. In: Peter Gowan and Perry Anderson (eds.). *The Question of Europe*. Verso, London.

Wiener, A. (1997). Making Sense of the New Geography of Citizenship: Fragmented Citizenship in the European Union, Theory and Society, 26:529-560.

Werbner, P and Yuval-Davis, N. (1999). Women and the New Discourse of Citizenship. In Prina Werbner and Nira Yuval-Davis (eds.) Women, Citizenship and Difference, Zed Books, London

THE FEDERAL TRUST seeks to enlighten the debate about good governance both at national and international level. As a charitable educational trust, we organise seminars, conferences and study panels, publishing the results of our investigations and discussions. We like to think that the output of the Trust supplies the underpinnings for an informed debate on governance.

THE FEDERAL TRUST publishes stimulating European Essays like this six time a year and sends them to its Friends in an effort to inform and enlighten the growing debate on Europe.

Yes, I would like to become a Friend of the Federal Trust. Please, charge me £60:

Name _____

Job Title _____

Company/Institution _____

Address _____

_____

Telephone _____ Fax _____

PLEASE SEND TO:
THE FEDERAL TRUST 7 Graphite Square, Vauxhall Walk, London SE11 5EE, UK / Tel 020 7735 4000 / Fax 020 7735 8000

I enclose a cheque (made payable to FEDERAL TRUST) or
Please debit my credit/debit card

Expiry ....
Signature ....
Date ....

About The Federal Trust

The Federal Trust's aim is to enlighten public debate on issues arising from the interaction of regional, national, European and global levels of government. It does this in the light of its statutes which state that it shall promote 'studies in the principles of international relations, international justice and supranational government.'

The Trust conducts enquiries, promotes seminars and conferences and publishes reports, books and teaching materials. It is the UK member of the Trans-European Policy Studies Association (TEPSA), a grouping of fifteen think-tanks from member states of the European Union.

The Federal Trust launched its series of *European Essays* in the autumn of 1999 with the aim of providing its wide circle of Friends with regular thought provoking information and analysis on a broad range of European issues.

Up-to-date information about the Federal Trust can be found on the internet at **www.fedtrust.co.uk**

Recent European Essays

'Regional Devolution in Europe: lessons for the UK' by **Stanley Henig** and **Ulrike Rüb**

> ISBN 1-903403-74-X

'The European Parliament and the British People: 2004' by **Michael Steed**   ISBN 1-903403-69-3

'Transforming Soverignty' by **Tommaso Padoa-Schioppa**

> ISBN 1-903403-68-5

'Britain and Europe' by **Lord Haskins**

> ISBN 1-903403-64-2

'Rethinking Nato' by **Stephen Haseler**

> ISBN 1-903403-63-4

'The European Convention' by **Graham Watson**

> ISBN 1-903403-58-8

'Rethinking European Citizenship' by **Andrew Duff, Marisol Garcia, John Handoll, Pavel Kelly-Tychtl, Paul Magnette, Jo Shaw** and **Antje Wiener**   ISBN 1-903403-48-0

'The Quest for a New European Federalism' by **Dusan Sidjanski**

> ISBN 1-903403-50-2

'The Constitutional Convention on the Future of Europe' by **Valéry Giscard D'Estaing, Pat Cox, Romano Prodi** and **José M. Aznar**

> ISBN 1-903403-47-2

'Immigration, Migrants and Citizenship in Europe' by **Enid Wistrich**

> ISBN 1-903403-44-8

'Plea for a European Constitution' by **Johannes Rau** and 'Steps towards a European Constitution' by **John Pinder**

> ISBN 1-903403-30-8

www.fedtrust.co.uk