A voyage around article 8: an historical and comparative evaluation of the fate of European Union citizenship.

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A Voyage around Article 8: An Historical and Comparative Evaluation of the Fate of European Union Citizenship*

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Part I: Introduction

"Citizenship of the Union is hereby established"[1] - easily done, this miraculous invention of EU citizenship. And so? Not a lot happened in fact.[2] But rather than dwell on the disappointments inherent in Article 8 EC,[3] this article is about the state of citizenship in the European Union in 1998 and what it could, as a dynamic concept, imaginatively interpreted, evolve into. It would have been a nice bonus to have been able to embellish the arguments below with some new Treaty changes introduced at the Amsterdam Intergovernmental Conference, but the changes were few and Article 8 EC remains substantively unchanged. In introducing that Article into the EC Treaty, the Maastricht Intergovernmental Conference begat a kind of

[1] Art. 8.1, EC Treaty.

[2] Although it generated a rich store of academic commentary and reaction. See, for example:
C. Closa (1992), "The Concept of Citizenship in the Treaty on European Union", 29 *CMLRev* 1137;
C. Closa (1995), "Citizenship of the Union and Nationality of the Member States", 32 *CMLRev* 487;
H.U.I. d'Oliveira (1994), "European Citizenship: Its Meaning, Its Potential", in R. Dehousse (ed), *Europe After Maastricht: An Ever Closer Union*, Munich;
M. Everson (1995), "The Legacy of the Market Citizen", in J. Shaw and G. More (eds), *New Legal Dynamics of the European Union*, Oxford, 73;
M. Everson and U.K. Preuß (1995), *Concepts, Foundations and Limits of European Citizenship*, Bremen;
R. Kovar and D. Simon (1994), "La citoyenneté européenne", *CDE* 285;
E. Meehan (1993), "Citizenship and the European Community", 63 *Political Quarterly* 172;
E. Meehan (1993), *Citizenship and the European Community*, London;
D. O'Keeffe (1994), "Union Citizenship", in D. O'Keeffe and P. Twomey (eds), *Legal Issues of the Maastricht Treaty*, London;
S. O'Leary (1992), "Nationality Law and Community Citizenship: a Case of Two Uneasy Bedfellows", 12 *YEL* 353;
S. O'Leary (1995), "The Relationship between Community Citizenship and the Protection of Fundamental Rights", 32 *CMLRev* 529;
S. O'Leary (1996), *The Evolving Concept of Community Citizenship*, The Hague;
U.K. Preuß (1995), "Problems of a Concept of European Citizenship", 1 *ELJ* 267;
U.K. Preuß (1996), "Two Challenges to European Citizenship", 44 *Pol. Studs* 543;
J. Shaw (1997a), "The Many Pasts and Futures of Citizenship in the European Union", 22 *ELRev* 554;
J. Shaw (1998), "Citizenship of the Union: Towards Post-National Membership", in *Collected Courses of the Academy of European Law*, The Hague, vol. 6, book 1, 237-347;
J.H.H. Weiler (1996), "European Citizenship and Human Rights", in J.A. Winter *et al.* (eds), *Reforming the Treaty on European Union: The Legal Debate*, The Hague, 57;
A. Wiener (1998), *European Citizenship Practice: Building Institutions of a Non-State*, Boulder.

[3] Art. 8 EC will, after the ratification of the Amsterdam Treaty, be known as Arts. 17-22. The pre-Amsterdam EC Treaty numbering is used throughout this paper.

"textual" citizenship *of* the European Union, the reality of which could neither be denied nor, however, precisely located.

This article focuses, to the contrary, on citizenship *in* the European Union, which predates Maastricht and which will develop despite lack of attention at Amsterdam. It is an examination of the extra-institutional, extra-textual, dimensions of citizenship with a realistic objective in mind - namely, the future interpretation of Article 8 by the European Court of Justice. Citizenship in the European Union has dimensions that far exceed Article 8 EC and which bear little relation with its stark, textual existence. The Treaties, which both support and suspend the supranational European Community / European Union, have proven apt for the furthering of many elements of Monnet's dream, but less so for others. Citizenship of the Union, a "conferred",[4] non-consensual, unique new status bearing little relation to the traditional meanings of the word, ranks amongst those most ill-suited to creation by international treaty-making methodology. None the less, Article 8 has been inserted into the Treaties and cannot, conceivably, escape the attention of the Court of Justice interpretative machinery.[5] The present discussion is less concerned with the dissection and critique of this Article and its limited pre-IGC, institutionally determined state, but rather with firstly a location of Article 8 in its historical space and, secondly, a consideration of its constitutional scope in a comparative context. The argument focuses not on "alternative" approaches to citizenship, but rather on forecasting how a judicially-shaped future might fill the constitutional void that Article 8 EC has created. The acknowledgement of the historical substance of the relationship between individuals in Europe, the precise history of citizenship itself (an intrinsic part of the EU's inheritance), and the incorporation of comparative influences from other constitutional domains that can be absorbed into the thinking on and judicial evaluation of Article 8, may allow it to escape from its stark, textual confines. It is, in short, a paper devoted to considering the potential of citizenship of the European Union within the confines of an anticipated progressive judicial appraisal.[6]

Article 8 EC has justifiably been the subject of much detailed academic analysis since the time of the virgin birth of citizenship of the European Union. It is, in its detail, a curiously archaic concept, undecided as to whether it has an economic or political focus. The definition and rights considered together have ensured there is a merging of both the political and economic; the pompous tone, the stately implications and the subsequent use of Article 8 imply a privileged political status (without any real concretization of same), but

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[4] *Second Report from the Commission on Citizenship of the Union*, COM (97) 230.

[5] This is not to suggest that the fate of citizenship of and in the EU rests entirely with ECJ interpretation. See further Weiner (1998) supra n 2.

[6] For wider perspectives on the subject, see, for example:
J. Habermas (1992), "Citizenship and National Identity: Some Reflections on the Future of Europe", *Praxis International* 12;
R. de Lange (1995), "Paradoxes of European Citizenship" in P. Fitzpatrick (ed), *Nationalism, Racism and the Rule of Law*, Aldershot;
P.B. Lehning (1997), "European Citizenship: A Mirage?" in P.B. Lehning and A. Weale, *Citizenship, Democracy and Justice in the New Europe*, London.

the rights or benefits prioritize an economically rooted concept of participation (namely, free movement), emphasizing the private property origins of bourgeois citizenship. The definition does not avoid the exclusionary ethos of EC free movement law, nor does it further the notion of justice in the European Community/Union in its alienation of the "resident subject".[7] These criticisms of Article 8 EC are well known and extensively documented.[8] In spite of the criticisms, citizenship of the EU that lacks substantive positive attributes may be said to have created a space beyond the institutionally framed concept of integration, in suggesting a connection between the peoples of the Member States in a sphere of "Europeanness" outwith classically defined integration, perhaps signifying the existence of connections or identifiers that subsist in an inchoate form beyond the scope of application of the Treaties. It might be argued that, although a creation of international law treaties, the European Union, or the character of Europe today is something more complex and embryonic, which exceeds the principles, institutions and general confines of its mother Treaties. Citizenship, though also largely a creation of a Treaty, touches upon this "mood" or "feel" of participation in a non-defined zone beyond the Treaties. The prospective EU Citizenship may orientate towards other, more expansive, elements of citizenship participation (social or environmental citizenship, for example). But, currently, it is individualistic in inspiration and functional in motivation, and - as a poor example of IGC constitutionalism - the end it serves is not clear.

This article poses some questions about the meaning of this citizenship without citizens, a citizenship without consent, without attachment to community, and no in-built concept of membership. Whatever the constitutional or political prospect or future of citizenship in the EU, the basic structure of the status is extant. Inadequate, incomplete and unsatisfactory in many respects, it is highly probably that Article 8 EC will serve as the basis for both jurisprudential development and political discourse in the Union. Having received only scant attention from the constitution makers at the Amsterdam summit, it is now more likely that any evolution rests with judicial interpretation. That the European Court of Justice should be responsible for interpreting (and here that word has more resonance than elsewhere) the meaning of EU citizenship is significant, in that it is the institution that is the most detached from Member State control and, once the interpretation machine begins to roll here, citizenship will become essentially detached from the tight control exercised over Article 8 by the institutional forces that created it.

Located within the broad range of analytical approaches to EU citizenship are those that trace in detail the route from Paris 1974 to Maastricht 1992 and the minutiae of Article 8, and - at the other extreme - those that treat the subject of EU citizenship without even mention of Article 8.[9] In reality, this is not a tale of just two citizenships - one (formally) "of" the Union, wooed and worshipped by the lawyers; and another at the

[7] See further, Weiler (1996) supra n 2.
[8] Supra nn 2 and 6.
[9] For example, Lehning (1997) supra n 6.

opposite extreme, that of the "practice" of or "live" citizenship, confined to the realm of the political and social scientists. A complex concept, it needs to be the subject of a reconstruction of the meaning of this word at many levels and within many disciplines. This article seeks a middle ground between two extremes of approaches to citizenship, taking Article 8 as the starting point and exploring the range of possibilities that could be allowed to emerge under cover of imaginative judicial interpretation. It is an attempt at a re-evaluation of Article 8 being fully open to its scope and potential. Article 8 is, at one and the same time, awesome in the chutzpah of its declaratory character, and yet it dwindles into detail and ambiguity, and is thus rendered limited and bland. It has been deliberately detached from the legacy of judicial development that preceded it, but also drafted in arrogant neglect of the entire history of citizenship in Europe.[10]

In consequence, Article 8 rights justifiably get ignored in theoretical evaluations of citizenship and sovereignty, as it seems to be completely divorced from the intellectual appreciation of these issues - despite a level of politeness that prevents this from being more openly acknowledged. The embarrassment of the intellectually antiseptic Article 8 was born out of IGC compromise, rather than studied research that normally precedes such a momentous creation. The Article itself appears to determine a low-key, restrained and theoretically confined reaction. It deceptively quietly declares that EU Citizenship shall exist henceforth and proceeds to root the concept in a bundle of previously existing EC law provisions, mixed with some new benefits for the nationals of the Member States. Unlike its historical antecedents - for example, citizenship in revolutionary France - it was not launched onto the political and legal map of the European Union with fanfare, debate or even great enthusiasm. It seems so much like an unfortunate combination of (Member State and institutional) vanity and (substantive) banality. At one level, it might have appeared that Article 8 was no more than a consolidation of previously existing (if imprecisely determined) rights, which attitude underlines much of the analysis to date. It is, at this superficial level, a disappointing constitutional development, tied to the economically determined "free movement" right, suggesting little more than a cutting and pasting of other rights from elsewhere in the Treaty to add ballast to the weak democratic element of the European Community/Union, and significant only in the political rights granted under Article 8b. But Article 8 may be more subtle than perhaps one can conceive the IGC machine to be and it is welcome to be able to express some admiration for the hidden potential of Article 8. It Is largely in this light that this article considers an evolution based on exposing some of the possibilities in the Article 8 framework; it is a conventional treaty development, seemingly limited in scope and imagination, preoccupied with Member State sovereignty paranoias, and generally reflective of the pattern of IGC outcome. Conservative in form

[10] On the general position of history in EC Law, see further: P. Allott (1997), "The Crisis of European Constitutionalism: Reflections on the Revolution in Europe", 34 *CMLRev* 439.

and largely in substance, but loaded with a chiaroscuro effect that renders it capable of as much, if not more potential than the key Treaty developments of the past - for example, Articles 5 or 119.

The arguments in this article are based upon an optimistic expectation of the judicial reception of Article 8. The signs, however, are not good. In Part II, the limited Amsterdam IGC treatment of citizenship is outlined, followed in Part III by an examination of European Court of Justice reaction to Article 8 to date - an analysis that does not immediately hint at future dynamism. The institutional positions thus grasped, the remainder of the article is devoted to the exploration of how the full scope of a historicized, contextualized citizenship might legitimately be read into Article 8 EC. The function of these arguments is not to test citizenship, to condemn its weaknesses and its failure to satisfy legal and political aspirations. Its scope is both more confined and more optimistic; it rests in an analysis of Article 8 EC framed within Europe's "capacity to develop the conditions of emancipatory politics"[11] and laws.

Part II: Treaties from Amsterdam: Complementary Citizenship?

"Citizenship of the Union shall complement and not replace national citizenship".[12]

The key role to be played by some form of citizenship in a post-Maastricht Europe was repeatedly emphasized in all of the preparatory documents in the lead up to the revision of the Treaty on European Union at the 1996/7 Intergovernmental Conference. Reform of major areas of Union policy and competence was suggested to be predicated upon the extent to which it will appeal to, endear the support of, and generally bring the citizens "closer". What is suggested in these expressed concerns for the citizens is a remarkable revival in the significance being attached to a mode of political participation that has distinctly lost meaning in national politics. But although the European Union version of citizenship was invented under the Treaty on European Union, no particular debt to this presumably higher concept is acknowledged in the Amsterdam documents and the words "nationals of the Member States" might just as conveniently have been used, undeniably without the same symbolic cache. The "citizens" are referred to in order to justify future developments in their name (security and defence, for example), and also as representing the basis for solutions to problems ranging from legitimacy and democracy to unemployment. Despite this extensive

[11] U. Vogel (1997), "Emancipatory Politics between Universalism and Difference: Gender Perspectives on European Citizenship", in P.B. Lehning and A. Weale, *Citizenship, Democracy and Justice in the New Europe*, London, 142 at 157.

[12] The additional sentence to be added to Art. 8(1) (Art. 17 after the ratification of Amsterdam). The other changes to Art. 8 are referenced in the use of the Art. 189b procedure (new Art. 8a(2)-18(2)) and the addition of this para to Art. 8d (Art. 21): "Every citizen of the Union may write to any of the institutions or bodies referred to in this Art. or in Art. 4, in one of the languages mentioned in Art. 248 and have an answer in the same language". *Treaty of Amsterdam Amending the Treaty on European Union* (Luxembourg, OOPEC 1997) at p. 27.

emphasis on citizenship as the salvation of the Union[13] or as a panacea for many political problems seen as affecting support for further expansion of the Union, the precise definition and content have remained largely unchanged under the provisions of the Amsterdam Treaty.[14] In fact, after the pre-IGC fanfare attached to it, citizenship (and attention to Article 8) itself slipped into negotiation purdah and was relatively ignored in all drafts for the new Treaty and at the Amsterdam summit itself. The IGC papers repeatedly underline the fact that the institutional and Member State representatives recognize the notion of the Union and *its* citizens. But the very definition of EU citizenship (Article 8 EC) denies this fiction; the TEU changes introducing citizenship gave Member State nationals additional benefits when they travel to live and work within the EU territory. That Treaty did not create a new class of citizens, it did not increase the level of political participation of EU nationals in Union or Community activities, it did not reformulate the relationship between those subject to the law and authority of the European Community/Union and the responsible institutions, it did not input an element of consent in its creation, it did not imply any change to the state of democracy in the European Community/Union. Article 8 evidences, to the contrary, a continuation of a type of supra-national politics and law cleansed of public participation, a zone of antiseptic democracy. In short, the Union cannot claim to have *its* citizens as a result of Article 8, or at least it cannot accordingly to traditional, nation State-based conceptions of the status of citizenship.

In the Council of the European Union Report on the functioning of the Treaty on European Union, the focus is on "bringing Europe closer to the people",[15] though this seems to be somewhat reluctantly admitted, rather in the manner of a monarchy that finds the subject distasteful. The tone is one of complacet satisfaction with the status quo, with some mention of the items that have not been achieved and no suggestion for using Article 8e to supplement the rights or even any thoughts on how the inadequacies that emerged in the operation of Article 8 might be remedied.

The European Parliament, in its Report, underlines the importance of the TEU "innovations", but notes that "there is still inadequate substance to the concept of EU citizenship and the scope of EU Citizens rights is still limited", and again highlights as one of four central objectives for the IGC "a European Union which is as close as possible to its citizens".[16] The emphasis was on practical steps to achieve this objective, which included accession to the European Convention on Human Rights, and reforms of the definition of

[13] See further:
G. de Búrca (1996), "The Quest for Legitimacy in the European Union", 59 *MLR* 349;
J. Shaw (1997b), "The 1996-97 Intergovernmental Conference and the Citizen Dimension of the European Union: A Brief Commentary", 19 *JSWFL* 231;
J. Shaw (1997c), "European Union Citizenship: the IGC and Beyond", 3 *EPL* 413;
J.H.H. Weiler (1997), "The European Union Belongs to its Citizens: Three Immodest Proposals", 22 *ELRev* 150.
[14] Supra n 12.
[15] *Report of the Council on the Functioning of the Treaty on European Union* (Brussels 1995).
[16] EP Doc A4-0102/95/Part I.B, 4 and 7.

discrimination, voting in national elections, mention of a European-wide "voluntary service" (all predictable and limited suggestions) as well as more openness and subsidiarity. In a follow-up Report,[17] there is further development of the need to add substance to citizenship, which covered full free movement, more developed equality for women, more rights in the states in which they live, etc. Finally, the Commission Report for the Reflection Group and the Commission Opinion cite as the first challenge "to make Europe the business of every citizen" along with enlargement.[18] As well as heightening the sense of belonging, "this new concept has scope to become a real motivating force within the Union".[19] The Report is most detailed on the weaknesses of citizenship. Starkly it notes "[t]he Treaty has made no improvement at all on what went before"[20] in relation to free movement. Repeated, mantra-like, here too is the line "…which does not replace but is in addition to national citizenship…". The purpose is to deepen European citizens' sense of belonging,[21] however "the citizen enjoys only fragmented, incomplete rights, which are themselves subject to restrictive conditions".[22] By the time, almost a year later, it renders its Opinion (a response to the Reflection Group Report), it is still underlining the need for the Union to be closer to its citizens as one of the three main objectives for the IGC.[23] There is a more sophisticated approach here, with the statement that "the concept of citizenship should be based on a European social model" guaranteeing fundamental rights,[24] with mention of human rights, rule of law, employment and sustainable development of the environment.[25]

The Reflection Group Report[26] also states that "making Europe more relevant to its citizens" is the first aim of the Intergovernmental Conference. It is initially defensive and cautious, though admitting frankly that the Union sits somewhere between not wanting to be a super-state but more than a market, and in this political limbo lies citizenship. It takes account of the fact that citizenship is based on common values[27] (human rights, democracy, equality), and identifies the issues that matter most to citizens as "greater security, solidarity, employment and the environment" (which hints of the top-down determination of the substance and meaning of citizenship). "The Union's principal internal challenge is to reconcile itself with its citizens",[28] and the need "to place the citizen at the centre of the European venture"[29] and make Europe the affair of its citizens, and serving the citizens' interests and perspectives for the future should be the main guiding

[17] EP Doc A4-0102/95 PE 190 440.
[18] *Commission Report for the Reflection Group* (Luxembourg, OOPEC 1995) 3.
[19] *Ibid.*, 19.
[20] *Ibid.*, 20.
[21] *Ibid.*, 21.
[22] *Ibid.*
[23] *Commission Opinion: Reflecting Political Union and Preparing for Enlargement* (Luxembourg, OOPEC 1996) 8.
[24] *Ibid.*, 9.
[25] *Ibid.*, 10.
[26] *Reflection Group's Report* (Brussels 1995) (SN 520/95 (Reflex 21)).
[27] *Ibid.*, iii.
[28] *Ibid.*, 4
[29] *Ibid.*, 11.

principle for reform.[30] The "principle" of citizenship was introduced by Article 8[31] and they support its development and changes of Article 8 are suggested, with finally given dissension among the Group, the suggestion that the Treaty should make it even more clear that citizenship of the Union does not replace national citizenship.[32] The first Draft Treaty[33] moves on from the desire for intimacy declared in the earlier documents and in the explanatory memorandum states that "[t]he European Union belongs to its citizens".[34] The basic structure is well established by now, with provisions on rights, etc., and changes in free movement and immigration/security, and the only change to Article 8 proposed is the addition of the following sentence to Article 8.1, "Citizenship of the Union shall complement and not replace national citizenship". This is repeated in the first version of the Amsterdam Treaty, though it is strangely relegated to the end of the section headed the Union and the Citizen entitled "Other Community policies".[35] There is also a proposed addition to Article 8d EC as follows: "Every citizen of the Union may write to any of the institutions or bodies referred to in this Article or in Article 4 in one of the languages mentioned in Article 248 and have an answer in the same language".

This is a direct continuation of minor, incidental concerns expressed in the Reflection Group's Report. They do little to enhance a more participatory sense of citizenship and defer essentially to Member State concerns about the possibility of any development or expansion of Article 8. However viewed, this IGC's focus swas away from the definitional aspect of citizenship into the expanding of its substance in wider contexts in a variety of related EC policies. The terse constitutional definition has been regarded by the IGC machinery as complete and major changes have been avoided. What has deliberately been done instead - in the form of both overt labelling and in the context of a strong PR exercise to make the new Union more citizen-friendly - has been the attachment of a substance to the status that makes it more readily recognizable to the beneficiaries. This citizenship "add-on" includes the promise of an eventual, more satisfactory free movement, an increased security dimension, principles on employment and enhanced commitment to the environment.[36] The pre-fabricated concept of Article 8 citizenship has been used as an instrument to promote improvements where they had long been required. But the "citizens" envisaged here are the nationals of the Member States, and it is as such that they are addressed and their concerns heeded, and not as people with any form of higher status of relationship that ties them to the Union. The supposed "value-added" concept of Article 8 citizenship of the Union has not been altered or enhanced to any great degree

[30] *Ibid.*
[31] *Ibid.*, 14.
[32] *Ibid.*
[33] *The European Union Today and Tomorrow* (Dublin II) (Brussels 1996) (CONF 2500/96) 33.
[34] *Ibid.*, 5.
[35] *Ibid.*, 74.
[36] *Treaty of Amsterdam*, supra n 12; new Title IIIa in EC Treaty, 28 (Visas, Asylum, Immigration and other policies related to free movement of persons); new Title Via in EC Treaty, 33 (Employment); new Art. 3c (amongst others) on Environmental Protection, 25.

at Amsterdam. In other words, as if a little embarrassed by this Maastricht monster, Article 8 has been largely ignored; the changes in the name of the citizens proposed at Amsterdam could all have been achieved *sans* Article 8 - and it was itself relegated to the strange category of "other Community policies" in one draft. The significance of the citizenship-related changes at Amsterdam is indicative of two contrary approaches: a) that legitimacy concerns are being taken seriously, and b) that this is accompanied by the marginalization of any consequences or importance that may be attached to the possible meaning of *Union* citizenship.

And so, Amsterdam gives us "complementary" citizenship and little else. This wording reflects the cautious perspective of the Danish government after Maastricht.[37] This wording may also have been introduced by the Member State governments, mindful of the European Court casting over-eager interpretative eyes on Article 8 in the future. The question is, what is the nature of this complementarity? In principle, this does not necessarily have to be negatively construed, as it suggests that, once the essence of citizenship of the Union has been discerned, then it is not inferior but equal in status to national citizenship. This wording also can be said to concretize Union citizenship to some extent; even though it cannot replace another form of citizenship, acknowledging it as some form of threat in this manner has the effect of underlining its existence and potential impact. Interestingly, the proposed new wording does not refer to *Member State* national citizenship, suggesting the possibility of citizenship of the Union being open to those not in possession of EC Member State nationality (for example, long-term resident non-nationals). So, the position after Amsterdam in relation to Article 8 is that *status quo* has more or less been maintained, and the definition remains largely unaltered. Although proclaimed as a subject high on the Amsterdam agenda, it was an altogether wider and looser notion of citizenship that was at issue. Ultimately, this was not to prove to be the Intergovernmental Conference for serious, intellectual and theoretical input into the real meaning of citizenship, preferring as it did to deal with its decoration rather than its foundations. Member State governments have therefore largely ignored Article 8 at Amsterdam. Has it fared any better thus far in Luxembourg?

Part III: The Court and Article 8: Citizenship Redux?

To date, Union citizenship, still residing in constitutional infancy, has not been subjected to any very lengthy form of EC-level judicial examination or interpretation.[38] An attempt to assert a positive role for a judicial contribution towards defining the scope and potential of Article 8 is somewhat thwarted, given the reaction of the European Court of Justice in some of the cases in which Article 8 EC has been considered. These cases

[37] "The Provisions of Part Two … do not in any way take the place of national citizenship", *Decision of the Heads of State and Heads of Government*, Edinburgh, 12 December 1992.
[38] See Shaw (1997a) supra n 2 at 558-9 on the Court's reluctance in this matter, which is in stark contrast to interpretations by the Court of, for example, Arts. 5, 6 and 119.

have arisen largely in the context of free movement of persons law and therefore of Article 8a.1.[39] Given the ambiguity of this provision and its potential effect on the exercise of free movement by individuals under EC law, it is unsurprising that the Court should have been faced with arguments centred on this dimension of citizenship.[40] The Opinions of the Advocates General have been significant in all of these cases. In *Skanavi*,[41] Advocate General Léger adopts a cautious approach towards the application of the citizenship provisions in stressing that the right of residence in another EU Member State derives not from Article 8a, but from Article 52.[42] The Court finds Article 8a to be a general expression of the rights provided under Article 52, and therefore secondary in importance to specific free movement provisions and, as a consequence, "it is not necessary to rule on the interpretation of Article 8a".[43]

After that blunt dismissal of Article 8's significance, the Court again overlooked an opportunity to examine the provision in *Boukhalfa*.[44] Here, the position of Advocate General Léger demonstrates a different level of appreciation of Article 8 and his Opinion includes strong support for the possible hidden qualities of that Article. Ms Boukhalfa was attempting to assert non-discrimination rights based on the policy of the German embassy in Algiers to discriminate between locally-employed German nationals and other nationals (including EU nationals). The case, similar to *Skanavi*, did not call into play any of the newly directly-conferred benefits of Article 8, but raised questions of the relationship with Article 6 EC. The Advocate General, in his discussion of the fundamentality of free movement of persons law, argues that it promotes "a feeling of belonging to a common entity", a feeling further enshrined by citizenship.[45] He questions here both the very reason for citizenship and implicitly its character as a defining status, by asking "What would be the effects of such a feeling of belonging or such citizenship if they disappeared once the geographical borders of the Union were crossed?"[46] The interesting dimension of this argument is the manner in which inchoate and more generalized qualities are attributed to the bland and sparse face of Article 8a.1. It is also very significant that the emphasis is on this sense of "belonging", which ought to flow from Union citizenship, a concept close to the absent "membership" dimension claimed by critics of Article 8.[47] Remarking upon the responsibility of the Court to take this citizenship from the constitutional twilight zone, Mr Léger reminds us

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[39] Art. 8a.1. "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the conditions and limitations laid down in this Treaty and by the measures adopted to give it effect."

[40] This issue was the subject of an abortive reference to the ECJ in the *Adams* case, Case C-229/94 *The Queen v Secretary of State for the Home Department, ex parte Adams* [1995] AllER EC 177. This case concerned the possibility of interpreting Art. 8a.1 as bringing intra-State restrictions on free movement within the scope of the Treaty. A subsequent ruling held, however, that such restrictions would still be seen as wholly internal - Case C-299/95 *Kremezow v Austria* [1997] ECR I-2629. (I am indebted to Gráinne de Búrca for this reference.) See further, Craig and de Búrca (1998) *EU Law, Text, Cases and Materials* (2nd ed.), Oxford, Chapter 15.

[41] Case C-193/94 *Criminal Proceedings against Sofia Skanavi and Konstantin Chryssanthakopoulos* [1996] ECR I-929.

[42] *Ibid.*, 936, para 21 of his Opinion.

[43] *Ibid.*, para 22 of the judgement.

[44] Case C-214/94 *Ingrid Boukhalfa v Bundesrepublik Deutschland* [1996] ECR I-2253.

[45] *Ibid.*, para 31 of the Opinion.

[46] *Ibid*.

[47] For example Weiner (1998) supra n 2.

that this article "is of considerable symbolic value" and that "it is for the Court to ensure that its full scope is attained".[48] "The concept should lead to citizens of the Union being treated absolutely equally, irrespective of their nationality". In other words, the implication is that Article 8 has changed the nature of the relationship between Member State nationals and the rights deriving to them from the Treaty. The court ignores these significant arguments and does not even mention Article 8 in its judgment.[49]

Advocate General Pergola subsequently delivered an Opinion that considerably reinforced the hints at expansive interpretation by his colleague. The case, *Sala*,[50] concerns the payment of an educational benefit (*l'allocation d'éducation*) to the child of a Spanish national living, but not working, in Germany. This particular benefit was payable to EC nationals who were in possession of a residence permit, which Ms Sala was not. She was essentially a single mother, who had worked in Germany on an irregular basis and had only intermittently been in possession of a residence permit, not an unusual position for an EC single-mother migrant worker, but one taking her outside the scope of free movement law. The Advocate General engages in a broad interpretation of Ms Sala's status so as to allow her to be recognized as a migrant worker under the relevant secondary legislation. However, despite these interpretations of worker status law, he suggests that if her status as a worker cannot be confirmed, then the question of her entitlement remains to be answered, and he poses the following question: "If it turns out that the claimant is not a worker, the question which, *residually*, remains to be answered is: what *other* provision is offered by the Union's legal order to prevent a community national in these circumstances, residing in Germany, being discriminated against by comparison with German citizens?"[51] This is a question that could not have been asked before the TEU changes and demonstrates an inventive use of Article 8, which is the provision he suggests may provide a solution.

The German Government had argued that freedom to move and reside is recognized by Article 8 expressly within the limits derived from the Treaty and secondary legislation. Rather than Article 8, it is claimed, the relevant law is Directive 90/364/EEC[52] and, as the claimant does not fulfil the conditions imposed in that Directive, she had no entitlement to a residence permit. In other words, EC free movement law is unaffected by Article 8's fine sentiments and declarations, and the pre-TEU *status quo* prevails. This conservative position received poetically-argued support from the United Kingdom and French Governments, the latter suggesting that Article 8 serves simply to collect together the various elements of free movement law as if they were pieces of a mosaic, without having any effect on the content of the law. Article 8 is then to be

[48] See supra n 44, 2271, para 63 of the Opinion.
[49] The ruling was given in April 96, perhaps a sensitive timing in the IGC context.
[50] Case C-85/96 *Maria Martinez Sala v Freistaat Bayern*, Conclusions de l'Avocat Général Pergola, 1 July 1997, Unreported, Traduction Provisoire du 18.07.97.
[51] *Ibid.*, 15, para 14 of the Opinion, emphasis original.
[52] OJ 1990 L 180/26

considered merely as a basket of symbolic rights, rather than a rights-conferring, innovative, active provision. The Advocate General draws upon the Commission's submission to the Court to introduce his eventual, wide interpretation of Article 8. He recalls the fact that it is not the right of residence *per se* that is called into question by this case, but rather the rights that accrue once resident. Having reached residency status, Article 8 should be of benefit to an EC national who cannot otherwise claim the protection of EC law. In other words, he suggests a contrary interpretation to that of the Court in *Skanavi*. His conclusions imply a fundamental change in the character of the right to reside since the entry into force of the Treaty on European Union. It no longer derives from secondary legislation, but is "granted" or bestowed (*"octroyé"*)[53] by the Member States to concerned nationals of other Member States.[54] Article 8a limits concern not the existence of the right, but the exercise of the right. Unlike Léger before him, Pergola enters into the heart of the ambiguous wording of Article 8a and suggests this interpretation that is in accordance with recognizing citizenship as having a fundamental status under the Treaties, and individuals having been granted or conferred a new status. Even if somebody cannot come within the scope of free movement directives, the Advocate General alleges that the right to reside now derives in an autonomous way from the primary provisions of Article 8. This quality of citizenship, he concludes, comes from the Treaty and the (Article 6) equality principle flows directly from citizenship status.

In Ms Sala's case, the German provisions are not illogical in the sense that a residence permit is a conditional part of the exercise of the right to reside in another Member State as long as you are within one of the defined categories of movers. But, as Ms Sala does not fall into one of these categories, the Advocate General goes a roundabout way, via Article 8, to bring her within the scope of the Treaty and therefore able to benefit from the principle of non-discrimination. Article 6, in other words, should apply to non-workers; citizenship is the instrumental way of establishing this but, in doing so, the Advocate General attributes characteristics and qualities to citizenship that he believes attach to its "fundamental" nature. He is aware that this is a test case for many similar problems likely to arise, and suggests that perhaps the Court will heed this advice and choose this as the case to at least acknowledge the existence (if not adopt his wide interpretation) of Article 8. The case is of interest in exposing a set of circumstances quite likely to proliferate in the future, in that many EC workers move and migrate, and then find themselves in irregular situations that bring them outside the narrow, restrictively-conceived limitations of the law on workers and related status. This is particularly germane in this case, concerning as it does a single mother, and the gendered roots of EC worker law prove themselves to be inadequate - and indeed perhaps to work against people in such situations.[55]

[53] Original punctuation.
[54] See supra n 15, 18, para 18 of the Opinion.
[55] See further: L. Ackers (1994), "Women, Citizenship and European Community Law: the Gender Implications of the Free Movement Provisions", 16 *JSWFL* 391; Vogel (1997) supra n 11.

What can one conclude from the above cases?[56] This initial testing ground for citizenship cases has demonstrated a willingness on the part of the Advocates General to endorse a recognition of an independent significance in Article 8 EC. The cases all have a free movement dimension and testify to the well-known weaknesses and limitations in this area of law. Arguably, the drive for reform and advancement suggested in the Opinions is motivated more by the need to reform this law. However, there are more than strong indications of a recognition of the potential that Article 8 offers, given wide interpretation. Thus far, however, the reticence of the Court has been matched only by the idealism of the Advocates General. But there are suggestions that Article 8 may not remain the staid, restricted, contained measure that its textual reality implies, if it continues to be subjected to the kind of reasoning here in nascent form. It may require a case disconnected from free movement and involving another of the Article 8 rights for the Court to feel free to adopt an expansive perspective on the meaning and status of citizenship. In linking citizenship to free movement, one of the most sensitively controlled dimensions of integration, in this obvious way in Article 8a.1, the Member States have rendered the Court gagged and bound in any case concerning the two. For, if the end result of an expansive interpretation of Article 8a.1 would have an effect on free movement rights, then the Court might understandably be cautious in the face of Member State positions.

Part IV: Multi-Layered Citizenship

If the immediate reaction by the Court to citizenship has evidenced a reluctance to adopt anything approaching a broad interpretation, this has been in marked contrast to the Court's attitude in relation to other fundamental elements of the Treaties. The emergence of citizenship at Maastricht had a well-established lineage of directly relevant ECJ pronouncements, but also an ancestry that proliferated at different levels, which can be said to have contributed to the past of Article 8. Citizenship is rooted in an EC history of its own, which the Court can legitimately build upon in future interpretations, and this Part is devoted to an attempt to locate and classify the identifiable elements of citizenship's past in the Union. Having examined above the current institutional perspectives, this Part of the article forms a short *passarelle* between the institutional reality, and the historical and comparative aspirational material to follow. It outlines a framework designed to facilitate the emergence of citizenship *of* the Union in full recognition of the unexplored depth of citizenship *in* the Union. The phases or layers identified below overlap, chronologically and substantively, and the purpose of this categorization is to suggest a holistic perspective of the *cadre* within which the future scope and meaning of citizenship would necessarily be determined. This

[56] Other cases where Art. 8 has arisen include Cases C-4 and 5/95 *Stöber and Periera v Bundesantstalt für Arbeit* [1997] ECR I-511, and Cases C-64 and 65/96 *Land Nordrhein-Westfalen v Uecker and Jacquet* [1997] ECR I-3171, where the Court ruled that Art. 8a does not cover free movement within a Member State. See, generally, Shaw (1997a) supra n 2 at 559, and Craig and de Búrca supra n 40 (1998).

loose classification essentially constitutes an attempt to grasp intellectually both the core and the spirit of citizenship in the Union, as an alternative to opting for the location of its essence either simply (and superficially) in Article 8 alone or, in ignoring the Treaty, searching for it in the everyday reality of the relationship between the governed and governors in the Union. It is an as-yet unworked composite of both of these elements, which means that the Court will never have complete control over the full meaning of citizenship and neither will the practice of citizenship in the Union be able to divorce itself from judicial appreciation. The main purpose in this categorization is to allow the diverse sources of citizenship to be recognized and integrated with each other. If it implies the lack of a role for the citizen, it is because it is a classification directed towards future expansive interpretation, rather than being focused on the actual, limited extent of the citizenship relationship within and with the Union. It is proposed as a framework for deeper comprehension and appreciation, rather than a detailed analysis or serious critique of all the elements that would rightly be considered in these contexts.

A. Judicial Citizenship

Some of the essence of EU citizenship rights emanating from the Court hail from an era characterized by what can be termed a "revolutionary" perspective towards the Treaty. This layer or phase of citizenship development did not see the word citizenship actually uttered by the Court, but evidenced a radically expansive interpretation of EC rights deriving to individuals.[57] It can be loosely understood as the coing of age of citizenship in the EC without the actual vocalization of the concept. The case that most strongly characterizes this phase is that of *Cowan*.[58] The latent possibilities inherent in this case have been identified in an Article 8 context when Advocate General Pergola attempted a *mélange* of *Cowan* and Article 8, to attempt an EC law-based classification of the status of a non-worker, single-mother resident in Germany in *Sala*.[59] But the right to receive services pronounced in *Cowan* has yet to have its full scope examined and used by the Court. If the Court persists in the reticent reflections on Article 8 discussed above, jurisprudence such as *Cowan*, from this juridically located layer of citizenship, offers the potential for a more radical development of the role of the individual under EC law than Article 8. Consider, for example, whether the right to enter another Member State to receive services would encompass the right of an indigent to stay and beg in that State.[60] EC free movement law has a well-established economic hierarchy that would exclude

[57] An example would be Case C-159/90 *Society for the Protection of Unborn Children v Grogan* [1991] ECR I-4685, which brought abortion law into the fabric of citizenship. "European law thus provides an arena for normative debates which may not exist in domestic legal systems…", Vogel (1997) supra n 11, at 148.
[58] Case 186/87 *Cowan v Le Trésor Public* [1989] ECR 195.
[59] See supra n 50, para 27.
[60] See P. Rosanvollan (1995), "Citoyenneté politique et citoyenneté sociale au XIXe siècle", 171 *Le Mouvement Social* 9 at 20, for a brief suggestion about the relationship between the right to beg and fundamental rights. US constitutional law has been used to argue the rights of indigents and others in similar positions. EC law, because of its economic focus and limited fundamental rights dimension, has not yet been tested in this subject.

the poorest of EC nationals from benefiting from the so-called "fundamental" freedom. Article 8 confers citizenship on EC nationals, impliedly regardless of economic status, but its primary constituent element is with reference to free movement. This, as was discussed above in relation to the cases concerning Article 8, is the limiting factor in any attempt at an independent definition of citizenship. But *Cowan*, unlike free movement, is not predicated upon the economic status of the national claiming to benefit from its provisions; thus its wording could in the future allow for rights to flow in favour of those who could not claim a similar right under the restrictive provisions of Article 8. Article 8 fossilizes certain important citizenship-related rights, which may mean that judicially inspired citizenship could continue to develop more broadly outwith the framework of that provision. "Belonging" and "membership", fundamental elements of any form of citizenship, ought not to be available only to those wealthy enough to participate in the benefits. Article 8 ties future membership to the "market"-based view of integration. Not to be a vaible market participant removes you, therefore, from the realm of citizenship.[61] This is a market that would exclude indigents and others trapped in poverty - despite their citizenship status and rendering its primary component meaningless for them.

B. Constitutional Citizenship

This layer of citizenship is the Treaty-based one, Article 8 EC.[62] It formally attaches a political dimension to the erstwhile market citizens, though in a weak and diluted form only. This constitutional citizenship has its origins in Member State treaty-making fora and negotiations; it springs from the drafting table directly to the "fundamental" without passing the Court. It now exists alongside the judicial layer of citizenship, waiting for inspiration and substance. It post-dates the Court's wider perspective on the role of the individual in integration and may therefore suffer from a "come-lately" position, with the judicial layer or dimension of citizenship being perceived as the more flexible and more suitable for expansion. To date, there has not been, as explained above, any extensive development of constitutional citizenship, but future evolutions will necessarily occur in the context of co-existing layers and not in splendid isolation. It will not be allowed the luxury of the timing and uncritical space that surrounded the Court's interpretations in the early years. A form of politicized subject has been created under Article 8, but even in the movement from Article 8 to Article 8a there has already been a diminution in the importance of that status; from nationality as entry requirement to the citizenship club, to the implication that entry has its price and that is pre-determined by

[61] See further: Everson (1995) supra n 2, and Everson (1995), "Economic Rights within the European Union", in R. Bellamy *et al.* (eds), *Democracy and Constitutional Culture in the Union of Europe*, London, 137.

[62] As will be discussed below in Part V, the distinction between revolutionary (real, open) citizenship and constitutional (formal, closed) citizenship was recognized during the development of French citizenship at the end of the eighteenth century.

the exclusionary "economic activity" requirement. The next layer is intended as an antidote to the impoverishment of this constitutional layer.

C. Participatory Citizenship

This layer, giving life and presence to Union citizenship, has a wider breadth than the previous two layers. This level of belonging or membership is not directly dependent upon judicial interpretation or renegotiation of the Treaties. If it is less tangible in origin, it is the most concrete layer in terms of encapsulating the reality of citizenship in the European Union for EC nationals. It represents levels of inclusion and participation in the integrative process of many who do not directly come within the market-based Treaty framework. EU integration, regulation, harmonization, and law- and policy-making have a bearing upon many who are prevented from any direct form of involvement; in other words, legal obligations filter through to those who have no reciprocal rights. Such excluded categories of people include children, refugees, illegal entrants and other non-economic actors, amongst others. This stratum of citizenship does not always imply or involve a positive or active level of participation, as many nationals and residents are involved in the sphere colonized by Union law and politics involuntarily - or at least without active support and consent. This does not necessarily just refer to the over-familiar dearth of legitimacy that characterizes the relationship between the Union and those who have at least limited political access to its processes.[63] Identifying and recognizing the significance of the participatory dimension of Union citizenship also entails acknowledging the enforced involvement or entanglement that integration has propagated. Children, for example, are the "subjects" of EC regulation in the field of employment and immigration, but without any corresponding mechanism for ensuring the representation of their position. This may not be entirely divorced from the situation under domestic law. However, the position of those affected by Union immigration and asylum provisions constitutes a more marked degree of negative participation. The remedy gap engendered by the influence of EU level mechanisms to control asylum and immigration starkly represents the meaning of involuntary participatory citizenship.

This layer of citizenship does not only related to the inclusion of those conceived as being outside the realm of active involvement in integration, but defines and encompasses the less direct way in which many people relate and communicate in an active way, within spheres of integration that are "close" to them in the real sense, rather than the ordained, IGC-enforced closeness. It is participatory in terms of *who* is included (in both positive and negative ways) and to *what* type of relationship with the Union it refers. At this level, citizenship involves a direct connection with aspects of integration, not mediated through Member States or institutions. Participation can arise in many different forms, positive here rather than negative as

[63] de Búrca (1996) supra n 13.

described above; the farmers who regularly collect subsidy pay-outs and whose livelihood is determined by the European Community; grass-roots, cross-border gatherings of women excluded from the more formal layers of citizenship;[64] the Erasmus/Socrates-funded students; the factory workers actively resorting to EC social policy legislation. Some of these are obvious; what is less obvious is the sense in which connections between citizens themselves, and citizens and the Union in a global, non-vocalized manner, are being generated at this level,[65] creating a positive and active communication space for those who might be marginalized or lacking access to power within the confines of national law and politics.

Citizenship conceived from this participatory perspective exists outwith Article 8, and beyond and disconnected from the full scope of the Court's jurisdiction. Vogel speaks of an "imagined community" and the diffusion of citizen activity into everyday practices of family life,[66] allowing minority (and other) interests to find a resonance that is usually denied to them in national politics.[67] This layer encompasses a wider, more active conceptualization of citizenship identifying the diffusion of EU-related citizenship activity into everyday contexts, which have proved effective in breaking the singular, one-way link between citizenship and the State. It captures the sense in which there is something beyond the grasp of both judicial and constitutional citizenship that has not been articulated at a politically-powerful level. IT is at this level that the borders of EU citizenship are blurred and vague. There can be restriction of this participation by Member States, when they select an IGC "opt-out" for their citizens, thus demonstrating that these ill-defined connections require recognition, institutional guarantees and unifying principles, in order to protect this level of real political empowerment, as opposed to the constitutional conception of political citizenship of Article 8.

Part V: Historicising EU Citizenship[68]

"*En lançant son 'citoyens', il a évoqué … tout un monde de souvenirs et d'espérances. Chacun tressaiille, frissonne.*"[69]

[64] See further: Vogel (1997) supra n 11.
[65] Vogel (1997) supra n 11, 157, refers to Tassin's "European fellow-citizenship", "which evolves less from the legal and administrative consolidation of citizen status than from the multiple sites and communicative processes of citizen activity."
[66] *Ibid.*, 145.
[67] *Ibid.*, 156. She gives the example of pensioners demanding a pensioners' parliament in Europe.
[68] Heading derived from M. Thornton (1996), "Historicising Citizenship: Remembering Broken Promises", 20 *Melbourne University Law Review* 1072.
[69] Cited in M.P. Johnson (1994), "Citizenship and Gender: the Légion des Fédérées in the Paris Commune of 1871", 8 *French History* 276 at 278, referring to the emotional reaction to the mere use of the word "citoyens" in a public meeting during the Paris Commune of 1871. Not quite the reception that it would receive today, but none the less an anecdote signifying the resonances that the word and concept holds in a European context.

Although the resonance that the word "citizenship" has was undeniably greater in Paris of 1871 than in Maastricht of 1992, it is, even today, a word imbued with historically-ingrained importance. If judicial and constitutional development is partly about invention, this next section is about the need for Article 8 to be located in an inventive context that fully acknowledges its historical roots. The significance of Europe's past - both immediate and more distant - is overtly denied in the Treaties, instruments and policies that shape and influence integration. There are obvious reasons why the more recent historical elements would be ignored; the Franco-German alliance that dictated the direction of integration would not have been served by too much remembrance of the past. But institutions and policies devoid of recognition of heir historical debts are bound to be eventually found lacking. This level of lack of awareness of the significance of history and the subsequent need to historicize the innovations spawned by integration is particularly marked in the case of citizenship. Article 8, in creating a constitutional citizenship for the Union, is the direct descendant of citizenships formed in European nation-State constitutions since the eighteenth century. Their legacy and influence have fed through to the TEU-introduced provision via Member State conceptions and uses of citizenship. Any future interpretation of Article 8 has an obligation to acknowledge this long-term influence and learn from it in order to fully comprehend and construct that provision in a meaningful manner. The entire constitutional heritage of Europe is replete with rich lessons for what is being invented in the name of Union.[70] It is as much part of the identity of the entity and the individuals as are political, social and cultural influences. But, within the realm of judicial interpretation and constitutional invention, this is not sufficiently acknowledged. The members of the Court of Justice hardly need a lesson in the use and integration of history, but there may be specific reasons why this Court, which so ably accompanied institutionally-driven integration, may not readily have historicized its decisions in the past; no doctrine of precedent and the influence of civil law systems may explain the relatively confined approach to historically influenced analysis by the Court.

Citizenship in revolutionary France during the period 1789 to 1804 is one of the best examples of the inheritance underlying Article 8 that can be evoked, in order to increase understanding of this provision. There are particular and especially instructive influences to be gleaned from the recognition of the influence of citizenship developments during that period of time for the more bland version that is its direct legacy two hundred years later. The timing is apt, as the period 1989 to 2004, though unlikely to witness the same cataclysmic events and dramatic constitutional developments of that era, is bound to witness Article 8 undergoing an important evolution. The suggestion is that the starting point for an understanding of the history of citizenship in the European Union is not Paris of 1974, but Paris of 1794 (the height of the Republican, revolutionary period) - for, while the lead up to Maastricht is important in appreciating how

[70] See further: Allott (1997) supra n 10.

Article 8 could have emerged in the first place, the significance of the provision lies rooted far more deeply than institutional manipulation of the concept.

There are many dimensions of French revolutionary citizenship that are especially apt in the historicizing of Article 8.[71] Those highlighted here revolve around the exclusion of women from citizenship status in this period.[72] This raises questions of the understanding of the nature of duties and gender-related dimensions of citizenship, which remain controversial and unsolved today in modern formulations of citizenship, including the EU version. The primary parameters and functions of citizenship have not radically evolved since that period of time, to the extent that it remains, as in its EU incarnation, economically dictated and therefore implicitly gender-biased. Much has rightly been made of the failure to connect citizenship with fundamental rights[73] in the Union and of the inherent discriminatory effects of the built-in link with free movement, but the neglect of the socially-inspired element of citizenship is equally (if not more) significant.[74]

Women were not classed as citizens in the early states of the revolutionary period. There was, instead, a "self-reinforcing triangle of manhood, military duties and political rights",[75] which influenced the definition and conception of citizenship, thus ensuring the exclusion of women. Many of the early constitutional definitions of citizenship during this time incorporated the duty to bear arms as an inherent dimension of citizenship.[76] The ingrained discriminatory "Soldier/Citizen" formulation inevitably excluded women from the citizenship status; if the primary duty of the *citoyen* was to bear arms to defend the Republic, then those conceived as not having the ability to bear arms would of necessity be prevented from benefiting from citizenship. Framed as a duty, it could be constructed as a privileged right, serving to preserve citizenship for men only and acting as a pre-determined exclusion operating against women.[77]

It was this dimension of citizenship - and as a reaction against the gendered nature of politics during the revolutionary era - that brought about a response from women in revolutionary France and led to their

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[71] See generally:
K.M. Baker (1997), *The French Revolution and the Creation of Modern Political Culture*, Oxford;
F. Fehér (1990), *The French Revolution and the Birth of Modernity*, Berkeley;
A. Forrest and P. Jones (eds) (1991), *Reshaping France*, Manchester;
H. Mason and W. Doyle (eds) (1989), *The Impact of the French Revolution on European Consciousness*, Gloucester;
S. Melzer and L. Rabine (1992), *Rebel Daughters: Women and the French Revolution*, Oxford;
S. Schama (1989), *Citizens: A Chronicle of the French Revolution*, London.

[72] See further: D. Godineau (1995), "Femmes en Citoyenneté: pratiques et politiques", *Annales Historiques de la Révolution Française* 197.

[73] For example, O'Leary (1995) supra n 2.

[74] See, for example: M. Everson (1996), "Women and Citizenship of the European Union", in T. Hervey and D. O'Keeffe (eds), *Sex Equality Law in the European Union*, Chichester; and Shaw (1997a) supra n 2.

[75] M.P. Johnson (1994), "Citizenship and Gender: the Légion des Fédérées in the Paris Commune of 1871", 8 *French History* 277.

[76] Godineau (1995) supra n 72 at 198.

[77] "Armed women in paramilitary formation undermined one of the central assumptions justifying the denial of the political rights to women, that only men could be warriors, and therefore citizens", Johnson (1994) supra n 75 at 276.

claims for empowerment and involvement in the political process.[78] Without formally possessing citizenship rights (and duties), women began to argue for their participation in the public and political life of France. In 1792, there began demands from women for the right to form a female national guard.[79] In 1793, women began increasingly relying on the *Declaration des Droits de l'Homme* to claim that citizenship rights, including the right to vote, were natural rights that could not be denied them. The arguments were based on the concept that the Republic constituted an "*espace de réciprocité*",[80] which ensured (or ought to ensure) that the exercise of citizenship - and therefore participation in public and political life - was not limited to its constitutional definition.[81] Demands for involvement and empowerment were derived initially from exclusion from the duties of citizenship, and widened to form claims for access to the rights also.

While, obviously, the position of women under Article 8 citizenship is far removed from the blatant discrimination of the 1790s in France,[82] this historically-influential era does allow for some parallels to be drawn with Europe of the 1990s and, consequently, for didactic analysis to feed into the understanding of Article 8. For "Soldier/Citizen", read "Consumer/Citizen" as the exclusionary element of our modern citizenship; Article 8 rights are largely exercisable only upon work-based residence in another EU Member State by the financially-empowered potential consumer (as opposed to the economically disabled, who might draw upon the State's resources rather than contributing to them). This formulation has both direct and indirect exclusionary effects, barring the non-consumer from the political rights that ought to flow from citizenship, in the same way that the duty to bear arms did so. Furthermore, the Article 8 definition of citizenship clearly excludes non-EC nationals; this limitation ought not to be taken for granted, as seeming as natural as the exclusion of women must have seemed to constitution drafters in the 1790s. A revival of the gender-based inclusionary concept of "*espace de réciprocité*" perspective of the political domain could be used to construct a framework for EU citizenship that breaks the nationality/citizenship mould. Finally, even this cursory examination of Article 8's constitutional ancestry offers insights into the use of citizenship duties. So far, this element of the provision has attracted little attention and the duties that were imposed at the same time as the conferral rights lie dormant and untouched.[83] But future definitions of such duties could result in possible indirectly gender-based and other forms of discrimination, preventing full participation in citizenship just as the duty to bear arms did.

There are many wider, less focused lessons from this age of citizenship, which could constructively be used to justify a deeper conception of citizenship than the superficial creation offered under Article 8; the

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[78] Godineau (1995) supra n 72 at 200.
[79] *Ibid.*
[80] *Ibid.*, "… dans lequel tous les membres du corps social doive coopéerer au bien de tous, à la chose public, la *Res Publica*".
[81] Herein resides the recognition of the significance of the difference between constitutional (formal) citizenship and what was then termed revolutionary citizenship (which would accord more closely with participatory citizenship) discussed above, Part IV.
[82] Ackers (1994) and Everson (1996) supra n 40.
[83] Art. 8 (2), "Citizens of the Union shall … be subject to the duties imposed [by the EC Treaty]."

powerful story of women's struggle for inclusion is just one element of this relevant, deeply-embedded history. The concept of the public space allowing participation and the exercise of rights that do not fall within formal, constitutional definitions of citizenship, could be claimed by many detached from the political and economic processes determined by integration. Not for the first time in history has citizenship been used as the artificial tool of legitimacy, then and now, but the examples above suggest a heritage for Article 8 that cannot be ignored by an enlightened and open-minded judiciary.

Part VI: The Constitutional Frontiers of Citizenship

"There is a hidden layer of contemporary jurisprudence capable of shaping the language of modern constitutionalism to fit the cultural diversity of citizens, rather than the other way round".[84]

The previous section argued the need for a judicial glance "backwards" towards the EU's constitutional heritage. Here, the proposition is extended in recommending that judicial interpretation of Article 8 embrace a glance "outwards" towards influences from constitutional determinants in other jurisdictions, in order to adopt an expansive perspective on the potential of EU citizenship. In *P v S and Cornwall County Council*,[85] Advocate General Tesauro examined legal developments in other jurisdictions in order to evaluate the possible position of transsexuals under EC equal treatment law.[86] The Court heeded the advice of the Advocate General to make a "courageous decision" in order to pronounce one of its most liberal decisions on the scope of a piece of secondary legislation.[87] The possibility of other such external jurisprudential influences is the subject of this section using a very selective example only of the kind of comparative case-law related to citizenship that could conceivably be brought to bear in an analysis of Article 8. There is an abundance of comparative material that the Court could draw upon in this regard in the recognition of other sources of law.[88] The following two potential influences on the unfolding of Article 8 are examined: a) the Australian High Court decision in the *Mabo* case,[89] as a significant example of postcolonial constitutionalism[90] that has the potential to influence EU citizenship development and scholarship; and b) a consideration of the case of "outsiders" within, the Amerindians of French Guyana and the boundaries of citizenship within the European Union.

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[84] J. Tully (1995), *Strange Multiplicity: Constitutionalism in an age of diversity*, Cambridge, at 100 - cited in D. Ivison (1997), "Decolonizing the Rule of Law: *Mabo*'s Case and Postcolonial Constitutionalism", 17 *OJLS* 253 at 254.
[85] Case C-13/94 [1996] ECR I-2143.
[86] Directive 76/207 EEC, OJ 1976 L 39/40.
[87] The Court itself, however, did not refer to the cases from other jurisdictions. Indeed, it does not even make a reference to the Advocate General's Opinion.
[88] See further: U.K. Preuß (1996), "Two Challenges to European Citizenship", *Political Studies* 534.
[89] *Eddie Mabo and Others v State of Queensland* [No. 2] High Court of Australia, 3 June 1992, *ALJR* 66 at 408.
[90] D. Ivison (1997), "Decolonizing the Rule of Law: *Mabo*'s Case and Postcolonial Constitutionalism", 17 *OJLS* 253.

A. *Mabo* and the Fiduciary Union?

The *Mabo* decision is well known for having established the principle of native title to land and abolishing the doctrine of *terra nullus*, in so far as it pertained to Aboriginal ancestral title.[91] This, ostensibly, may seem a momentous decision in its own right, but disconnected from issues of citizenship in Europe. The connections are, however, there to be made and reside primarily in the potential exploitation of the concept of the "fiduciary duty" owed by the Crown, which was discussed in the case. In the European Union, nobody seems to want to claim possession or, more properly perhaps, responsibility for the citizenship; ignored by citizens themselves aware of the hollowness of Article 8, its significance shunned and denied by the Court, receiving only cursory attention from the Member State governments in IGC mode, it sits awkwardly in the critical Part Two of the EC Treaty, a beacon flashing brilliantly but speaking to no one.[92] An imaginative judicial decision from Australia is not going to revive the drooping spirits of EU citizenship, but there are insights in the case suggestive of a modern role of the citizen/State relationship in a federal context. Apart from the concept of Fiduciary Duty, there are other dimensions of *Mabo* that could have a bearing on the eking out of a form of politics and constitutionalism appropriate to the European Union: considerations of sovereignty in a post-colonial federation;[93] questions of subsidiarity and the mediation of values between the various levels in a state; and the example of the overthrowing of age-old, in-built assumptions by an emancipated judiciary in recognition of a new morality for a new era.[94] This enlightened decision forced consideration of what laws were appropriate for contemporary Australia, concerns germane also to the Luxembourg judiciary.

The principle of racial exclusion was at the very foundation of the Australian State, and permeated overtly into laws and political practice of the country until relatively recently.[95] The Aboriginal community was treated as a "populus nullius"[96] and "there was a form of 'imperial constitutional law' which maintained this wrongful myth and 'which governed the acquisition of Crown sovereignty in settler states'".[97] The Court in *Mabo* held that the claimants retained ancestral title to their lands and rejected the long-established non-recognition of Aboriginal land rights. The principle of *terra nullius* (an international law fiction) served to uphold and substantiate racially dictated laws in support the notion that, on the arrival of Europeans,

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[91] For lengthy analysis of *Mabo* see, for example, *Essays on the Mabo Decision* (Sydney 1993).
[92] The Commission's "Citizens First" campaign has had little success in altering this position.
[93] Ivison (1997) supra n 90, 277 on questions of indivisible sovereignty and "the rather banal fact that the sovereignty of Australia is not justiciable in an Australian municipal court has been taken to rule out any consideration of the manner in which sovereignty was acquired, i.e. the consequences of that acquisition."
[94] "[The common law] cannot be frozen in an age of racial discrimination", Brennan J at 422 of the decision.
[95] "Until 1967, they were still excluded from the Constitution; moreover, as recently as the 1960s, some of that long-standing body of horrendously racially discriminatory legislation was still on the statute books in various States …", B. Hocking (1993), "Human Rights and Racial Discrimination after the *Mabo* Cases: No more racist theft?", in *Essays*, supra n 91, 178 at 185.
[96] *Ibid.*
[97] Ivison (1997) supra n 90 at 262.

Australia was unoccupied territory. This resulted in the denial and negation of the very existence of the Aboriginal population as a cultural, social or legal entity,[98] and condemned them to a kind of civil death. They had no legal personality accorded to them and were not entitled to protection under the law, but had all obligations of the law imposed on them.[99] Land rights have a particular importance for Aborigines; their customary law is marked by an ancient, embedded attachment to the land, which sees land as a live entity.[100] *Mabo* can be considered all the more radical in inverting ingrained racist legal fictions in the recognition of the fundamental property rights of Aborigines to their ancestral lands.[101]

Part of the judgment was based on the acknowledgement that the public authorities (the Crown) had failed in the obligation to protect Aboriginal interests, i.e. in their Fiduciary Duty. Toohey J[102] puts forward a proposition based on the notion of Trust and principles of equity,[103] which he suggests underlie the Crown's powers. He sees the relationship between the Crown and the claimants as giving rise to a fiduciary obligation on the part of the Crown, based on the scope of the one party to exercise a discretion capable of affecting the legal position of the other. On colonization of Australia, there was a transfer of executive power that ought to give rise to the general presumption that the rights of indigenous people would be protected.[104]

The concept of a "fiduciary duty" extrapolated from *Mabo* could offer insights in relation to issues of sovereignty and democracy in the European Union; a relationship of trust based on transfer of political (rather than property) rights could be formulated at two levels. Member States have "contracted out" of national level rights under the EC/EU Treaties and there is a transfer of some of the essence of the nationally-determined relationship between public power and the citizen, which the European Community and European Union now hold and exercise under a form of political trust, giving rise to responsibility and duties on its part. "Underlying such relationships is the scope for one party to exercise a discretion which is capable of affecting the legal position of the other. One party has a special opportunity to abuse the interests of the other";[105] this sums up in an unusual but incisive manner the nature and origin of the EC/EU's power and competence. Apart from the restrictively interpreted Articles 173 and 215, there is little scope for nationals

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[98] R. Lafargue (1994), "La revolution Mabo ou les fondements constitutionnels du nouveau statut des Aborigènes d'Australie", *Revue du Droit Public*, p. 1329 at 1332.

[99] There are superficial parallels with Third Country nationals resident in the EU in terms of their position as non-recognized under EC law, or being in a zone of secondary recognition only.

[100] Not dissimilar to the position of the Amerindians discussed in s VI/B below.

[101] The decision has, however, been exposed to critical examination. See, for example, M.J. Detmold (1993), "Law and Difference: Reflections on Mabo's case", in *Essays on the Mabo Decision*, 39.

[102] See supra n 89, at p. 408 of the judgment.

[103] Which had been recognized and used in a similar context in US constitutional law also: *Country of Oneida v Oneida Indian Nations* (1985), 470 US 266.

[104] "A fiduciary obligation … does not limit the legislative power of … Parliament, but legislation will be a breah of that obligation if its effect is adverse to the interest of the title holders or if the processes it establishes do not take account of those interests …" (at 494) "Courts still struggle to isolate the essence of such relationships and it has not yet been suggested that the category of such relationships is closed.", R. Blowes (1993), "Governments: Can you trust them with your traditional title?", in *Essays*, supra n 91, at 134.

[105] See supra n 89, Toohey J at p. 493 of the judgment.

of the Member States to effectively (legally) enforce their relationship with the institutions of the European Community/Union. As international Treaty creations, superficially it might be argued that no legal scope existed to establish a link or "contract" sufficient to enforce the relationship. But since the pioneering days of *Van Gen den Loos*,[106] there has been Court endorsement of the special nature of individuals under EC law, which recognizes the *sui generis* consequences of supra-nationality. However, the appropriate *loci* for exercise of this special relationship has consistently been found by the Court to be at the Member State level;[107] an acknowledgement that the States have duties arising out of the transfer of rights under the Treaties, but no comparably wide position as regards the Community/Union itself has been formulated.

Using a "fiduciary duty"/political trust-based analysis of the nature of EC/EU powers could offer the potential to frame the relationship with nationals of the Member States in such a way as to give the Community and Union both an identity as well as a level of general responsibility not recognized in the Treaties. The mechanism for doing so might be found in the expansive interpretation of Article 8 being suggested throughout this article; EC nationals have been classed, without consent, as citizens of the Union and given both limited rights and undefined duties as a consequence. Although this classification is peremptorily dependent on the nationality relationship that the Member State controls, the status must raise questions of the nature of the relationship with the Union, which citizenship has surely created or enhanced. To date, European Parliament voting rights and access to the Ombudsman are the only such indications that hint at this connection.

But if citizenship is to be considered as a reciprocal relationship, the duties and responsibility of the other party (the Union) remain to be defined.[108] This "protection" or responsibility dimension of citizenship can be supported also by a comparison with United States citizenship.[109] The EC Treaties and the Community *acquis* are not totally devoid of elements that might suggest a duty-based reading of Article 8, which would serve to render citizenship a more real concept; the Article 169 and 170 enforcement procedures, for example, suggest some level of responsibility on the part of the institutions. The political trust or fiduciary duty interpretation of citizenship might serve also as a space to explore the remedying of the high levels of accepted democratic deficits in the Community/Union, based as it is on the concept of protection of those

[106] Case 26/62 [1963] ECR 1.

[107] From *Van Gend* through indirect effect (Case 14/83 *Von Colson and Kamann* [1984] ECR 1891) and *Marleasing* (Case C-106/89 *Marleasing SA v La Comercial International de Alimentaçion SA* [1990] ECR I-4135), through to the *Francovich* remedy (Cases C-6/90 and C-9/90 *Francovich* and *Bonifaci v Italy* [1991] ECR I-5357). See further, Craig and de Búrca (1998) (2nd ed), Oxford, Chapter 4.

[108] The notion that citizenship involves reciprocal duties is implied by Preuß in his discussion of the comparison between European citizenship and United States citizenship "… we may understand European citizenship as an instrument which serves to remove 'from the citizens of each state the disabilities of alienage in the other States'", US Supreme Court (1869), *Paul v Virginia*, US 75, 168, 180, in U.K. Preuß (1996), "Two Challenges to European Citizenship", *Political Studies*, 534 at 550.

[109] *Ibid.*, 550, "In the American case the establishment of national citizenship served to render the Union the protector of individual rights which were jeopardized by the Member States".

unilaterally deprived of rights by public powers. Questions of "governmental" obligations and political trust, or the concept of the "trust in the higher sense" derive from colonial cases, where this was distinguished from the normal form of trust.[110] In the Community/Union, this concept has potential use in a wide range of cases in the sphere of fundamental rights, environmental law cases, or issues of regional policy and structural funds that have a partnership dimension.[111] This form of trust can arise because of the circumstances of the relationship in which the Community/Union might be seen as base on the transfer of the "property" that nationals of the Member States had in the control over national level law and policy making, now partially lost because of sovereignty transfers under the Treaties.

B. The Reluctant Citizens? The Amerindians of French Guyana

If "it is the essential nature of law to recognise difference" (a failure to some extent rectified in *Mabo*),[112] the European Union has complex layers of difference that EC law has to deal with. While *Mabo* may seem like a distant legacy of colonialism (even though it involves a Member State), the residues of the colonial age are still very much prevalent in the Community/Union, requiring consideration of the nature of the relationship between EC law and people who are many steps removed from its legitimate sphere of application - people who indeed are not Europeans. Postcolonial constitutionalism is not in fact an external, comparative source of law, but one which has an application to situations that arise within the territorial boundaries of the Community/Union. The case of the Amerindian community of French Guyana is considered here to highlight the extent to which Article 8 may be considered an inappropriate inclusionary instrument for all those it assumes to class as citizens.

There has, in general, been little focused opposition to EU citizenship; the Eurosceptic agenda has concentrated on European Monetary Union and other high profile issues, and not Article 8. Of course, Euroscepticism tends to be the voice of the relatively powerful and economically motivated, and not the expression of the poor or otherwise disenfranchised and certainly rarely representative those most distant of Europeans, residents of regions that are politically and legally part of the European Union, though not part of Europe.[113] Colonially determined affiliations construct artificial Europeans of the residents of these territories and cannot ensure that citizenship will be accepted by them on the same terms as nationals resident in the European Community. This section is a brief consideration of the issues that are raised by having created an all encompassing citizenship under Article 8, which makes assumption about its universal

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[110] *Kinlock v Secretary of State for India* (1882), App Cas 7, 618 and *Tito v Waddell* (No. 2) [1977] AllER 129, where the concept was argued unsuccessfully.

[111] See, further, J. Scott (1998), "Law, Legitimacy and EC Governance: Prospects for Partnership", 36 *JCMS* No.2 Special Issue 175, K. Armstrong and J. Shaw (eds), *Integrating Law*.

[112] M.J. Detmold (1993), "Law and Difference: Reflections on *Mabo*'s case", in *Essays* at 39.

[113] Art. 227 EC. Art. 227(2) will be replaced by a new Art. 227(2) upon ratification and implementation of the Amsterdam Treaty.

appeal. The discussion is centred on the implications of Article 8 for non-Europeans, but it has wider implications in terms of the extent to which EC law can accommodate difference. There is a mounting body of literature[114] on the treatment of third country nationals *within* the Union itself, which highlights the gradually emerging secondary status of those excluded from the benefits of EC law, even though legitimately resident in the physical space that it governs.

Residents of French Guyana and of other French *departements d'outre-mer*, are naturally entitled to all the benefits of EC law in the maintenance of the legally-supported fantasy that these areas of the world constitute part of Europe. The European Union inherited the values and myths of a colonial era, and mediates them by simple incorporation into the body of EC law without special exception. Here, as well as suggesting some potential problems for the falsely universal declarations in Article 8 EC in terms specifically of "others within", it is also argued - as with the *Mabo* extrapolations above - that exposing EU citizenship to such challenges to its universality can allow it to develop and evolve as a more multi-faceted, substantive status. Article 8 EC, a kind of constitutional blunderbuss in its stark generality, may prove to be an especially unsuitable tool for endowing the Amerindians of Guyana with citizenship status.[115]

These *de jure* Europeans were resident in the territory before the arrival of Europeans in 1604. Although not a large community (6000 approximately), their relationship with the colonial power has for some time posed problems under French law.[116] As a gradually emerging influential local political force seeking to ensure the upholding of their identity, culture and languages, they have made claims to entitlement to ancestral lands not dissimilar to the Australian Aborigine. Beyond questions as to what extent French law can accommodate these claims is the issue of how EC law might impinge upon them.

In French Guyana, there is a long tradition of a difference between the constitutional position of the Amerindians and partial-only application of the law. Entitled to citizenship and nationality of the French Republic, they initially manifested no interest in either status, mostly because of their alternative reliance upon customary law to regulate those aspects of life that would have brought them into the sphere of application of French public law.[117]

The 1960s, however, witnessed a concerted campaign of "Frenchification", which resulted in a widespread take-up of French nationality and citizenship. Nevertheless, certain communities refused to do so, seeking

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[114] See, for example, T. Hervey (1995), "Migrant workers and their families in the European Union: the pervasive market ideology of community law", in J. Shaw and G. More (eds), *New legal dynamics of European Union*, Oxford; and T. Kostakopoulou (1997), "Why a 'Community of Europeans' could be a Community of Exclusion", 35 *JCMS* 301.

[115] On this community's position under French law, see I. Arnoux (1995), "Les Amérindians dans le département de la Guyane: problems juridiques et politiques", *RDP*, 1615.

[116] French law does not encompass the recognition of national minorities. France has not ratified the Council of Europe texts relating to the protection of the rights of national minorities.

[117] Arnaux (1995) supra n 115, at 1624.

to safeguard their identity and traditions.[118] They continue to have no civil status (*état civil*) under French law, with the result that they have no voting rights. This situation raises questions of the extent of application of Article 8 to these reluctant citizens. However, even those Amerindians who have accepted French citizenship have only a limited relationship with this status; they may vote, but are not required to pay full taxes or do military service (Article 8. (2) would require some accommodation for this situation), and live generally only partly governed by the Civil and Penal Codes. Customary law serves instead to regulate family life, property and criminal law in an effort to preserve identity and take account of concepts of right, family and property, which they do not share with French law on these matters. For example, some communities allow polygamy and their definition of family is very wide. This, and their concept of collective use of land without ownership amongst other traditions, would pose serious challenges for some fundamentals of EC law, were such a confrontation ever to arise in a judicial setting.

Meanwhile, even this summary analysis of the position of one group, which resides literally at the boundaries of EC law, exposes the fragility of boldly declaring "Citizenship of the Union is hereby established". Learning to accept the legacy of colonialism is part of the recognition that the European Union has a diverse history, which cannot be divorced from the face of Treaty.

Part VII: Conclusion

Citizenship of the Union was not, then, perhaps such an immaculate conception after all. Its roots lie deeply embedded in European constitutional history. It is not, equally, an island - sacrosanct and preserved from external influences - and its outer reaches have yet to be even glimpsed. The secret subtleties of Article 8 await discovery. It has been relegated to an area of secondary importance by the Member States and accepted as a given by the political institutions. Of course, there is a real, living citizenship outwith Article 8, but any concrete definition of the status - for the purposes of not only exercising Union citizenship but *enforcing* it - necessitates Court attention. This article was about the need for this constitutional rejuvenation of citizenship in the Union, in the limited context of judicial interpretation. The voyage to the nether regions of the EU's history and comparative sources of law that may feed such rejuvenation is now over. It was a tale of two citizenships in many senses; one given out as charitable salve for legitimacy lacunae, one that embraces the commonness and connections that Europeans inherently share; one that creates an exclusive club for those same Europeans, matched by yet another citizenship that offers more than national citizenship. The presence of the European past and the moral imperatives of the future mean that this voyage will eventually be undertaken. It is not appropriate here to imagine the nature of journey's end. It is

[118] *Ibid*. 1625. The Wayana and the Palikur tribes refused to become citizens on the basis of preserving their identity and traditions.

not suggested that citizenship will present as panacea for the Union's ills, but the formal constitutional confines that bind it need to be broken and its existence celebrated rather than bemoaned, in order to make the journey worthwhile.

Part VIII: Postscript

The recent European Court of Justice decision in the case of *María Martínez Sala v Freistaat Bayern*[119] avoids any attempt at an expansive interpretation of Article 8 recommended by Advocate General Pergola. Essentially, the Court identifies the root of the unequal treatment meted out to non-German EC nationals in Germany in the requirement that their entitlement to the social benefit at issue in the case was made subject to the possession of a residence permit, whereas this was not the case for German nationals. This was discrimination caught by Article 6 EC. Ms Sala was not in possession of a residence permit, but was (as was accepted by the parties) lawfully residing in Germany; and *that* fact - and not a wide interpretation of Article 8 EC - brought her within the scope of the relevant EC law (Article 6). So, the Court once again evades the necessity and desirability of a reading of Article 8 that might offer some insights into the (or perhaps a) meaning of EU citizenship. Article 8, the Court asserts, was not necessary to the effort to locate the protection of EC law for the unequal treatment here. But the curious dimension of the decision is that, despite this, the language and terminology of citizenship is used to specifically find that Ms Sala may benefit from Article 6 EC. The decision has ambiguous connotations in, on the one hand, its support of lawful residence (even without permit) and the related need to ensure that the fundamental provisions of Article 6 EC should be respected by Member States, and, on the other hand, suggesting some necessary link between EU citizenship and Article 6 - while at the same time omitting to define the contribution, if any, that citizenship (as opposed to free movement law) makes in such a situation. For an enlightened and engaged judicial reception of Article 8, and an appreciation of EU citizenship's hidden marvels - well, we must still wait a while.

[119] Case C-85/96, Decision of 12 May 1998, Unreported. Supra n 50 for the Advocate General's Opinion.