# PARTICIPATORY DEMOCRACY, CIVIL SOCIETY AND SOCIAL EUROPE

# PARTICIPATORY DEMOCRACY, CIVIL SOCIETY AND SOCIAL EUROPE

A Legal and Political Perspective

Gautier Busschaert



Intersentia Ltd

Sheraton House | Castle Park Cambridge | CB3 0AX | United Kingdom

Tel.: +44 1223 370 170 | Fax: +44 1223 370 169

Email: mail@intersentia.co.uk

www.intersentia.co.uk

Distribution for the UK and Ireland:

NBN International

Airport Business Centre, 10 Thornbury Road

Plymouth, PL6 7 PP

United Kingdom

Tel.: +44 1752 202 301 | Fax: +44 1752 202 331 Email: orders@nbninternational.com

Distribution for Europe and all other countries:

Intersentia Publishing nv

Groenstraat 31

2640 Mortsel

Belgium

Tel.: +32 3 680 15 50 | Fax: +32 3 658 71 21

Email: mail@intersentia.be

Distribution for the USA and Canada: International Specialized Book Services 920 NE 58th Ave. Suite 300 Portland, OR 97213

USA

Tel.: +1 800 944 6190 (toll free) | Fax: +1 503 280 8832

Email: info@isbs.com

Participatory Democracy, Civil Society and Social Europe. A Legal and Political Perspective

© Gautier Busschaert 2016

Artwork on cover: Rythme n° 3, décoration pour le Salon des Tuileries, Delaunay Robert (1885-1941), Paris, musée d'Art moderne de la Ville de Paris, Photo © RMN-Grand Palais / Agence Bulloz

The author has asserted the right under the Copyright, Designs and Patents Act 1988, to be identified as author of this work.

No part of this book may be reproduced, stored in a retrieval system, or transmitted, in any form, or by any means, without prior written permission from Intersentia, or as expressly permitted by law or under the terms agreed with the appropriate reprographic rights organisation. Enquiries concerning reproduction which may not be covered by the above should be addressed to Intersentia at the address above.

ISBN 978-1-78068-395-9 D/2016/7849/69 NUR 828



British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

### **ACKNOWLEDGEMENTS**

This book originates from a doctoral thesis completed in September 2013. It could not have been written without the support of my beloved wife, Christina. I thank her for our endless discussions, for her proof-reading skills and for reminding me that there is a life worth living outside PhD research.

I also thank my friends and family for being there in times of doubt. One of them, Sébastien, made a decisive contribution to my thesis but unfortunately passed away just before I could thank him. I bid him farewell.

I am grateful to the scholars I met during the UACES conferences. I have also greatly benefited from a workshop on post-national rulemaking organised by the University of Amsterdam. I particularly wish to thank Alex Warleigh, Deirdre Curtin and Dawid Friedrich for their input.

I am also thankful to the Catholic University of Louvain for entrusting me with a job of teaching assistant during the last two years of my PhD. My participation in the activities of its Centre for European law have greatly contributed to my research. I particularly wish to thank Stéphanie Francq and Jean-Yves Carlier in that respect.

Of course, thank you to Adam Cygan, my PhD supervisor, for his patience and guidance. I could not have hoped for better support at the University of Leicester. Likewise, I am grateful to Michael Dougan and Oxana Golynker for their encouraging comments during the viva voce examination.

Last but not least, thank you to the editorial staff and the two anonymous reviewers at *Intersentia*, without whom you could not possibly hold this book in your hands today.

Intersentia V

# **CONTENTS**

	nowledgements
	pter 1 nocratic EU: from Representation to Participation
1.1.	Introduction
	Representative Democracy and the Community Method
1.3.	Participatory Democracy and the Community Method 5
	1.3.1. Citizenship
	1.3.2. Organised Civil Society
	Participatory Democracy and the Open Method of Coordination 11
1.5.	Assessing the Participatory Turn: Outline
Cha	pter 2
	iewing the Participatory Ideal of Bits and Pieces
2.1.	Introduction
2.2.	The Participatory Theory of Democracy and Its Limits
	Battling for the Soul of (European) Civil Society
	Deliberative Democracy and Its Limits
2.5.	Conclusions
Cha	pter 3
Ove	rcoming the Participatory Ideal of Bits and Pieces
3.1.	Introduction
	Civil Society: a Sphere of Participation between State and Market 36
3.3.	Organised Civil Society in Multilevel Social Europe
3.4.	European Economic Law: Colonising?
3.5.	Social Europe: Democratic?
3.6.	Social Europe: Effective? 54

Intersentia vii

	pter 4
Kev	isiting the Fundamentals of Internal Market Law
4.1.	Introduction
4.2.	Freedom of Establishment
4.3.	Freedom to Provide Services
4.4.	Delivering Welfare Services Financed by Social Solidarity: an
	Economic Activity?
4.5.	Civil Solidarity in an Economic Context
4.6.	Conclusions
	pter 5
Kev	isiting the Fundamentals of European Competition Law
5.1.	Introduction
5.2.	Are CSOs Undertakings?
5.3.	CSOs and Anti-Competitive Agreements
	5.3.1. Balancing Competition against Social Goals under
	Article 101(1) TFEU 85
	5.3.2. Integrating Social Goals within Competition under
	Article 101(1) TFEU
	5.3.3. Integrating Social Goals within Competition under
	Article 101(3) TFEU
5.4.	CSOs and State Aids
5.5.	Conclusions
Cha	pter 6
The	Civil Dialogue - A Magic Cure for the Democratic Ailments of
the	Community Method? 101
	Introduction
	European Civil Society: an Elite Game
	Procedural Rules I: Opening Consultations
	Procedural Rules II: Democratising European Civil Society
6.5.	Conclusions
Cha	pter 7
	Open Method of Coordination – Radicalising Participatory
Den	nocracy in the EU?
7.1.	Introduction
7.2.	Theoretical Promises
73	Practical Disappointments 133

viii Intersentia

#### Contents

Reform	ning the Social OMC140
7.4.1.	Legal Reforms
7.4.2.	Political Reforms
7.4.3.	Constitutional Reforms
Concl	usions
pter 8	
king B	ack – Moving Forward
Introd	luction
Europ	ean Economic Law: Colonising?
Social	Europe: Democratic?
8.3.1	The Community Method
8.3.2.	The Open Method of Coordination
	Comparative Assessment
Social	Europe: Effective?
	The Community Method
	The Open Method of Coordination
8.4.3.	Comparative Assessment
le of Le	gislation
	ses
•	ıy
	7.4.1. 7.4.2. 7.4.3. Concluder 8 king Basel Introdes Europ Social 8.3.1 8.3.2. 8.3.3. Social 8.4.1. 8.4.2. 8.4.3.  le of Legle of Cal

Intersentia

## **ABBREVIATIONS**

APA Administrative Procedure Act
CJEL Columbia Journal of European Law

Can J L & Jurisprudence Canadian Journal of Law and Jurisprudence

CLR Columbia Law Review
CM Community Method

CML Rev
CoR
Common Market Law Review
CoR
CSCC
Civil Society Contact Group
CSO
Civil Society Organisation
CUP
Cambridge University Press

CYELS Cambridge Yearbook of European Legal Studies

DDP Directly-Deliberative Polyarchy

DG Directorate-General

EAPN European Anti-Poverty Network
EBLR European Business Law Review

EBOR European Business Organization Law Review

ECI European Citizen Initiative
ECJ European Court of Justice
ECJ European Competition Journal
ECLR European Competition Law Review

EC Tax Review

EESC European Economic and Social Committee

EIOP European Integration online Papers
EJIL European Journal of International Law

EJSL European Journal of Social Law
EJSS European Journal of Social Security

ELI European Law Journal
EL Rev European Law Review

EMU Economic and Monetary Union

EPL European Public Law

EPP European Platform against Poverty
ESM European Stability Mechanism
EStAL European State Aid Law Quarterly

EU European Union

Intersentia Xi

FEANTSA European Federation of National Organisations

working with the Homeless

Fordham Int'l LJ Fordham International Law Journal

GC General Court
IA Impact Assessment

ICLQ International & Comparative Law Quarterly

IGC Intergovernmental Conference

ISG Inter Service Group

IJNFPL International Journal of Not-for-Profit Law JCER Journal of Contemporary European Research

JCMS Journal of Common Market Studies

JDE Journal de Droit Européen

JECL&P Journal of European Competition Law & Practice

JEPPJournal of European Public PolicyJESPJournal of European Social Policy

JHPPL Journal of Health Politics, Policy and Law

Inl Soc Pol Journal of Social Policy

LIEI Legal Issues of European Integration

Living Rev Dem Living Reviews in Democracy
Living Rev Eur Gov Living Reviews in European Governance

MJ Maastricht Journal of European & Comparative Law

ML Rev Modern Law Review

MTBO Medium-Term Budgetary Objective
NCAs National Competition Authorities
NRPs National Reform Progammes
NSRs National Social Reports
OMC Open Method of Coordination
OUP Oxford University Press

PSCs Public Service Compensations

RDUERevue du Droit de l'Union EuropéenneRMUERevue du Marché Unique EuropéenSGEIServices of General Economic InterestSMEsSmall and Medium-sized EnterprisesSocial PlatformEuropean Platform of social NGOs

SPC Social Protection Committee

TFEU Treaty on the Functioning of the European Union

TEU Treaty on European Union

U Chic Legal Forum University of Chicago Legal Forum

Voluntas Voluntas: International Journal of Voluntary and

Nonprofit Organizations

White Paper on European Governance

YEL Yearbook of European Law

Xii Intersentia