

# The constitutional development of citizenship in the EU context: with or without the Treaty of Lisbon

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## I. Introduction: citizenship and constitutionalisation

While the eventual fate of the Treaty of Lisbon,<sup>1</sup> following the Irish referendum ‘no vote’ in June 2008, remains unclear, its provisions none the less deserve further assessment, not least in order to ascertain what impact they could have *vis-à-vis* the status quo, in event of their entry into force. Moreover, in the case of citizenship – which is the focus of this paper – other general questions about the mix of Treaty-based and judicially driven change in the context of the evolution of the EU’s constitutional framework arise alongside the specific question of the fate of institutional reform. Setting aside for the moment the political question why the Treaty of Lisbon has encountered difficulties during the ratification process, the paper attempts to consider the longer term evolution of a concept of citizenship for the emergent Euro-polity. It uses the Treaty of Lisbon as a case study illustrating the contingency of Treaty reforms in the broad constitutional arena, given the continuing role which the Court of Justice plays in the process of the constitutionalisation of the Treaties. That is not to say that the Court of Justice is an unconstrained actor in the context of the evolution of the EU legal order. Its activities increasingly come under scrutiny, and its legitimacy is challenged from time to time, both by national courts and by national governments. On the contrary, the Court is a constrained opportunist within the context of the role it has been assigned under the EU Treaties. To express this notion, the paper thus adopts the cautious definition of judicial constitutionalisation applied by Hunt when she examined the putative impact of the Constitutional Treaty upon the Court of Justice. Rejecting the portrayal of the Court’s case law as inherently integrationist, she argued that

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1 References throughout to the TEU and the TFEU are to the consolidated numbering (as per the table of concordances) as it would be after the entry into force of the Treaty of Lisbon. For the consolidated text, see OJ 2008 C115/1. For purposes of clarity in referencing, an asterisk (\*) has been added to reinforce wherever it is the post-Lisbon versions of the TEU and TFEU provisions which are being cited in their renumbered versions, and also to make the point that these are not yet in force.

'constitutionalisation may be a consequence of the activities of the Court, a useful label ascribed to the various judgments which have had a structuring impact on the nature of the EU legal order, but constitutionalisation should not be seen as some inherent logic within the legal system, driving the Court – and the integration process – ever forward.'<sup>2</sup>

Thus in the area of citizenship, changes wrought by the Treaty of Lisbon have to be set against a complex history of legal development through Treaty provisions, secondary legislation such as the Citizens' Rights Directive of 2004<sup>3</sup> and significant judicial interventions. Although the introduction of provisions on 'Citizenship of the Union' into the EC Treaty in the 1990s shows how a limited legal concept of citizenship has been given formal constitutional status within the EU's legal order, it could also be argued that a number of judicial interventions in this field have been equally influential in terms of establishing the basis on which individuals can be understood to have the status of citizens within the emerging Euro-polity. Many commentators have argued that there was a distinct 'citizenship dimension' within the broad approach to the application of the Article 12 non-discrimination principle which the Court took in the 1980s cases of *Cowan*<sup>4</sup> and *Gravier*<sup>5</sup> which stretched the protective scope of EC law to cover 'free moving' tourists and students.<sup>6</sup> More recently, much of the value-added of the post-Maastricht provisions in Article 17-22 EC has once again evolved through the creative interpretative work of the Court of Justice in relation to Articles 17 and 18 EC.<sup>7</sup> The Court's case law, much of which has been exceedingly controversial, has pushed the boundaries of the scope of protection of EC law in relation to citizens of the Union (especially students and work seekers) lawfully resident in another Member State,<sup>8</sup> constrained the capacity of the Member States to deny the right of residence to EU citizens and their third country national family members,<sup>9</sup> and developed an analysis whereby any national measure

- 2 J. Hunt, 'The End of Judicial Constitutionalisation?', (2007) 3 Croatian Yearbook of European Law and Policy 135-155 at 142.
- 3 Directive 2004/38 OJ 2004 L158/77.
- 4 Case 186/87 *Cowan v. Le Trésor public* [1989] ECR 195.
- 5 Case 293/83 *Gravier v. City of Liège* [1985] ECR 593.
- 6 E.g. B. Wilkinson, 'Towards European Citizenship? Nationality, Discrimination and Free Movement of Workers in the European Union', (1995) 1 European Public Law 417-437.
- 7 See J. Shaw, 'A view of the citizenship classics: Martínez Sala and subsequent cases on citizenship of the Union', in: *Maduro/Azoulai* (eds.), *The Past and Future of EU Law; The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, 2008, forthcoming.
- 8 E.g. Case C-85/96 *Martínez Sala v. Freistadt Berlin* [1998] ECR-I 2691; Case C-184/99 *Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-La-Neuve* [2001] ECR-I 6193; Case C-209/03 *R v. London Borough of Ealing, ex parte Bidar* [2005] ECR I-2119; Case C-138/02 *Collins v. Secretary of State for Work and Pensions* [2004] ECR I-2703; Case C-224/98 *D'Hoop v. Office National de l'Emploi* [2002] ECR I-6191.
- 9 Case C-413/99 *Baubast and R* [2002] ECR I-7091; Case C-200/02 *Chen v. Secretary of State for the Home Department* [2004] ECR I-9925.

which can be seen to be restricting or burdening the free movement of citizens would require justification by a Member State, even if it is indistinctly applicable.<sup>10</sup> On the basis of these lines of case law, it has been widely argued that the free movement of citizens, as such, is evolving into a distinctive fifth freedom.<sup>11</sup> Finally, the Court of Justice has started, albeit tentatively, to delineate the distinctive political capacities of citizens of the Union, restricting itself thus far to the question of the definition of the electorate for the European Parliament.<sup>12</sup> In the case of *Eman and Sevinger (Aruba)*, the Court brought to the foreground the question of what the significance of EU citizenship might be for the non-migrant citizen. This remains an open question.

It is against the backdrop of such activism on the part of the Court of Justice – with all the issues of the legitimacy of the judicial role that this inevitably raises – that the changes proposed in the Treaty of Lisbon need to be assessed. Clearly, however, although the focus of most of the Court’s case law has been on the rights of migrant EU citizens under the headings of free movement, non-discrimination and residence, the assessment should not be limited to the strict domain of Citizenship of the Union, as constituted in the EC Treaty. This is not least because there are very limited legal changes in relation to the formal status of citizen of the Union, a fact which has been ascribed by some commentators to the fact that there was no Working Group of the Convention on the Future of Europe which directly addressed the issue of citizenship.<sup>13</sup> In the modesty of the changes which it proposes to citizenship of the Union, it is clear that the Treaty of Lisbon is the natural heir to the Constitutional Treaty.

But a wider perspective demonstrates that there may be more to the current developments than immediately meets the eye. Since the Treaty of Amsterdam, there has been a gradual tendency to insert references to ‘the citizens’ into the Treaties. This has been the case with the Area of Freedom, Security of Justice, and post-Lisbon would be the case with the Common Foreign and Security Policy.<sup>14</sup> This

10 Case C-192/05 *Tas Hagen* [2006] ECR I-10451; Joined Cases C-11/06 and C-12/06 *Morgan and Bucher*, judgment of 11 September 2007. This has involved the Court of Justice ‘reading across’ certain principles from its case law on other fundamental freedoms, where it posed the analysis in rather general terms, e.g. Case C-55/94 *Gebhard* [1995] ECR I-4165.

11 J. Kokott, ‘EU citizenship – citoyens sans frontières’, Durham European Law Lecture 2005, available at [http://www.dur.ac.uk/resources/deli/annuallecture/2005\\_DELI\\_Lecture.pdf](http://www.dur.ac.uk/resources/deli/annuallecture/2005_DELI_Lecture.pdf); Editorial Comments, ‘Two-speed European Citizenship? Can the Lisbon Treaty help close the gap?’, (2008) 1 Common Market Law Review 1-11.

12 Case C-145/04 *Spain v. United Kingdom (Gibraltar)* [2006] ECR I-7917; Case C-300/04 *Eman and Sevinger v. College van burgemeester en wethouders van Den Haag (Aruba)* [2006] ECR I-8055.

13 See C. Ladenburger, ‘Fundamental Rights and Citizenship of the Union’, in *Amato/Bribosi/de Witte* (eds.), *Genesis and destiny of the European Constitution*, Brussels: Bruylant, 2007, 311-365 at 318-319.

14 Article 3(5) TEU\*.

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highlights the role of the Union as a *protective* polity. Similarly, much of the tenor of the Laeken Declaration of 2000 strongly invoked the ‘spirit’ of citizenship. It referred on several occasions to the performance of the European Union as a polity *vis-à-vis* its citizens and to its putative ‘closeness’ to the citizen. This trend, purporting to reflect the Union as a *participatory* polity can also be seen in a number of diverse ways in the text of the Constitutional Treaty, although many commentators expressed themselves disappointed by the outcomes of the Convention and the subsequent IGC.<sup>15</sup> It is therefore important to analyse the Treaty of Lisbon in terms of the broader issue of ‘citizenisation’, understood here as incorporating these protective and participatory elements, rather than solely by reference to the formal texts on citizenship of the Union. These alone give an incomplete picture, and in particular one which neglects the crucial question of whether, how and when concepts of EU citizenship may become more relevant to the non-migrant citizen. For this has not so far occurred, notwithstanding the Court of Justice’s mantra that citizenship of the Union is ‘destined to become the fundamental status of nationals of the Member States.’<sup>16</sup> This is also the conclusion reached in a recent Editorial on this question in the *Common Market Law Review*.<sup>17</sup>

Three issues will be briefly explored in this paper:

Even though the Treaty of Lisbon regularly invokes ‘the citizen’, there is one notable absentee when one compares the list with that to be found in the Constitutional Treaty (‘CT’). This is the reference to the ‘will of citizens’ in Article I-1 CT which is omitted from the new ‘postconstitutional’ Treaty of Lisbon.<sup>18</sup>

Some rather limited changes have been introduced to Articles 17-22 of the EC Treaty; they have been slightly reworked, in part amplified, and substantially restructured – the latter as a consequence of the reworked division between the Treaty on European Union (‘TEU’) and the Treaty on the Functioning of the European Union (‘TFEU’).

The Treaty contains some important developments in relation to the status of the European Parliament as a representative body, and in relation to democracy more generally.

15 See, for example, *Ladenburger*, above n.13; *Closa*, ‘Constitutional Prospects of European Citizenship and new forms of democracy’, in *Amato et al*, above n.13, 1037-1063.

16 Case C-184/99 *Grzelczyk v. CPAS* [2001] ECR I-6193. *Closa*, above n.15 at 1052, regrets that the drafters of the Constitutional Treaty did not see fit to incorporate this sonorous phrase into the Treaty texts.

17 See above n.11.

18 A. *Somek*, ‘Postconstitutional Treaty’, (2007) 8 *German Law Journal*, 1121-1131.

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Overall, this paper broadly concurs with the view of Schrauwen,<sup>19</sup> who argues that, taken together, what appear at first sight to be cosmetic<sup>20</sup> changes in the legal regulation of citizenship amount in sum to the emergence of a more independent and less complementary idea of EU citizenship. Where the paper departs somewhat from the convincing analysis put forward by Schrauwen is in its insistence on how a blend of Treaty change and judicial activism could be contributing to this trend.

## II. The 'will' of citizens

Article I-1 CT, which sought to 'establish' the refounded European Union under the Constitutional Treaty, purported in that context to reflect 'the will of the citizens and the States of Europe to build a common future'. One of the most controversial aspects of the transition from the Constitutional Treaty to the Treaty of Lisbon was the so-called abandonment of the constitutional idea, formalised in the detailed mandate for *reform* rather than *refoundation*, agreed at the June 2007 European Council.<sup>21</sup> Unsurprisingly, the Madisonian ideal of constitutive self-government expressed in Article I-1 CT was excised from the more modest provisions of the Treaty of Lisbon as part of that 'abandonment'. In that fate, it joined other elements such as the reference to the primacy of Union law, the flag, the symbols and the motto.

The Treaty of Lisbon, not least in the manner in which it was negotiated via the detailed mandate negotiated under the German Presidency and the perfunctory IGC held under the Portuguese Presidency, not to mention the marked preference for parliamentary ratification insisted upon in every Member State apart from Ireland, seemed to offer the authoritative reassertion of the principle that the Member States are the ultimate masters of the Treaties. At the same time, those elites thought that by dropping the blatant statist symbols they were appeasing some of the anxieties expressed in the 2005 Dutch and French referendums. The Irish referendum vote seems, at least in part, to suggest that matters are not as simple as that. While this paper has already reflected upon two different sources of constitutional change in the Union, namely Treaty amendments and judicial activism, the Irish Referendum reminds us that there is still the issue of popular consent to be taken into consideration. It is clear that one strand of argument which objects, on democratic and participatory grounds rather than eurosceptic grounds, to the denial of referendums in other states played at least a minor theme in the Irish referendum campaign. Whatever the

19 A. Schrauwen, 'European Union Citizenship in the Treaty of Lisbon: Any Change at all?', (2008) 15 Maastricht Journal of European and Comparative Law 55-64.

20 A point made in relation to the Constitutional Treaty by R. Barents, *Een Grondwet voor Europa: Achtergronden en Commentaar*, The Hague: Kluwer, 2005 at 211 as quoted by Schrauwen.

21 Presidency Conclusions, Council Document 11177/1/07, Rev 1, Concl 2, 20 July 2007.

political elites of the European Union and at least some of its Member States might wish, it is clear that the question of the proper role of popular consent in relation to the further development of European integration is not an issue which is simply going to dissipate on the back of a set of assurances to national parliaments that Treaty amendments are a good thing. It may be the case that the concerns that citizens have too little influence over the direction and content may gradually ebb away if and when European Parliament elections come to be perceived as significant moments of 'European' democracy (as opposed to being second-order national elections with ever lower participation rates as is generally the case at present), but ironically the failure of the Treaty of Lisbon to enter into force will retard that very same trend. At present, it is tempting to argue that the story of the Laeken Declaration, the Convention, the Constitutional Treaty, the reflection period, the negotiation and signature of the Treaty of Lisbon and now the severe threat to ratification posed by the Irish referendum show how the political elites which have most influence over the content of both EU treaties and the focus of EU policies have failed to break out of a vicious circle in which the more they think they are doing to increase the democratic legitimacy of the EU polity and its treaty basis, the more they are perceived within the confines of national politics of illegitimately meddling in the arena of national popular sovereignty.

This bleak assessment is upheld by opinion surveys on citizenship issues. A Eurobarometer survey published in February 2008<sup>22</sup> highlighted (continuing) widespread ignorance about the details of citizens' rights under EU law, especially in the new Member States, even though a substantial 78% of those questioned across the Member States did claim some familiarity with the term. In practice, they were often unable to identify correctly which rights attach specifically to Union citizenship and/or did not know that they automatically were Union citizenship by virtue of their national citizenship. However, an earlier Eurobarometer survey published in May 2006 on topic of the Future of Europe,<sup>23</sup> which contained some questions on citizenship, revealed an interesting trend. When respondents were asked what would be the best ways to strengthen European citizenship, rather large numbers of them *spontaneously* replied that they did not wish to be a European citizen. The figure stood at 8% across the EU as a whole, but was a daunting 25% in the United Kingdom. This suggests a modest approach remains necessary when discussing such matters – especially, but not solely in the UK – and suggests that citizenship of the Union has – for most people – a Cinderella status. This point needs to be borne in mind as the analysis in this paper proceeds. While it is often said that citizenship of the Union, in its current treaty form, is a vapid and impoverished version of the membership concept which has been central to liberal democratic and constitutionally based (national) polities, there does not seem to be any obvious popular legiti-

22 Flash Eurobarometer 213.

23 Special Eurobarometer 251.

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macy driving the argument that EU citizenship *should* be developed in more substantial ways than it is at present. The next section assesses the modest changes to the content and structure of the legal status of Union citizenship, before we turn finally to the issue of democracy.

### III. The legal evolution of Union citizenship

In the TEU, as amended most recently by the Treaty of Nice, there were no references to ‘citizenship’ as such, other than in the preamble, which refers to the establishment of a ‘citizenship common to the nationals’ of the Member States. There have been a number of references to ‘citizens’ in general, although the concept of ‘citizen’ being applied has not been defined. Citizenship of the Union appeared in Part Two of the EC Treaty. The Constitutional Treaty took a rather different approach, placing citizenship at the centre of a section in Part I dealing also with fundamental rights (Article I-10 CT). Such an approach is replete with constitutional symbolism. The details of citizenship then appeared in Part III.

Following the lead of the mandate for what was then referred to as the Reform Treaty agreed at the European Council meeting in June 2007 under the German Presidency,<sup>24</sup> which envisaged citizenship remaining within what was to be the Treaty on the Functioning of the European Union, this was reflected in the July 2007 version of the Treaty.<sup>25</sup> There was no reference at all to citizenship of the Union in the TEU, and merely a reference to the *equality* of citizens. This reference may have been inspired by Article 20 of the Charter of Fundamental Rights,<sup>26</sup> which refers to the liberal principle of equality before the law.

However, in its final version signed in December 2007, Article 9 TEU\* provides:

‘In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it.’

The final two sentences, drawn from the text of Article 20(1) TFEU\*, were included in the Treaty of Lisbon at the behest of the European Parliament representatives in the IGC.<sup>27</sup> The parliamentarians had adopted citizenship of the Union as a political

24 See Presidency Conclusions of the Brussels European Council, June 2007, Annex 1, IGC Mandate, 11177/1/07/REV, 20 July 2007. See *Schrauwen*, above n.19 at 59.

25 See proposed amendments to Article 8 TEU in CIG 07/1, 23 July 2007 at point 12;

26 This refers to the December 2007 version of the Charter which is referred to in the Treaty of Lisbon and as solemnly proclaimed by the Presidents of the European Parliament, the Council and the Commission: OJ 2007 C310/41.

27 See the interviews with two of the European Parliament representatives at the 2007 IGC (Enrique Baron Crespo, Elmar Brok) for the webzine of the Young European Federalists, available at <http://www.taurillon.org/IGC-on-the-Reform-Treaty-Interview-with-MEPs>.

priority because of its symbolic importance.<sup>28</sup> It is obviously clumsy to have such textual repetition between the TEU and the TFEU, but it was perhaps unavoidable in this particular context.

The most significant difference between the EC Treaty citizenship provisions and those of the post-Lisbon TEU and TFEU (Articles 20-24 TFEU\*) concerns how the relationship between national citizenship and citizenship of the EU is worded. In the Treaty of Lisbon, this relationship is articulated as *additionality*. EU citizenship is *additional* to national citizenship. Previously, citizenship of the Union was expressed as being *complementary* to national citizenship in Article 17 EC. In both texts, it is made clear that EU citizenship does not *replace* national citizenship. Expressing Union citizenship as *additional* to national citizenship was insisted upon by the Member States, in order to reinforce the point that EU citizenship can only *add* rights, and cannot *detract* from national citizenship. Duff suggests it was done ‘cleverly, to mollify conservative eurosceptic opinion’.<sup>29</sup>

Legally speaking, additionality, reinforcing the duality between national and EU citizenship as legal statuses seems to be a more accurate delineation of the relationship between the two, and avoids any unfortunate implications that there is somehow a notion that one status should bend to the will of the other, in order to achieve the sought after ‘complementarity’. Conceptually speaking, it makes the point that the development of different layers of citizenship entitlements is not a zero sum game, in which rights given at one level must necessarily detract from those given at another level. In that sense, it is not so far from – but avoids the negative connotations of – the controversial wording contained in the Praesidium’s first draft of Part One of the Constitutional Treaty. This referred to citizens having ‘dual’ citizenship: EU and national, and being ‘free to use either, as he or she chooses’.<sup>30</sup> De Búrca subjected this wording to some trenchant criticism back in 2003.<sup>31</sup>

‘The notion of a dual citizenship is an unfortunate way of describing the co-existence of national and EU citizenship. If it is intended as a description of the currently existing relationship between EU and national citizenship it is misleading, and if it is intended to define these categories in a new way for the future, under the basic Constitutional Treaty, then it is a regrettable move. The concept of dual citizenship suggests full and competing loyalties/relationships to two different and entirely separate polities, each of which makes similar claims of allegiance on the individual.’

Perhaps these criticisms were heard, because in subsequent versions of Part One of the Constitutional Treaty it was the additionality formula which prevailed.

28 See also the emphasis placed on citizenship by Andrew Duff, the third of the 2007 European Parliament IGC representatives, in his book on the Constitutional Treaty: *The Struggle for Europe’s Constitution*, London: Federal Trust, 2005.

29 Duff, above n.28 at 56.

30 See Conv 360/02 of 28 October 2002 at 9.

31 G. de Búrca, *Fundamental Rights and Citizenship*, in: de Witte (ed.), *Ten Reflections on the Constitutional Treaty for Europe*, Florence: European University Institute, 2003, 11-44 at 13.

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Schrauwen takes a positive view, suggesting that this formula represents one step towards a 'more autonomous development of Union citizenship'.<sup>32</sup>

Despite these comments, the shift from complementarity to additionality seems unlikely to make a substantial difference to the trajectory of EU citizenship. Thus far, the cases in which the Court of Justice has placed weight upon the status of EU citizenship, from *Martínez Sala* onwards,<sup>33</sup> have not truly detracted from the status of national citizenship, except in terms of undermining its exclusivity by, for example, extending the territorial boundaries of the welfare state.

Other changes concentrate on amplification of the existing texts. A legal basis for adopting the measures necessary to give effect to citizens' initiatives as provided for under Article 11 TEU\* has been added to Article 24 TFEU\* (which also addresses the right to petition the European Parliament, to apply to the Ombudsman and to write to any of the institutions and agencies of the Union in any of the official languages of the Union and to receive a reply in that language). A new paragraph has been added to Article 23 TFEU\* giving a legal basis, using a special legislative procedure involving only consultation of the European Parliament, for the Council to establish the coordination and cooperation measures necessary to facilitate diplomatic and consular protection, as per that provision. In addition, in fleshing out the former Article 20 TEU (Article 35 TEU\* post-Lisbon), the drafters of the Treaty have sought to impose additional duties on the diplomatic and consular representations of the Union *and* the Member States in third countries give effect to protection for Union citizens on the basis of this status, rather than nationality:

[The diplomatic and consular missions of the Member States and the Union delegations in third countries] shall contribute to the implementation of the right of citizens of the Union to protection in the territory of third countries...'

This chimes well with the wider concerns in the Treaty of Lisbon, as with the Constitutional Treaty, with the external role and mandate of the Union, as well as institutional developments such as the High Representative of the Union for Foreign Affairs and Security Policy and the proposed European External Action Service.

Finally, pursuant to amendments made to the Freedom, Security and Justice provisions of the TFEU which have seen the introduction of a specific legal basis in relation to the adoption of measures on passports, identity cards and residence permits (Article 77(3) TFEU\*), the exclusion of such matters from what will be Article 21 TFEU\* (formerly Article 18 EC) is no longer necessary. Moreover, the reference to social security and social protection has been switched around. No longer are such matters not to be covered by measures adopted under Article 21 TFEU\*. They can now be addressed in measures adopted under this provision, provided the Treaty has not otherwise provided the necessary powers, but only where the Council acts

<sup>32</sup> See *Schrauwen*, above n.19 at 59-60.

<sup>33</sup> Case C-85/96 *Martínez Sala v. Freistaat Bayern* [1998] ECR-I 2691.

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unanimously after consulting the European Parliament (Article 21(3) TFEU\*), under a special legislative procedure.

Overall, these are very modest changes. Some significance could be read into the restructuring which has occurred in relation to both the TEU and the TFEU. In the former, citizenship is paired with democracy; in the latter, with non-discrimination. It may be that in due course the Court of Justice, through a teleological and contextual reading, may make something of those juxtapositions. It is hard, however, to make firm predictions especially in relation to the latter question, where the precise scope of EC law at present, never mind EU law in the future, is very much in question before the Court of Justice following cases such as *Mangold*.<sup>34</sup> In relation to the issue of democracy, however, the Treaty of Lisbon has sought to make a substantial, if not always wholly clear, contribution to developing a notion of the EU as having its own autonomous democratic basis.

#### IV. The democratic life of the Union

Where the Constitutional Treaty grandiosely referred to ‘the democratic life of the Union’, the TEU post-Lisbon contains merely a title on ‘democratic principles’, although the basic provisions are the same. This title fleshes out somewhat the notion of the citizen as a political actor within the EU, without fully embracing a concept of democratic citizenship. Speaking to the provisions of the Constitutional Treaty on democratic engagement, but with clear resonance for the Lisbon Treaty provisions also, Closa warns that:

‘The conception of citizenship that emanates from these provisions privileges a vision of citizens as bearers of rights that provide them protection from public authorities, grant them some reduced scope of participation in the policy process but, by and large, it does not establish a solid connection between the citizens and the exercise of their political rights and the “democratic life of the Union”.’<sup>35</sup>

The provisions on democracy, which could be criticised for lacking a central focus, address consecutively concepts of representative, direct and participatory democracy, without giving the impression of how these might be linked in a coherent way. The provision with the greatest capacity to capture headlines is the one on citizens’ initiatives, where an important link to citizenship of the Union is made. Article 24 TFEU\* contains a legislative power, permitting the European Parliament and Council, acting by co-decision, to adopt the provisions necessary to implement the new ‘citizens’ initiatives’. This new opportunity to direct the input of a minimum of one million signatures into the legislative process will harness citizen power, especially

34 Case C-144/04 *Mangold v. Helm* [2005] ECR I-9981.

35 C. Closa, *Constitutional Prospects of European Citizenship and new forms of democracy*, in Amato et al, above n.13, 1037-1063 at 1052.

via the internet, enabling it to be channelled towards seeking specific legislative initiatives to be put forward by the Commission. Citizens' initiatives were originally included in the Constitutional Treaty (allegedly at the behest of Giscard d'Estaing himself), and they were retained in the TEU provisions on 'democratic principles' (Article 11(4) TEU\*). Under the TFEU, the European Parliament and the Council must together define what constitutes a 'significant number of Member States', for the purposes of determining the minimum standard of cross-EU representativity for any citizens' initiative which is to be taken up in legislative format. These initiatives may develop into interesting cases of *transnational* popular democratic pressure, without as such detracting from the powers of national parliaments.

Referring to the Constitutional Treaty provisions on this matter, Piris makes clear his view that this is an important initiative in favour of the role of the Union's citizens within its functioning. Doubtless it is not his intention to be negative when he states that 'this provision is very innovative and symbolic'.<sup>36</sup> That his view is positive can be discerned from the fact that he does not think that one million signatures is a very high threshold to be reached, and that while 'the Commission will not be legally obliged to follow up on any such initiative, the political weight of it will, in practice, force the Commission to engage in serious work following the result of an initiative.'

It is also interesting to note that the provisions on the European Parliament in the TEU now refer to 'citizens', where previously the analogous provisions in the EC Treaty referred to the 'people'. Article 14(2) TEU\* will provide that: 'The European Parliament shall be composed of representatives of the Union's citizens...'; Article 10(2) TEU\* states that 'citizens are directly represented at the Union level in the European Parliament'; and Article 10(3) TEU\* states that 'Every citizen shall have the right to participate in the democratic life of the Union.' The text of Article I-19(2) CT providing for the European Parliament to be elected 'by direct universal suffrage of European citizens in free and secret ballot' is not in the post-Lisbon TEU, but the reference to universal suffrage in connection with the European Parliament does appear in Article 39 of the Charter of Fundamental Rights. The Charter is, of course, recognised under Article 6(1) TEU\* post-Lisbon as a legal source of equal standing to the Treaties.

In any event, the status of the principle of universal suffrage under EU law (whether by virtue of the Charter, or by virtue of Article 3 of Protocol No. 1 of the ECHR) had already been clarified even before the Treaty of Lisbon, as a result of the judgments of the Court of Justice in the *Gibraltar* and *Aruba* cases.<sup>37</sup> It is im-

36 *J.-C. Piris*, *The Constitution for Europe*, 2006, at 119.

37 Case C-145/04 *Spain v. United Kingdom* (Gibraltar) [2006] ECR I-7917; Case C-300/04 *Eman and Sevinger v. College van burgemeester en wethouders van Den Haag* (Aruba) [2006] ECR I-8055. For an extended discussion of these cases see *J. Shaw*, *The political representation of Europe's citizens: Developments*, 4 *EuConst* (2008) 162-186.

plicit in the Court's important judgments in these politically sensitive cases about the scope of voting rights in European Parliament elections that European citizens have a right, as a matter of democratic principle, to vote for 'their' parliament. This emerges especially clearly from the *Aruba* case. The provisions of both the current Article 19 EC and the prospective Article 22 TFEU only provide explicitly for an *equal treatment* right, whereby nationals of the Member States resident in *other* Member States have the right to vote in European Parliament under the *same conditions* as nationals. There has, hitherto, never been a text in the EU Treaties which states, in terms, that 'the citizens of the Union shall elect the members of the European Parliament.' However, an important conclusion can be drawn, in particular from the *Aruba* case, that citizens of Union cannot be deprived of their right to vote in European Parliament elections, if the national legislation which excludes them from the franchise fails a basic rationality test.<sup>38</sup> This amounts to recognising the right to vote in European Parliament elections as a normal incident of EU citizenship, even if this is not explicitly stated in the Treaties. In fact, the Advocate General explicitly made this point in his joint Opinion on the two cases and he argued that the right to vote in European Parliament elections is *the most important* EU citizenship right.<sup>39</sup>

The shift from the language of 'people' to that of 'citizens' in relation to the European Parliament raises important questions about the allocation of seats. The principle of 'degressive proportionality' was enshrined in Article 14(2) TEU\*, and its application already caused some difficulty with respect to the allocation of seats to Italy during the 2007 IGC. This led to establishment of the 'fudge' whereby the European Parliament will constitute 750 members, plus one – the President – in order to accommodate one extra MEP for Italy. Hitherto the calculation base for Member State populations, both for EP purposes and for purposes of QMV in the Council of Ministers, has been that of the number of residents rather than the number of nationals. This avoids difficult questions about the divergences in national laws on citizenship acquisition. For example, if a Member State has national rules which make acquisition of national citizenship so hard that this artificially deflates the number of national citizens, should this be taken into account when assessing the relevant numbers for purposes of calculating MEPs or QMV weightings?<sup>40</sup> There are

38 At issue was a national rule which excluded Arubans from voting in EP elections so long as they were resident in Aruba, but allowed them to vote under general Netherlands expatriate voting rules when they moved to a third country.

39 Opinion of AG Tizzano of 6 April 2006, para. 67: 'it can be directly inferred from Community principles and legislation as a whole, thus overriding any indications to the contrary within national legislation, that there is an obligation to grant the voting rights [in European elections] to citizens of the Member States and, consequently, to citizens of the Union.'

40 See the discussion by Andrew Duff in a Working Document for the European Parliament Committee on Constitutional Affairs on the Election of the European Parliament (III), PE400.478v01-00, 18 January 2008 at 2-3.

also more advanced statistical methods available for estimating the number of residents present on the territory between the dates of comprehensive national censuses than there are for calculating the number of national citizens. Even so, Italy was successful in raising a specific issue about numbers of citizens abroad as part of the array of arguments it used to lay claim to the same number of MEPs in the 2009-2014 Parliament as the UK, where the principle of degressive proportionality seemed to demand that it should have one less. It remains to be seen whether any future reforms of the European Parliament electoral procedures, such as are currently under review before the Committee on Constitutional Affairs,<sup>41</sup> might take on board this shift from 'people' to 'citizens'. In his presentation of these matters for the Committee in a preliminary paper, Duff makes it rather clear where his own preferences lie:

'Or do we follow James Madison's belief that, in the republic, parliamentary representation is more of a birthright than a civic privilege? The Madisonian approach suggests that the European Parliament represents not only de jure EU citizens (as formally established by the EU Treaty), but that it also represents, and has a duty of care towards, anyone else who abides in the territory of the Union, including minors and denizens. That being the case, the traditional method of distributing seats in the Parliament on the basis of total population – to say nothing of counting votes in the Council – is the right one and should not be amended.'<sup>42</sup>

Finally, the question arises as to whether the rewording in the Treaty of Lisbon would make any difference if the issues such as those which arose in the *Gibraltar* case came before the Court of Justice once again. In that case, the Court of Justice was faced with a challenge by Spain to the UK's policy of including Commonwealth Citizens in its normal franchise for European Parliament elections. The particular scenario at issue concerned Gibraltar, which was only first included in European Parliament elections in 2004, following a case brought by Gibraltarians before the European Court of Human Rights contesting their prior exclusion from the framework of European Parliament elections in the United Kingdom.<sup>43</sup> The proceedings before the Court of Justice encompassed an interesting discussion by Advocate General Tizzano of the provisions of the EC Treaty on the European Parliament. He concluded that the reference to 'peoples' of the Member States in Articles 189 and 190 EC should be treated as largely coterminous with the citizens or nationals of the Member States (thus avoiding alternative 'ethnic' rather than 'civic' connotations of the term 'peoples'), which would suggest that it makes little difference that the TEU post-Lisbon now explicitly refers to citizens. On the other hand, he denied that the people/citizens, so defined, and the electorate for the European Parliament should not be treated as automatically coextensive, an argument which the Court of Justice also accepted. Such an argument, which focuses on the civic connotations of 'peo-

41 See the papers prepared by Duff above n.40 in that context.

42 Duff, above n.40 at 3.

43 *Matthews v. UK* Appl. 24833/94, judgment of 18 February 1999, [1999] 28 EHHR 361.

ple' as used in the present version of the EC Treaty pre-empts quite effectively the possibility of relying upon the shift, in Article 10 TEU\*, from 'people' to 'citizens' as a significant change in terminology. The AG doubted, in any event, whether the expression 'peoples of the States brought together in the Community' in Article 190(1) EC was intended to have a 'precise legal meaning'.<sup>44</sup>

## V. Conclusions

One possible way of concluding this paper would be to concentrate on the question of whether, in the event that the Irish referendum no-vote forces the eventual abandonment of all attempts to complete the ratification process for the Treaty of Lisbon, some or all of the innovations highlighted here could be brought into force. For example, one could develop a discussion about whether Article 308 EC could offer a legal basis for a regulation institutionalising citizens' initiatives, thereby constituting through legislation an ordinance denying some of the autonomy which the Commission currently possesses in relation to legislative initiative. That very possibility was canvassed by Efler in a study on citizens' initiatives commissioned for a European Parliament political group during the hiatus between the French and Dutch referendums, and the relaunching of the Treaty reform process in June 2007.<sup>45</sup> Such an approach misses the point, however, about the tensions between the various drivers of constitutional change (and indeed constitutional stagnation) which has been the underlying theme of this paper. As a general approach, this transcends the specific question of whether a given treaty will or will not be implemented. The dialogue between treaty amendment and judicial activism has been a constant throughout the history of European integration, and seems set to continue in the future.

So far as the Treaty of Lisbon represents a case study of treaty-based change, overall the changes must be viewed as modest. This is despite (or perhaps because of) the fact that since the introduction of citizenship of the Union by the Treaty of Maastricht there have been some quite radical interpretations of the scope and effects of citizenship of the Union by the Court of Justice. These started with challenges to the territorial scope of the national welfare state, extended through judgments asserting the fundamental nature of the right of free movement for citizens and the consequent right to reside throughout the territory of the Member States, and have culminated in the *Gibraltar* and especially the *Aruba* cases with some tentative steps towards curbing the electoral sovereignty of the Member States, at least in relation to the exercise of European Parliament voting rights. Given both the modesty of these changes and the challenges posed to the ratification of the Treaty of

<sup>44</sup> Opinion, para. 80.

<sup>45</sup> See *M Efler*, European Citizens' Initiative. Legal options for implementation below the constitutional level, GUE/NGL, December 2006 at 3.

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Lisbon, it seems plausible to suggest that the next phase of citizenship developments in the EU is more likely to be led by the Court of Justice than it is by the Member States and/or the political institutions. Whether such developments are legitimate, especially when viewed in the light of the Constitutional Treaty debacle and the comments in Section II about perceptions of Union citizenship, is a speculation which lies outwith the scope of this brief paper.