LYONS, C. 2000. The limits of European Union citizenship. In Bankowski, Z. and Scott, A. (eds.) *The European Union and its order: the legal theory of European integration*. Oxford: Blackwell, chapter 8, pages 149-167.

The limits of European Union citizenship.

LYONS, C.

2000

The Limits of European Union Citizenship

Carole Lyons, University of Aberdeen

Introduction

"*Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.*"[1]

Imagine reading those words twenty years ago, let alone fifty or a hundred years before. European Union citizenship is a dramatic and palpably potent, original outcome of European integration. It is a testament to the power of (and yet also a test of the limits of) supra-nationality. It is the epitome of the non-negotiated nether regions in the relationship between nation state law and supra-national law; by definition, it is supra-national in form, but lives only on the basis of a nationally determined body of laws. This symbiotic character of Union citizenship renders it both complex and confusing, as attempts to understand it or give it meaning based on its origins in national law are bound to be insufficient; yet, to resort to the same exercise from a supra-national perspective is impossible. So much is (rightly) expected of citizenship of the European Union: by citizens in a concrete manner, in the general facilitation and betterment of our lives as Europeans; and, theoretically, in providing the scope to analyse the nature of the vertical (citizen/Union) and horizontal (citizen/citizen) relationships that are being formed in contemporary Europe.

In this chapter, I argue that European Union citizenship is fundamentally and intrinsically limited, while - at the same time - it is inherently unlimited as a political and legal concept, and could be developed beyond anything that might be anticipated given its nation state-based conceptual origins. This seemingly contrary observation is based on exploiting the ambiguity currently surrounding the meaning and interpretation of Union citizenship, but suggesting that this be done very much in the acknowledgement of the context of the political and judicial reality in which any substantial development is likely to occur. For this purpose, it is useful to consider European Union citizenship as a hybrid example of "functional citizenship"[2] - instrumentally related to material benefits and rights, as opposed to non-functional or affective citizenship, rooted in nationality-centred emotions and conditions. In order to see more clearly where the borders of Union citizenship lie, it is necessary to maintain a coherent distinction between the functional and non-

[1] Article 17 of the European Community Treaty (ECT) (previously Article 8.1 ECT using the pre-Amsterdam Treaty numbering. The Amsterdam Treaty entered into force on the 1st May 1999).
[2] M. Fleming, *The Functionality of Citizenship*, (1997) Harvard Jean Monnet Working Paper, http://www.law.harvard.edu/Programs/JeanMonnet/papers/87/97-10.html

functional dimensions. In the nation state paradigm, there is a conflation of these,[3] with access to the material benefits of membership of a polity normally linked to the cultural and political affinity underlying nationality laws. The "decoupling" of the functional dimension of citizenship from its non-functional base seems possible as well as necessary in the European Union, as there is no "Union nationality". It may be only a matter of time before this artificial link (Union citizenship / fifteen nationality laws) cedes to favour the enhancement of the vertical (functional) and horizontal ("new" non-functional) relationships mentioned above. But this desirable severance will have to be mediated through the existing procedures for review and reform of the EC/EU, namely Member State treaty change and European Court of Justice treaty interpretation. In this chapter, I look at the latter in particular - what the ECJ has done already for Union citizenship and some directions for what might be achieved in the future.

The structure of the chapter is as follows. Part 1 briefly looks at the EC Treaty provisions where Union citizenship is located. In Part 2, there is an examination of ECJ reaction to Article 8 (now Articles 17-22) to date - an analysis that does not immediately hint at future dynamism. The institutional positions thus grasped, the remainder of the paper is devoted to the exploration of how the full scope of an historicised, contextualised citizenship might legitimately be read into Articles 17-22 EC. The function of these arguments is not to test citizenship, to condemn its weaknesses and failure to satisfy legal and political aspirations. Rather, its scope is both more confined and more optimistic; it rests on an analysis of Articles 17-22 EC framed within Europe's "capacity to develop the conditions of emancipatory politics"[4] and laws.

1. A brief overview of Union citizenship

European Union citizenship is defined in Articles 17-22 (previously Article 8 of the European Community Treat (ECT)). These Articles are awesome in the chutzpah of their declaratory character, and yet at the same time they dwindle into detail and ambiguity, and are thus rendered limited and bland. Union citizenship has been deliberately detached from the legacy of judicial development that preceded it and these provisions are drafted in arrogant neglect of the entire history of citizenship in Europe.[5] The embarrassment of these intellectually antiseptic Treaty provisions was born out of IGC compromise, rather than the kind of studied research that normally precedes such a momentous creation. Articles 17-22 seem to command a low-key, restrained and theoretically confined reaction. Deceptively quietly, they declare that EU citizenship shall exist henceforth and proceed to root the concept in a bundle of previously-existing EC law provisions, mixed

[3] See Fleming, though, where the 1992 new Dutch Citizenship and nationality laws achieve some degree of "decoupling". Supra n. 2, p. 6.

[4] U. Vogel, '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, 1997), p. 142 at p. 157.

[5] On the general position of history in EC Law, see further P. Allott, 'The crisis of European constitutionalism: reflections on the revolution in Europe', 34 *CMLRev* 439 (1997).

with some new benefits for the nationals of the Member States. Unlike its historical antecedents - for example, citizenship in revolutionary France - Union citizenship was not launched onto the political and legal map of the EU 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 Articles 17-22 were no more than a consolidation of previously existing (if imprecisely determined) Treaty-based rights. Viewed from this perspective, citizenship seems to be 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 so as to add ballast to the weak democratic element of the EC/EU and significant only in the political rights granted under Article 19.

The Amsterdam Treaty did not make substantial change to the EC Treaty provisions on citizenship. The following wording is added to Article 17.1: "Citizenship of the Union shall complement and not replace national citizenship." This wording reflects the cautious perspective of the Danish government after Maastricht.[6] It may also have been introduced by the Member State governments mindful of the ECJ casting over-eager interpretative eyes on Articles 17-22 in the future. The question is, what is the nature of this complementarity? In principle, it does not necessarily have to be construed negatively, because 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 concretise Union citizenship to some extent, for even though it cannot replace another form of citizenship, acknowledging it as some form of alternative citizenship in this manner has the effect of underlining its potential impact. Interestingly, the proposed new wording does not refer to *Member State* national citizenship, suggesting the possibility (given wide judicial interpretation) of citizenship in the Union being open to those not in possession of EC Member State nationality (for example, long-term resident non-nationals).[7] So the position on citizenship after Amsterdam is that the *status quo* has more or less been maintained and the definition remains largely unaltered. Ultimately, this was not to prove to be the IGC 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.

[6] "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.

[7] See Kostakopoulou, T. 'Towards a theory of Constructive citizenship in Europe' (1996) *The Journal of Political Philosophy*, Vol. 4, No. 4, pp. 337-358.

The criticisms of Union citizenship are well known and extensively documented.[8] It is a 'conferred',[9] non-consensual, unique new status bearing little relation to the traditional meanings of the word, and was ill-suited to creation by international treaty-making methodology. Nonetheless, Articles 17-22 have been inserted into the Treaties and will not escape the attention of the ECJ interpretative machinery.[10] This chapter firstly undertakes a location of Union Citizenship 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 vacuum that Articles 17-22 EC have created. The argument is that an acknowledgment 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, as well as an incorporation of comparative influences from other constitutional domains that can be absorbed into the thinking on and judicial evaluation of Articles 17-22, may allow citizenship to escape from its stark, textual confines.[11]

2. Citizenship before the European Court of Justice

To date, Union citizenship, still residing in constitutional infancy, has not been subjected to a very lengthy form of EC level judicial examination or interpretation.[12] The cases in which citizenship has been considered

[8] See, for example, C. Closa, 'The concept of citizenship in the Treaty on European Union' 29 CMLRev 1137 (1992); ibid. 'Citizenship of the Union and Nationality of the Member States', 32 CMLRev 487 (1995); H.U.J. d'Oliveira, 'European Citizenship: its meaning, its potential' in R. Dehousse (ed.) *Europe After Maastricht: An Ever Closer Union*, (Munich, 1994); M. Everson, 'The Legacy of the Market Citizen' in J. Shaw and G. More (eds.) *New Legal Dynamics of the European Union* (Oxford, 1995) p. 73; M. Everson and U.K. Preuß, *Concepts, Foundations and Limits of European Citizenship* (Bemen 1995); R. Kovar and D. Simon, 'La citoyenneté européenne' *CDE* 285 (1994); E. Meehan, 'Citizenship and the European Community', 63 *Political Quarterly*, (1993), p. 172; ibid. *Citizenship and the European Community*, (London, 1993); D. O'Keeffe, 'Union Citizenship' in D. O'Keeffe and P. Twomey (eds.) *Legal Issues of the Maastricht Treaty* (London, 1994); S. O'Leary, 'Nationality Law and Community Citizenship: a case of two uneasy bedfellows' 12 *YEL* 353 (1992); ibid. 'The Relationship between Community Citizenship and the Protection of Fundamental Rights' 32 *CMLRev* 529 (1995); ibid. *The Evolving Concept of Community Citizenship* (The Hague, 1996); U.K. Preuß, 'Problems of a Concept of European Citizenship' 1 *ELJ* 267 (1995); ibid. 'Two challenges to European Citizenship', 44 *Pol. Studs* 543 (1996); J. Shaw, 'The many pasts and futures of Citizenship in the European Union' 22 *ELRev* 554 (1997a); ibid. 'Citizenship of the Union: towards post-national membership' in *collected courses of the Academy of European Law* (The Hague, 1998a); ibid. 'The interpretation of European Union Citizenship' (1998b) *Modern Law Review*, Vol. 62, No. 3, p. 293, J.H.H. Weiler, 'European Citizenship and Human Rights' in *Reforming the Treaty on European Union: The Legal Debate*, J.A. Winter *et al.* (eds.) (The Hague, 1996) at p. 57; ibid. 'To be a European Citizen: Eros and Civilisation' in J.H.H. Weiler, *The Constitution of Europe* (CUP, 1999); A. Wiener, *European Citizenship Practice: Building Institutions of a Non-State* (Boulder, 1998).

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

[10] This is not to suggest that the fate of citizenship of an in the EU rests entirely with ECJ interpretation. See further Weiner (1998), *supra*. n. 8.

[11] For wider perspectives on the subject, see for example: J. Havermas, 'Citizenship and National Identity: Some Reflections on the Future of Europe', 12 *Praxis International* (1992); R. de Lange, 'Paradoxes of European Citizenship' in Fitzpatrick, P. (ed.) *Nationalism, Racism and the Rule of Law* (Aldershot, 1995); P.B. Lehning, 'European Citizenship: A Mirage?' in Lehning, P.B. and Weale, A., *Citizenship, Democracy and Justice in the New Europe* (London, 1997); L. Nauta, 'Changing conceptions of citizenship' 12 *Praxis International* (1992), p. 20; UK. Preuß, 'Citizenship and Identity: Aspects of a Political Theory of Citizenship' in R. Bellamy *et al.* (eds.) *Democracy and Constitutional Culture in the Union of Europe* (London, 1995) at p. 107; V. della Sala and A. Weiner, 'Constitution making and citizenship practice: bridging the democracy gap in the EU?' SEI Working Paper No. 18, Sussex European Institute (1996).

[12] See Shaw (1997a) (*supra* n. 8) at pp. 558-9 on the Court's reluctance in this matter, which is in stark contrast to interpretations by the Court of, for example, Articles 5, 6 and 119.

have arisen largely in the context of free movement of persons law, and therefore of Article 18.[13] 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.[14] The Opinions of the Advocates General have been significant in most of these cases. In *Skanavi*,[15] AG 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 (now Article 18), but from Article 52 (now Article 43).[16] 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.'[17]

After that blunt dismissal of Article 8's significance, the ECJ again overlooked an opportunity to examine the provision in *Boukhalfa*.[18] Here, the position of Advocate General Léger demonstrates a different level of appreciation of Article 7 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, in a similar way to *Skanavi*, did not call into play any of the newly conferred benefits of Article 8, but raised questions of the relationship with Article 6 EC (now Article 12). 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.[19] 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?'[20] The interesting dimension of this argument is the manner in which inchoate and more generalised qualities are attributed to the bland and sparse face of Article 8a.I. 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.[21] Remarking upon the responsibility of the ECJ to take this citizenship from the constitutional twilight zone, AG Léger reminds us

---

[13] Article 18 (ex Article 8a): 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.
[14] This issue was the subject of an abortive reference to the ECJ in the *Adams* case (C-229/94, *R v Secretary of State for the Home Department, ex parte Adams*, [1995] AER EC 177). This case concerned the possibility of interpreting Article 8a. I 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. See further, Craig P. and de Búrca G., *EC Law, Text, Cases and Materials*, 2nd ed. (Oxford, 1998), Chapter 15, and Craig P. and de Búrca G. (eds.) *The Evolution of EU Law* (Oxford, 1999), Chapter 14.
[15] Case C-193/94 *Criminal Proceedings against Sofia Skanavi and Konstantin Chryssanthakopoulous*, [1996] ECR I-929.
[16] Paragraph 21 of his Opinion.
[17] Paragraph 22 of the Judgment.
[18] Case C-214/94 *Ingrid Boukhalfa v Bundesrepublik Deutschland* [1996] ECR I-2253.
[19] Paragraph 31 of the Opinion.
[20] *Ibid.*
[21] For example, Weiner (1998) *supra* n. 8.

that this article 'is of considerable symbolic value' and that 'it is for the Court to ensure that its full scope is attained'.[22] '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 mention Article 8 in its judgment.[23]

Advocate General Pergola subsequently delivered an Opinion that considerably reinforced the hints at expansive interpretation by his colleague. The case, *Sala*,[24] concerned the payment of a child-raising allowance to 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. The Advocate General engages in a broad interpretation of Ms Sala's status so as to allow her to be recognised 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 theses circumstances, residing in Germany being discriminated against by comparison with German citizens?'[25] 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 ECJ went on to hold that Sala, even though a non-economically active Member State national, was lawfully resident in Germany and therefore entitled to receive the child benefit. This decision is interesting, as it extends the right to equal treatment to a Member State national who was not economically active and for whom the source of lawful residence in another Member State was not EC law.[26] The extension of this right to Ms Sala was facilitated by the interpretation of Union Citizenship provisions.

What can one conclude from the above cases?[27] The initial testing ground for citizenship cases has demonstrated a willingness on the part of the Advocate Generals to endorse a recognition of an independent significance for 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

---

[22] Paragraph 63 of the Opinion.

[23] The ruling was given in April 96, perhaps a sensitive timing given the IGC context.

[24] Case C-85/96 *Maria Martinez Sala v Freistaat Bayern*, judgment of 12 May 1998. For detailed analysis, see Fries S. and Shaw J., 'Citizenship of the Union: First Steps in the European Court of Justice' (1998) *European Public Law*, Vol. 4, No. 4, p. 533; More, G., 'The Principle of Equal Treatment' in Craig and de Búrca (1999) *supra* n. 14, Chapter 14, p. 536-540; O'Leary, S. 'Putting flesh on the bones of European Union Citizenship' (1999) 24 *European Law Review*, p. 68 and Toner, H. 'Union Citizenship caselaw: transformation or consolidation' (1999, forthcoming).

[25] Paragraph 14 of the Advocate General's Opinion, emphasis original.

[26] It was instead an international agreement, the European Convention on Social and Medical Assistance.

[27] Other cases where Article 8 has arisen included Cases C-64 and 65/96 *Land Nordrhein-Westfalen v Uecker and Jacquet*, 1997 ECR I-3171, where the Court ruled that Article 8a does not cover free movement within a Member State. See, generally, Shaw (1997a) at p. 559.

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 the Treaty citizenship provisions offer, given wide interpretation. Thus far, however, the reticence of the Court has been matched only by the idealism of the Advocate Generals. 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 especially evidence in *Sala*. As Fries and Shaw say, '… it would appear that something close to a universal non-discrimination right, including access to all manner of welfare benefits has now taken root in Community law as a consequence of the creation of the figure of the Union citizen'.[28] It may require a case disconnected from free movement and involving another of the Article 17-22 rights for the Court to develop a more 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 18, 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 18 would have an effect on free movement rights, then the Court might understandably be cautious in the face of Member State positions.

3. Citizenship beyond the Treaty?

In the Introduction, I mentioned the contrary character of citizenship; an unimaginative, limited concept at one level, this being most obviously manifested in the Treaty provisions themselves, which prioritise and embody its 'functional' nature. But, on the other hand, citizenship does not have to be confined to the seeming banalities of Articles 17-22, partly because elements of citizenship existed before these provisions were drafted and partly because the entire essence and reality of European citizens and their dreams for the concept cannot be captured by the Treaties. In this Part, I suggest a multi-layered conceptual perspective on citizenship.

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 Articles 17-22. 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 paper forms a short bridge 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

[28] Fries and Shaw (1998) *supra* n. 24.

Union. The phases or layers identified below overlap, chronologically and substantively, and the purpose of this categorisation is to suggest an holistic perspective of the framework within which the future scope and meaning of citizenship would necessarily be determined. This 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 17-22 alone, or, in ignoring the Treaty, searching for it in the everyday reality of the relationship between the governed and governors in the Union, or between citizens themselves. Citizenship is an, as yet, unworked-out 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 categorisation is to allow the diverse sources of citizenship to be recognised and integrated with each other. If this discussion 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.

Judicial Citizenship

Some of the essence of EU citizenship rights emanating from the Court hail from an era characterised 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.[29] It can be loosely understood as the coming of age of citizenship in the EC without the actual vocalisation of the concept. The case that most strongly characterises this phase is that of *Cowan*.[30] 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*.[31] 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 do Articles 17-22. Consider, for example, whether the right to enter another Member State to receive services would encompass the right of an

[29] An example would be 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 this provides an arena for normative debates which may not exist in domestic legal systems'. Vogel (1997) at p. 148.
[30] Case 186/87 *Cowan v Le Trèsor Public* [1989] ECR 195.
[31] Opinion p. 27.

indigent to stay and beg in that State.[32] EC free movement law has a well-established economic hierarchy that would exclude the poorest of EC nationals from benefiting from the so-called 'fundamental' freedom. Article 17 confers citizenship on EC nationals, impliedly regardless of economic status; but its primary constituent element is embedded in 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, so 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 Articles 18. This fossilises 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 18 ties future membership to the 'market' based view of integration. Not to be a viable market participant removes you therefore from the realm of citizenship.[33] 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.

Constitutional citizenship

This layer of citizenship is the Treaty based one, that is Articles 17-22 EC.[34] 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 politicised subject has been created under Articles 17-22, but even in the movement from Article 17 to Article 18 there has already been a diminution in the importance of that status; from

[32] See P. Rosanvollan, 'Citoyenneté politique et citoyenneté sociale au XIXe siècle' 171 *Le Mouvement Social* (1995), p. 9 and p. 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.

[33] See further, Everson (1995) *supra* n. 8 and *ibid.* 'Economic rights within the European Union' in R. Bellamy *et al.* (eds.) *Democracy and Constitutional Culture in the Union of Europe* (London, 1995), p. 137.

[34] As will be discussed below, the distinction between revolutionary (real, open) citizenship and constitutional (formal, closed) citizenship was well recognised.

nationality as entry requirement to the citizenship club, to the implication that entry has its price and that is pre-determined by the exclusionary 'economic activity' requirement. The next layer is a suggested antidote to the impoverishment of this constitutional layer.

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 dependant 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 EU 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, harmonisation, 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 colonised 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 characterises the relationship between the Union and those who have at least limited political access to its processes.[35] Identifying and recognising 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 relate 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 *what* type of relationship with the Union it refers to. At this level, citizenship involves a direct connection with aspects of integration not mediated through Member States or

[35] de Búrca G., 'The Quest for Legitimacy in the European Union' (1996) 59 *MLR* 349.

institutions. Participation can arise in many different forms, positive here rather than negative as described above; the farmers who regularly collect subsidy pay-outs and whose livelihood is determined by the EC; grass-roots, cross-border gatherings of women excluded from the more formal layers of citizenship;[36] 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 (horizontal citizenship), and citizens and the Union in a global, non-vocalised manner (vertical citizenship) are both being animated at this level,[37] creating a positive and active communication space for those who might be marginalised or who lack access to power within the confines of national law and politics.

Citizenship conceived from this participatory perspective exists outwith Articles 17-22 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,[38] allowing minority (and other) interests to find a resonance that is usually denied to them in national politics.[39] This layer encompasses a wider, more active conceptualisation of citizenship, identifying the diffusion of EU-related citizenship activity into everyday contexts that 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 19).

4. Citizenship without a past?

Much of the mood of this chapter is forward looking, attempting to anticipate a positive future for citizenship. But in this Part, I argue that the past is as important as the future. This is something that has been overlooked in the functional formulation of Union citizenship, reflecting a general ahistoricised tendency in European integration. This Part, then, is about the need for citizenship 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, and the instruments and policies that shape

[36] See, further, Vogel (1997).
[37] Vogel (1997) 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" (at p. 157).
[38] At p. 145.
[39] *Ibid.* at p. 156 she gives the example of pensioners demanding a pensioners parliament in Europe.

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 their 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 historicise the innovations spawned by integration is particularly marked in the case of citizenship. Article 17, 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 Articles 17-22 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.[40] It is as much part of the identity of the polity 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 ECJ 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 historicised 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 1789-1804 is one of the best examples of the inheritance underlying Article 17 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 1989-2004, though unlikely to witness the same cataclysmic events and dramatic constitutional developments of that era, is bound to witness Articles 17-22 undergoing an important evolution. The suggestion is that the starting point for an understanding of the history of citizenship in the EU is not Paris of 1794 (the height of the Republican, revolutionary period), for, while the lead up to Maastricht is important in appreciating how Article 17 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 historicising of Union citizenship.[41] Those highlighted here revolve around the exclusion of women from citizenship status

[40] See further, Allott (1997) *supra* n. 5.

[41] See generally, K.M. Baker, *The French Revolution and the Creation of Modern Political Culture* (Oxford, 1997); F. Fehér, *The French Revolution and the Birth of Modernity* (Berkeley, 1990); A. Forrest and P. Jones (eds.) *Reshaping France* (Manchester, 1991);

in this period.[42] This raises questions of the understanding of the nature of duties and gender-related dimensions of citizenship that 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[43] in the EU 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.[44]

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'[45] that influenced the definition and conception of citizenship thus ensuring the exclusion of women. Many of the early constitutional definitions of citizenship during this period of time incorporated the duty to bear arms as an inherent dimension of citizenship.[46] 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.[47]

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 claims for empowerment and involvement in the political process.[48] 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.[49] 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

---

H. Mason and W. Doyle (eds.) *The Impact of the French Revolution on European Consciousness* (Gloucester, 1989); S. Melzer and L. Rabine, *Rebel Daughters: Women and the French Revolution* (Oxford, 1992); S. Schama, *Citizens: A Chronicle of the French Revolution* (London, 1989).

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

[43] For example, O'Leary (1995) *supra* n. 8.

[44] See, for example, L. Ackers, *Shifting Spaces: Women, Citizenship and Migration within the European Union* (Bristol, 1998); R.A. Elman (ed.) *Sexual Politics and the European Union* (Oxford, 1996), M. Everson, 'Women and citizenship of the European Union' in T. Hervey and D. O'Keeffe (eds.) *Sex Equality Law in the European Union* (Chichester, 1996); and Shaw (1997a) *supra* n. 8.

[45] M.P. Johnson, 'Citizenship and gender: the Légion des Fédérées in the Paris Commune of 1871' 8 *French History* 276 (1994), 276 at p. 277.

[46] Godineau (1995) at p. 198.

[47] '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) at p. 276.

[48] Godineau (1995) at p. 200.

[49] *Ibid.*

concept that the Republic constituted an '*espace de réciprocité*'[50], 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.[51] Demands for involvement and empowerment were derived initially form exclusion from the duties of citizenship and widened to form claims for access to the rights also.

While, obviously, the position of women under Union citizenship is far removed from the blatant discrimination of the 1790s in France, 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 Articles 17-22. For 'Soldier/Citizen', read 'Consumer/Citizen' as the exclusionary element of our modern citizenship; Article 18 and 19 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 17 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 17'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 of rights lie dormant and untouched.[52] 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 that could constructively be used to justify a deeper conception of citizenship than the superficial creation offered under Article 17 and the 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

[50] '…dans lequel tous les members du corps social doive coopéerer au bien de tous, à la chose pubic, la *Res Publica*' *ibid.*
[51] 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.
[52] Article 17 (2) (ex 8 (2)) 'Citizens of the Union shall … be subject to the duties imposed [by the EC Treaty]'

used as the artificial tool of legitimacy, then and now, but the examples above suggest a heritage for citizenship that cannot be ignored by an enlightened and open-minded judiciary.

5. The constitutional limits?

Seven years after its 'invention', it is as yet unclear what the future direction of Union citizenship will be. 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 Articles 17-22 embrace a glance 'outwards' towards influences from constitutional determinations in other jurisdictions, in order to adopt an expansive perspective on the potential of EU citizenship. In *P v S and Cornwall County Council*,[53] Advocate General Tesauro examined legal developments in other jurisdictions in order to evaluate the possible position of transsexuals under EC equal treatment law.[54] 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.[55] 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 caselaw related to citizenship that could conceivably be brought to bear in an analysis of Articles 17-22. There is an abundance of comparative material that the Court could draw upon in this regard in the recognition of other sources of law.[56] The following two potential influences on the unfolding of citizenship are examined: A. the Australian High Court decision in the *Mabo* case,[57] as a significant example of postcolonial constitutionalism[58] 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 EU.

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 nullius* insofar as it pertained to Aboriginal ancestral title.[59] 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

[53] Case C-13/94 [1996] ECR I-2143.
[54] Directive 76/207 EEC.
[55] The Court itself, however, did not refer to the cases from other jurisdictions. Indeed it does not even make a reference to the AG Opinion.
[56] See further U.K. Preuß, 'Two Challenges to European Citizenship', *Political Studies* (1996), p. 534.
[57] *Eddie Mabo and Others v State of Queensland* [No. 2], High Court of Australia, 3 June 1992, 66 ALJR at 408.
[58] D. Ivison, 'Decolonizing the Rule of Law: Mabo's Case and Postcolonial Constitutionalism' (1997) 17 *Oxford Journal of Legal Studies*, p. 253
[59] For lengthy analysis of Mabo, see for example *Essays on the Mabo Decision* (Sydney, 1993)

of the 'fiduciary duty' owed by the Crown, which was discussed in the case. In the EU, nobody seems to want to claim possession, or more properly perhaps, responsibility for citizenship; ignored by citizens themselves aware of the hollowness of Article 17, 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.[60] 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 for the citizenship 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 postcolonial federation,[61] 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.[62] 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.[63] The Aboriginal community was treated as a 'populus nullius'[64] 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".[65] 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 supporting the notion that, on the arrival of Europeans, 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[66] 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 the obligations of the law imposed on them.[67] Land rights have a particular importance for Aborigines; their customary law is marked by an ancient, embedded attachment to the land that sees land as a live entity.[68]

---

[60] The Commission's 'Citizens First' campaign has had little success in altering this position.

[61] Ivison (1997), p. 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 the sovereignty was acquired, i.e. the consequences of that acquisition.'

[62] '[The common law] cannot be frozen in an age of racial discrimination' Brennan J. at p. 422 of the Decision.

[63] '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, 'Human Rights and Racial Discrimination after the Mabo Cases: No More Racist Theft?' in *Essays* (1993) (*supra* n. 57), p. 178 at p. 185.

[64] *Ibid.*

[65] Ivison (1997) at p. 262.

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

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

[68] Not dissimilar to the position of the Amerindians discussed in B. below.

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.[69]

Part of this 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.[70] puts forward the proposition based on the notion of Trust and principles of equity,[71] 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 colonisation 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.[72]

The concept of a 'fiduciary duty' extrapolated from *Mabo* could offer insights in relation to issues of sovereignty and democracy in the EU; 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 EC and EU 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 that is capable of affecting the legal position of the other. One party has a special opportunity to abuse the interests of the other'[73]; 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 'access to justice rights' under Articles 230 (ex 173) and 288 (ex 215), there is little scope for nationals of the Member States to effectively (legally) enforce their relationship with the institutions of the EC/EU. 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 Gend en Loos*,[74] there has been Court endorsement of the special nature of individuals under EC law, which recognises the *sui generis* consequences of supranationality. However, the appropriate *loci* for exercise of this special

[69] The decision has, however, been exposed to critical examination. See, for example, M.J. Detmold, 'Law and Difference: Reflections on Mabo's Case' in *Essays on the Mabo Decision* (1993) at p. 39.
[70] At p. 4008 of the Judgment.
[71] Which had been recognised and used in a similar context in US constitutional law also: *Country of Oneida v Oneida Indian Nations*, 1985 (470 U.S. 266).
[72] 'A fiduciary obligation … does not limit the legislative power of … Parliament, but legislation will be a breach 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 p. 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, 'Governments: Can You Trust Them with your Traditional Title?', in *Essays* (1993) *supra* n. 57 at p. 134.
[73] Toohey J. at p. 493 of the Judgment.
[74] Case 26/62 [1963] ECR 1.

relationship have consistently been found by the Court to be at the Member State level;[75] 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 EC/EU both an identity as well as a level of general responsibility not recognised in the Treaties. The mechanism for doing so might be found in the expansive interpretation of Articles 17-22 being suggested throughout this paper; 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 dependant on the nationality relationship that the Member State controls, the status must raise questions of the nature of the relationship with the Union that 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.[76] This 'protection' or responsibility dimension of citizenship can be supported also by a comparison with United States citizenship.[77] The EC Treaties and the community *acquis* are not totally devoid of elements that might suggest a duty-based reading of Article 17, which would serve to render citizenship a more real concept; the Article 226 (ex 169) and 227 (ex 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 EC/EU, based as it is on the concept of protection of those 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.[78] In the EC/EU, 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.[79] This form of trust can arise because of the circumstances of the relationship in which the EC/EU might be seen as based on the transfer of the 'property' that nationals of the Member States had in the

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

[76] 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, *Paul v Virginia*, 75 U.S. 168, 180 (1869), in U.K. Preuß, 'Two Challenges to European Citizenship', *Political Studies* (1996), p. 534 at p.550.

[77] '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', Preuß (1996) at p. 550.

[78] *Kinlock v Secretary of State for India* (1882) 7 App Cas 619, and *Tito v Waddell* (no. 2) [1977] All ER 129, where the concept was argued unsuccessfully.

[79] See further, J. Scott, 'Law, legitimacy and EC Governance: Prospects for Partnership', *JCMS*, Vol. 36, No. 2 special issue, *Integrating Law*, K. Armstrong and J. Shaw (eds.) (1998).

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 'Indigenous people represent the most far-reaching challenge to the modern equation among nation, state and law…',[80] they also represent a direct challenge to European Union citizenship. 'It is the essential nature of law to recognise difference' (a failure to some extent rectified in *Mabo*)[81] and the EU has complex layers of different 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 EC/EU, 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 EC/EU. The case of the Amerindian community of French Guyana is considered here to highlight the extent to which citizenship 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 EMY and other high-profile issues, and not Articles 17-22. 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 of those most distant of Europeans, residents of regions that are politically and legally part of the EU, though not part of Europe.[82] Colonially-determined affiliations construct artificial Europeans of the residents of those territories and cannot ensure that citizenship will be accepted by them on the same terms as nationals resident in the EC. This section is a brief consideration of the issues that are raised by having created an all-encompassing citizenship under Article 17, which makes assumptions about its universal appeal. The discussion is centred on the implications of Articles 17-22 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[83] on the treatment of TCN's *within* the EU 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

[80] de Sousa Santos, B., *Towards a New Common Sense: Law, Science and Politics and Paradigmatic Transition* (London, 1995) at p. 318.
[81] M.J. Detmold, 'Law and Difference: Reflections on Mabo's Case', in *Essays* (1993), at p. 39.
[82] Article 299 EC (ex 227).
[83] See for example, T. Hervey, '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, 1995), and T. Kostakopoulou, 'Why a "Community of Europeans" could be a Community of Exclusion', 35 *JCMS* (1997), p. 301.

that these aeras of the world constitute part of Europe. The EU 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 17 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 multifaceted, substantive status. Article 17 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.[84] The *de jure* Europeans were resident in the territory before the arrival of Europeans in 1604. Although not a large community (6000 approx.), their relationship with the colonial power has for some time posed problems under French law.[85] 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 Aborigines. 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.[86] 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 to safeguard their identities and traditions.[87] 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 Articles 17-22 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 17.2 might 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 that 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 (among 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

[84] On this community's position under French Law, see I. Arnoux, 'Les Amérindiens dans le département de la Guyane: problèmes juridiques et politiques', *Revue du Droit Public*, p. 1615 (1995).

[85] 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.

[86] Arnaux (1995) at p. 1624.

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

one group that 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 EU has a diverse history, which cannot be divorced from the face of Treaty.

Conclusion

The secret subtleties of Union citizenship 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 the Treaty provisions, but any concrete definition of the status for the purposes of not only exercising Union citizenship but *enforcing* it necessitates Court attention. This paper was about the need for this constitutional rejuvenation of citizenship in the Union, in the context of judicial interpretation. But the fundamental dilemma is that this process will be effective only in acknowledging that the essence of what it means to be a European citizen cannot be judicially determined. Its spirit lies elsewhere and its limits lie far beyond Articles 17-22 EC.