

European Union Citizenship:

The Long Road to Inclusion

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## Abstract

The University of Manchester

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European Union Citizenship: The Long Road to Inclusion

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This thesis considers the development of the concept of citizenship, both historically and in its supranational guise. It addresses the traditional models of citizenship that have arisen in the national arena before turning its focus to supranational citizenship.

The development of quasi-citizenship rights at the European level between 1957 and 1992 are discussed whilst asking whether, in fact, these principles amounted to a *de facto* creation of citizenship as would be formally understood in a national model. Thereafter, post-1992 developments are considered via the activities of the European courts. The courts' particularly activist role in expanding our understanding of Union citizenship by using existing Union legislation in imaginative ways is highlighted and used as a key factor in determining Union citizenship's capacity to adapt and develop in the face of new challenges.

This thesis plays particular attention to the non-Member State nationals who reside in Union territory and find themselves ostensibly deprived of citizenship rights despite being actively involved in the Union's activities. Supranational citizenship is viewed through the unusual lens of stateless persons and this thesis suggests that Union citizenship does not live up to its ideals by excluding them from its understanding of the citizenry. It formulates a novel conception of rights-based residence, as opposed to nationality-based, supranational citizenship that is predicated on the Union's heritage of respect for rights and would include Member State nationals, alongside third-country nationals, the stateless and refugees (who would struggle to gain recognition under a conventional citizenship paradigm), with the aspiration of rendering Union citizenship a more inclusive and rounded conception.

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## **Dedication**

For 'im and 'er,  
without whose love, support and unshakeable belief this would not have been possible.  
'im, you are missed every day.

## **Acknowledgement**

With grateful thanks to Dora Kostakopoulou who has been an endless source of information and encouragement and a model of patience. Thank you for all your positive comments and support in difficult times. Also, to Nuno Ferreira who has provided plentiful feedback and ego boosting and to Adam Tucker who has provided a calming influence in the latter stages. Judith Aldridge has also helped smooth the way. Jackie Boardman's assistance and reserves of kindness have also been a great comfort when dealing with red tape: thank you very, very much. Lastly, thank you A – I love you: there have been some interesting moments along the way, but you have been there at the best and worst times – thank you.

## Introduction

“There are no such animals as European Citizens.  
There are only French, German or Italian citizens”<sup>1</sup>.

RAYMOND ARON

In 1992 the European Union embarked on a project that was to precipitate an irrevocable change to the Union legal order. Challenging the belief that the Nation State was the sole forum in which the individual could fulfil self-expression and that it was the only vessel capable of creating citizenship, the Union instigated a formal citizenship of its own. It used its form of citizenship to convey rights on Member State nationals independently of the States themselves. Approaching its twentieth anniversary of formal existence, Union citizenship remains an unsettled concept. Like a ship cut adrift, Union citizenship blows with the wind; the European Court of Justice and the Union’s institutions between them have provided the directional breeze for its sails.

Increasingly, criticism has been levied at Union citizenship over its restrictive approach towards inclusion. Despite this criticism, Union citizenship’s form remains fundamentally unaltered, the only substantive changes flowing from the European Court of Justice and the minor changes to the definition of Union citizenship contained in the major Treaties<sup>2</sup>. The usual lens through which Union citizenship is criticised is

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<sup>1</sup> “Is Multinational Citizenship Possible?” *Social Research*, 14:4 (1974), 653.

<sup>2</sup> See the difference between ex.Art.17 ECT and the current Art.20 TFEU.

that of a perceived ‘democratic deficit’ at the Union’s core. When asking, “what is a democratic deficit?” Warleigh asserts:

“one of the difficulties of defining the democratic deficit is the existence of rival understandings of what democracy is ... defining democracy in the EU context cannot be done without taking into account other contested notions such as national sovereignty”<sup>3</sup>.

This thesis suggests that it is the notion of national sovereignty and the role it plays in citizenship discourse that actually lies at the heart of Union citizenship’s inclusive shortcomings.

When it created its citizenship the Union was afforded a rare opportunity to formulate something altogether new. However, the Union seemed trapped by the traditional notion of citizenship; one with a fully bounded nature and limited membership. The wording of Article 17 ECT expressly restricted its scope of application to those already citizens of the Member States, thereby transferring the nationality paradigm of citizenship directly to the supranational arena. Was it possible to implement a different model? Could citizenship follow a different paradigm so that Union citizenship’s foundation was alternatively constructed? This thesis will argue that there is an alternative model of citizenship that could have been utilised at the Union level that would successfully disentangle Union citizenship from the national archetype. Instead of making use of the blank canvass it was offered, however, the Union merely reproduced an earlier illustration of what citizenship might be, following conventional citizenship discourse which would have it that there are basically two types of citizenship. These are *ius soli* (law of the soil) and *ius sanguini* (law of the blood): the one confers citizenship on those born in a given territory, the other sees citizenship pass through familial bloodlines. Both formulations convey the idea of scarcity, that citizenship is a limited resource – specific conditions are attached that, if not met, automatically preclude citizenship’s possession. Yet this restrictive mode of conferral (or a combination of the two) has served nation states well for hundreds of years. A

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<sup>3</sup> Warleigh, 2003, p.3.

supranational conglomeration that depends on its constituent States for its continued existence was, perhaps, destined to maintain this method of restrictive membership.

The failings of the national citizenship exemplar inevitably stem from its limited view of membership and the lack of flexibility it has when seeking to absorb diverse cultural elements. This is particularly problematic when considering that modern polities have a historical legacy that renders them cosmopolitan in nature. This problem is exponentially greater in the supranational arena, where the differences between the cultural backgrounds of the Member States are magnified *before* even considering the cultural diversity present in the States themselves. There is a further feature, however, that undermines the Union's reliance on the traditional citizenship paradigm, which is the extent of resident aliens in Union territory. The Union citizenship model could have been created in such a way that these resident non-nationals were included in the polity, but it was not to be. However the Union has striven to prove it has a strong democratic heritage, the lack of a truly inclusive form of citizenship shakes that claim to the core. The goal of this thesis is to establish that there is an alternative route to inclusion that would expand Union citizenship from its current confines to a pan-Union mode of recognition for all those caught and affected by the Union polity.

## **Thematic Overview**

My discussion proceeds in three main stages. The stages are split over the course of the five following chapters as follows: Chapter 1 is the first stage; the second stage covers Chapters 2 and 3; the final stage is stretched over the final two chapters. Throughout, I use a pluralist approach, assessing the relevant issues through historical, political and legal lenses and blending different methodological approaches like liberalism (particularly in the final stages), cosmopolitanism and critical legal studies, evolving a novel, inclusive conception of Union citizenship. The benefits of using these approaches are multiple. When seeking to answer such questions as 'how is citizenship constructed, is the current understanding of citizenship the only viable option, what are its shortcomings and how might it be improved', it is possible, by using these mixed approaches, to assess how and why citizenship has evolved as it has, what benefits arise

for the entity bestowing citizenship from employing whichever model they have chosen to and, particularly in the case of critical legal studies, to look beyond the State to broader theories such as human rights, to address alternative considerations for assigning ‘citizenship’.

The first stage of the discussion, Chapter 1, asks how we got to our modern understanding of citizenship. Using a historical, comparative approach, it charts the development of history by exploring some major civilisations and their manifestations of citizenship. By discovering what our forebears valued, we can determine which facets of their citizenship models were the most influential and which prove useful in modern terms. The civilisations and stages of development chosen for this study are Athenian and Roman citizenship, Moorish citizenship in Spain, citizenship in the Revolutionary period (both in France and America) and the post-industrial era. Elements of each of these models have survived to influence the modern rendering of citizenship theory as propounded by Marshall. Marshall’s triumvirate of political, social and economic rights is, thereafter, used as the barometer for evaluating citizenship at the Union level. In the course of this chapter, we discover that, while times change, factors affecting societies largely remain the same. For instance, in chapter 4 there is considerable discussion of a problem with multiculturalism causing deep divisions in States. But, in chapter 1, we see that ancient citizenship paradigms had to confront this difficulty themselves: their approaches were somewhat different from that taken in the modern day.

While the Ancient Athenians doggedly stuck to their limited form of citizenship, excluding all *metics*, irrespective of their social standing, from all active aspects of society, the Romans weighed up the effective benefit of incorporating selected foreigners to the polity. However, the Moorish society in Al-Andalus provides a breathtakingly modern idea of inclusion: effectively citizenship for all who earned it (by making some kind of inclusion to the running of the State) regardless of their cultural, ethnic or religious background. The model of citizenship explored by the Moors in Spain will serve as the main inspiration for the ideas expounded in the third Stage: the idea that inclusion is possible beyond the nationality framework and that, as difficult as it may be to instigate change, wholesale inclusion enriches the State, the people, the culture and the general welfare of those who benefit from it.

The second stage of the discussion focuses directly on the Union and its citizenship, over chapters 2 and 3. Taken together these chapters ask whether Union

citizenship has, in reality only been in existence since the 1992 formalisation and questions how it is constructed. The discussion in Chapter 2 addresses the issue of Union citizenship before any such entity was formally credited. To begin with, the aspirations of Jean Monnet, the first officially recognised European citizen<sup>4</sup> are discussed: in particular his correspondence with European leaders and the clear picture it gives of a man trying to create closer links between people. By focussing on the rights devolved on individuals by various of the Community's institutions including the Court(s) we can see the implementation of quasi-citizenship at Community level. For example, by creating the right of free movement for workers, the Union left considerable scope for the notion of "worker" to be explored, expanded and enhanced. In this respect the economic rights from worker status gave access to other rights, such as a right of non-discrimination<sup>5</sup>, and the free movement rights were supported by the creation of such things as special rights and the implementation of the European passport.

Moreover, once the Community truly looked beyond its economic confines it began the process of expanding individual rights wholesale: to economic (and social) rights, the Community added political rights, all before 'citizenship' officially existed and raising the possibility that the quasi-citizenship that free movement rights had appeared to create was, actually the *de facto* citizenship that Monnet so longed for. Chapter 3 moves the discussion to the post-Maastricht era, where the Community became a Union and the economic citizenship transformed into a thing of reality. It addresses exactly what Union citizenship has become, who benefits from it and the role of the Court as the individual's ally in expanding it beyond the Member States' initial expectations.

The final two chapters consider the third stage of discussion and seek to move beyond the idea of Union citizenship purely for Member State nationals. In order to do so, the general focus of the discussion turns to those normally excluded from the Union's protective embrace. Chapter 4 begins this thread by revisiting the limitations of the very article conferring Union citizenship, Article 20 TFEU. Given that possession of the correct nationality is essential in the current Union citizenship schema, the

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<sup>4</sup> European Council meeting, Luxembourg, April 1-2 1976.

<sup>5</sup> e.g., *Defrenne v SABENA*.

Chapter begins with an examination of nationality before moving to an assessment of the fate of those unfortunate to reside in the Union without benefitting from its citizenship provisions. It is in this chapter that the issue of marginalisation is raised, particularly focussing on those who lack nationality of any description: the stateless. The topic is contextualised in the following chapter, where the extent of a population of concern is contrasted with populations of various current Union Member States, with the goal of demonstrating that for the Union to perpetuate the cycle of exclusion serves as a considerable challenge to its claim to legitimacy and its purported human rights foundation.

The culmination of this exercise is a suggested model of a new Union citizenship, one that would allow all resident aliens to be eligible for citizenship's benefits, principally by creating a new European passport to facilitate intra-Union free movement. The benefits of this proposal are multiple – not only would this travel document be available to third-country nationals who arrived in the Union under their own national passports, it would also be instrumental in incorporating the stateless, who traditionally find it nigh on impossible to gain recognition, or to obtain the documents that would enable them to prove their identities. Stage three, then, while formulating something novel, does so by returning to the initial starting point and the historical citizenships explored in the first chapter. Where historical models of citizenship were successful in combating thoroughly modern problems, like multiculturalism, it would be unwise not to learn from their actions or incorporate similar mechanisms into proposed novel iterations of citizenship.

### **Contribution to the Existing Literature**

Although the main approach to citizenship discourse is to use the traditional *ius soli* or *ius sanguinis* determinates, other routes to citizenship have been suggested. Since 1992, Union citizenship has been the subject, directly and obliquely, of many publications. The early 1990's saw consideration of exactly what the impact of citizenship was likely to be, politically, socially, for the Member States, individuals and



the supranational polity alike. As it became more established, attention turned to the role (over-reaching or otherwise) of the Courts in developing its future development.

Ultimately, the focus of this thesis has lain with the notions of inclusion and exclusion. Since the late 1990's, those issues have been discussed by many prominent academics, and the field has proven ripe for discussion. The existence of this thesis illustrates that the matter is far from closed. Shachar suggests that citizenship could be viewed through the lens of property rights (with its notions of acquisition, loss and heritability), with the object of expanding its scope of application to others. Others, such as Rubio-Marín, have taken a comparative approach to this issue (albeit from the national level), looking at ideologies of inclusion in such places as the United States. In addition, Kostakopoulou has consistently called for the inclusion of third-country nationals in the Union-fold, while Bosniak has investigated several means of including resident aliens in society through such models as constitutional citizenship. Guild's contribution to this field has also been useful, by investigating alienage in the context of European identity. More recently, statelessness (an important element of this thesis) has been the subject of not one, but two publications<sup>6</sup>. These studies focussing on the damage statelessness causes individuals were instructive in highlighting the need to ensure that any new model of citizenship proposed would provide these people with the opportunity to gain full recognition in the Union legal order, with concomitant rights, *if they so chose*.

Considerable literature, therefore, exists on the issues of the restrictive nature of Union citizenship and the dangers of allowing statelessness to continue. What is the contribution of this thesis to that body of literature? This thesis utilises ideas such as the theory of inclusion by virtue of residence (or domicile)<sup>7</sup> but looks to expand the scope of the notion to all resident aliens with a particular intent on including the stateless. By referencing various positive features of historical citizenship models (which, it is suggested, should be incorporated in *any* reimagining of Union citizenship) this thesis recognises that vulnerable groups, who are often disinclined to make themselves known to authorities, can make exceptional contributions to the societies in which they live. The model of citizenship arrived at herein achieves the goal of absolute inclusion in

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<sup>6</sup> See Sawyer and Blitz, Blitz and Lynch.

<sup>7</sup> Propounded by Kostakopoulou and Rubio-Marín.

Union life, without affecting either the Member States' right to confer their own citizenship without fear of diluting their idea of the nation, or affecting the newly included citizens in such a way that they would risk losing their own sense of national identity. Rather, what is outlined is a system under which Union citizenship would exist on a plane independent of such issues as nationality, but which would, by virtue of such mechanisms as passports and embassies, secure an internal citizenship with full social, economic and political rights, under conditions which the Union has already determined for itself<sup>8</sup>. The use of a new form of passport as proof of European Citizenship (a sort of internally recognised identity card) and which has uses *only* within the Union's borders, provides a new twist to the citizenship paradigm.

The EU is much more than a chance agglomeration of trading partners and Union citizenship has the capacity to reflect that by affording individuals opportunities that national citizenship cannot match. The challenge for Union citizenship is to overcome the petty rivalries of national identities and reflect the contribution of all those who work to make the Union a success, regardless of their cultural or ethnic differences. Supranational citizenship could well be the portal to overcoming many regional misunderstandings that promise to divide people and I believe that it can, will and must shed, once and for all, the pre-conceptions of nationality if it is to achieve these outcomes. A democratic entity that aspires to be recognised as a legitimate polity must not be seen to be plagued by inconsistent beliefs and behaviours. For many years the Union has recognised that 'Europe' is composed of many *peoples*, but it has failed to include them *all* in its reckoning of citizenship. The novel formulation of citizenship proposed in this thesis aspires to include those peoples with the hope that, in so doing, Union citizenship will be free to enter an unprecedented new era of social reform and integration, carrying these novel citizens along in its wake.

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<sup>8</sup> In legislation such as Directive 2004/38 – see Ch.5.

## Chapter 1. Citizenship: A Developed and Developing Concept.

### Introduction

In 507BC Kleisthenes established a form of government in Athens which became known as democracy, that is rule by the people. In so doing he made discussion about what, or who, constitutes ‘the people’ an essential part of political and social debate and ensured that discussion of democracy and citizenship would remain two intertwined, albeit separately developing, ideas. The idea of ‘the people’ developed into the concept of citizenship: both centred on the notion of ‘belonging’, with those lucky enough to belong to the chosen group wielding, in theory at least, considerable political and social power. Later, the words *civis romanus sum* (“I am a Roman citizen”) acted as a shield to those who were fortunate enough to be able to say them when they travelled through the Roman Empire whilst simultaneously providing a source of aspiration to those not yet considered Roman citizens. The idea of citizenship, then, is an ancient one. Over centuries it has evolved, adapting to different models of government and (sometimes instigating) changes in social attitudes and behaviours, such as in America in the 1960s following the civil rights movement.

Citizenship is becoming ever more important in the light of globalisation and increased wealth which has led to increased mobility. Furthermore, in a post 9/11<sup>9</sup> and 7/7<sup>10</sup> world there is a perception that it is important to be seen to ‘belong’, and holding citizenship of a country (or an entity) is an ideal way of demonstrating attachment to and acceptance of a given way of life, whether it be western liberal democratic or another form of ideals. Why is this the case? Following 9/11 there has been an increased sense of protectionism. Newspapers carry stories of attacks on ethnic

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<sup>9</sup> September 11, 2001.

<sup>10</sup> July 7, 2005.

grounds, police powers to stop and search have been increased and racial profiling has been argued for. ‘Belonging’ to an *ethnos* or *demos*<sup>11</sup> has become a crucial part of life as a means of demonstrating that the individual is not a threat and in a modern world with endless travel prospects, that belonging needs to be demonstrated not just inter-state but intra-state.

This chapter will examine the origins and development of citizenship as an ideal and as an interesting, if at times flawed, institution, from its earliest origins to its development in revolutionary periods and its reconstruction in post-Second World War Europe. In this way the current entity can be contextualised and the various conceptions’ strengths and weaknesses identified. It will be seen that citizenship and democracy have become very much intertwined notions, with discussion of one necessarily entailing discussion of the other and with the expectation that a state wishing to call itself ‘democratic’ will have an open and equal form of ‘citizenship’. The entity that is European Union citizenship (Union Citizenship) will also enter into consideration, although discussion of the possible conflicts arising between national and supranational citizenships will form part of the discussion in later chapters. However, the considerable bulk of this introduction will focus on how citizenship is defined and operated in the national arena.

Kelsen posited that national law derives its legitimacy from a greater power: international law. In the European Union (EU) there is a form of Supranational (i.e., international) citizenship which, as I shall demonstrate, rests above that of the nation state. Given that the two notions of democracy and citizenship can be considered to be interdependent, any shortcoming on the part of a European supranational citizenship, (i.e., Union citizenship), will have a direct, and I suggest detrimental, effect on the democratic legitimacy of a European supranational entity, here the EU. Highlighting the

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<sup>11</sup> In Greek, “*ethnos*” (or *ἔθνος*) means nation, but refers in this context to people belonging to the same ethnic or racial grouping sharing distinctive characteristics and culture. Meanwhile, “*demos*”, whilst similar, is differentiated because its meaning is broader: the original *demos* referred to those classed as citizens in the Athenian city state, but has come to mean, generally, “the people”. [*Demos* retains a particular meaning in modern Greece as a term used in administrative government: for the purposes of this work, the broader meaning outlined above will be assumed].

potential, or indeed enhancing the value, of Union citizenship will, therefore, have a beneficial effect on the democratic, social and political standing of the EU, both internally and externally (i.e., as an international actor).

### **Citizenship: Definitions.**

What is citizenship? Why does it matter whether one is considered a citizen? Of what is one a citizen? Is citizenship a stable and rigid construct, or is it malleable? Are there different degrees of citizenship? Does it matter what form citizenship takes? Is citizenship inextricably linked to democracy (and by extension politics) or can/does it exist in another (i.e., totalitarian or autocratic) setting? All these are valid and to different degrees important questions that must be addressed as part of any discussion of citizenship, in order to understand why holding citizenship at an organisational, national and now supranational level is significant.

Citizen has come to be synonymous with ‘national’, or ‘native’, or ‘rights-holder’ and indicates that one is not a foreigner<sup>12</sup>. Therefore, the implications are that lacking citizen status renders one an outsider or foreigner, excluded from society and deprived of citizenship’s associated rights. This would seem a well-founded basis for identifying what citizenship conveys, but it does not to my mind go far enough as it still leaves the notion somewhat nebulous and intangible. In order to answer the preceding questions, however, further definition of citizenship is necessary and will follow.

### **How Do We Define “Citizenship”?**

The dictionary would seem to be the ideal place to begin attempting to define the terms “citizen” and “citizenship”. There, “citizen” is defined as “1. A legally recognised subject or national of a state or commonwealth, 2. an inhabitant of a town

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<sup>12</sup> Troper, at p.28.

or city”<sup>13</sup>. This definition, (which is repeated for “citizenship”<sup>14</sup>) links the notion directly to a localised area, be it a country, state, city or town, but also appears to indicate that citizenship does not arise automatically: it is conferred instead *by* the nation/state/town/city *upon* a person. However, the second part of the definition would seem to cause problems. In a modern world of travel an Italian can move from Italy to reside in Portsmouth, but such a transplantation does not mean that the Italian has become English. Therefore, it seems erroneous to suggest that mere inhabitation of a place can denote citizenship<sup>15</sup>.

It seems then that legal recognition (as would be seen on a passport for instance) is an essential ingredient of citizenship, but mere residence is not sufficient to cause citizenship to arise. The dictionary does elucidate the idea that citizenship has a geographic connotation, pertaining to the state or commonwealth, but it gives no clear idea as to what it means to be a ‘citizen’. In other words those features we would expect to find as common to different citizenships are not elaborated upon or even included in a dictionary definition of the words. Therefore, we must look further afield.

### ***Before Marshall***

Several centuries ago citizenship was something that defined a man<sup>16</sup>, to the extent that to “have *civitas* – citizenship – was to be civilised, an assumption still embedded in English to this day. ... A citizen defined himself by the fellowship of others, in shared joys and sorrows, ambitions and fears, festivals, elections and disciplines of war”<sup>17</sup>. From this perspective we see that citizenship was not merely tied to a location but conveyed a sense of belonging and community, in both personal and

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<sup>13</sup> Concise Oxford English Dictionary, 2004.

<sup>14</sup> *ibid.*.

<sup>15</sup> Nonetheless, as shall be demonstrated in subsequent discussions, the notion of residence being sufficient cause for the generation of citizenship is not novel. Moreover, residence for a sufficient period in a geographical area is used as one leg of naturalisation criteria in many countries.

<sup>16</sup> i.e., *not* a woman.

<sup>17</sup> Holland, at p.12.

statal matters. It is also apparent that beyond this social, communitarian dimension, there was a political dimension, as to be a citizen meant to be involved in the electoral system.

If citizenship had not developed since Roman times, however, it would imply that government and society had been stagnant too. However, a very brief overview of the evolution of democracy would demonstrate that stagnation is the opposite of what has happened. Democracy has developed from the pure direct democracy of Ancient Athens into a more inclusive representative concept, which in modern terms can be construed in many different ways. With the development of countries as opposed to small states, direct democracy has proved unwieldy and cumbersome, hence representative democracy has emerged, and some countries have adopted republicanism as their favoured model of democracy. In addition, the ideals behind democracy, which can also be seen to be shared to some extent with those of citizenship, have necessitated expanding the idea of democratic inclusion. In this way we have seen the end of slavery and, since 1971<sup>18</sup>, the full emancipation of women in Europe and the Americas.

Given that government and society have thus evolved, it would be incongruous if citizenship had not. Therefore, it would seem that a more modern definition of citizenship must be found. However, we have already seen that citizenship has, for more than two millennia, been viewed as multi-dimensional. In the early 1960s, citizenship was identified as existing in three categories, as civil, political and social citizenship<sup>19</sup>. These categories of citizenship were defined as follows:

“Under civil citizenship Marshall grouped ‘the rights necessary for individual freedom ...’ Political citizenship was the right to participate in the exercise of political power ... social citizenship encompassed ‘the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to

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<sup>18</sup> Switzerland extended the franchise to women only as late as 1971.

<sup>19</sup> Marshall.

live the life of a civilized being according to the standards prevailing in society”<sup>20</sup>.

### *Marshall*

Writing in the 1950s, Marshall delivered what has come to be regarded as the seminal work on a modern interpretation of citizenship and what it should and must entail. In many ways, his viewpoint could be said to have derived from his having been born at the end of the 19<sup>th</sup> century and lived through the great social upheavals of the early 20<sup>th</sup> century that changed the face of Europe. Even with that in mind, Marshall’s theory of citizenship could be considered odd in that it had as its first stage the notion that the State must compel the citizen to a first action: education<sup>21</sup>. Education was necessary to elevate the standing of the working classes to gentlemen, enabling them to participate fully in society and thereby enjoy its advantages to the full. The importance of education will be further elaborated below. Marshall, considered this elevation essential as “there is a kind of basic human equality associated with the concept of full membership of a community – or ... of citizenship – which is not inconsistent with the inequalities which distinguish the various economic levels in the society. In other words, the inequality of a social class system may be acceptable provided the equality of citizenship is recognized”<sup>22</sup>.

There are two possible criticisms of Marshall to be levied here, firstly that in speaking purely in terms of “gentlemen”, he, perhaps unwittingly, excludes women from his framing of social citizenship. Nonetheless, that criticism could be dismissed by either of the following devices: either by saying that Marshall was a product of his time and that his formulation can be applied in modern times by ignoring the omission of women, or by stating that the term ‘gentlemen’ was merely a convenient euphemism for

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<sup>20</sup> Fahrmeir, at p.2.

<sup>21</sup> “Marshall, at p.68.

<sup>22</sup> *ibid.*, at p.70.



the class of people as a whole<sup>23</sup>. The second criticism is this: his theory seems to have been devised for England and lacks, to a considerable degree, an easy transfer to other States. In addition, I would argue that he overlooked many of the facets of citizenships pre-dating the 18<sup>th</sup> century which acted as the precursors to much of what we accept as citizenship today (which I will demonstrate in the sections below), particularly reciprocation of rights and duties.

Looking for the moment beyond his requirement of enforced education, Marshall considered that citizenship denotes a status made up of rights and powers. The threefold nature of Marshall's citizenship, as outlined above by Fahrmeir, was developed, he says, across three centuries. The civil aspect (made up of various individual rights, such as free speech) came about in the 18<sup>th</sup> century, the political aspect in the 19<sup>th</sup> century, reflecting the emergence of the working classes into the political domain, (i.e., reflecting the spread of the franchise) and the social aspect in the 20<sup>th</sup> century, with the increased attention of states resting on the welfare and education of the population. The fundamental tenet of Marshall's theory seems to be that citizenship is dependent upon equality: unless opportunities are open to all on an equal footing then citizenship as an entity cannot be said to be in existence.

When considering the civil strand of citizenship, Marshall states that the rights included were not bestowed *en masse*, instead, "there was a gradual addition of new rights" to all those who were adult and free (and male). In theory this was a universal right as vassalage in the 18<sup>th</sup> century was a thing of the past and 'freedom' from servitude (which became synonymous with 'citizenship') meant that people could in theory travel, creating a national form of citizenship. Political citizenship, he argues, is a different animal. He posits that the development of political rights in his theory of citizenship was not the creation of a new class of rights but instead the extension of those rights to a greater class of people. Marshall's goal is to drive home the fact that civil rights in citizenship became universal at a much earlier stage than did political rights: one could be a citizen by virtue of civil rights and yet still be disenfranchised<sup>24</sup>. It

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<sup>23</sup> Turner, 2001, identified several weaknesses with Marshall's model including its failure to distinguish between different forms of citizenship and a general criticism that it overlooked women.

<sup>24</sup> Marshall, at p.79.

is important, therefore, that political and civil rights be placed on an equal footing in the make-up of citizenship in order for it to function properly.

When dealing with the social arm of citizenship, Marshall raises an interesting problem. Traditionally in England, social benefits did exist for the poorest sectors of society, but he claims that those supposed benefits (under the Poor Law) “treated the claims of the poor, not as an integral part of the rights of the citizen, but as an alternative to them – as claims which could be met only if the claimants ceased to be citizens in any true sense of the word”<sup>25</sup>. Marshall indicates then that the poor were actively excluded from any meaningful exploitation of (or even barred from holding) citizenship until the developments of the late 19<sup>th</sup> and 20<sup>th</sup> centuries.

Marshall uses these three strands of citizenship to support his starting point that education should be enforced by the state, as in so doing future citizens are shaped: adult citizens can only exercise their rights as citizens if they are aware of what those rights are and such awareness can only come about if the adult in question has been educated in the first place. Citizenship cannot exist properly without education as it cannot be properly appreciated or exercised, and this is one of Marshall’s most noteworthy premises. A further consideration of Marshall’s impact on modern conceptions of citizenship will follow hereafter.

Marshall proposes a broader and more fully considered definition than the dictionary and gives an indication that modern citizenship is not simply communitarian and political but is also rights based. In addition, it leads to the expectation that the state will, when necessary, provide support. However, this multi-level definition also indicates that citizenship is a constantly developing and adaptable concept, which should ensure that it will be able to survive social upheaval whilst retaining certain fundamental properties (namely a political dimension and a means of identifying and delineating members of a social group). All that being said, Marshall’s definitions are almost fifty years old and he has been criticised for presenting an androcentric perspective of citizenship, unpalatable in a modern and inclusive democracy.

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<sup>25</sup> *ibid.*, at p.80.

## *Beyond Marshall*

The intervening years have seen democratic developments and it must be assumed, therefore, that there have also been developments in citizenship. Fahrmeir posited a more modern (2007) definition, which I would argue is not so promising. He states that now “citizenship is not only contested, it has also become quite diffuse”<sup>26</sup>. In other words, it would seem that citizenship in a modern sense has come to be nebulous and difficult to define, which perhaps renders difficult the task of trying to ascertain what it conveys, or what it *should* convey. Nonetheless, he says that its content ranges from nationality to participation rights and benefit entitlement, to “commitment to a particular political or social order, even decent behaviour towards one’s colleagues on university campuses”<sup>27</sup>, all of which are somewhat wide-ranging and varied in nature and which seem to stray from the original idea of a territorial (and perhaps ethnically driven) form of identification.

All the definitions offered above are limited in certain ways. Consequently, it is necessary to offer a definition of how citizenship has been rationalised for the purposes of the ensuing discussion. It is obviously intended to convey a sense of belonging to a community. In the light of globalisation and following the creation of the EU, it is suggested that such community membership could potentially be of a municipal, regional, national or supranational variety or, indeed, a combination of any or all of these, especially as elections exist at all these levels of government. In other words, it should be possible for a person to be the holder of a single or multiple citizenships, a viewpoint shared by several commentators<sup>28</sup>. However, it is possible that the creation of too many forms of citizenship could be dangerous. For example, it is probably unlikely that a person who is defined as belonging to a particular State should require the creation of a citizenship to denote municipal or regional belonging. It is, however, possible that there will be areas where this might be desired. An example might be Belgium, where there has been increased conflict between the Flemish and non-Flemish and calls for separation. In addition, there has been a longstanding North/South divide in England: nonetheless, having citizenship defined on such a regional basis could lead

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<sup>26</sup> Fahrmeir, at p.1.

<sup>27</sup> *ibid.*.

<sup>28</sup> Examples include, *inter alia* Meehan, Shaw, and Kostakopoulou.

to destabilisation of the nation state and could act as a precursor to countries which are, historically speaking, only recently formed entities reverting to their previous existence as a mere collection of states<sup>29</sup>. Therefore, despite compelling arguments and a recognition that many people feel equally tied to a regional area as to a nation, “citizenship” might be best construed on the national and supranational levels.

In addition to the community element of citizenship, there is a political dimension (as espoused by Marshall) which ties citizenship to notions of democracy and which entails the right to enter into, and participate in, the political process of the polity<sup>30</sup>. Furthermore, modern citizenship has, to my mind, to incorporate a rights dimension, i.e., citizenship must include human rights which the citizen can rely upon vis-à-vis other citizens and/or the state/entity to which he belongs. However, I do not consider that modern citizenship can be purely about personal gain for the citizen. Therefore citizenship can be said to contain duties which are owed to other members of the polity and the state/supranational organisation. These duties include such things as paying tax and obeying the law. Just as democracy cannot function without the people choosing to engage with it, by performing their duty to vote and participate in democratic institutions (i.e., standing for election or performing their duty as jurors in the Ancient Athenian tradition), so citizenship cannot function properly, for me, unless there is some form of reciprocity between the citizen and the State to which he belongs.

There is a further consideration to be made. Not only must we consider *what* is included in citizenship, we must consider *how* that citizenship is determined. There are traditionally two competing and yet complimentary concepts of *how* citizenship is constructed, one being *ius sanguinis* and the other being *ius soli*. Firstly, *ius sanguinis* is the notion that citizenship is contingent upon the maintenance of a bloodline, i.e., if your mother/father is Welsh, then you are Welsh. On the other hand, *ius soli* is centred upon a tie to the soil, which is to say, if you are born within a territory, for instance Scotland, then you are Scottish. In reality, modern citizenship is constructed on a mixture of the

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<sup>29</sup> “The Economist” on January 27<sup>th</sup> 2011 speculated that the electoral strife resulting from the 2010 elections and driven by discord between the ‘two halves’ of Belgium could result in the fragmentation of one of the most pro-European of the EU’s Member States. [www.economist.com/node/18008272](http://www.economist.com/node/18008272) (last accessed 09/04/12).

<sup>30</sup> Bellamy, 2001.

two ideas<sup>31</sup>, and the relative proportions of these two ingredients will reflect the importance which a State places upon the notion of attachment to the place, or upon the maintenance of an ethnicity. However, it is important to note that one or other or both of these principles has had some place in citizenship's development down the centuries<sup>32</sup>.

In the light of all these statements, citizenship would indeed appear to be a complex and diffuse construct, but this does not mean that it should be dismissed as being too nebulous to convey anything meaningful. Complexity is not (automatically) a bad thing. In order to assess how citizenship became such a complex notion, it is essential to consider its origins and development in more detail.

## **Citizenship's Origins and Development**

### ***Athenian Citizenship***

The notion which developed into citizenship began with the identification of the *demos* in Ancient Athens. *Demos* means 'people' and defining who constituted 'the people' was to define who had political and social rights. In Athens, the class of people we would recognise as citizens was extremely limited<sup>33</sup>. Nonetheless, they had a definite "sense of identity and solidarity"<sup>34</sup>, which led to people from other city-states being viewed as 'outsiders' (*metics*<sup>35</sup>). The *metics* would, almost certainly, have been considered part of the *demos* in their own state, but the fact that they had moved resulted in their exclusion from the Athenian political process.

In Athens, the 'people' had a definite sense that they were the masters of their own destinies, because Athenian government was, as discussed above, a direct

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<sup>31</sup> A suggestion supported by, *inter alia* Fahrmeir.

<sup>32</sup> e.g., Brubaker, in relation to France and Germany.

<sup>33</sup> In order to be an Athenian citizen, one had to be a free born, adult male.

<sup>34</sup> Held, at p.12.

<sup>35</sup> Dunn, at p.35.

democracy, meaning that all citizens were allowed and encouraged to vote and propose legislation. Nonetheless, the concept of the *demos* was more complicated than the simple notion of *metics* and non-*metics*: the *demos* was constituted only of adult males of Athenian descent. Instead of the *demos* being a universal concept, it was limited both in terms of gender, age and geography. Citizenship in Ancient Athens was not at all the open and accessible entity that we would today expect to see.

Moreover, in Ancient Greece there was a flourishing slave trade and possessing slaves was a desired symbol of status and wealth. Slaves were considered chattel, not people and their consequent exclusion from political and social life in Athens would not have been a cause for surprise or dismay. Whilst their exclusion may not have caused surprise, given that they were owned, it is perhaps more surprising that women and children (the wives and offspring of members of the *demos*, who were no doubt involved in Athenian society's day to day activities) were also not considered worthy of inclusion in the *demos*. All of these exclusions meant that, although "the citizen population of Athens was never very large, perhaps 100,000 in all ... about 30,000 would have been full citizens, all adult males ... In addition there were some 40,000 resident aliens (*metics*), men, women and children, a few of whom could hope in due course to become citizens themselves, and a much larger number of slaves, (perhaps 150,000 in all). The full citizens therefore represented little more than a tenth of the population"<sup>36</sup>.

From this extract we can see that Greek notion of citizenship would today be deemed unpalatable for many reasons. It may have taken several hundred years, but the slave trade was abolished in England over two hundred years ago<sup>37</sup>, and to exclude people from the citizenry for reasons relating purely to social class, gender, level of education or age is now unacceptable. It is true that some rights pertaining to modern citizenship may, at times, be withheld from a person<sup>38</sup>. Nonetheless, a person will be

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<sup>36</sup> *ibid.*, at p.35.

<sup>37</sup> In fact in 1807.

<sup>38</sup> Examples being that minors may not vote, that prisoners in the UK may not vote during their imprisonment and that, in some American States, people convicted of a felony lose the right to vote thereafter. It is estimated that 5.3 million Americans (1:41 adults) have currently or permanently lost the right to vote as a convicted felon. There is a perceived added racial element to this figure, and it is stated that currently 13% of

actively excluded from the citizenry only in highly unusual circumstances. Whilst the enfranchisement of women may be perceived as a modern development in citizenship rights (occurring largely in the last century as it did), to modern eyes it would seem utterly alien that they should be excluded from a citizen class as a matter of course.

Nonetheless, the Athenians did not share the view that their social construct was flawed. Thucydides quoted Pericles as saying that decision-making powers lay in the hands of “the whole people”<sup>39</sup> and that “everyone is equal before the law”<sup>40</sup>. In addition to this, they were “equally free to compete for public honours by personal merit and exertion, or to seek to lead the city, irrespective of their own wealth or social background”<sup>41</sup>. From this we can see that what modern eyes perceive as shortcomings were utterly acceptable standards of the day. Exclusion was, we are left to suppose, an expected and common feature of the time, and Athens was not alone in excluding various sectors of the social fabric from the polity<sup>42</sup>. That being said, the sentiments conveyed in the above quotations ring true today: equality is a fundamental tenet of modern life. It is simply the case that societal expectations have changed in the intervening period. We still want the same ideals to flourish in modern society: we just want them to be universally applicable.

We must then ask, what advantages did inclusion in the *demos* convey? Athenian citizenship was a symbol of status and liberty – that of itself made it a valuable commodity. Furthermore, “the citizens had come to wish to conceive themselves as a community”<sup>43</sup>, indicating that even two thousand years ago citizenship was a unifying element of society. In addition, being run by a direct democracy, there was an obvious element of political advantage to it. Every citizen had the right not only to attend but also to be heard at the Assembly and to do so on an equal basis, “whatever their own level of personal wealth or education, the social standing of their families, or the

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African American men are disenfranchised.

[www.sentencingproject.org/template/page.cfm?id=133](http://www.sentencingproject.org/template/page.cfm?id=133) last accessed 09/04/12.

<sup>39</sup> Thucydides, in Held, at p.13.

<sup>40</sup> *ibid.*.

<sup>41</sup> Dunn, at p.26.

<sup>42</sup> Rome is an example of this. For a more detailed analysis, see below.

<sup>43</sup> Dunn, at p.27.

prestige of their occupations”<sup>44</sup>. Given the regional nature of Athenian government, this meant that they decided on local matters of direct concern to their lives. On the face of it, this is an ideal means of including all sectors of the citizenry in government and equality of standing in the democratic process is an ideal which is still cherished today. However, as idealistic as this seems, the reality was much less appealing as not all of those ostensibly included in the *demos* would have been able to exercise their political rights, for reasons such as an inability to travel or to leave farms. Cast in a modern light this is an unacceptable position: direct democracy might be too cumbersome to work in modern society, yet it is a fundamental tenet of western liberal democratic life that every person eligible to vote should have that opportunity.

From a different perspective, however, an important element of Athenian citizenship was that it instilled a sense of civic obligation in those who held it: “individuals could only properly fulfil themselves and live honourably as citizens in and through ... the life of the political community”<sup>45</sup>. This can be seen in the fact that there was provision for a panel of approximately 6,000 paid volunteer jurors who served on an annual basis<sup>46</sup>. Therefore, citizens stood in judgement of each other (as well as *metics*, women and slaves). In addition, accompanying the right to be heard in the Assembly was the “duty to hear out the persuasions of every fellow citizen ... and ... the still more painful duty to accept whatever these fellow citizens together then proceed to decide”<sup>47</sup>.

It was this obligation to hear all sides of an argument (perhaps being swayed by them) and then to be bound by the decisions of the majority from which the State derived its legitimacy. Having said that, minority views would be heard, but there was no compulsion for them to be either respected or protected. People could be marginalised but there was, nonetheless, a duty to allow them to say their piece unimpeded. Whilst protection for minorities’ rights has been built into modern citizenship, the right to be heard is an aspect of Athenian citizenship which survives to this day, most readily in the form of deliberative democracy.

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<sup>44</sup> *ibid.*, at p.36.

<sup>45</sup> Held, at p.14.

<sup>46</sup> Dunn, at p.35-7.

<sup>47</sup> *ibid.*, at p.62-3.



Something which appears not to have been passed down the ages is the sense of civic obligation to be involved in the political process which accords the most meaning to the status of “citizen”. Indeed, in the light of the 2000 US Presidential and the 2002 French Presidential elections, it has been said that “both elections were typical in that they showed declining voter participation rates. In the United Kingdom’s 2005 election, barely a quarter of the population voted”<sup>48</sup>. It seems, therefore, that modern citizens, far from maintaining their involvement in the political process have significantly withdrawn from it, a problem replicated at the supranational level as indicated by Eurobaromètre polls<sup>49</sup>. Given that Athens derived legitimacy from its citizens’ involvement in political life, we must ask whether a reduction in citizen participation in modern times has a direct effect upon municipal/national/supranational legitimacy. Nonetheless, we still see that duties form part of modern citizenship. Thus this element of Athenian democracy appears to have survived. Citizens still sit on juries, and there are now further duties, such as paying tax.

The Athenian construct of the *demos* was far from perfect. It was limited in the geographical, demographical and egalitarian senses. However, it was not the direct source of modern citizenship as the Romans took the idea and developed it in new ways.

### ***Roman Citizenship***

The word “citizen” is derived from the Latin word *civitas*. The Roman conception of citizenship shared many features in common with the Greek *demos* and yet it went beyond some of the Greek model’s limitations.

In common with the Greek *demos*, Roman conceptions of citizenship were limited in that only men could be citizens. That is not to say that women were excluded

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<sup>48</sup> Fahrmeir, at p.214.

<sup>49</sup> [www.euractiv.com/en/elections/european-parliament-elections-2004-results/article-117482](http://www.euractiv.com/en/elections/european-parliament-elections-2004-results/article-117482) (last accessed 09/04/12) In the 2004 European elections, there was a general trend in the EU 15, even in those States with mandatory voting, for decreased participation.

from influence in the same way as they were in Athens: indeed there are several examples of very prominent women over the course of Rome's history who were able to wield considerable power, albeit not in a formal sense<sup>50</sup>. Also, as was the case in Greece, citizenship was a status symbol: as Cicero said, "to be a citizen was to know one was free"<sup>51</sup>.

However, the most fundamental difference between Greece and Rome was that Roman citizenship (*civitas*) could be acquired. To the Roman mind, citizenship "enabled the spirit of a state to be known"<sup>52</sup>. Therefore, the fact that the citizenry was an open entity spoke volumes about the nature of the state. To that end, a man could join the army for a twenty five year period, knowing that when he was demobbed he would be made a citizen, be free to marry his woman and legitimise his children, thereby giving them a better start in life. Furthermore, there were instances of *civitas* being granted to brave opponents in battle<sup>53</sup>, and members of the other Italian states sought recognition as Roman citizens. Therefore, *civitas* was an ever expanding institution and created an aspirational society. People wished to be upwardly mobile<sup>54</sup>. (To some extent we see this replicated in modern society: citizenships of nations can be acquired – some polities will grow and others shrink and some citizenships will be more desired/valued than others<sup>55</sup>).

The Roman Army provided the Republic with the perfect model for the delineation of its citizens. Whilst citizen status could be acquired, it was, unlike in

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<sup>50</sup> Examples would include Clodia Metelli and the Sybil.

<sup>51</sup> Cicero, in Holland, at p.76.

<sup>52</sup> Holland, at p.12.

<sup>53</sup> *ibid.*, at p.56.

<sup>54</sup> *ibid.*, at p.93, "there were few citizens who did not dream of clawing themselves up the ladder ... The higher a Roman climbed, the more fresh vistas emerged, to tempt him on further ... It was typical of the Republic that the greatest privilege it could grant one of its citizens was the chance to put himself to the vote of his fellow citizens and win even greater glory. Typical also that the mark of failure was to lose the class inherited from one's father".

<sup>55</sup> An example of this being the lottery system in place to acquire an American Green Card. See below for a discussion of hierarchical citizenships.

Athens, a hierarchical entity in itself. Hence, when the army was being sorted into ranks it was done:

“according to their wealth and status, for in war, as in peace, every citizen had to know his place. At the summit of the hierarchy there had been those rich enough to afford their own horses, the *equites*; below the equestrian class were five further classes of infantry; at the bottom of the heap were citizens too poor to buy even a sling and a few sling-stones, the *proletarii*. These seven classes had in turn been divided into further units, known as ‘centuries’. This allowed status to be calibrated with exquisite precision.”<sup>56</sup>.

This hierarchy was replicated directly in the political process, the most fundamental expression of citizenship rights. Unlike Athens, Rome was not a direct democracy, it was a representative democracy. Therefore the election of representatives was an essential aspect of social life, much as it is today. To encourage participation in this area of society, a law was passed in 367BC which enabled “any citizen to stand for election to the great offices of state – previously a prerogative of the patricians alone”<sup>57</sup>. This is a feature of Roman society common to many modern western liberal democracies, specifically replicated in the EU<sup>58</sup>, and which ensures that governments and their decisions have greater legitimacy. Much as was the case in Athens, states still derive their legitimacy from their citizens.

This optimism about the state of Roman political life, is however, somewhat misguided. Whilst it was true that every citizen had the right to vote in the many types

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<sup>56</sup> Holland, at p.93.

<sup>57</sup> *ibid.*, at p.23.

<sup>58</sup> “1. Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State.” Art.22 TFEU.

of elections, it was also the case that “only the rich had any hope of winning office”<sup>59</sup>. This could be ascribed to the fact that the people preferred the familiar, or it might have been that because the society was aspirational – people voted for that which they wanted to be<sup>60</sup>: why alter a system that you desired to enjoy the benefits of when you gained sufficient social status? However, the dysfunctional<sup>61</sup> nature of Roman hierarchies in the exercise of citizenship rights can be seen in the voting processes that were employed and their detrimental effects on the legitimacy of the state and its appointments.

Voting occurred by presenting oneself at the Campus Martius and then being grouped according to class (tribes) in the Ovile (sheepfold). It was the case that:

“Every member of every tribe was entitled to his vote, but since this had to be delivered in person at the Ovile, the practical effect was to ensure that only the wealthiest out-of-towner could afford to travel to Rome to exercise his right. Inevitably, this skewed the voting in favour of the rich. ... the rich were the ones who contributed most to the republic, and so it was generally conceded that their opinions should carry the greatest weight. Disproportionate voting power was yet another perk of rank”<sup>62</sup>.

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<sup>59</sup> Holland, at p.26.

<sup>60</sup> *ibid.*, “The Roman character had a strong streak of snobbery: effectively, citizens preferred to vote for families with strong brand recognition, electing son after father after grandfather to the great magistracies of state, indulging the nobility’s dynastic pretensions with a numbing regularity”.

<sup>61</sup> The hierarchical system can be called dysfunctional because the manner in which voting was carried out, described below, was such that, even though those lower down the hierarchy had the right to vote, they were to all intents and purposes prevented from doing so.

<sup>62</sup> Holland, at p.94.

To modern eyes, weighted voting for individuals in elections seems unthinkable, as there is an embedded notion that social equality means that every person should have an equal vote. Whilst it is true that vestiges of the class system remain in most countries, it is a general theme of modern democracy and citizenship practice that wealth and privilege have no place in elections. Rome's system of flagrant and accepted citizen inequality would today lead to it being considered an undesirable and untenable means of constructing a society.

These failings were evident to an even greater extent when considering elections to the highest offices, where the citizens were ranked as they would have been had they been joining the army, with the rich granted the privilege of being first in line. "Nor was that their only privilege. So heavily weighted were their votes that they usually served to decide an election."<sup>63</sup> Given the weighting of votes to the detriment of the lower classes, there were occasions when elections had been decided before they were required to register their votes at all. Therefore, those who probably had most to gain from exercising their status as a Roman citizen were punished by Rome's very system of government and hierarchical citizenship whilst those with the power to alter lower citizens' status and welfare were not inclined to do so. In effect, this simply highlighted the fact that *civitas* was highly exclusionary, a situation which would not be permitted to exist today at national level.

In Rome it was not a simple matter of being or not being a citizen, it was a question of whether you were a citizen who mattered or one who did not. That being said, Cicero would have it that every citizen was important, as their involvement in the electoral process glorified Rome: the mightiest citizen still had to court the vote of the people<sup>64</sup>. This feature of Roman political life still rings true today: politicians must

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<sup>63</sup> *ibid.*, at p.95.

<sup>64</sup> "It is the privilege of a free people, and particularly of this great free people of Rome, whose conquests have established a world-wide empire, that it can give or withhold its vote for anyone, standing for any office. Those of us who are stormtossed on the waves of popular opinion must devote ourselves to the will of the people, massage it, nurture it, try to keep it happy when it seems to turn against us. If we don't care for the honours which the people have at their disposal, then obviously there is no need to put ourselves

canvass for their votes as without some popular support no one can be elected to office.

If we accept that Roman citizenship was stratified in this manner, we must ask why hierarchy was so important to Roman society. The whole of Roman society was predicated upon social rank, as was demonstrated by considerations such as where one lived and where one sat at the public games. How, then, was social standing calculated with any accuracy? Given that military ranks and electoral power were predicated upon the citizenship hierarchy, this is a question of essential import. The answer lies in Rome's census<sup>65</sup>. Held at five year intervals, the census required Roman citizens to register themselves, and they were obliged to give many personal and intimate details to the state, which would then be evaluated by Rome's two elected censors. A citizen:

“also had to declare the name of his wife, the number of his children, his property and his possessions, from his slaves and ready cash to his wife's jewels and clothes. The state had the right to know everything ... It was knowledge, intrusive knowledge that provided the Republic with its surest foundations. Classes, centuries and tribes, everything which enabled a citizen to be placed by his fellows, were all defined by the census”<sup>66</sup>.

Any increase or reduction in social standing as decided by the censors would have a direct effect upon a citizen's influence.

This concept is anathema to modern eyes, where a person's worth is not determined by monetary considerations. Some people with considerable personal influence may be more esteemed than others but when considering political capacity (the ability to run for and vote in elections) such considerations are deemed

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at the service of their interests, but if the political rewards are indeed our goal, then we should never tire of courting the voters”. Cicero in Holland, at p.25-6.

<sup>65</sup> This is another feature of Roman life which endures in modern times and is essential in determining the make-up of any State.

<sup>66</sup> Holland, at p.96.

unimportant in modern western liberal societies which are run on the basis of one person one vote.

Becoming involved in politics was a means of social advancement, as was seeking honours in the army: both tactics worked for such Roman luminaries as Sulla, Julius Caesar and Octavian. However, all Roman citizens sought to improve their standing or that of their children in order to reap the associated benefits of wealth, recognition and security. Frustratingly, however, “the higher a Roman climbed, the more fresh vistas emerged, to tempt him on further”<sup>67</sup>. In many ways, this is not a problem which is replicated to such a degree in modern societies, as the automatic inclusion of all parties (albeit with the exceptions outlined previously) in the citizenry precludes the necessity to scramble for social recognition.

It could be argued that this flaw in *civitas* is further highlighted when considering that despite its hierarchical nature, citizens did not so much seek opportunities for societal change, as the chance “to do better out of it. Inequality was the price that citizens of the Republic willingly paid for their sense of community”<sup>68</sup>. From this we can see reinforced the notion that Roman society and its construct of citizenship was far from being about social equality, or creating a level playing field. It was not something that sought to improve the lives of all sectors of society. Whilst modern citizenship does not automatically have social betterment at its core, it is true that modern governments accept the notion of a minimum standard of living and have as a goal the ideal that no citizen shall live below that level. In this sphere, we can see that the aspirations of modern citizenship have moved beyond those of its predecessors.

To the Roman mind, however, competition was not a bad thing. In fact, the sense of competition engendered by the Roman model had a positive effect, as Romans realised that there had to be limits to personal thirst for glory: to be too shameless in one’s search for glory was ultimately frowned upon and reduced the individual’s standing.

“The good citizen, in the Republic, was the citizen  
acknowledged to be good. The Romans recognised

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<sup>67</sup> *ibid.*, at p.93.

<sup>68</sup> *ibid.*, at p.95.

no difference between moral excellence and reputation, having the same word, *honestas*, for both. The approval of the entire city was the ultimate, the only test of worth ... Praise was what every citizen desired – just as public shame was his ultimate dread. ... To place personal honour above the interests of the entire community was the behaviour of a barbarian. ... In their relations with their fellows then, the citizens of the Republic were schooled to temper their competitive instincts for the common good”<sup>69</sup>.

Therefore, despite the feeling of community that it engendered, it appears that the rich sought to shore up their positions whilst the poor wanted merely to become rich: *civitas* was more about competition than anything else. Modern citizenship appears more welfare and equality based.

An important and noteworthy aspect of *civitas* is that it was, effectively, a brand, as demonstrated both by the fact it was sought after by foreigners and by the fact that it was recognised as a protective shield for travellers. To be a Roman citizen was to be backed by the wrath of Rome should any harm befall you at foreign hands. I would suggest that citizenship of any polity, whatever its scope, only has value if it generates external recognition.

Unlike in Ancient Greece, where travelling outside one’s State rendered a member of the *demos* nothing more than a *metic*, travelling within the Roman Empire did not alter the status of a Roman citizen. Greece at that point did not exist as a country but as a collection of city-States. It was much the same in Italy, as Rome was a city-State as were Samnium and Campania. However, such was the value of *civitas* that natives of the other Italian States sought it: it had external recognition and was desirable. Obviously, when considering the vastness of the Roman Empire, we are presented with a further problem, in that it was so extensive that it was unlikely many citizens would come into contact with non-Roman subjects owing to travel and financial limitations. That being said, countries such as Egypt (before it was subsumed into the Roman

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<sup>69</sup> *ibid.*, at p.5.



Empire) did recognise and accord status to Roman citizens (Holland). This demonstrates a clear linear evolution of the value and enforceability of citizenship.

There were many positive aspects of *civitas*. It was a more open concept than the Greek *demos*, permitting men to join its ranks and extending beyond the city confines. It created a sense of community amongst its holders and inspired people to aspire to its acquisition. In addition, it generated a sense of competition which led to innovation and a vibrant economy. Nonetheless, like the Greek *demos*, it was highly exclusionary, with women publicly prevented from being involved in political life and largely ordered to remain at their father's home until they were married and from there to pass to that of their husband (ideas which are objectionable in western modern life). Owing to its hierarchical nature, it was not of equal worth to all those who held it. Nevertheless, it was a symbol of freedom and raised individual standing, opportunity and political rights. These are admirable elements which we see replicated in many modern forms of citizenship. However, Roman citizenship was not the final embodiment of the idea from which modern citizenship is derived.

### *Citizenship in the 'Dark': Al-Andalus*

Whilst most of Europe languished in the Dark Ages, the Arab state of Al-Andalus brought wealth, power, learning and advancement to the Iberian Peninsula. Wrested from the Visigoth King Rodrigo<sup>70</sup> in 711 by the Arab general Tariq, Al-Andalus survived for more than seven hundred years. At its height it stretched across almost the entire Iberian peninsula (excluding the Basque country) into southern France<sup>71</sup>, but in the end Granada was the last stronghold of Islamic Spain. Al-Andalus was the name given by the Moors to both Spain and Portugal. At that time Portugal was one entity, but "Spain" was a collection of states, *inter alia* Leon, Castile, Navarre, Granada. During the period of Al-Andalus' existence some of these 'Spanish' states merged until, with the marriage of Ferdinand and Isabella and the subsequent conquest of Granada, Spain was to all intents and purposes a unified entity.

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<sup>70</sup> Also known as Rodric.

<sup>71</sup> At that time "France" was not an entity but, like most of Europe was constituted of smaller states.

Al-Andalus did not survive for 700 years in a state of uninterrupted peace. At various times the balance of power shifted among the Muslim overlords, with fundamentalists from North Africa at one time overpowering the more tolerant Arab leadership and attempting the forced conversion to Islam of Christians and Jews. At other times such behaviour had been not just frowned upon but not even attempted by the Arab rulers, as they recognised Christians and Jews as fellow “people of the book”<sup>72</sup>. (Conversion to Christianity was ultimately enforced upon Jews and Muslims by the Catholic Kings, Ferdinand and Isabella, following the reconquest and in breach of the terms of surrender of Granada). In addition, Al-Andalus shrank in that period, with incursions from the Catholic Kings from the North and from France, as well as the ultimate reconquest, at various times changing the peninsula’s political geography until Al-Andalus solely represented Granada and Cordoba. For the purposes of this section, Al-Andalus will be used to denote the entire peninsula, not merely that section of Spain under Muslim rule.

### *Religious Citizenship*

Citizenship in Al-Andalus was not construed so much along traditional Greco-Roman lines, nor indeed in modern terms, rendering it something of an aberration in western Europe. Instead, it was formed much more according to religious groupings. In its 700 year existence the fortunes of different religious communities varied depending upon the successes or otherwise of various armies. That being said, opportunists, such as El Cid, saw that by joining the armies of a different religion (El Cid was Christian, yet at one time served Arab military masters) there were many opportunities for advancement and increased standing. There was not democracy in modern terms – in fact, leaders of the day were aware of the state’s very lack of legitimacy<sup>73</sup> – and more often than not political power was determined either by nepotism or familial wealth and rank, both within the Muslim controlled state<sup>74</sup> and without. Nonetheless education, literacy and military strength contributed to one’s status as a citizen of Al-Andalus. The illiterate were most commonly members of the lowest class, whilst education provided a

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<sup>72</sup> “people of the book”, or *dhimmi* were accorded special status. Menocal, at p.72.

<sup>73</sup> Reilly, at p.55.

<sup>74</sup> *ibid.*, at p.57.

stepping stone to religious/community leadership and/or positions in councils or at court.

In this brief overview of Al-Andalus' social make-up, however, certain things have become evident. In common with Roman society, Al-Andalus enjoyed a hierarchical structure, with those of the lower classes enjoying the least influence. The army was a viable route for advancement, and power generally stayed in the hands of those who were already wealthy or influential. In addition, Al-Andalus was far from being an entirely different beast from the other examples of citizenship's development that I have chosen to examine: slavery was rife, both for Muslim and Christian traders; there was a massive disenfranchised underclass and there was no real role for women. Occasionally there are records of female courtiers and/or poets in Al-Andalus contributing to Council meetings<sup>75</sup> (albeit that such accounts are rare) and the Castilian Queen Isabella was at that time unique in the way in which she seized, extended and then maintained power.

What, then, makes Al-Andalus such a different example of citizenship from its predecessors? The religious divides are the most obvious difference between Al-Andalus and all other ancient models of citizenship. The Moors constituted a minority in Spain and relied upon the support of the conquered, who largely remained in power or as consultants in the immediate aftermath of the conquest<sup>76</sup>, to ensure the smooth running of the State. Indeed, they were positively welcomed by certain of their new subjects, the Jews, who perceived that the arrival of the invaders could well promote their standing in society by ending the persecution which they had suffered beforehand<sup>77</sup>. As a consequence, the survival of Al-Andalus can in general terms be ascribed to the notion of *convivencia* which permeated political and social life. That being said, as Muslim command dwindled, so did the application of *convivencia*. As the Arabs fought to maintain their foothold in Al-Andalus the freedoms which they had extended to others became more restrictive (with Jews and Christians alike suffering various indignities, and many Christians choosing to move North to the Catholic-held states)

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<sup>75</sup> "An Islamic History of Europe", Rageh Omah, BBC3 15/01/2009.

<sup>76</sup> Reilly, at p.61.

<sup>77</sup> Lowney, at p.32.

and some non-Muslims decided to seek sanctuary beyond the confines of Moorish control.

*Convivencia* is the principle of tolerance, or living with one another. Towards the end of Al-Andalus' existence the Moors' pre-eminence was secured by virtue of the fact that Christians lacked strong leaders and the Jewish population's leadership lacked the desire for social change<sup>78</sup>. Arguably the latter can be attributed to the fact that they felt certain that they would be better treated with the maintenance of the status quo than under Christian rule. *Convivencia* was manifested most clearly in some of the following ways. Scholars (education was, perhaps as a foreshadowing of Marshall, viewed as a stepping stone to full status as a citizen) worked side by side in translating ancient works. Decrees were passed to ensure the continued worship of the three faiths side by side under Muslim rule (interestingly this was one of the first things to suffer in the wake of the decline of Muslim control), albeit with restrictions placed on the height of steeples and the loudness of bells<sup>79</sup> used in worship. These covenants, called *dhimma*, were in fact granted to the local Jewish and Christian populations because they belonged to a form of organised worship: pagans on the other hand did not continue to live an irreligious life unhindered – they were positively pursued with the intention of forcing them to convert to the Islamic faith<sup>80</sup>. Furthermore, physical manifestations of *convivencia* can be demonstrated in the churches and other architecture of the time which indicate that Muslim architects and builders worked alongside Christian and Jewish counterparts.

A better illustration of this practice is that Al-Andalus produced, during its existence, “the most creative, prosperous Jewish civilization of the medieval era ... Spain's Jews created and nurtured what dazzled scholars called a Jewish Golden Age. Their legacy still enlightens Jewish and world thought, long after the living flame of that Golden Age was swamped in watery exile or snuffed out at the charred stake”<sup>81</sup>. Whilst most of Europe subjugated and excluded the Jews, Al-Andalus provided for some

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<sup>78</sup> Reilly, at p.79.

<sup>79</sup> *ibid.*, at p.56.

<sup>80</sup> Menocal, at p.72.

<sup>81</sup> Reilly, at p.145.

considerable time a mostly stable atmosphere in which they could begin to settle and enjoy life alongside other religions.

It would be a sweeping generalisation to say that throughout its seven hundred year existence Al-Andalus was a beacon of religious enlightenment, however. During one period of upheaval, a more hard line approach to religion was taken by the Muslim occupiers. In 1148 North African invaders (traditionally more strict in their observance of Islam) entered Spain and, after gaining power, caused a dramatic reversal in the fortunes of both Jews and Christians. Instead of *convivencia*, both religions suffered for their religious differences. Both religions were “proscribed”<sup>82</sup> and places of worship were closed. One measure of the degree to which integration had occurred in Al-Andalus is that, in the absence of concerted pressure to adopt Islam, the native population had come to adopt the dress of the occupiers. However, following the 1148 invasion this situation was altered: “Jews were forced to don distinctive costumes, and both Christians and Jews were pressured to convert”<sup>83</sup>. Periods such as these were the flip-side of religious citizenship: just as there could be effective equality of opportunities, religion could also be used as a means of identification, leading to societal stratification. Nonetheless, it was predominantly the case that, under Muslim rule, Spain enjoyed a greater degree of religious tolerance, social integration and equality than had been the case under Visigoth rule, or than would be following the reconquest by Ferdinand and Isabella.

#### *The Growth of ‘Traditional’ Citizenship*

The change from a religious citizenship to a more ‘familiar’ brand of citizenship did not instantly coincide with Spain’s unification in 1492. It was a more gradual process, occurring as a result of encroachment from the North into the Muslim controlled portion of Al-Andalus. In northern Spain in the 12<sup>th</sup> century advances were made in the realm of political citizenship as towns became larger and more economically viable. There was a wholesale urbanisation and with it institutions were

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<sup>82</sup> *ibid.*, at p.146.

<sup>83</sup> *ibid.*.

developed wherein the citizens (those on the *consejo*, or council) could participate in decision-making in the form of the development of a municipal code<sup>84</sup>.

This conferral of power to the people (albeit in a limited sphere and to a limited section of the population) took power away from the Church. Religion had traditionally been the seat of power and rank in the Iberian peninsula, but this new citizen class was largely composed of home owners or city-dwelling business men<sup>85</sup> (again we see, for the Northern Christian territories, a geographical element in citizenship) meaning that the vast majority were excluded from political power. As was the case in Rome, the mob could be called upon to lend physical support to one quarter or other, but citizenship was largely predicated upon wealth. The criteria for holding citizenship were such that it was an open form of citizenship, but it was realistically very unlikely that the ranks of citizens would swell dramatically.

However, with the advent of the 12<sup>th</sup> century the situation was altered. Citizenship in a form more familiar to a modern spectator was facilitated by the *reconquista*, the reconquest. In pursuing an attempt to drive the Moor out of Al-Andalus, citizenship became open through the traditional avenues of patronage, wealth and the military. Campaigns against the Muslims provided ample opportunity for the lower classes to push for social advancement and thereby claim the accompanying political advantages. The nobility became subject to a hierarchy all of its own, with the older, more established, families occupying the top ranks, above two strands of lesser nobility below them, both of which were propertied. The underclass was, at times able to gain entry to these lower nobilities by their martial exploits. Indeed various military orders became substantial land owners following campaigns in Andalusia<sup>86</sup>.

### *The Death of Convivencia*

The reconquest saw the end of the religious citizenship of Al-Andalus and entrenched more firmly the traditional and familiar Greco-Roman form. The nobility

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<sup>84</sup> *ibid.*, at p.144.

<sup>85</sup> *ibid.*, at p.145-6.

<sup>86</sup> *ibid.*, at p.149.

had the most to gain from the reconquest in terms of acquisition of land and personal wealth, whilst its object was ostensibly to remove the last of the Moorish ruling class from Spanish soil (the principality of Granada) and to restore Catholicism. Notice that the Jews had nothing to gain as such from the reconquest and that those living under Muslim rule (albeit only 1% of Granada's then population<sup>87</sup>) had much to lose in terms of personal freedoms. The reconquest was a Christian occupation.

However the reconquest was not the sole reason behind the collapse of *convivencia*. Beyond Granada's borders there lived many Muslims, commonly derisively called *mudejars*<sup>88</sup> who had lived under various Christian Kingdoms. Like the Jews they lived largely in ghettos and had jobs as artisans, although inevitably there was a degree of intermingling. For some time Muslims and Jews were allowed to practice their religion and travel freely, provided they answered directly to the relevant Crown and paid special taxes<sup>89</sup>, and forced conversions were exceptional.

Religious citizenship was still evident after the reconquest when we observe that the Jews became subject to more rigorous forms of persecution. There were attempts to force conversion (those who did convert being known as *conversos*), Jews were made to wear distinctive badges, their taxes could be summarily increased and segregation was enforced. The advent of the Inquisition led to Jews being pressed to incriminate *conversos* for non-adherence to Christian life. However, with the completion of the reconquest in January 1492 following a fifteen month siege of Granada, the position of the Jews changed yet more dramatically. Months after the surrender treaty with Granada was signed, Ferdinand and Isabella decreed the expulsion of all Jews from

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<sup>87</sup> *ibid.*, at p.191.

<sup>88</sup> The term *mudejar* is contested. It is used to refer to Muslims remaining on Christian land without changing their religion, but is also used to denote inferior status, or entry into a state of vassalage. It has been postulated that the word is etymologically linked to words meaning "domesticated" or "tame" when referring to animals and was probably bandied as a taunt more than anything. All from Harvey, at p.3-4.

<sup>89</sup> Reilly, at p.199. This tax was imposed solely because the Jew or Muslim was a Jew or Muslim, subject to the Crown.

Spain<sup>90</sup>. Moreover, the Jews' status as lower people was re-enforced by the prohibition of their removing wealth from the country and the levy of an entry tax into neighbouring Portugal<sup>91</sup>.

The terms of the Treaty of surrender signed in 1492 seemed more palatable for the Muslims remaining in Spain. However, within a decade they too suffered for their religious difference as they were forbidden to speak Arabic, practice their religion, or wear their traditional dress. Ultimately religious citizenship came to an end in 1502 when Ferdinand and Isabella ordered the mass baptism<sup>92</sup> or exile<sup>93</sup> of all Muslims, leaving non-converts to flee. This treatment at one and the same time shattered the terms of the surrender Treaty and demonstrated that Muslims had been viewed as an underclass in the newly united Spain. The demise of *convivencia* and the religious citizenship that was associated with it can be seen most clearly from the epitaph on the tomb of Ferdinand and Isabella, which reads, "Destroyers of the Mohammedan sect and the annihilators of heretical obstinacy"<sup>94</sup>.

The importance of the citizenships of Al-Andalus lies in the demonstration that citizenship can be predicated on grounds other than birth and that it could be formed in a realm that was not political. Also, it serves as a useful indication of the importance of education and tolerance in forming a coherent, inclusive and growing state. These ideas can be seen in most modern day states: more and more reference is made to multiculturalism and emphasis placed on accessible education as a right, signifying that these are two facets of modern living which must be incorporated in any current conception of citizenship.

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<sup>90</sup> The order to depart ordered "the said Jews and Jewesses of our kingdoms to depart ... and never return". Lowney, at p.241.

<sup>91</sup> *ibid.*, at p.243.

<sup>92</sup> "An Islamic History of Europe", BBC3 Rageh Omah, 05/01/09.

<sup>93</sup> Lowney, at p.250.

<sup>94</sup> *ibid.*, at p.254.



### *Revolutionary Citizenship.*

The next most significant stage in citizenship's evolution occurred during the periods of the American and French Revolutions<sup>95</sup>. The Revolution in America was an attempt to overthrow what was effectively foreign rule, whilst the French Revolution had the purported aim of overthrowing the aristocracy and creating a brotherhood of equal citizens. Citizenship in this period was a somewhat different commodity from that of the old world. It is possible to perceive Revolutionary citizenship of this period as the foreshadowing of what we now consider 'modern citizenship'. Fahrmeir states that:

“the almost simultaneous emergence of the ‘citizen’ as political actor, conscripted soldier, and passport-holder is usually seen as marking the invention of modern citizenship as membership of a society of equals governed democratically. The exclusion of women and the poor from citizen status in the revolutionary era therefore appears as a failure by revolutionaries to live up to their principles”<sup>96</sup>.

From this extract we can see that whilst it had noble aims, revolutionary citizenship fell somewhat short of its purported ideals. Despite the notion that all men were equal (as stated in both the French Declaration of the Rights of Man and of the Citizen and the American Constitution ) it would seem that in terms of Revolutionary citizenship, some were more equal than others. Importantly, this is indicative of a clear linear progression from the *demos* and *civitas* to more modern forms of citizenship.

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<sup>95</sup> Whilst the American Revolution pre-dated, and in some ways acted as a model for later French Revolution(s), it will be considered second in this discussion. The reasons for this re-organisation are geographical rather than ideological, with France being spatially closer to the states from which other citizenship examples have been drawn and part of the Union whose citizenship forms the basis of the rest of this thesis.

<sup>96</sup> Fahrmeir, at p.27.

In Revolutionary France, there were three Constitutions in four years. These had broadly similar features but there are some very important differences between how the concept of citizenship and its intended scope was defined in each. Indeed, as will be demonstrated below, it is possible to say that the 1791 Constitution and its 1793 replacement were progressive in outlook having a broad application. In contrast, the 1795 Constitution was more restrictive and, possibly because it was the product of a state seeking to establish itself and its ideals, moved more towards the exclusionary models of Greece and Rome, which could be seen as more stable.

A positive feature of Revolutionary citizenship was that it affirmed the notion that to be a citizen demanded a degree of political participation and representation and that without these things the state lacked legitimacy: in this sense, Revolutionary citizenship emanated features of *Republican citizenship* (i.e., the notion of civic self-rule) found in the earlier Athenian and Roman models (and revived during the Renaissance) and espoused by writers such as Aristotle<sup>97</sup>. In addition the citizenry under the Revolutionary banner had no real standing nor citizenship any value. In the words of Robespierre:

“All citizens, no matter who they are, have the right to aspire to every degree of representation... [s]overeignty resides in the People, in every member of the populace. Each individual therefore has the right to a say in the laws by which he is governed and in the choice of the administration which belongs to him. Otherwise it is not true to say that all men are equal in rights, that all men are citizens.”<sup>98</sup>.

This notion is one that is a fundamental part of modern citizenship: it seems unfathomable that today's citizens would be deprived of the opportunity to exercise political rights, and to do so (as was the case in the USA until the end of segregation, for example), is seen as exclusionary and highlights some lack of legitimacy in a State's

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<sup>97</sup> Aristotle, “Politics”.

<sup>98</sup> Held, at p.115.

political workings. It is fundamentally undemocratic and has, as far as possible, been eradicated in citizenship's western liberal political incarnation.

The American Revolutionary model of citizenship was an attempt to repudiate monarchical rule and to bring unity to a vast continent of disparate colonies. The success of this attempt was ultimately not complete, but it was a significant step forward in citizenship's evolution, and the results have spilled over and, to a certain extent, are found in some forms of modern citizenship.

### *The 1791 and 1793 Constitutions of France*

It is interesting to note that under these Constitutions, the word citizen had universal application<sup>99</sup>. From the outset Revolutionary French citizenship seems more inclusive than Greco-Roman conceptions. It was enforceable from the age of majority (i.e., 21). However, this perception is somewhat optimistic, as French citizenship was subdivided (evoking memories of *civitas*), with the different categories having different worth. In fact, the 1791 Constitution “was, without contradicting the Declaration of Rights, able to create the category of ‘passive citizens’, who didn’t vote, but who, because they were represented were, nonetheless, citizens and had political rights”<sup>100</sup>. From this, we can see that French Revolutionary citizenship had a strong emphasis on its political rights dimension and that, as there were “passive citizens”, there must also have been “active citizens”.

It would seem that the 1791 Constitution attempted to convey a sense of social inclusion and community by making citizenship a blanket notion, covering all sectors of society. A Frenchman or woman was a ‘citizen’ regardless of whether or not they had the right to vote which we have to consider is implied in the possession of political citizenship. This is reflected in modern societies, where every member of a polity, whatever their age or gender, is deemed a citizen irrespective of whether or not they are free to exercise political rights<sup>101</sup>.

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<sup>99</sup> That is to say, to both men and women.

<sup>100</sup> Troper, at p.30.

<sup>101</sup> Meaning, prisoners and minors.

As is the case in modern society, French citizenship was centred on the notion that “men are born and remain free with equal rights”<sup>102</sup>. Equality was, nominally at least, the foundation stone of French society in the wake of the Revolution. Therefore, although the political rights pertaining to citizenship could only be utilised by ‘active citizens’, it was believed that all French people “would be citizens in the broader sense of the word because they would all have civil rights”<sup>103</sup>. Consequently, as is the case in modern times, French Revolutionary citizenship was a multi-faceted entity, composed of a multitude of rights and obligations. It appears to be a semi-inclusive concept, with the ‘passive citizens’ able to wield civil, rather than political, rights, and the Constitution’s own wording of citizenship appears to support this perspective. French citizens were:

*“Ceux qui sont nés en France, d’un père français; ceux qui, nés en France d’un père étranger, ont fixé leur résidence dans le royaume; ceux qui nés en pays étranger d’un père français sont venus s’établir en France et on prêté le serment civique; Enfin, ceux qui, nés en pays étranger et descendant à quelque degré que ce soit d’un Français ou d’une Française expatriés pour cause de religion viennent demeurer en France et prêtent le serment civique”*<sup>104</sup>.

On the face of it, this model is highly exclusionary as the wording above seems to apply only to men. This should not strike us as strange given that traditionally citizenship has been the province of men alone. Nonetheless, it is significant that French revolutionary citizenship is clearly open to expansion, including those who are,

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<sup>102</sup> Article 1, 1791 Constitution, Troper, at p.30-31.

<sup>103</sup> *ibid.*, at p.32.

<sup>104</sup> “Those who were born in France to a French father; those who were born in France to a foreign father, who are now resident in the Kingdom; those who were born in a foreign country to a French father, but have come to take up residence in France and have taken the civic oath; finally, those who were born in a foreign country and descended to a certain degree from a French man or woman who emigrated for religious reasons, who have come to take up residence in France and have taken the civic oath”. *ibid.*, at p.33.

to all intents and purposes, foreigners. Citizenship, under this construction, contains elements of both *ius soli* and *ius sanguinis*: there was a desire to include people with some tie to France, either by virtue of birth or heritage. Furthermore, Article 3 of the 1791 Constitution contains other grounds for extending French citizenship to foreigners who do not satisfy one of the above criteria, namely: a residence period<sup>105</sup>, the taking of the civic oath *and* acquisition of property or marriage to a French woman (thereby indicating that women were of some importance in the formation of citizenship, even if that was not reflected in terms of political participation), or establishing an agricultural/business venture<sup>106</sup>. This seems to be evidence of the first form of the naturalisation processes which we see in all western liberal societies today: citizenship of one place could be shed and a new one acquired. Moreover, we see a linear progression of citizenship from the *demos*, to *civitas* and beyond: *civitas* was accessible to soldiers and by invitation to extraordinary non-Romans, yet revolutionary French citizenship could be acquired much more freely.

Interestingly, the 1793 Constitution took a different approach. It abandoned the reliance upon *ius sanguinis* and reduced the residence period for naturalisation. It had a different definition of who was permitted to “exercise the rights of French citizens”<sup>107</sup>, and was somewhat wider in construction<sup>108</sup>. These alterations made it a more inclusive concept than the 1791 model and, owing to the shorter residence requirements, rendered it somewhat more liberal than the naturalisation processes of today’s major western nations<sup>109</sup>. Therefore, this conception of citizenship is, perhaps, one from

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<sup>105</sup> A residence period of five years.

<sup>106</sup> Troper, at p.33.

<sup>107</sup> Fahrmeir, at p.40.

<sup>108</sup> *ibid.*, “It admitted the following people ‘to exercise the rights of French citizens’: anyone born in France, after reaching the age of 21, any alien over 21 who had lived in France for one year ‘of his own labour’; had adopted a child, nourished an aged person, acquired a property or married a French woman or was considered worthy by the legislative assembly. A civic oath was no longer required. The combined effect of the 1790 Decree, the 1791 Constitution and the 1793 Constitution was to turn almost all alien residents of France who did not wear uniform into French citizens as a matter of right, regardless of whether they desired this to happen.”

<sup>109</sup> Discussed below.

which lessons can be learned. Admittedly, population sizes today are considerably greater than they were two centuries ago. Nonetheless, extremely stringent naturalisation processes are much less democratic than this model's and are also more exclusionary. Revolutionary France required foreign nationals to make some contribution to the French state (either through marriage or the economy) and it is not unreasonable to expect some form of societal contribution from those wishing to join the citizenry. However, the 1793 Constitution seemed to strike a fair balance between contribution and inclusion, with its attendant political and civil rights.

Another feature of this period of French revolutionary citizenship which echoes those of Greek and Roman and even Al-Andalusian forebears and is replicated in modern times is the feeling of community which it fostered. Troper states that political rights arose from the 1791 Constitution, which in turn was generated by a feeling of nationalism, otherwise known as a sense of "belonging"<sup>110</sup>. This sense of community is, therefore, an essential constituent of citizenship as we have come to perceive it.

#### *The 1795 Constitution*

Whereas the preceding Constitutions had made French citizenship more inclusive, and created political and civil rights which could be wielded by a greater proportion of society (making citizenship recognisable as a modern entity), the 1795 version took a more retrenched approach to the issue. This could perhaps stem from the political instability of the preceding four years, a period of volatility which claimed the head of Robespierre himself, despite his contribution to the Revolution.

Part of this retrenchment is evidenced by the restrictions applied to the previously liberal and open naturalisation process and by the removal of French citizenship from those who acquired it by accident of birth, i.e., *ius soli* now had to be combined with continued *residence* in France. The naturalisation process was altered in the following manner: a declaration of intent to create a fixed domicile was required, as well as an increased period of residence to seven years, which went beyond even the period attached to the 1791 Constitution, or marriage to a French woman. The ability to

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<sup>110</sup> Troper, at p.34.

determine a fixed domicile necessitated some considerable personal standing. Thus the 1795 constitution heralded a return to the idea of citizenship accompanied by wealth, thereby surely excluding many resident outsiders who wished to become French citizens.

In addition to this, the political sphere of the 1795 Constitution was also quite limited. Many of those eligible to act politically declined the opportunity<sup>111</sup>, meaning that the political element of French citizenship was vested in the few and continued to exclude ‘citizens’ such as women and children, who could nonetheless continue to be determined *passive citizens* but be deprived of what would in the modern west be characterised as *meaningful* aspects of citizenship. Not only that, but the 1795 Constitution contained mechanisms by which those eligible for citizenship of a political nature (irrespective of whether or not they chose to exercise it) or otherwise, could lose that eligibility should they lose their “respectability”<sup>112</sup>, i.e., acquire a criminal conviction or become bankrupt. This is an important development as it prepares the ground for people to become ‘uncitizens’. This is most commonly a feature associated with modern citizenship in the political realm, although social and civil rights usually remain in place. Therefore, the wholesale loss of status, alongside the certainty that citizen status cannot be automatically acquired by moving to another country, renders the 1795 Constitution particularly severe.

The three constitutions foreshadowed modern citizenships in that they all bestowed the title ‘citizen’ universally, regardless of the types of right the ‘citizen’ was entitled to exercise. This feature was removed in 1803, when the Civil Code formulated a separation of nationality and citizenship. It “separated ‘the quality of being French’ from political rights, introducing a difference between a ‘nationality’ of men, women, children, servants, bankrupts or criminals and a ‘citizenship’, which conferred political rights on respectable and independent adult males, as defined in the constitutions”<sup>113</sup> and it totally removed the acquisition of citizenship by virtue of *ius soli*. The significance of this is great. It utterly undermined the progress of the 1791 Constitution in promulgating “passive citizenship”, which is reflected so often today in the civil and

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<sup>111</sup> Fahrmeir, at p.40.

<sup>112</sup> *ibid.*.

<sup>113</sup> *ibid.*, at p.41.

social rights of minors. It had the consequence of restoring the underclass of women and children, whilst adding to it poor men and criminals, and prevented it from being an open entity, set to include future generations of those born on French soil. The Civil Code completed the return to existence in France of a citizenship which would have been familiar to Ancient Athenians and seems to break the link between French Revolutionary citizenship and modern conceptions.

Nonetheless, it should be noted that at no stage of the French Revolutionary citizenships was equality really a fundamental element of 'citizenship'. The disparity between the rights available to those called 'citizens' varied widely and from a modern perspective this situation is untenable.

#### *American Revolutionary Citizenship*

The Revolutionary period in the Americas pre-dates that of France, but serves for the purposes of this paper as a comparative approach to citizenship. Before the Revolution the Americas had been subject to British rule. The overthrow of the British led to much consideration of what it meant to be a citizen and much argument over who should be entitled to pursue the rights attached to that citizenship. Interestingly the concept of citizenship in this period was broadly of a political nature which, despite the manifold nature of modern citizenship, is broadly reflected today. There was discussion of equality in the franchise, a feature which we would demand in modern times, but at the outset of the Revolution the franchise was (mostly) restricted to propertied adult white men.

In some respects however, American Revolutionary citizenship was a reframing of what had come before. That is, land ownership requirements were attached to political citizenship. The Constitution did not contain any specific conferral of the vote<sup>114</sup>. Instead, the pre-existing rules, established by the British for the colonies, required that those entitled to vote be adult males who owned property<sup>115</sup> a requirement justified by stating that only those in this position would have sufficient "independence"

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<sup>114</sup> Keyssar, at p.4.

<sup>115</sup> *ibid.*, at p.6.



to enable them to cast a free vote. Those with an undoubted economic dependence (including women and labourers) could not be trusted with the vote.

In addition, there were colonies which attached residence requirements to the franchise, thereby excluding vagrants and those who travelled in search of work. More particularly women were excluded because their supposed “delicacy”<sup>116</sup> meant they were unfit to enter into the cut and thrust of political life. This must be countered, however, with the concession that in New York counties and some Massachusetts towns, propertied widows (i.e., economically independent women) *were* enfranchised. Also prior to the Revolution some colonies discriminated on religious grounds (unwittingly recreating the notion of citizenship restrictions found in Spain prior to the Moorish occupation in Al-Andalus): Jews and Catholics were each disenfranchised in four or more states.

During the Revolutionary period there was continuous discussion about the future of the franchise. Thomas Jefferson was amongst those arguing for the continuation of property restrictions, as he viewed independence in the voting process as essential. In contrast, advocates of extended suffrage, such as Benjamin Franklin, argued that voting was a natural right which should only be withheld in exceptional circumstances<sup>117</sup>. Unusually, given the modern history of the United States, extension of the vote to African Americans was considered as “the depriving of any men or set of men for the sole cause of colour from giving there [*sic*] votes for a representative ... [was] an infringement upon the rights of mankind”<sup>118</sup>. There was also an argument to extend the vote to all those who had fought in the military (echoing Roman citizenship), as it was deemed unjust that those who had bled to secure the independence of the country should now be deprived of a stake in the future direction of the nation.

The franchise in Revolutionary America posed one problem startlingly different from any that had been faced elsewhere: the problem of the geographical scope of the country. The General election was decided not as it is in modern times, *de facto* by the people, but rather by the College itself. The vote which was sought after was not one which would have a *direct* say in the outcome of a Presidential election. As such, this can

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<sup>116</sup> *ibid.*.

<sup>117</sup> *ibid.*, at p.12.

<sup>118</sup> *ibid.*.

be seen as akin to the modern British procedure whereby the people elect politicians, but it is the politicians themselves who elect the leaders of their respective parties. The system can be said to be democratic and legitimate precisely because the citizens were heard at the outset, even if the ultimate decision as to *who* will wield power is vested in another authority.

In the period between 1776 and 1790 however, the franchise was extended but only in a limited fashion. The franchise in America by 1790 looked like a model for that of the French Constitution of 1795. However, there was not uniformity across the States. In general, in order to hold the vote, a man had to satisfy residency<sup>119</sup> requirements and all states imposed property-holding/tax-paying requirements<sup>120</sup>. In addition, as a model for the later French Constitution, there was a general expectation of good behaviour<sup>121</sup> and religious observance. Nonetheless, some States broke with convention, notably New Jersey which extended the franchise to women and Vermont which, whilst it had a residency requirement, did not impose restrictions which would have withheld suffrage from the poor.

Whilst it was a product of its time, American Revolutionary citizenship can nonetheless be seen as part of the linear progression of citizenship which has eventually led to citizenship as it is formulated today. This is both in terms of its being a precursor to French Revolutionary citizenship and by virtue of its expansion of the franchise: the vote was extended to approximately 70% of the male population. Whilst it is offensive to modern sensibilities in that extending the vote to black men was considered but ultimately dismissed<sup>122</sup>, this conception of citizenship demonstrated that, although narrowly accepted, both the poor and women could be included in the franchise without democracy (and thereby legitimacy) suffering.

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<sup>119</sup> By 1790, ten of the fourteen States had residency requirements of between six months and two years. *ibid.*, Table A1, at p.340-1.

<sup>120</sup> *ibid.*.

<sup>121</sup> Contained in the 1776 Constitution, *ibid.*.

<sup>122</sup> A situation not rectified in America until the Voting Rights Act of 1965, despite the abolition of slavery by Amendment XIII of the Constitution in 1865.

## Modern Citizenships

The preceding discussions of citizenship, with the notable exception of Al-Andalus, may be said to fall broadly under the heading of models of *republican* citizenship. However, citizenship theories also posit another formulation, that of *liberal* citizenship. Interestingly, the Roman model as outlined above shared features of both republican and liberal ideas; republican insofar as those who were deemed citizens were expected to be involved in the running of the state and the making of its laws and that involvement graced the state with legitimacy. In other words, the republican model of citizenship has a high expectation of civic participation in the political activities of the State.

However, where the Romans also display vestiges of a *liberal* citizenship is in the notion that it was not entirely a closed entity: those people conquered were often accorded an opportunity to join the citizenry and, therefore to take advantage of the legal protection that it afforded. Arguably, there were vestiges of this trait visible in French Revolutionary citizenship with its creation of passive citizenship, i.e., citizenship that has little or no role in the actual political activities of the State, but nonetheless bestows certain rights on the holder. Liberal citizenship therefore is instrumental in ensuring the citizens are not merely bound to the state by virtue of the obligations they have in ensuring the State is well-run: arguably, liberal citizenship allows the individual to enjoy a set of rights and freedoms that make life somewhat more comfortable. Ultimately, it is in the modern developments of citizenship as epitomised by Marshall, particularly with the recognition of the competing social and economic interests of the populous, that liberal citizenship really has come into its own and has become the predominant model of citizenship in use in the modern west.

### *Marshall Revisited*

In order to assess modern citizenship we shall return to Marshall and his theory of citizenship as developed in the early 1950s. His theory can be summarised in the following quotation:

“Citizenship is a status bestowed on those who are full members of a community. All who possess the

status are equal with respect to the rights and duties  
with which the status is endowed.”<sup>123</sup>

From this we see that, for Marshall, citizenship is inclusive and exclusive at one and the same time. Once it is obtained it is open to all on an equal footing, but in order to obtain it they must have “full” membership of a given community. How the ‘fullness’ in question is to be ascertained is not discussed, but it can be presumed that he recognises that, habitually, there are requirements for citizenship of a given polity and that these must be met in full. However, if one considers that his conception is contingent on three elements and that most modern states withhold political citizenship until majority is reached, Marshall’s theory of citizenship appears to exclude minors in their entirety. From most perspectives, this is not acceptable.

Another facet of Marshall’s theory is that, for him “citizenship requires a bond of a different kind<sup>124</sup>, a direct sense of community membership based on a loyalty to a civilization which is a common possession. It is a loyalty of free men endowed with rights and protected by a common law”<sup>125</sup>. This approach is found in modern and ancient forms of citizenship. The notion that citizenship is a manifestation of a sense of belonging and of a homogenous state entity is a reflection of modern demos theory and as such forms a central part of modern citizenship.

When considering modern citizenship we have the expectation of certain rights being conferred on the bearer. Indeed this forms one part of Marshall’s conception as outlined above. Amongst these rights is, “... in principle the right of the citizen to a minimum standard of living ...”<sup>126</sup>. There are clearly many others. Conversely, “if citizenship is invoked in the defence of rights, the corresponding duties of citizenship cannot be ignored. These do not require a man to sacrifice his individual liberty or to submit without question to every demand made by government. But they do require that his acts should be inspired by a lively sense of responsibility towards the welfare of the community”<sup>127</sup>. Therefore, in terms of modern citizenship we see the resurgence of

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<sup>123</sup> Marshall, at p.84.

<sup>124</sup> i.e., different from kinship.

<sup>125</sup> Marshall, at p.92.

<sup>126</sup> *ibid.*, at p.111.

<sup>127</sup> *ibid.*, at p.112.

the notion of reciprocity between rights and duties, which was such a feature of Athenian and Roman citizenship. In addition, Marshall's theory demands that the duties demanded be such that they benefit the community as a whole – in other words, it is a further example of the egalitarian nature of modern citizenship.

Unlike Athenian and Roman citizenship, where there was a hierarchy of sorts (most certainly in the case of the Romans) the principal positive feature of Marshall's conception of citizenship is his belief in the "fundamental equality of all citizens"<sup>128</sup>. This belief is indeed a crucial element of most western liberal democratic states and is reflected in many quasi-constitutional documents dealing with citizens and citizenship. For instance, the American Declaration of Independence states that:

“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness”.

It is followed in the Preamble to the U.S. Constitution by the declaration that the pursuit of personal liberty is one of the aims of the nation. Similar sentiments can be found in the French motto and, *inter alia*, those of Turkey, Saint Lucia and Andorra, indicating that equality is a fundamental preoccupation of most States, who see it as essential for ensuring their smooth running and continuation.

Despite the many positive aspects of Marshall's theory, it suffers in many ways from the fact that it is outdated (for instance, he stipulates that military service is a compulsory part of citizenship), that it appears to have been constructed as only applicable to England, that it has as its primary focus a socio-economic aim of advancing lower class workers' status in society (as opposed to a legal one) and that it is now more than fifty years old. Therefore, we must incorporate the positive features of Marshall's work into a more modern and inclusive conception to arrive at a contemporary definition of what citizenship means.

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<sup>128</sup> *ibid.*, at p.120.

## *Citizenship and Politics*

The preceding models of citizenship have all helped to shape the entity of citizenship as we now expect to see it. Many of the features of these older forms of citizenship are visible today. For instance, just as Roman citizenship conferred status and recognition on the holder, so present day citizenship has the feature of external recognition. The consequence of this is that a French national and citizen is recognised as such within the borders of France, but is also recognised as such by foreign governments, e.g. England, and vice versa. This means that modern citizenship has the advantage of being a portable entity, and the protections afforded by being a citizen of a polity can be enjoyed or relied upon (within limits) whilst abroad. Thus, the protection afforded by holding Roman citizenship in the event of assault is replicated in current international law, where the state to which a citizen belongs can seek redress for harm done to that citizen.

There are many additional features that we have come to expect to see in modern citizenship, but chief among these are political features as espoused by Marshall. Given that the progression of democracy can be traced along broadly the same lines as those of citizenship<sup>129</sup> and that, since its origins in Athens, political participation has formed an integral part of citizenship, it is not surprising that we have come to expect citizenship to be invested with political rights for all. However, what may be surprising is that the realisation of this expectation has come about relatively recently.

This can be attributed to the fact that Greek democracy was not without contemporary critics<sup>130</sup>. As a model of majoritarian direct democracy, decisions were subject to frequent change, leading to societal instability. Dunn says, interpreting Plato and Hobbes, that this means that “there can be no lasting shape to a democratic

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<sup>129</sup> For a fuller account see Dunn.

<sup>130</sup> These critics included, *inter alia*, Plato and Aristotle. Plato’s *Republic* has been viewed as a work against democracy, whilst Dunn also states that Plato saw democracy “in essence as an all but demented solvent of value, decency and good judgement, as the rule of the foolish, vicious, and always potentially brutal, and a frontal assault on the possibility of a good life, lived with others on the scale of a community”, in Dunn, at p.46.

community, and nothing reliable about the ways in which power is exercised within it. What this means, ...is that in a democratic community there can be no real security for anyone or anything except by sheer fluke”<sup>131</sup>. Whilst this is a reflection of the misgivings of a bygone age, the threat of political instability in an era when ‘countries’ as a single entity were still in their infancy was one which could not be ignored. The counter argument to extending the franchise to all citizens was that, by restricting the political rights now expected, social stability was more likely. Indeed this seems to have formed a considerable portion of the thinking behind Revolutionary citizenship in the 1795 French Constitution, all the more so when considering that one of the victims of the societal upheaval caused by extending the citizenry and its attendant rights was Robespierre who had been a prominent figure at the outset of the Revolutionary period.

For some considerable time, however, countries, as opposed to City-States, have become the accepted locus of government, with citizenship being vested in the national rather than municipal arena. Once this occurred, any lapse in the extension of the franchise became unpalatable. Nonetheless the practice still occurred.

That being said, equality in terms of political rights is a relatively new reality. To modern eyes it may seem bizarre that the rights we currently take so much for granted are recent innovations. Nonetheless, whilst minors remain disenfranchised (without that causing moral outrage), reaching the age of majority (now usually 18) usually coincides with the obtaining of the suffrage, irrespective of such factors as gender, colour, race or intellect. Indeed, in 1821 it was mooted by James Madison that the denial of suffrage “violates the vital principle of free government, that those who are to be bound by laws ought to have a voice in making them”<sup>132</sup>. Despite this, in the USA, which appears to consider itself a paragon of democratic virtue, this realisation of Madison’s ideals took some considerable time. The enfranchisement of women was granted by Amendment XIX of the Constitution in 1920 (admittedly some eight years before the Equal Franchise Act in Great Britain did the same).

Moreover, whilst slavery was abolished in the USA in 1865, under Amendment XIII of the Constitution<sup>133</sup>, it was not until the Voting Rights Act (VRA) of 1965 that

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<sup>131</sup> *ibid.*, at p.45.

<sup>132</sup> Madison, in McCoy, in Held, at p.83.

<sup>133</sup> United States Constitution.

the vote was fully extended to black citizens. Since then, the VRA has been subject to repeated ratification and not all the States have been in favour of its application. This is one example of the ways in which both citizenship and democracy can be threatened: democracy cannot always be pushed forwards where those in power are not in favour of conferring rights equally and unequal application of citizenship rights cheapens the concept in itself and brings into doubt the legitimacy of the State which proffers it.

Perhaps the most horrifying and offensive fact to our modern sensibilities (and a further illustration of the point made above) is that it was not until 1971 that the right to vote was afforded women in Switzerland, despite the pre-existence of the United Nations Convention on Political Rights of Women 1952, which stated that “women shall be entitled to vote in all elections on equal terms with men without any discrimination”<sup>134</sup>. This can be seen in two ways. The first would lead us to condemn Switzerland as a backward, undemocratic backwater of Europe lacking in legitimacy and seemingly rife with inequality and then to go on to state that citizenship is still dogged by androcentric tendencies. The other would persuade us to take a more positive approach to Switzerland’s model of citizenship and consider that citizenship is obviously still a work in progress. In so doing it is possible to accept that different states can legitimately take different approaches to citizenship construction and to open up to the possibility that *novel* models of citizenship can still come into being. If some states may legitimately adopt certain facets more slowly than others, so other states may adopt new features which may seem unusual until they become more accepted. In such a way it is possible to expand notions of citizenship from being purely male dominated or political to incorporating social and economic rights and to developing notions of both national and supranational citizenship.

For some academics, citizenship is nothing if it is stripped of its political nature. Such commentators would have it that citizenship, at whatever level, is intended to denote “the relationship between an individual and a *locus* in politics”<sup>135</sup>. Dobson goes on to state that citizenship is not citizenship unless rights and duties and a sense of belonging are accompanied by political standing, yet I would suggest that this

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<sup>134</sup> United Nations Convention on the Political Rights of Women 1952, [www1.umn.edu/humanrts/instree/e2cprw.htm](http://www1.umn.edu/humanrts/instree/e2cprw.htm) last accessed 09/04/12.

<sup>135</sup> Dobson, at p.20.



conception is fundamentally flawed. Whilst the concept of the *passive citizen* of the French revolutionary period was intended to create a sense of belonging in a tumultuous period for those not given political rights, it is worth remembering that, in a sense, it still exists as it remains applicable to minors who are deemed citizens under any modern interpretation of the word. Whilst it is true that the predominant focus of this paper has lain with political citizenship it remains nonetheless significant that there are many models of citizenship, many of which have considerable credence and not all of which rely upon political considerations.

### *The Making of the 'Demos'*

Accepting the idea that for there to be a democracy there must be a demos, it follows that there must also be a demos to make up a citizenry. In the popular imagination, it may be that the demos is thought of as a static entity: this was certainly so in the case of Germany – until the point of reunification where “until the fall of the Wall and the discovery that East Germans were almost unrecognizable cousins, there was a very clear assumption about ‘being German’ simply because one’s parents had been”<sup>136</sup>. However, as the citizenry of a state is redefined in the course of a state’s development, so the demos must face various phases of evolution and changes in definition: like citizenship itself the notion of the demos must be fluid. Each State’s expectations of the demos varies and becomes most evident in naturalisation processes, as will be outlined below. Broadly speaking, however changeable the demos is, it is accepted that there must be some homogeneity of language, culture, beliefs and a general sense of social cohesion: when such factors are present the people making up the demos can expect to be treated as equals as they all share a stake in this collective identity.

In addition to these ideas there have also been other societal advances which have stimulated the growth of the idea of the demos. The first of these was state-building, which served to create sovereign, political entities. The second was the development of industrial, commercial economies, acting as a spur to standardisation of measurements, cross-border travel for trade and the creation of civil and economic

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<sup>136</sup> Fulbrook and Cessarini, in Cessarini and Fulbrook, at p.213.

rights. Lastly came a phase which saw the development of national consciousness and, with it, common languages, which in turn helped foster a sense of community between co-nationals. How these three phases contributed to the establishment of a *demos*, I will consider below.

The first phase was responsible for establishing the fundamental principle of equality within the *demos*, the second was sufficient to establish the notion that the people shared a communal interest in the running of the State. Ultimately, the third phase:

“led citizens to consider themselves as a people, sharing certain common values and various special obligations to one another. It also fashioned the context for a public sphere in which people could communicate with each other using a common idiom and according to rules and practices that were broadly known and accepted”<sup>137</sup>.

Therefore, we see that *demos* theory is predicated upon the concept of community; that there are clear guidelines about inclusion and exclusion and that the passage of history, and the changing conception of citizenship which has followed, has been an essential element in the formulation of modern *demos* theory. Bellamy goes on to say that, in addition to a common language and culture there is:

“presupposed a set of shared values, common memories, and a kind of mutual sentimental bond between both the people themselves, and them and their homeland. On the basis of such a commonality, that very same people shared in the sovereignty of the state and in its will and capacity for self-rule ...”<sup>138</sup>.

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<sup>137</sup> Bellamy, Castiglione, Shaw in Bellamy, Castiglione and Shaw, at p.5.

<sup>138</sup> *ibid.*.

Here we see that language and culture alone are not sufficient. It explains why many of the naturalisation processes to be discussed below culminate in the swearing of an oath of allegiance and the expectation of some pronouncement of loyalty to the country to which a would-be citizen wishes to belong.

Whilst it is possible to ascribe a *demos* to individual countries by virtue of historical and idiomatic homogeneity, it is more difficult to find sufficient commonality using these principles when looking at supranational entities, depending on the size (in terms of population and geography) of the supranational entity. For instance, if Germany and Austria were to form a union it would arguably be relatively easy to find sufficient commonalities and geographic proximity between the two peoples to form one supranational entity. However, an attempt to find those links between the Member States of the United Nations would pose an altogether greater challenge.

That challenge was faced by the European Union (EU) when, in 1992, it formalised its own citizenship. In the absence of a collective identity based on all these features that can be ascribed to the totality of EU Member States but the undoubted existence of a supranational form of citizenship, we are led to ask whether the *demos* might not be said to form a citizenship, but whether, in a supranational context, citizenship itself can be the vehicle by which a collective identity is created. This idea, and the possibilities it provides, will be revisited in a later chapter.

### ***Naturalisation Problems***

When seeking naturalisation an individual is, in effect, seeking admission to the *demos* of a given state. The naturalisation process is the manifestation of the ‘acquisitional’ nature of citizenship. As such it can be traced back to Roman origins and yet it is a matter for contention. In particular, this has been a problem in the 20<sup>th</sup> century, most specifically during and immediately after WWII. By virtue of their nature, naturalisation processes are a form of exclusion: falling into or outside naturalisation processes will affect the rest of a person’s life. Naturalisation is the means by which a State can control admission to its polity and prevent overstretching or a breakdown of its *demos*. However, it is in the naturalisation process that we can clearly see citizenship’s

at times ugly relationship with politics, as racial and ethnic prejudices can be enforced apparently arbitrarily against would-be citizens.

Specific examples of this can be found in France (and her colonies) during WWII. In Free French Algeria, Jews were stripped of their citizen status and reduced to that of subjects (a modern reflection of the reconquest of Al-Andalus). Whilst this was overturned in 1943<sup>139</sup>, it nevertheless acts as cautionary reminder that, when it comes to adding non-nationals to the polity, a variety of non-political factors can be taken into account. Moreover, in 1945 de Gaulle signed a letter requesting that certain guidelines be implemented in the naturalisation process “in order to limit the influx of Mediterraneans and Orientals”<sup>140</sup> and the letter further contained proposals for a naturalisation quota system which, by inference, was exclusionary on grounds of religion and colour: it would have refused entry to Africans, Asians and Jews<sup>141</sup>. These proposals were not entirely of de Gaulle’s formulation<sup>142</sup>, yet they demonstrate the thinking of a man who was later to become the leader of France.

Whilst the specific examples of highly exclusionary tendencies in naturalisation processes cited above are sufficient to prompt distaste, it is essential to recollect that States cannot simply open their borders to all comers. In purely practical terms there is a finite amount of territory within states which can be populated and they already have a native population which must be attended to and whose size will inevitably be subject to fluctuations. To that end, traditionally marriage was considered as a means of joining the *demos*, but this avenue has been closed. As a means of automatic acquisition it survived longest in France, but even there it was terminated in 2003. Therefore, some form of criteria must be applied in order to assess those able to join a polity and it is sensible to do this according to their likelihood of being readily assimilated in the *demos*. In addition, there is no free way to join the polity: each naturalisation process has a fee

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<sup>139</sup> Fahrmeir, at p.169.

<sup>140</sup> Letter from Charles de Gaulle to Pierre-Henri Teitgen, Justice Minister, June 12, 1945, in Fahrmeir, at p.166.

<sup>141</sup> *ibid.*, at p.167.

<sup>142</sup> The man to whom the specifics of the quota system can be attributed was Georges Mauco.

attached to it. Some are relatively affordable, making the process more open, whereas others are more costly and, therefore, exclusionary.

The rest of this section will focus on the naturalisation processes of the last forty years in France, Germany, Great Britain and the USA, those processes which developed once the post-war dust settled.

### *Great Britain*

The naturalisation process in Great Britain traditionally has been unusual in being devoid of racial connotations<sup>143</sup>. However, the 1980s saw a change in the way that citizenship could be acquired in British territories (i.e. the colonies). The British Nationality Act of 1981 removed the automatic acquisition of citizenship for children and decreed that British citizenship could only be passed on to those children born in the territories if their parents were citizens themselves or were permanent residents. In so doing it removed the *ius soli* element of citizenship acquisition in the territories and was an attempt to restrict the citizenry to those who could demonstrate a substantial tie to the country. It was a clear attempt to redefine the scope of the *demos*.

That being said, Great Britain itself has a relatively open naturalisation process. With a rejection rate of merely 8%<sup>144</sup>, the British process is the least restrictive of the four processes considered here. In addition, it is one of the fastest processes, one which is generally concluded within a matter of months. For all that it has a low rejection rate, its requirements are also amongst the least rigorous. There are language and cultural requirements as well as a five year residence requirement<sup>145</sup>. In addition, a common factor linking all modern naturalisation processes with those discussed above in the consideration of Revolutionary citizenship is the requirement of good character and a

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<sup>143</sup> Fahrmeir, at p.30.

<sup>144</sup> As of 2007, in Fahrmeir, at p.205.

<sup>145</sup>

[www.ukba.homeoffice.gov.uk/britishcitizenship/eligibility/naturalisation/standardrequirements/](http://www.ukba.homeoffice.gov.uk/britishcitizenship/eligibility/naturalisation/standardrequirements/) last accessed 09/04/12.

sound mind<sup>146</sup>. In modern terms this relates to criminal convictions and, in a post-9/11 world, specific questions relating to terrorist activities<sup>147</sup>.

### *France*

The development of French naturalisation processes has a long history. However, over the past twenty years these processes have developed significantly. Like Britain, France has an Imperial history and still has colonies. Prior to 1983 there were different rights attached to native French and naturalised citizens, but, starting in 1978, these discrepancies were gradually eroded, resulting in treatment much closer to parity. Nonetheless France, like other States, still operated a system whereby *naturalised* citizens could lose their citizen status should their conduct fall below an expected standard (a direct modern manifestation of the standards imposed in Revolutionary France some two hundred years ago).

When considering the acquisition of citizenship by birth, the rules in France have been subject to frequent alteration, at first removing automatic acquisition and then presuming it. In 1993 the rules concerning the offspring of aliens born and resident in France were changed so that those children had positively to *choose* French citizenship between the ages of 16 and 21, or run the gauntlet of the naturalisation process<sup>148</sup>. A mere five years later, however, the presumption was turned the other way: children of resident aliens must positively *reject* French citizenship.

Joining the polity in France is dependent upon satisfying residence conditions<sup>149</sup> (in line with those of the UK), possessing a permanent address and satisfying various

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<sup>146</sup> [www.ukba.homeoffice.gov.uk/britishcitizenship/eligibility/soundmind/](http://www.ukba.homeoffice.gov.uk/britishcitizenship/eligibility/soundmind/) last accessed 09/04/12.

<sup>147</sup> [www.ukba.homeoffice.gov.uk/britishcitizenship/eligibility/goodcharacter/](http://www.ukba.homeoffice.gov.uk/britishcitizenship/eligibility/goodcharacter/) last accessed 09/04/12.

<sup>148</sup> Fahrmeir, at p.206.

<sup>149</sup> [www.apa.org.au/upload/2004-4D\\_Rallu.pdf](http://www.apa.org.au/upload/2004-4D_Rallu.pdf) last accessed 09/04/12.

character and sound mind conditions<sup>150</sup>. In addition, the process of naturalisation in France is not one with guaranteed success. It is an extremely lengthy process, taking up to two years<sup>151</sup> and does not have a guaranteed positive outcome, with a rejection rate of approximately 30% making it one of the most elusive forms of citizenship in modern western liberal democracies.

## USA

Over the past thirty years America's naturalisation process has changed, taking account both of increased illegal immigration and of terrorist activities. In the 1980s citizenship remained very much one of *ius soli* (granting citizenship to those born within the territory, seemingly irrespective of the parents' nationality). However, in modern terms the process is contingent upon satisfying residence, language, character and cultural requirements<sup>152</sup>, much as is the case in other countries. In addition, US naturalisation has traditionally been one of the most open processes. Between 1971 and 1990 there was generally a 98% acceptance of applicants<sup>153</sup>. It is true that more recently this figure has fallen to a mere 77%<sup>154</sup>, but even at this level US citizenship appears, *prima facie*, to be one of the most open.

Furthermore, the US process is one of the fastest to complete, taking approximately 120 days, including the interview process and citizenship is formally obtained upon taking the Oath of Allegiance, whereupon the citizenship rights are activated. That being said, there is a discrepancy between the rights of native and

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<sup>150</sup> [www.euskosare.org/euskal\\_herria/euskal\\_herrian\\_bizi/french\\_nationality](http://www.euskosare.org/euskal_herria/euskal_herrian_bizi/french_nationality) last accessed 09/04/12.

<sup>151</sup> Fahrmeir, at p.209.

<sup>152</sup> [www.uscis.gov/portal/site/uscis/menuitem.cb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=d84d6811264a3210VgnVCM100000b92ca60aRCRD&vgnextchannel=d84d6811264a3210VgnVCM100000b92ca60aRCRD](http://www.uscis.gov/portal/site/uscis/menuitem.cb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=d84d6811264a3210VgnVCM100000b92ca60aRCRD&vgnextchannel=d84d6811264a3210VgnVCM100000b92ca60aRCRD) last accessed 09/04/12.

<sup>153</sup> Fahrmeir, at p.209.

<sup>154</sup> *ibid.*. Between 1991 and 2000 that figure fell to 81% acceptance and between 2000 and 2004 it fell to 77%.

naturalised citizens in terms of the offices for which they can run. Naturalised citizens are ineligible to run for the Presidency, although they can run for lower office<sup>155</sup>.

### *Germany*

Germany is the final country whose naturalisation process will be considered. In its post-war existence Germany was divided and following unification its citizenship criteria changed frequently. In order to qualify for naturalisation there are the usual residence requirements, as well as conditions relating to income, employment, good health and living accommodation. In 2000 alterations were made to the acquisition of citizenship which meant that *ius soli* citizens (children born within Germany and permanently resident there) were provisional citizens until the age of 23, at which point they must specifically reject other nationalities<sup>156</sup>. Interestingly, they would automatically lose their citizenship should they accept identity documents from other countries.

The most recent modifications to the process occurred in 2008<sup>157</sup> when changes to the Nationality Act demanded that candidates be able to demonstrate a high degree of cultural integration. Moreover, since 2006 the German process has had some of the most stringent language requirements of any naturalisation process<sup>158</sup>, demanding that would-be citizens complete some six hundred hours of language training. Taken together these things indicate that a high premium is placed upon cultural and linguistic homogeneity in the German *demos*.

Whilst all States have a naturalisation process, it is important to note that there are also procedures for the withdrawal of citizenship: in this way an individual can one

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<sup>155</sup> A high-profile example of this situation was Arnold Schwarzenegger, who successfully ran for the Governorship of California.

<sup>156</sup> Fahrmeir, at p.211.

<sup>157</sup> [eudo-citizenship.eu/docs/CountryReports/Germany.pdf](http://eudo-citizenship.eu/docs/CountryReports/Germany.pdf) last accessed 09/04/12.

<sup>158</sup> Fahrmeir, at p.211.



day be a national (and with it a citizen) and the next find himself adrift in a no-man's land, devoid of a sense of belonging and stripped of the rights that the previous day he probably took for granted. The circumstances for withdrawal are guided by international Conventions which lack true authority owing to an absence of enforcement mechanisms (and at times ill-considered drafting)<sup>159</sup>.

Another critical aspect of naturalisation processes is that there are no two exactly the same. In this way States are able to manifest their individuality and to promote those concepts which are most important in their concept of *demos*. The negative aspect of this continual difference between processes is, of course, that some countries make acceptance to the polity much harder than others, even when geographically they are neighbours. For example, State X and State Y are neighbours. Two people from State Z, both with the same language abilities and employment status, make separate citizenship applications, one under the process of Y, the other under X's process. However, X has a far more stringent application process and the applicant fails, whilst the applicant to Y succeeds. Whilst there is nothing wrong with this, as it is for each State to determine who may be eligible to join the polity, the situation may appear somewhat different if both X and Y are members of a supranational entity, A, which confers its own citizenship upon the citizens of its Member States. In that event, the unequal entry requirements to States X and Y affect the eventual openness of citizenship to A and, indirectly, its legitimacy.

The importance of this inequality of naturalisation procedures (and any inequalities involved in initial acquisition of citizenship at birth) is of the utmost importance when multiple nationalities are brought together in a co-operative social, political and economic body: where that body, or union, operates a form of individual membership that depends upon possession of national citizenship, an uneven playing field can lead to situations that appear to deprive some individuals of the full rights that this new, supranational citizenship (European Union citizenship, that will be discussed in the following chapters) intends to convey.

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<sup>159</sup> For example, the 1961 *Convention on the Reduction of Statelessness* which contains no prohibition on rendering an individual stateless.

## **Conclusion**

Citizenship is not new. Its development has seen a transition from a male-centred exclusionary entity to one which is multi-faceted and altogether more inclusive. It can exist on many levels, is capable of supporting an enormous polity and, as its development has largely coincided with that of democracy, is now seen as conferring legitimacy upon a State. A citizenry capable of determining the direction of the State by means of active participation in the decision-making process is generally seen as an effective citizenry. In addition, citizenship takes many forms, meaning that the widest possible proportion of a population can be included under the citizenship umbrella.

One of the many developments of citizenship has seen its progression from a fairly parochial entity to one with national, and even supranational, application. It is in the latter sphere that the next stage of citizenship's progression seems most likely to occur and the possibilities for supranational citizenship seem most likely to be discovered in the guise of European Union citizenship. Relatively novel as a concept (particularly in the historical chronology of its development), it is possible that Union citizenship will become the standard bearer for future models of citizenship.

## **Chapter 2. A 'European' Citizenship: Informal Recognition by Formal Institutions. Developments from 1957-1992**

### **Supranational Citizenship**

The conceptions of citizenship outlined in Chapter 1 have all been applicable to the national domain as that has been citizenship's traditional arena. Yet, as intimated previously, there is scope for citizenship to be implemented beyond the national sphere. Whilst it is too soon to be able to term a person a citizen of the world, the growth of a global economy has helped spur the creation of citizenship as an entity above the nation state.

The global economy's current downturn has, in some ways, led to the strengthening of the bonds between peoples of different nations (and, therefore, supranational citizenship's claims of validity) with a recognition that there are binds between peoples that transcend national borders. A prime example of this attitude is the EU, with the move to extend economic support to Greece, Ireland, Portugal and others in the face of their enormous budget deficits<sup>160</sup>, a move which tends to answer in the affirmative Richardson's assertion that "Citizens will need to be convinced that what we might call the 'European journey' though difficult, brings with it a degree of protection from pure market forces"<sup>161</sup>. This willingness to be of mutual assistance is of considerable significance when considering that the EU is the foremost example of

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<sup>160</sup> An attempt to explain this move away simply as a self-interested action by the other members of the Euro-zone could be made, but that does not sit well when considering that the UK was party to the negotiations, despite not being financially responsible for the subsequent payouts.

<sup>161</sup> Richardson in Teague, at p.xi.

supranational citizenship, with European Union Citizenship (Union Citizenship) having been formally in existence since the enactment of the Maastricht Treaty<sup>162</sup> in 1992.

The specific wording of the Treaty provided that:

“1. 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”.

Consequently, we can see that supranational citizenship is not an entity freestanding, but holding it is now contingent upon the prior possession of Member State citizenship, restricting its application in terms of potential citizens. Nonetheless, the scope for application of Union Citizenship currently rests at approximately 490 million people, with that number set to increase with further expansion in 2013. It is also apparent from its complimentary, non-replacement nature, that it rests above Member State citizenship. Being complimentary tends to suggest that it will not extend the combined rights and duties of the individual Member State citizen with the inevitable result that Union citizenship cannot mean the same thing to all those who possess it. The unfortunate outcome of this situation is that the EU has created a hierarchical form of citizenship at odds with its stated intention of creating harmony within its borders. A further, more detailed discussion of Union citizenship in its various stages will form the bulk of what follows.

Union Citizenship can be seen as evolving in several distinct phases, each to be discussed in turn, beginning with what will be termed ‘putative-citizenship’, the period between 1957 and 1992. Firstly there need be some discussion of what intentions, if any, Jean Monnet (arguably the principal force behind the Community’s creation) had for Union citizenship prior to the inception of the European Coal and Steel Community (ECSC) in 1952, or the European Economic Community (Community or EC). Subsequently, a discussion of what rights nationals of the States enjoyed once the ECSC/Community arose will follow and then their development over the following three decades will be charted, with a special focus placed on the institutional attitudes

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<sup>162</sup> Article 17 ECT.

towards the creation of a “special rights’ policy from the 1970s until the creation of Maastricht. This will culminate in a discussion of whether what existed in this period can be considered ‘citizenship’ according to the various models outlined in Chapter 1. This becomes all the more important when we begin to take account of the various rounds of enlargement to which the Community (as the EU prior to 1992 shall henceforth be referred to) was subject between 1957 and 1992. Doubling from its initial membership of six to twelve states, it is clear that the issue of a ‘European’ citizenship has increasing import, both as a means of gauging the importance of the individual within the Community and of assessing the democratic legitimacy of the Community as a whole.

The final part of this chapter will examine where ‘European citizenship’ stood immediately prior to the dawn of its official creation under the Maastricht Treaty. Such an examination is necessary, because it is essential that the precise nature of putative-citizenship is understood prior to assessing the contribution that formal recognition and subsequent development has brought in the twenty years since Maastricht. As Art.17 ECT (now altered as Art.20 TFEU) indicated nothing about the politicisation that has come to be attached to the notion, it is essential that we see how crucial a role the institutions (in particular the ECJ) have played in the entity’s formulation.

### **The Role of Monnet in Union Citizenship’s Creation**

Frequently credited with being one of the fathers of the Community, Monnet’s role in the creation of Union citizenship at first glance may seem somewhat tenuous. Upon closer inspection, however, a line can be drawn directly from Monnet’s involvement in behind-the-scenes discussions during World War II (WWII) straight to the official birth of the entity some fifty years later. How can this be? Monnet played an active role, both in the public and private sphere, in trying to convince statesmen and friends (often one and the same given his profession) to advance the position of citizenship in their political negotiations. His success will be evaluated.

### *Monnet and the 1940 Declaration*

In 1940, Monnet took part in discussions in London between the French and British governments. These discussions had been germinated some years previously, but were coming to a head as a result of the development of WWII, particularly in light of German military advances across the continent. The talks were aimed at creating a Treaty of Union between Britain and France and in June 1940 Monnet, together with René Pleven, Desmond Martin, Sir J. Arthur Salter and Sir Robert Vansittart, wrote a “draft declaration of indissoluble union”<sup>163</sup>. Its title alone declares that its contents were intended to have an air of permanence and the agreement to it of both the British and French Heads of Government (concord that would become more difficult to replicate in later years) indicates that this sentiment was shared at the highest levels in both states. The draft declaration read as follows:

“Every Frenchman and every Englishman would have the full rights of citizenship in both countries. There would be a customs union and a common currency. The war damage suffered by each country would be jointly repaired”<sup>164</sup>.

This draft declaration provides one of the earliest examples of a recognition that a joint, multi-national citizenship was deemed a viable project. Indeed: “no Government ever proposed a more radical and far-reaching plan for supranational integration”<sup>165</sup>. Significantly, whilst the UK may be viewed in the modern EU as a reluctant partner in the European project, this declaration is clear evidence that it was a willing participant in the germination of the citizenship idea. Indeed, the Draft was itself the culmination of talks, ideas and proposals between men of state that went back a further two years.

A further significant feature of this draft is that, in allowing “full rights of citizenship” to be bestowed, there is a recognition that creating unequal status or uneven application of rights (and presumed benefits) would render the project untenable. From a modern day perspective this emphasis in the draft upon uniformity

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<sup>163</sup> Monnet, at p.23.

<sup>164</sup> *ibid.*.

<sup>165</sup> Shlaim, at p.27.

and full participation may seem fanciful: the French and English were thinking of applying these rights to much smaller numbers of citizens than was the reality even under the ECSC, let alone than in the modern EU. Moreover, it posited the creation of a joint or cross-citizenship without establishing any body to oversee its application. It was to be a stand-alone cross-border entity seemingly without bureaucracy, unparalleled in modern politics. Nonetheless, it set a precedent and is a valuable ideal when considering the ramifications of, or potential disunity caused by, the wording of Art.17 ECT<sup>166</sup>.

It cannot be ignored that a more cynical light can be cast on the nature and content of the Draft, all the more so in light of its timing. Given the recent near catastrophe at Dunkirk, the British were undoubtedly keen to engage the French government in a scheme that would ensure their continued involvement in the struggle against Nazi Germany. By pooling resources and ensuring combined attempts to overthrow an aggressive European power, the Draft Declaration and surrounding negotiations can be viewed as a mere device to strengthen French resolve and one which ultimately failed<sup>167</sup>. This is a view shared by Shlaim and one that may appear inviting.

Shlaim's thesis primarily focuses on presenting the proposal of a Union as being a hurriedly drafted and ill-conceived attempt to reassure a jittery French government and one which ultimately failed to come to fruition, owing both to that government's ultimate lack of will potentially to place its subjects at risk of exacerbated reprisals upon the German's eventual capture of the country and, in the end, a surprising degree of

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<sup>166</sup> now Art.20 TFEU.

<sup>167</sup> Shlaim argues that a pledge by Churchill to the effect that France, in the face of the country's destruction at German hands, could capitulate and seek an armistice whilst the British would continue the struggle in perpetuity, was interpreted willingly by the French Commanders as a tacit agreement that the joint initiative outlined in the draft and other negotiations was at an end: France was free to pursue its own policies. Instead, Churchill's rousing promise was intended to spur the French into a greater national defence.

Anglophobia<sup>168</sup>. However, by reference to public addresses predating the draft by two or more years<sup>169</sup>, as well as government level talks, he contradicts this notion and instead gives credence to the assertion that the draft, while novel and, perhaps, revolutionary, was something that was arrived at as the result of concerted effort. Ultimately, he asserts that, despite the best endeavours of Monnet *et al*, the draft never stood any real chance of becoming fact, because the desire simply was not there at the highest levels on the side of the French. In contrast, Churchill publicly proclaimed the idea of indissoluble union shortly before the draft came to fruition, indeed before the formal negotiating process even began.

Taking all this into account, the fact remains that, in many ways this Draft Declaration is a foreshadowing of much that was to come to pass in the development of the EU and that Monnet was central to the negotiations that created it. The draft was subject to further revision after subsequent approval by the British cabinet, but it is clear that citizenship of a shared (albeit not supranational) nature was considered an important (perhaps essential) constituent element of intergovernmental co-operatives. These two countries, now amongst the most senior members of the EU, agreed a putative blueprint for future negotiations about the development, direction and possible content of a 'European' Citizenship. Between them, De Gaulle (present largely at Monnet's insistence) and Churchill saw the far-reaching contents of the draft as essential to ensure that it would function. In combination with this citizenship element an economic union was mooted much like that which came into being a mere seventeen years later. The official declaration which followed the draft was in much the same vein and when released on July 16<sup>th</sup> 1940 stated:

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<sup>168</sup> *ibid.*, at p.53. Shlaim quotes various French ministers expressing abhorrence at the thought of France becoming subsumed in the British Empire and preferring to become a "Nazi province". Furthermore, to reflect that this was how the rejection was received across the Channel, Shlaim quotes Churchill: "Rarely has so generous a proposal encountered such a hostile reception".

<sup>169</sup> Specifically an address in Paris given by Duff-Cooper in December 1938 concerning the pooling of British and French resources for the good of civilisation, noted *ibid.*, at p.29.



“At this most fateful moment in the history of the modern world the Governments of the United Kingdom and the French Republic make this declaration of indissoluble union and the unyielding resolution in their common defence of justice and freedom against subjugation to a system which reduces mankind to a life of robots and slaves.

“The two Governments declare that France and Great Britain shall no longer be two nations, but one Franco-British Union.

“... Every citizen of France will enjoy immediately citizenship of Great Britain, every British citizen will become a citizen of France.

“Both countries will share the responsibility for the repair of the devastation of war, wherever it occurs in their territory and the resources of both shall be equally, and as one, applied to that purpose...”<sup>170</sup>.

Coming so closely after the draft was written it is unsurprising that we see the reiteration of the idea of a shared, or combined citizenship, as well as the expression of an equal pooling of resources, although this is much the same idea as was deemed necessary at the inception of the ECSC. Neither state is proposed to be superior to the other, *nor are its peoples*. This idea proved to be a fundamental facet of both the supranational citizenship ideal (embodied alike in both the 1957-1992 period and thereafter) and in the relationships between the States in the ECSC and subsequent Treaties. Taken as a whole, the indissoluble union idea has two striking features. One is that it does not overtly proclaim the existence of a new form of citizenship (despite such an intention being open to interpretation and the incontrovertible fact that a new form would have had to arise). The other is that, despite the best of intentions and the full-throated support of negotiators and high level officials from both sides, the

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<sup>170</sup> Monnet, at p.28.

declaration never amounted to anything, owing to the fall of the Reynaud-led French government led by Reynaud and the subsequent German occupation.

It seems that, from Shlaim's perspective, the traditional positions of the two European powers was inverted during this period, with the highest tiers of French government proving recalcitrant and isolationist, quite in opposition to the urgings of Monnet and other civil servants. It is, therefore, more than a touch ironic that in the space of five years the British position was quite the reverse of what it had been: when asked a direct question in the House about whether the proposal for union between the countries remained official policy, Churchill was most emphatic in answering in the negative<sup>171</sup>. Monnet himself was extremely disappointed in the outcome of these negotiations, but not to the extent that he was willing to give up on the idea of a union:

“The whole business ended in failure ... but think what it could have meant if the political offer of union had succeeded. There would have been no way of going back on it. The course of the war, the course of the world might have been different. We should have had the true beginnings of Europe.”

He continued:

“Ideas do not die...and if nations can come so close together in war, perhaps we can carry some fraction of that accord into the peace. At any rate that is the job before us”.

Nonetheless, the seed of a European citizenship can be traced back to these wartime negotiations. Whilst Monnet's aspirations leaned towards the establishment of a federal Europe, rather than an intergovernmental co-operative<sup>172</sup>, there was little more

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<sup>171</sup> *ibid.*, at p.62.

<sup>172</sup> Referring to economic unions in existence prior to the creation of the ECSC, Monnet wrote:

“These experiments were not without value, however – provided they taught us a lesson. They made it easier for me to persuade the champions of mere co-operation that

to indicate his feelings concerning ‘European’ citizenship for several years and that which there was inextricably linked citizenship to economic policies. Following the drama of the Anglo-French union proposal, Monnet’s actions in promoting ‘European citizenship’ come mostly in the guise of private action.

### *Monnet’s Activities in the Private Sphere*

Even before the Community came alive, Monnet had privately linked economics to the idea of a European citizenship in a letter of August 1950 to his friend and fellow negotiator in the Anglo-French union discussions, René Pleven. In that letter Monnet commented:

“The drift towards the inevitable continues. The Schuman Plan, even before it took practical shape, proved that it was in line with the forces of change. Everything that tends to create a *broader community of peoples*<sup>173</sup> ... and to transform old fashioned capitalism into a means of sharing among *citizens*<sup>174</sup> the fruits of their collective effort ... will be enthusiastically received.”<sup>175</sup>

These private thoughts can be read as an affirmation that Monnet felt that an inevitable outcome of increased integration was a strengthened feeling of community between European peoples, even if the Community of which he was thinking would only have a membership of six States at that time. Whilst these thoughts were expressed in private it is also apparent that Monnet had not, at this point, considered a more rounded form of citizenship, i.e., one with greater social or political impact. Therefore, the ‘citizenship’

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inter-government systems, already weakened by the compromises built into them, were quickly paralyzed by the rule that all decisions must be unanimous. I had already learned this from my experience at the League of Nations...” Monnet, at p.281.

<sup>173</sup> Emphasis added.

<sup>174</sup> Emphasis added.

<sup>175</sup> Monnet, at p.340.

envisaged in 1950 was not such as would have been perceived as amounting to citizenship more formally, for example when considered under the Marshall criteria<sup>176</sup>. Nonetheless, elsewhere in his “Memoirs” Monnet indicated that he felt a European Federation was a necessary outcome of economic unity, albeit that he was unsure of the timescale for its creation or how large it would become. A citizenry would form part of that Federation.

He remained an advocate, albeit subtly, for the creation of a European citizenship (one which was more in line with modern expectations) even after he saw his Community come to fruition. He was afforded the opportunity to address the institutions and before the Common Assembly said:

“We can never sufficiently emphasize [sic] that the six Community countries are the fore-runners of a broader united Europe, whose bounds are set only by those who have not yet joined. Our Community is not a coal and steel producers’ association: it is the beginning of Europe...

“When I think that Frenchmen, Germans, Belgians, Dutchmen, Italians and Luxembourgers are obeying the same rules and, by doing so, are now seeing their common problems in the same light, when I reflect that this will fundamentally change their behaviour one to another – then I tell myself that definitive progress is being made in relations among the peoples of Europe”<sup>177</sup>.

This provides us with an insight into Monnet’s vision of a future European citizenship, one which moved beyond mere economic bounds and more towards the political citizenship which, as demonstrated in the previous Chapter, has come to be expected of citizenship in modern times, albeit one based in the national arena. As I will demonstrate, the reality of this politicised citizenship would take another thirty years to

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<sup>176</sup> See Ch.1.

<sup>177</sup> Monnet, at p.392-393.

become even partially realised. This statement was not his only foray into voicing his apparent desire to see a political manifestation of citizenship. Monnet expressed such an idea (again privately) in another letter, this time addressed to his friend and then German Chancellor, Willy Brandt, in 1969<sup>178</sup>. It was a letter in which he emphasised that by promoting greater unity between European peoples the Community would be pushed to change fundamentally from a common market to a more rounded political entity. This in turn, he argued, would be the sole basis for solving common problems, i.e., those experienced by all the peoples, not governments, of the Community<sup>179</sup>. It is possible to counter that Monnet was speaking in general terms, to a close, long time friend and was not providing a public indication of the direction in which he wished to see citizenship develop. In addition, as with so many of Monnet's references to the "peoples of Europe", he failed specifically to use the word "citizenship" to specify *how* he would like to see that "unity" manifested and the view that citizenship was a likely outcome of his efforts seems difficult to maintain in the face of fervent assertions to the contrary by fellow Frenchman, Raymond Aron<sup>180</sup>. Such an assertion seems to fly in the face of the cumulative evidence of Monnet's wishes: what else could he have really meant? It is not insignificant that the wording of this letter is echoed in the Preamble to the ECT, which calls for an "ever closer union" between the European peoples.

It is, perhaps, a touch ironic to note that in 1976 the European Council met and 'created' an official position of European Citizen, specifically intending that it should be

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<sup>178</sup> Note that this letter was written a decade prior to the first round of European Parliament elections, when citizens were able to exercise their democratic rights.

<sup>179</sup> Monnet. at p.495. Letter to Willy Brandt, Chancellor of Germany October 1969. "The summit meeting is now due. It will afford the opportunity to take a broad view of Europe's needs and to make fundamental and practical progress in uniting Europe's peoples. The transformation of the Common Market into an economic and monetary union, the beginnings of political union ... all are possible on one condition: that an initiative from you changes the climate from peevish haggling about points of detail to a positive collective effort to solve the problems that are common to us all." A useful indication of Monnet's strength of feeling on this issue is seen in his requesting a friend, who was also a statesman, to intervene and encourage others involved in the European project to more actively pursue his dream.

<sup>180</sup> Aron, 1974, in Shaw, at p.20.

bestowed upon the man who had played such a significant role in the creation and development of the Community. To that end the Council proclaimed the following statement:

“The European Community, which is now more than 25 years old, is already, notwithstanding its shortcomings and its imperfections, a remarkable achievement at a time when hopes of deepening the prospects of European Union are beginning to take shape.

“... Jean Monnet has resolutely attacked the forces of inertia in the political and economic structures of Europe in an endeavour to establish a new type of relationship between states, bringing out the solidarity between European States and translating it into institutional terms.

“... although he first concentrated on economic interests, he never abandoned his vision of achieving a wider understanding between the individuals and peoples of Europe which would extend to all fields of activity. There has sometimes been a tendency to lose sight of this objective amongst the vicissitudes of European construction, but it is an objective which has never been disavowed.

“... Jean Monnet recently retired from public life. Having devoted the greater part of his talents to the European cause, he deserves from Europe a very special mark of gratitude and admiration.

“It is for these reasons that the Heads of State or Government, meeting in Luxembourg as the

European Council, have decided to confer on him the title of Honorary Citizen of Europe’’<sup>181</sup>.

It would take another sixteen years for the peoples of the Community officially to be afforded that title on a non-honorary basis, despite Monnet’s efforts to drive the Community in that direction. In addition, this statement at the Luxembourg European Council meeting can be seen as providing evidence that the States themselves were aware that the development of a supranational citizenship was being left behind in legislative terms (although the ECJ was gradually pushing the bounds of the economic rights granted by the Treaty, as will be demonstrated below) and could be construed as a statement of intent to return to the issue in the coming years.

Sadly the Council’s creation of honorary citizenship would be the only form of Union citizenship Monnet would live to see, as he died in 1979 at the venerable age of 90. He didn’t even live to see the first European elections that occurred a mere three months later, providing the political facet of Union citizenship, a facet that would fulfil the triumvirate forming the basis of the Marshallian model and *supposedly* complete the formation of Union citizenship as a modern entity. Irrespective of this, Monnet’s efforts during the war and his subsequent private prodding of Statesmen in the direction of creating rounded economic and political citizenship ultimately came to fruition in December 1992.

As citizenship in the twentieth century has been constructed on an economic, social and political basis, a thesis developed by Marshall in the 1950s and 1960s, coincidentally the same period as that we are focussing on as the formative period of ‘European citizenship’, we will proceed to focus (primarily) on the economic rights enjoyed by the peoples of the Community prior to 1992 and consider whether they can be seen as fulfilling or surpassing our expectations of citizenship, falling short of them, or constituting something altogether different and new.

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<sup>181</sup> Meeting of the European Council, Luxembourg, April 1-2 1976, [aei.pitt.edu/1412/01/Luxembourg\\_April\\_1976.pdf](http://aei.pitt.edu/1412/01/Luxembourg_April_1976.pdf) last accessed 09/04/12.

## Community Citizenship of an Economic Kind

Declaring the existence of a pre-1992 form of supranational citizenship as a *de facto* entity from 1957 and stating that it developed incrementally until Maastricht's formalisation of it may strike one as rash. This view is one supported by Wiener who, whilst arguing that an argument can be made in support of a pre-1992 citizenship (hereafter pre-citizenship) from the 1970s onwards, denies the existence of the same prior to the Paris Summit in 1973<sup>182</sup>. However, in contradiction to that assertion, one can point to the economic contents of the ECT, which came to be termed the four fundamental freedoms: free movement of persons; services; goods and capital. The original text of the ECT called for the "foundation of an ever closer union among the peoples of Europe"<sup>183</sup> and these freedoms formed one means of forging that Union. Therefore, much as Monnet had initially advocated, the primary rights enjoyed by the first 'European' citizens ('pre-citizens) lay in the economic arena. Whilst the original text of the ECT manifestly fails to refer to 'citizens' of the Community, the existence of the four freedoms means that the individual can be construed as being the focus of the European legislation that followed. Moreover, as Teague has explained when writing on the subject of "economic citizenship"<sup>184</sup> it can readily be inferred that there is a strong case for identifying a form of citizenship within the EU since 1957, even if it is predicated solely upon this economic pedestal. The type of 'citizenship' enjoyed by the peoples of the MS between 1957 and 1992 for my purposes shall henceforth, in spite of the addition of voting rights in 1975, be deemed "Economic Citizenship".

When considering the wording of the EU's formal texts, the fact that the Preamble makes reference to 'peoples' of Europe, rather than one unified mass, cannot go unnoticed. The fact that it does so provides a problem: it appears to indicate that any

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<sup>182</sup> "As a policy, citizenship remained largely invisible until citizenship of the union was spelled out and legally grounded in the 1993 Treaty of the Union. Nevertheless, the roots of citizenship policy and actual citizenship practice can be traced over a period of about two decades... From the basic information about the process of policy making developed above, it is possible to derive the starting conditions for EC/EU citizenship policy making in the 1970s", in Wiener, 1998b, at p.41-51.

<sup>183</sup> Preamble, ECT 1957.

<sup>184</sup> Teague, at p.xi.



notion of a supranational citizenship must be standalone, i.e., it must be distinct from preconceptions surrounding national citizenship, most importantly the geographical tie. This does not mean that the European entity must be wholly dissimilar to national citizenship, indeed it could well share many of the same attributes (including any *demos theory* connotations) as outlined in Chapter 1. Rather, Union citizenship provides an opportunity to formulate a European construction unencumbered by previous preconceptions<sup>185</sup>.

Monnet's vision of citizenship both as construed in the war years and in his private aspirations for the European entity was, for its time, revolutionary. Whilst not immediately aspiring to the same heights (as the economic freedoms arising out of the ECT clearly were intended to be devoid of political content), the intention behind the Community was to ensure the stability of Europe and to encourage the erosion of distrust between European peoples (notably French and German) replacing that distrust with confidence and inter-dependence. This inter-dependence could be achieved by promoting integration between former enemies, but until the Community arrived at some formal composition and framework, quite how such integration was to be made applicable to the pre-citizens remained unclear<sup>186</sup>. Nonetheless, such integration was essential were the Member States to reach their goal of implementing an internal market, thereby preventing the potential outbreak of a third World War.

Whilst Monnet's vision has not been borne out yet, there is some recognition that there has been a move in its direction. Teague states that "while a federal Europe is not in sight, complex interdependencies have arisen between the EU and the member-states"<sup>187</sup>. Given this reality, it must be assumed that the same can be said for national citizens and their relationship with the Union. Teague is careful to relate his comments

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<sup>185</sup> That realisation will be discussed in Ch.5.

<sup>186</sup> For instance, one might reasonably ask whether the EC was going to make legislation itself to pursue these aims and that would be universal in application, or whether the States, individually, would enact enabling legislation with a view to pursuing shared goals. This question is contested to this day with the notion of subsidiarity instrumental in European policy and, yet, some policies are deemed sufficiently important that they mandate uniform top-down application.

<sup>187</sup> Teague, at p.8.

to the economic sphere of citizenship, and it seems somewhat contradictory with his later assertion that the development of economic citizenship is tied to the nation State<sup>188</sup>. In a geographical space where internal borders have come to be deemed invisible for the purposes of trade, however, we can afford a very wide interpretation of 'nation state' so as to include the EU as it existed in its 1957 format. A Nation Statist approach to economic citizenship as it is interpreted in this chapter focuses on the fact that the EU sought to create deep and unifying economic bonds between its peoples, to all intents and purposes generating a single geographical space and presenting a common scheme of economic action. The primary method by which the Community was able to begin that process was the content of its legislation, particularly the four freedoms.

On the face of it, the rights contained in the freedoms seem mostly applicable to those in business or wealthier people (in terms of capital movement). However, a closer inspection would instead suggest that the benefits of the freedoms would have been felt by all. As a perfunctory overview, it can be posited that the creation of more easily moved goods would result in lower prices and better business opportunities. In addition, the free movement provisions allow the individual to pursue certain human rights which are considered essential in any modern interpretation of citizenship<sup>189</sup>, namely to seek work and, more tenuously, the right to seek education as an adjunct to that work (which will in turn, of course, generate better future employment opportunities). Taking this into account it seems that the Four Freedoms actually assist the EU to build citizenship upon more than 'just' economic rights: the enactment of Regulation 1612/68 is a prime example of this expansion of rights, predicated upon one of the original economic benefits.

In fact, the benefits that arise from the free movement provisions seem to cover broader policy areas, such as social policy and allowed for the later policy expansion and rights-giving that was derived both from ECJ intervention and later Community legislation (e.g., Directive 2004/38). Wiener has asserted that "citizenship cannot be located in just one policy area: instead, a variety of crucial policy areas need to be

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<sup>188</sup> *ibid.*, at p.12.

<sup>189</sup> These human rights and more have come to be enshrined in the Charter of Fundamental Rights. This is further discussed in Ch.4.

considered”<sup>190</sup> and, despite an apparently limited initial scope of application, the Four Freedoms can instead be viewed as the springboard that has led us to the modern entity of *'European Union Citizenship'*.

There are other more tangential benefits which accrued as a result of these economic rights, but which do not automatically amount to citizenship rights, such as the right to travel. In a more overarching fashion, the fact that the Preamble calls for an approximation of the economic policies of the signatories also can be read as constructing an economic form of European citizenship by virtue of creating a similar economic environment across the states through which the peoples now had the right to travel and seek work. The Four Freedoms, then, began to provide an opportunity for the mingling of peoples and for the general growth of interdependence and exchange of ideas that could lead to a successful international co-operative.

The Four Freedoms operate in such a way as to overcome the previous distinctions between the separate States and instead form a cohesive whole: to do otherwise would “play down the shared experiences of and connections between separate countries”<sup>191</sup> and it is precisely these shared experiences that would form the basis of a modern citizenship, if we were attempting to begin the enterprise in the current day. These ‘shared experiences’, that would enable peoples to work together to construct a modern model of citizenship in line with the Marshall criteria, are capable of being interpreted very widely: at the outset of the Community the most important shared experience was that of the War and the economic difficulties it led to. Enabling people to improve their economic situation in unity with former enemies was achieved by giving them the power to move for work and regenerate industries free of levies, charges and barriers to trade: such powers were contained in the Four Freedoms.

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<sup>190</sup> Wiener, 1998b, at p.42.

<sup>191</sup> *ibid.*, at p.21.

## The Four Freedoms in Focus

Putting aside for the moment the reality that modern sensibilities demand that citizenship contains not just an economic dimension but also some social and political element (lacking in any real form in the Community until 1974, with the call for direct European Parliament elections), a more detailed analysis of the economic freedoms affecting Member State citizens is now called for.

Whilst the freedoms are multiple, as indicated above, the most important in terms of having a direct impact on the individual is the free movement of persons as found in Art.39 (ex. Art.48) ECT (now Art.45 TFEU). This Treaty provision is, *prima facie*, an exclusionary one. The right to free movement is, it appears, limited as the terms of the provision allow a person to move to take up employment in any Member State, with a safe-guard of non-discrimination on nationality grounds. Hence the right of movement is protected insofar as it is exercised in accordance with employment opportunities. The existence of non-discriminatory safeguards did not mean that Member States acted in accordance with them at all times and the requirement that movement be for employment purposes ignores the potential, albeit delayed, economic benefits of extending the free movement right to other areas, such as education. For such reasons did the ECJ become an important actor in the development of putative citizenship. It acted decisively<sup>192</sup> in order to make itself an advocate for the uniform and proper application of EU legislation, supporting the punishment of offending members (and arguably corporations and individuals) and acting in such a way as to place the citizens at the core of Community policies.

As briefly indicated above, Art.45 TFEU and the right it enshrines does not appear to extend to non-workers i.e., students, the retired, refugees, non-working minors, or those wishing to move in search of employment but without a firm offer. Nevertheless, this restriction is false as the provision *does* extend beyond these rather limited parameters and, with a careful reading, can be construed as having a considerably broader application. By creating a right of free establishment, those who are self-employed are included in the scheme of ‘market citizens’<sup>193</sup> as are artisans and

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<sup>192</sup> The ECJ is responsible for many seminal decisions, some of which went on to form the core of future EU policy. Some of these will be discussed in some detail below.

<sup>193</sup> Art.43 (ex Art.52) ECT now 49 TFEU.

professionals<sup>194</sup> and those who are dependents of those caught by Art.45 TFEU<sup>195</sup>. Furthermore, the Treaty imposes upon the Community (and now EU) institutions an obligation to enact certain social security protections in order that the ‘economic citizen’ will not in old age (or sporadic periods of unemployment) risk losing pension or other entitlements as a result of having taken the opportunity to exercise a Community right. In this way we see one of the first manifestations of the reciprocity expected in modern citizenship<sup>196</sup>: ‘market citizens’ have the right to exercise a provision, *provided that* they adhere to the rules attached to that right. In return, the ‘State’ or in this case Community exercises a duty *towards them* to protect them from a future detriment, where possible.

Whilst the Art.45 rights have been interpreted as having purely an economic function, there were those in power who were wary of imbuing these rights solely in an economic forum. By 1968, the Italian Commission President, Lionello Levi-Sandri, felt it necessary to state that:

“free movement of persons represents *something more important* and more exacting than the free movement of a factor of production. It represents rather an *incipient form – still embryonic and imperfect – of European Citizenship*: on the Community plane and as regards the pursuit of man’s most practical activity – work – *all the citizens of the Member States are placed on an equal footing and therefore possess the same status*”<sup>197</sup>.

The thrust of this statement is still, broadly speaking, economic (given the emphasis being placed on work as the prime activity of people), but it indicates that the politicians themselves were aware that there was a wider arena in which the Community operated. Moreover, Levi-Sandri referred to *all* Member State citizens, not just those engaged in

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<sup>194</sup> Art.50 (ex Art.60) ECT now 47 TFEU.

<sup>195</sup> Art.42 (ex Art.51) ECT now 48 TFEU.

<sup>196</sup> By reciprocity I refer to the notion of rights coupled with duties forming the core of the Citizen-State relationship in modern citizenship, as was discussed in Ch.1.

<sup>197</sup> Wiener, 1998b, at p.77, emphasis added.

employment activities, and by acknowledging that pre-citizenship was something in its formative stages he automatically conceded that it had the potential to become something more, freed from its economic bonds. For the time being, however, it remained, in the eyes of the Member States, firmly entrenched as an economic right, rather than something more.

Having demonstrated that the free movement provisions are, in fact, broader than they seem at first sight, it is now time to discover how, if at all, the institutions of the Community acted to transform the scope of ‘market citizenship’ into something more closely resembling a fuller citizenship, recognisable as such in a modern, plural society. The ECJ and Council in particular, were active in developing the fundamental freedoms to render them more beneficial to Community residents than was initially intended. Whilst the ECJ’s actions may lead to questions of judicial over-reaching, such issues will not be addressed here.

### *How the ECJ Intervened*

The ECJ originated, not as an activist body, but one whose function was to ensure that the framework for European co-operation and integration, as set out in the Treaty, was followed through. However, with a string of decisions and with the deft creation of some principles that have now become part of the established EU framework, the ECJ transformed itself into the prime champion of citizens’ rights, starting with taking the breathtaking decision to announce that citizens had *always* been able to assert certain of their rights directly, without any need for the Member States to enact implementing legislation<sup>198</sup>. The ECJ has been particularly active in fulfilling the potential of Art.45 TFEU, albeit often in a manner “strongly contested by governments”<sup>199</sup>. However, it has striven to demonstrate that it is simply fulfilling the members’ will by filling gaps in legislation that they had unwittingly overlooked.

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<sup>198</sup> *Van Gend en Loos* (Case 26/62) [1963] ECR 13.

<sup>199</sup> Meehan, at p.9.

With the Community still in its first decade, the ECJ indicated that it intended to be a proactive institution. The way it did so was to formulate a concept that still causes debate and, in some quarters, confusion: direct effect. How this benefited the citizen was, however, immediately obvious. In 1963, the Court was asked whether Art.12 EEC (now Art.30 TFEU) could be relied on by nationals in the national courts: its response was to say that, for numerous reasons, including that the new laws were intended to become part of the citizens' legal heritage, certain Treaty articles were capable of conferring rights directly upon the citizen. The case was *Van Gend en Loos* and it is fair to say that it marks the point at which the "European Citizen" truly became an entity in its own right.

Thus the ECJ began playing its considerable role in developing the concepts of direct and indirect effect<sup>200</sup>, mechanisms which seek to bring the law of the Community straight to the citizen and which enable him to take action against a Member State, or other party, when Community rights have been breached. That is not to say that the principles originated in the ECJ. Indeed, the ECJ has sought to argue that it based the principle of direct effect on the spirit and wording of the Treaty itself and that the States themselves created this dimension of Community law when they approved Art.249 ECT<sup>201</sup>, which expressly catered for many types of EC provision to have "direct applicability". This notion has steadily been expanded to become the modern concept of direct effect. Part of this development could cynically be put down to a need to free up the other Community institutions (particularly the Commission) from the burden of legislative enforcement oversight, transferring such a burden to the peoples of the Union: a form of bottom-up enforcement replacing top-down methods. Whether or not this truly was a motive underlying the creation of direct effect, the consequence of it has been a decided enhancement of the role of the individual within the EU framework. It must be borne in mind that direct effect has not been created and developed without constraint: the ECJ has applied certain conditions limiting its application<sup>202</sup>.

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<sup>200</sup> Indirect effect was introduced a decade later in *Von Colson* and intended to overcome the shortcomings that had become apparent with direct effect.

<sup>201</sup> ex Art.189 EEC.

<sup>202</sup> See below for a fuller discussion.

The principle stems from the ECJ's decision in *Van Gend en Loos*<sup>203</sup>, a ground-breaking case in many ways. By highlighting the Community's nature as a "new legal order"<sup>204</sup> and emphasising the rights that were intended to be conferred upon individuals, the Court succeeded in establishing that the Community was something novel, unprecedented and open to new forms of legislative creation and enforcement. The ECJ then went on to outline the idea that Treaty articles should be relied upon in such a way as to accord a directly enforceable right<sup>205</sup>. Moreover, the ECJ sought to emphasise that the nationals of Member States were not precluded from bringing an action against their state for non-implementation of a Community provision by the inaction of the Community institutions in doing the same. Conditions were attached to this fairly broad idea, however. Should individuals seek to apply their rights, they must do so when a provision contained "a negative obligation"<sup>206</sup> with the idea that "the very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between Member States and their subjects"<sup>207</sup>. In order to enforce their rights, citizens were further constrained in that they had to pursue something which was clearly and unambiguously provided for within the Treaty, and that the ECJ explicitly stated that it did not intend individuals to be able to pursue actions against one another<sup>208</sup>: a stance which would gradually be eroded in later years, as the Court flexed its interpretive muscles<sup>209</sup>.

The principal novel feature of the doctrine, however, was that the ECJ used its interpretive latitude to dictate that the EU constituted a "new legal order", that it applied not just to the States *but equally to their citizens*<sup>210</sup>, a situation that had never before been the case with an international treaty. In so doing, the ECJ managed to elevate the

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<sup>203</sup> *Van Gend en Loos*.

<sup>204</sup> *ibid.*, at para.3.

<sup>205</sup> *ibid.*, at para.5.

<sup>206</sup> *ibid.*, at part II, B.

<sup>207</sup> *ibid.*.

<sup>208</sup> *Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] ECR 273.

<sup>209</sup> i.e., with the introduction of indirect effect and incidental horizontal effect. See case law discussed later.

<sup>210</sup> *Van Gend en Loos*.



standing of citizens, for the first time recognising them as belonging to a 'constitutional' framework beyond the Nation State. Not only that, the Court opened the doors to the possibility of taking it upon itself to 'fill the gaps' in Community legislation and expand the role of pre-citizenship far beyond that which was originally envisaged.

The concept of direct effect was gradually fleshed out by the ECJ. It did this by revisiting the limits it had imposed in *Van Gend* and gradually eroding them, before going on to expand the legislative scope for direct effect's application. Significantly, this had a dual impact: the first prong of this was to effectively increase the power of the ECJ *vis-à-vis* both the other institutions and the States themselves; the second prong was to consolidate the notion of the Community citizen. How could an individual possibly pursue actions against either the Community, or use the Community mechanisms against their State, were they anything other than a citizen of the Community? The Court pursued its new policy of direct effect (and later *indirect effect*) with considerable enthusiasm, creating a body of case law to illustrate its new doctrine<sup>211</sup>. Importantly, this doctrine was pursued so as to give social rights to people, rights that, ostensibly, flowed directly from the economic rights of the Four Freedoms<sup>212</sup>. Parenthetically, some of these rights, contentious when created, subsequently have been expanded on

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<sup>211</sup> For instance: *Van Duyn v. Home Office* [1974] ECR 1337, where the ECJ removed the barrier to direct effect of issues falling under State discretion; *Reyners v. Belgium* [1974] ECR 631, wherein the Court removed another *Van Gend* restriction, that requiring there be no need for further implementing measure; *Pubblico Ministero v. Tullio Ratti* [1979] ECR 1629, which further made concrete that Directives were capable of being directly effective and *Inter-Environment Wallonie ASBL v. Région Wallone* [1997] ECR I-7411, albeit a much later case, but which further removed restrictions on the direct effect of Directives by spelling out that States must not implement legislation contradictory to the intention of a Directive during the time before the deadline for implementation. Taken together, these cases provided a surer footing for European Citizens to more effectively defend and develop their Community rights.

<sup>212</sup> *Lair* [1988] ECR 3161 is an example of the workers' rights which flow from the Treaty being used in an expanded manner to pursue a right to education/training, albeit only for employment purposes.

themselves, particularly those concerning movement and support for educational purposes<sup>213</sup>.

The greatest bar to citizens enforcing their European rights lay in their being forbidden to pursue actions against private individuals or companies. Were they citizens in a traditional, national sense, such civil actions would have formed no bar to rights enforcement. Thus the ECJ had other mechanisms to create in order to ensure the broadest possible application of EU law. By pursuing such methods as indirect effect and (later) state liability the ECJ sought to shore up the individual's position within the Community and actively discourage the Member State from acting in a fashion designed to harm Union citizens or diminish their standing. The net effect was to create a situation whereby one individual was able to pursue a breach of an EU entitlement, such as the non-implementation of a Directive, when committed by another individual, by virtue of pointing out the Member State's role in any loss or detriment suffered.

In the case of indirect effect, the Court gave power to the individual citizen by ensuring that national courts interpreted national law in accordance with Directives "as far as possible"<sup>214</sup>. This had the beneficial effect of enhancing the powers of the citizen by ensuring that they were able to apply European law in a greater number of circumstances and across an increased breadth of their personal and contractual relationships. The previous shortcomings of direct effect, as established by *Marshall*, had proven inconvenient, leading various Advocates General<sup>215</sup> to call for a broadening of direct effect in order that it would include horizontal situations (i.e., those between individuals, not between the individual and State). Originating in *Von Colson*<sup>216</sup> more than two decades after *Van Gend* the concept was developed in such a way that it could be seen as a rival to direct effect in terms of utility and versatility<sup>217</sup> and it has come to

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<sup>213</sup> *Lair* was expanded on, following the implementation of the Maastricht Treaty, to create more substantive and far-reaching education rights, an example being *Bidar v London Borough of Ealing* [2005] ECR I-2119.

<sup>214</sup> C-106/89 *Marleasing SA v. La Comercial Internacional de Alimentacion SA* 1990.

<sup>215</sup> These Attorneys General included AG Van Gerven who gave his opinion as *obiter* in *Marshall*.

<sup>216</sup> *Von Colson* [1984].

<sup>217</sup> *Chalmers et al.*

be termed horizontal direct “effects by the back door”<sup>218</sup> which, if true, would seem to have answered the Attorneys General’s call. Moreover, the development meant that it could apply to all sources of law, not simply Directives, thus strengthening the assertion that ‘horizontal effect by the back door’ was being effectively pursued in relation to *all* EU law.

Nonetheless, there is a perspective that the ECJ’s active role in attempting to further the position of the individual has, in fact, succeeded only in creating a lack of clarity. The argument goes that, by attempting to formulate ‘rights’ on a European plane (whether of direct or indirect nature and whether the Member States anticipated it or not when they entered into an economic arrangement), the jurisprudence fostered a sense of great uncertainty about what those rights attached to the citizen are and how far they may go to enforce them<sup>219</sup>.

Possibly mindful that they might be reproached for judicial over-reaching, the Court was careful to steer clear of controversial extensions of citizen power. With this in mind, they were careful not to allow any aggravation of criminal liability under the guise of indirect effect<sup>220</sup>, albeit with the potentially confusing *Pupino*<sup>221</sup> case seemingly contradicting this assertion. Moreover, they explicitly stated that, in the light of the national courts’ obligations concerning the reading of Directives, there could be no *contra-legem* interpretation<sup>222</sup>, meaning that there would be some circumstances when courts would be constrained from applying any remedy whatsoever in favour of clearly wronged citizens.

Indirect effect, therefore, was not sufficient remedy for the shortcomings existent in the enforcement of Union law and the detrimental impact this had. In recognition of this, the ECJ developed a third shield for the individual: State liability.

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<sup>218</sup> Steiner, at p.6.

<sup>219</sup> Prechal, in Barnard, at p.43-47.

<sup>220</sup> *Luciano Arcaro* [1996] ECR I-4705.

<sup>221</sup> *Pupino* [2005] ECR I-5285, a case which muddled the waters as the ECJ indicated that a Framework decision should be read, as far as possible in line with national law (in the same vein as Directives), thereby appearing to extend indirect effect to the third pillar after all.

<sup>222</sup> *Wagner Miret v. Fondo de Garantía Salarial* [1993] ECR I-6911.

The beauty of this mechanism was that it was an entirely separate entity from the previous two and was particularly stinging to the State as it generated a financial penalty in terms of compensation. What better way to ensure Member State compliance with Union legislation? In order to benefit from this mechanism it was originally decided that an affected individual needed to demonstrate three things<sup>223</sup>:

- They were the beneficiary of a right;
- That right was identifiable on the face of the provision they were relying on;
- There was a causal link between the damage/loss suffered and the State's action/omission.

The conditions arose in a situation involving non-implementation of a Directive the result of which meant workers had lost their pension rights because their employer had become insolvent. Had the Member States acted properly and ensured implementation of, and abidance by, the Directive they would have been protected. The ECJ took this opportunity to set a precedent and hold States more responsible than they could ever previously have expected. The *Francoovich* conditions seemed easy to meet, but the ECJ not long after revisited the issue and altered the conditions in *Brasserie du Pêcheur*<sup>224</sup> making it so that the first two *Francoovich* conditions effectively merged, adding a novel second condition:

- the breach causing loss must be **sufficiently serious**.

This simple substitution ensured that compensation would now be conferred upon the most deserving where the most egregious violations or omissions occurred, rather than being readily attainable in the event of *any* loss. It may appear that the ECJ was, therefore, restricting the rights and reducing the power of individuals which, to an extent, is a valid perspective. On the other hand it could be argued that, in fact, they were indirectly extending them by making them have greater impact when they were used. Moreover, it should have become the case that, where liability was found, the fact of its being found would prove more damaging to the State/institution involved. Therefore, the apparent restriction can be seen as a very empowering development.

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<sup>223</sup> These are the conditions as originally outlined in *Francoovich and Others v. Italian State* [1991] ECR I-535.

<sup>224</sup> *Brasserie du Pêcheur SA v. Germany* [1996] ECR I-1029.

Although existing as an altogether separate mechanism<sup>225</sup>, state liability reflects many of the standards of other Union enforcement procedures in terms of scope and application, by virtue of the fact that it is not just the State who is caught by it: it is now established that national courts<sup>226</sup> and legally independent bodies<sup>227</sup> must also abide by these rules. In so doing, the individual is able to secure the greatest protection of rights and capacity for redress when they are infringed: the ECJ had once again fulfilled its unspoken role as the people's champion and had ensured that the Member States and their institutions were bound by the same standard of care as the Union institutions were under Article 340 TFEU<sup>228</sup>. Putative citizenship was, therefore, further enhanced by the ECJ's action in the arena of enforcement: by creating methods by which the citizen could independently enforce his rights the ECJ removed much of the oversight burden from the Commission and placed citizens more in command of their own relationships and firmly at the centre of future political and legislative considerations.

The mechanical methods created by the ECJ were not the only ones used to increase 'putative-citizenship'. There was also a legislative and policy focus aimed at increasing the scope of the social and political rights that the individual could enjoy. The launch for this was a return to the spotlight of the contents of the original treaties.

### *The ECJ, the Battle for Sex Equality and a Unified Citizenship of Nationals*

One of the strongest limbs for continuing to develop the role and standing of the individual was by the expansion and redefinition of the scope of Articles 12 and 141<sup>229</sup> ECT (now Arts. 18 and 157 TFEU): those dealing with non-discrimination. Until this point we have focussed on how the ECJ attempted to pass rights directly to the

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<sup>225</sup> Prechal, in Barnard, at p.36.

<sup>226</sup> *Koebler v. Austria* [2003] ECR I-10239.

<sup>227</sup> *Haim v. Kassenzahnärztliche Vereinigung Nordrhein* [1994] ECR I-425.

<sup>228</sup> ex Art 288 ECT, which provided/provides that "In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties".

<sup>229</sup> ex. Art 119 ECT.

individuals in order to enable them fully to enjoy their standing within the EU. However, by focussing on the idea of discrimination, predicated either on gender or nationality, the ECJ was able to enable the various national citizenries to show solidarity with each other and form a cohesive body. The easiest, most efficient way to form this cohesive body was to focus on equal treatment between peoples and the ECJ took the opportunity to demonstrate that a general principle of equal treatment between the sexes was fundamental to Community law in such cases as *Sabbatini*<sup>230</sup> and *Ariola*<sup>231</sup>, which directed this principle squarely at the Community institutions themselves.

The seminal case for the expansion of this notion to the wider Community was *Reyners*<sup>232</sup> in 1974. The Court dealt with a situation where a Dutch national, Reyners, was forbidden admittance to the Belgian bar, despite holding the relevant qualifications, purely by virtue of his being Dutch. The decision was challenged and the ECJ's response was unequivocal: "The rule on equal treatment with nationals is one of the fundamental legal provisions of the Community ... this rule is, by its essence, capable of being directly invoked by nationals of all the ... Member States"<sup>233</sup>. With such a pronouncement the ECJ clearly indicated that equality between citizens was of paramount importance. Where such equality was found wanting, individuals were, by this case, reassured that they held the power to rectify the situation and that such power had always been accorded to them directly by the EC: they were not obliged to wait upon any Member State to recognise that this was the situation.

*Reyners* was not a case apart. There is a considerable body of case law concerning Art.157 TFEU (which originated after France voiced fears that it would suffer in comparison with fellow Member States who did not as rigorously enforce equal treatment in labour provisions), a body of jurisprudence that extends well into the post-Maastricht era. The *Reyners* rationale was further extended in the *Defrenne*<sup>234</sup> case, which concerned a dispute over equal pay (therefore, gender-based discrimination). The ECJ, on this occasion, availed itself of the opportunity to further assert the place of the

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<sup>230</sup> *Luisa Sabbatini, née Bertoni v. European Parliament* [1972] ECR 345.

<sup>231</sup> *Ariola v Commission* [1972] ECR 221.

<sup>232</sup> *Reyners v Belgium* [1974] ECR 631.

<sup>233</sup> *ibid.*, at paras.24 and 25.

<sup>234</sup> *Defrenne v. Société Anonyme Belge de Navigation Aérienne* [1976] ECR 255.

citizen, this time declaring that the article's aim was not merely economically minded: it had, in fact, a social justification<sup>235</sup>. Here, therefore, we can see that the ECJ has pushed the bounds of pre-citizenship once again beyond mere economic citizenship purely founded upon a person's worker status. By using worker status as a spring-board, it was able to expand the concept making it something more closely resembling the Marshallian model that was the accepted 'norm' in the western world by this time. The Court specifically stated:

“Article 119 pursues a double aim ... this provision forms part of the social objectives of the Community, which is not merely an economic union, but is, at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living conditions of their peoples ... This double aim, which is at once economic and social, shows that the principle of equal pay forms part of the foundations of the Community.”<sup>236</sup>

By highlighting that the Community had such a dual purpose and owed recognition of it to its Member State nationals, it ensured that pre-citizenship could not continue to be viewed in one-dimensional, purely economic, terms.

Art.157, at the heart of the *Defrenne* case, may have lacked precision in terms of defining what 'equal pay' and 'equal work' meant exactly, but the ECJ was able to ignore any confusion about the relative values of different types of work and instead identified a single principle. In this instance, that principle was that of paying people equally when they undertook the same work. This was a broad and overarching principle, but the important knock-on effect of this case was that individuals found themselves able to demand the respect equivalent to other citizens whether they be of the same nationality or not. The principle was further enhanced a mere two years later when it became clear that the abolition of sex discrimination between nationals was deemed “a fundamental

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<sup>235</sup> *ibid.*, at para.10.

<sup>236</sup> *ibid.*, at paras.8-10, 12.

Community right’’<sup>237</sup> begging the question, how can one have fundamental rights as part of an institution if one is not, *de facto*, a citizen of it? The answer, surely, is that one cannot.

Sex discrimination is, in many ways, one of the easiest areas in which to find an absence of citizenship and citizen parity and identify measures implemented in an attempt to rectify this disparity. To that end, the ECJ has been and continues to be particularly active in this field, continuing to pursue the social aims identified in *Defrenne*<sup>238</sup>. It is clear that Art.157’s status was fundamentally important to the Community legal order<sup>239</sup>, despite the fact that it took time to be considered directly effective *per se*<sup>240</sup>. The issue of direct effect has been adjudicated frequently, even in the post-Maastricht era<sup>241</sup>. Initially it was deemed that in order for there to be direct effect there was the requirement that there have been implementing legislation, which in the majority of MS, if not all, has been the case<sup>242</sup>. That being said, citizens found extra protection accorded them by the Court, once again affirming their status as an active and integral part of the Community. Pre-citizenship was given greater validity in a series of decisions made in the 1980s, fleshing out the extent of the equal treatment provisions. Equal treatment protection means nothing to individuals if they are unable to assess whether they have been accorded unequal treatment in the first place.

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<sup>237</sup> Craig and de Búrca, at p.384.

<sup>238</sup> Other, more recent examples include *P v. S and Cornwall County Council* [1996] ECR I-2143 and *Deutsche Telekom v. Schröder* [2000] ECR I-743.

<sup>239</sup> Chalmers *et. al.*.

<sup>240</sup> *ibid.*, at p.877.

<sup>241</sup> E.g., *Mangold v. Rüdiger Helm* [2005] ECR I-9981.

<sup>242</sup> In the UK, this is found in the Equal Pay Act 1970, which came into effect in 1975. This statute has itself been the centre of much litigation, a recent example being *Allonby v. Accrington and Rossendale College and Others* [2004] IRLR 224. In this case part-time lecturers were denied renewed contracts and instead were re-hired on ‘self-employed’ contracts. More women than men were placed on this contract (with more men retaining their original contracts) and an equal pay claim was generated. The claim failed, not because of their ‘self-employed’ contract, but because of the absence of a comparator from the same contract type.



Beginning in 1982<sup>243</sup>, the ECJ acted to assure pre-citizens that they had the right to ascertain what their employer's notion of work's value was: the onus was placed on the employer to provide clarification about their pay practices and schemes.

The individual was further empowered *vis-à-vis* employers (and citizenship made more concrete) when the Court demonstrated how far it was willing to go in order to protect pre-citizenship. *Danfoss*<sup>244</sup> was incredibly important as it clearly went beyond the earlier *Commission v. United Kingdom* decision to state concretely that there was no room for opacity in employers' pay practices. The impact of *Danfoss* lies not so much in the Court's reiteration and hardening of the previous case's stance, but in the fact that the ECJ chose to flex its muscles, acting precisely to impede a fellow Community institution. It stood in direct opposition to the wishes of the Council, who sought to block an attempt by the Commission to make employers demonstrate that their opaque pay structures had been implemented for a valid reason. The ECJ took a stand for the individual and *Danfoss* is now the accepted Community standard for employment relations.

As a result of the ECJ's intervention a major shift in the standing of pre-citizenship was evident between 1957 and the mid-1980s. No longer an entity that conferred rights solely derived from Art.45, there were now a variety of grounds from which citizenship rights could be drawn<sup>245</sup>. Giving pre-citizens greater standing by explicitly upholding (or, perhaps more accurately, creating) a social arm to the entity was part of the process needed to make pre-citizenship a viable and legitimate creation. From its 1957 genesis, the Member State nationals and ECJ between them, one by pressing suits and the other by creatively adjudicating them, had steadily advanced pre-citizenship into a force that the States not only had to contend with, but had to actively embrace and respect when formulating their own legislation and policy practices. What was missing, however, was a feature whose absence was, arguably, the greatest threat to pre-citizenship's legitimacy as an institutional construct: political rights.

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<sup>243</sup> *Commission v. United Kingdom* [1982] ECR 2601 at para.9.

<sup>244</sup> *Handels-og Kontorfunktionærernes Forbund i Danmark v. Dansk Arbejdsgiverforening, acting on behalf of Danfoss* [1989] ECF 3199.

<sup>245</sup> Including Directive 75/117, repealed and replaced by Directive 2006/54.

## Developing Citizenship from the 1970s Onwards

It is easy to ignore dissatisfaction within a polity if its members have no forum in which to express that dissatisfaction. It may well be argued that the Council is an institution constituted by elected members of the national governments, meaning that dissatisfaction in the European arena would be reflected by a change in its make-up following national elections. However, as illustrated by the attempt of the Council to protect employers' interests over those of the individual employee<sup>246</sup>, being elected in a national domain does not mean that individual interests would carry forth into supranational politics. Therefore, in order to secure individuals the protection they required, it was necessary to provide them with a voice and, consequently, a protector other than the ECJ.

Moreover (and perhaps a more likely candidate for the impetus behind the creation of a more political pre-citizenship), the move towards politicisation was beneficial to the EC itself. By the 1970s it was undergoing a crisis, manifested both internally and externally. The global economy contributed to the external crisis with the increase in oil prices partly to blame<sup>247</sup>. However, the internal aspect of this crisis was manifested by "declining public support from European citizens"<sup>248</sup>, something which threatened the continuity of the entire enterprise given that it was still comprised of a relatively small membership and had the potential, therefore, to be derailed by anti-integrationist sentiment, if vehemently enough expressed, at home.

The recognition of this deficit of support was deemed important enough by the heads of governments and served as a stimulus to developing the political arm of pre-citizenship. Although by the 1970s there were nine Member States (a 50% increase) the political problems facing the EC were significant and were addressed directly by the Belgian Foreign Minister, Van Eslande, who astutely observed the lack of connection between the Community and its citizens and stated:

"Europe cannot be monopolized [sic] by economic and technological achievements and neglect, under

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<sup>246</sup> The *Danfoss* decision specifically relates to this incident.

<sup>247</sup> Wiener, 1998b, at p.63.

<sup>248</sup> *ibid.*.

penalty of losing essential support, the aspirations  
of its citizens”<sup>249</sup>.

This lack of connection was in effect a reiteration in 1974 of the same sentiment expressed by Levi-Sandri some six years previously. The extent of the problem had only grown in the intervening time because the individual citizen had, arguably, not been made to feel anything other than an economic unit by the Community, despite the best efforts of the ECJ to expand the scope of Art. 39 into something more overarching. The first truly significant, visible, political, step in rectifying this imbalance was to come with the call by the Council of Ministers in 1974 for the European Parliament to become directly elected (a call that merely implemented the Treaty of Rome requirement anyway). Whilst this move, which led to the first elections in 1979, achieved the aim of fleshing out the political arm of putative citizenship, there was much more that needed to be done and it did not all fall on the shoulders of the Court.

Between 1970 and 1992, there were several policy shifts which came together to form an altogether more rounded embryonic entity, one that bore several of the features associated with Marshall’s citizenship construction. Combined with the economic advancements included in the expansion of the notion of the term worker, where the traditional rights attached to the individual were most directly felt, were advancements in what came to be known as ‘Special Rights’<sup>250</sup>.

### *Development of Special Rights*

Thus far, the Court has taken centre stage as the protector and advocate of the putative citizen. However, it was not the sole protagonist in its development and the other institutional actors should not be marginalised. The way in which the institution became involved in the process through the commissioning and publication of various

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<sup>249</sup> *ibid.*, at p.68.

<sup>250</sup> “Special Rights” were defined under the Commission report “Towards European Citizenship” in 1975 and from this point on became part of the *acquis communautaire*. Their importance, therefore, was recognised long before the entity was crystalised as part of the Treaties.

reports on special rights, followed by recommendations for and the realisation of their implementation, requires discussion and assessment. It must, as part of any such discussion, be borne in mind that a report is not the same thing as the initiation of a policy: the one does not automatically generate the other. Instead, it could be said that the commissioning of a report is, in fact, a delaying mechanism<sup>251</sup>, serving to impede the progress of citizenship's development, rather than seeking its furtherance. The extent to which this was the intention shall be considered in due course.

“Special Rights of a political nature are essentially the rights to vote, to stand for election and to hold public office”. So said the Bulletin of the European Communities in 1975<sup>252</sup>. However, that was not the be all and end all. During the 1970s and 1980s several Community institutions convened and generated reports concerning what they felt should be done about these ‘special rights’. There were several competing considerations that needed much discussion and could, potentially, be the root of considerable disruption, leading to many questions such as, ‘are fundamental rights and special rights the same thing’, ‘should these rights apply to Community citizens across the Community or just to the individual in any given host state’ and ‘how can special rights be reconciled with issues of national and community identity’?

During the early part of this discussion, there were three ‘reports’, which together formed the backbone of decision-making in this area whilst at the same time reflecting the widely disparate thought involved. Special rights, as considered by the Commission’s report on the subject, “would be the logical result of applying the principle of equality”<sup>253</sup>. However, the approach the Commission was to take in this area was far more restrictive than that of the Parliament. This disparity cannot be put down to differing levels of citizen representation, as might be the case today, but instead seemed to stem from different ideals as to *what* the citizen could *become*. The fruition of these reports would take some time to enter into being, but the developments from 1992 onwards tend to indicate that the more expansive view taken by Parliament in the 1970s has won out.

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<sup>251</sup> Wiener, 1998b, at p.99.

<sup>252</sup> EC Bulletin, Supplement 7, p.28.

<sup>253</sup> Wiener, 1998b, at p.76.

The Commission's proposal in 1975 was one that encompassed the political nature of voting rights and engaged in a discussion about who was eligible to stand for and vote in elections to the Parliament. The approach the Commission took was, as stated above, restrictive. However, it provided a sound rationale for this, stating:

“equal treatment for foreigners in the economic and social fields is accepted by public opinion... the same does not apply for foreigners in the political field. This is a new idea and the public will have to be given an opportunity to get used to it.”<sup>254</sup>

Nonetheless, by dwelling on the principle of equality, one enshrined in the Treaty and used as a lever by the ECJ for the promotion of the individual, the Commission was able to deflect attention away from the politicisation of putative citizenship. Instead, it could focus on creating equality between fellow citizens<sup>255</sup>, perhaps bypassing the need to confer *European* citizenship rights altogether, by construing citizen rights, in the words of Wiener, “according to the principle of equality, thus providing the citizens with the possibility of adding ‘rights relating to the original nationality... to the rights in the host State’”<sup>256</sup>.

The Commission's report, by taking such a stance, was able to obviate the need for an in-depth consideration of the role of the ‘foreigner’. By favouring a national, as opposed to supranational, approach to the conferral of rights, the Commission's report was to construe rights as being bestowed because of a principle, rather than accorded as of right. Thus, foreigners were to remain a tolerated presence in a host state, rather than assume the role of citizens taking their place within a broader community: workers should be given rights *because* of their worker status, rather than assuming them as a corollary of simply being Member State citizens in the first place.

This view was at odds with that expressed by the European Parliament only a few years later. Faced with oncoming elections, it confronted the developing nature of citizenship with an expansive and welcoming perspective. It put forward the view that

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<sup>254</sup> EC Bulletin, Supplement 7, p.30.

<sup>255</sup> Wiener, 1998b, at p.86.

<sup>256</sup> *ibid.*, at p.87.

the citizens' rights pertained to *every* member of the Community, rather than being attached to those resident in a host state (so as to ensure that they did not suffer detriment when compared to nationals of that State). It promulgated a resolution on 16<sup>th</sup> November 1977<sup>257</sup> presenting a detailed consideration of the multiple rights to be attached to the citizens. Those included extensive political rights, such as the right to stand in elections in a host state, become unionised and a right to petition Parliament itself. These were somewhat at odds with the conservative approach the Commission had propounded beforehand. The Bayerl report, which had a profound influence on Parliament, called on special rights to be construed as follows:

“all the constitutional rights on which the legitimacy of a democratic State depend are conferred upon the citizens of the European Community vis-à-vis the European Community and, secondly, to include those rights which citizens of a particular member State possess but which have not hitherto been granted to other citizens of the Community.”<sup>258</sup>

From one perspective, the European Parliament had come to its position by utilising the same equality argument favoured by the Commission, calling on rights to be conferred universally so as to avoid inequality within the Community, with the additional consideration that all rights conferred by the Treaties should come under the umbrella heading of ‘special rights’ and ignoring any supposed distinction between rights flowing from the Treaty and those accorded owing to residence.

The two reports, while placing different emphases on the nature of ‘special rights’, shared a common goal: to encourage the finding of a political dimension in putative citizenship. This appeared to be in stark contrast to the Council which, rather than engaging in either the commissioning of reports or presenting clear opinions at the round table organised by the European Parliament, concentrated on the difficulties attached to increasing the scope of citizen rights. This perhaps reflected the idea that the Council was more and more dominated by issues of national, rather than

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<sup>257</sup> OJ No. C299, 12 December 1977.

<sup>258</sup> Bayerl Report at p.86-87.

supranational, interest<sup>259</sup>. Thus it was left to the two unelected non-judicial institutions to further outline the political rights that would come to be embodied in the Maastricht Treaty. They did so most willingly.

The outcome of the Florence Round table was promising. By the end of the 1970s both Commissioners and Parliamentarians<sup>260</sup> had voiced the opinion that citizenship of a supranational kind must be considered and given room to germinate. This was despite recognition that allowing such a supranational entity to evolve would inevitably cause conflict with long-seated notions of belonging and identity and the more worrying question of whether the average individual was even aware that he/she possessed rights of a Community nature<sup>261</sup>. Events made such considerations more academic: in 1978 a Council directive stemming from the round table paved the way for *in loco* suffrage (i.e., voting rights for those foreigners resident in a host State), while in 1982 Parliament created a draft calling for rights to be extended to all Member State citizens irrespective of their place of residence<sup>262</sup> and, in 1983, the Legal Affairs Committee called for them all to be able to *stand* for election, irrespective of their place of residence<sup>263</sup>. These initiatives culminated in the first calls for a new Treaty with citizenship rights codified therein.

This policy shift was crystallised in the 1980s, concentrating not just on the political rights that formed the backbone of discussion in the 70s (now a little less important given that the first elections had been held) but also on social and welfare entitlements (arguably raised in importance given the Court's activism in this area). Political rights, in the form of a concrete position being taken over the extent of national citizens' right to stand and vote, nonetheless remained a valuable

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<sup>259</sup> Wiener, 1998b, at p.98.

<sup>260</sup> For example, Commissioner Davignon and Mr. Colombo, President of the European Parliament.

<sup>261</sup> Commissioner Davignon, as quoted in Wiener 1998b.

<sup>262</sup> Contained in its "Draft uniform electoral procedure for the election of Members of the European Parliament", March 10<sup>th</sup> 1982, OJ EC, No. C87 April 5<sup>th</sup> 1982 at p.61-64

<sup>263</sup> Contained in a resolution sent to the Parliament on "the right of citizens of a Member State residing in a Member State other than their own to stand for and vote in local elections", in Wiener, 1998b, at p.97.

consideration given the commitment made in the Preamble to the Single European Act to the promotion of democracy. With this in mind it was more critical to ensure that, by the time of the 1989 elections, suffrage would be provided for national citizens irrespective of their place of domicile. At this point in the story it was the Commission who became the champion of the individual, as they wrote a proposal in 1986 calling for the extension of voting rights to all those currently excluded by virtue of not being in their home State. It was preposterous that an entity claiming to have democratic ideals at its heart should have the result of undemocratically excluding those who had availed themselves of the economic opportunities propounded by it, especially in light of the discussion a mere decade beforehand, which had called for Special rights *only* to be conferred on those who had availed themselves of the opportunity to use their worker status under the Treaty. The report said:

“the Commission considers that an initiative on voting rights in local elections in the Member State of residence is a logical consequence of the desire to create ‘a People’s Europe’. The political and legal difficulties do not justify abandoning this idea which could demonstrate to the man in the street that the Community is relevant and give voters identical rights irrespective of their place of residence.”<sup>264</sup>

Therefore, the Commission left open the mechanisms by which this could be implemented but set it as an overarching priority and did so in terms of making the EU relevant to those who may not otherwise give it a second thought. It is interesting to note that such a consideration was relevant twenty years ago: increasing voter apathy (both nationally and supranationally) makes such exigencies timely once more.

A process of negotiation (lasting several years) between Commission, European Parliament and Council ensued. Ultimately, in 1988 the “Proposal for a Council Directive on voting rights for Community nationals in local elections in their Member States of residence” was submitted to the Council, but there was insufficient time to enact the necessary changes before the Maastricht Treaty came into being. Indeed, as

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<sup>264</sup> EC Bulletin, Supplement 7 1986 at p.44.



will be discussed later, changes to citizenship legislation and policy initiatives affecting their standing continued to be required in the post-Maastricht era.

Interestingly, the Commission's involvement in the citizenship issue went beyond that of which the ECJ could have been capable. Constrained by only being able to deal with those issues presented to it, the Court could not develop broad brushstrokes of policy beyond the realms of their competence. The Commission was not subject to any such niceties. Other than some careful politicking vis-à-vis the other (at times less willing) institutions, the Commission was able to act with a fairly free hand, and could, without fear of being accused of overreaching, state that:

“[I]f ordinary citizens are to be involved in the building of Europe, they have to be gradually granted at the European level the political rights enabling them to do so.”<sup>265</sup>

With this in mind, the political position of the citizen prior to Maastricht was in something of a quandary. There was a clear desire for the democratic ideals expounded by the Community to become a reality (and a sense of irony that it was absent from those economic migrants who otherwise exemplified the European ideal), but the enactment of this will was still a work in progress. However, it constituted a significant advancement on what had been available to the individual in the previous twenty-year period.

Hand in hand with the special rights issue went social rights and they were not overlooked in this timeframe. At the end of the 1980s a new advancement was achieved with the coming into force of the Social Charter. However, it suffered significantly by its lack of uniform application. A sweeping innovation (recognising, in large part, the work of the Court) that codified many principles surrounding free choice and equal treatment, it was nonetheless unpopular with the worker<sup>266</sup> and was repudiated by the UK. The full impact of the Charter would, however only be felt in the post-Maastricht period. Nonetheless it was a significant step, in that it clearly recognised another facet

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<sup>265</sup> Wiener, 1998b, at p.173.

<sup>266</sup> *ibid.*, at p.177.

of the putative citizen's life that fell within the traditional focus of the nation state: the need for a productive and satisfying home life.

For an entity that had yet to receive formal recognition, putative citizenship had considerably developed. In the space of forty years, it had gone from being an unwelcome side effect of economic integration to being something positively, urgently, required by the Community institutions. World events would, however, make its crystallisation all the more pressing.

### *Passport Rights and the Schengen Agreements*

The development of pre-citizenship in the field of Special Rights cannot be properly understood without some brief mention of the concurrent Passport rights policy. In simple terms, passports for citizens were assumed to be a natural progression as they would foster fellow-feeling between peoples, enable easier free movement<sup>267</sup> and provide a visible manifestation of the EC to non-Member countries<sup>268</sup>. As was to be expected progress was slow (15 years between conception and realisation<sup>269</sup>) and far from smooth: certain States were reluctant to follow through on the necessary relaxation of border controls<sup>270</sup> and the Council, as the national executives' mouthpiece, also proved difficult when seeking to push the policy forward<sup>271</sup>. The European Parliament was again the citizen's ally, urging the Council to pursue the passport policy, hoping for it to be implemented in 1978: that hope was to be frustrated, but passport policies were eventually included in the TEU.

Before that time, however, several steps in the policy's development were completed. The seemingly superficial matter of passport colour was agreed upon<sup>272</sup> only in 1981 and yet this single issue was of great importance. Assuming a uniform approach

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<sup>267</sup> EC Bulletin, Supplement 7, 1975, p.17.

<sup>268</sup> Wiener, 1998b, at p.107.

<sup>269</sup> *ibid.*.

<sup>270</sup> *ibid.*, at p.113.

<sup>271</sup> *ibid.*, at p.111.

<sup>272</sup> *ibid.*, at p.112.

to passport colour, this decision was going to mark out EC passports as distinct from all other countries for the future of the Community's lifespan. In the eyes of the EC, there were limits to the control that could be exerted over the harmonisation of passports<sup>273</sup> as the document remained one ostensibly of *national* identification. Instead, the importance of agreement over the passports' appearance was twofold:

“one is symbolic, attaching importance to the feeling that citizens of the Member States belong to the Community, and the other is practical, since the introduction of the passport represents the first step towards the implementation of the controls within the Community and equality of treatment of European citizens by non-member countries”<sup>274</sup>.

Thus, the equal treatment that the institutions had sought to instil in Community policies was, once again, at the core of *this* project. Unfortunately, a binding agreement about the implementation was to elude the Community for many years.

However, in 1984 the first signs of accord were visible. France and West Germany signed a bilateral agreement that would stagger a reduction in border controls between the two states, as each was aware that “the ever-closer union of the peoples of the Member States ... should find expression in free passage across internal borders for all nationals of those States”<sup>275</sup>. This agreement was, in early 1985 followed by a flurry of Community activity that culminated in a proposal that called for harmonisation of “legislation concerning foreigners and of policy matters connected with issuing visas”<sup>276</sup>, a step far in excess of that which had, to date, been achieved. The Community again appeared ambitious, with the promise of being galvanised into action, although the thorny issue of policing security in the Community seemed like it could derail the process before it really began<sup>277</sup>. Still, the bilateral agreement of 1984 paved the way for

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<sup>273</sup> *ibid.*.

<sup>274</sup> European Parliament 1992, in Wiener, 1998b, p.113.

<sup>275</sup> *ibid.*, at p.185.

<sup>276</sup> *ibid.*, at p.187.

<sup>277</sup> *ibid.*.

more bilateral and multilateral agreements that, in turn, provided the basis for the 1985 Schengen agreement<sup>278</sup>.

Schengen occupies an interesting place in Community and Union history. Initially it was a non-Community initiative (being incorporated in the Union framework in 1997) but boasted as its members the Benelux states, France and Germany. That membership gradually expanded. It provides a scintillating illustration of what Community citizenship *could* have been with more belief on the part of the States<sup>279</sup>. With a membership that includes non-Community members (notably Iceland, Norway and Switzerland) it pursued an objective of complete removal of internal borders, both for persons and goods and realised its objective in (in terms of supranational politics) breakneck speed. Where an objective is sufficiently valuable to interested parties, it appears goals can be achieved with remarkable alacrity. Thus, by the mid 1980's the continent ran separate but contemporary 'passport' policies. Despite the pressures of several of the Community's institutions, however, a clearly *Community-based* passport policy required the intervention of extensive Treaty negotiations and was finally realised in conjunction with 'true' *Union* citizenship in the Maastricht Treaty.

### *The Road to Maastricht and the Shift from Putative to European Citizenship*

The completion of the formalisation of the citizenship project was yet to be realised, but the need for it became more pressing following the end of the Cold War. The most significant feature of the end of that conflict for the then Member States was the reunification of Germany. The reunification process took part in stages: the social and economic union officially dated from July 1<sup>st</sup> 1990<sup>280</sup>. However, the unification as

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<sup>278</sup> To be discussed more fully in Ch.4.

<sup>279</sup> Even today, not all Union members are Schengen members. However, in effect, the Community was opened up to free movement on the part of third-country nationals, proving that, in another context where Union citizenship was reformulated, extending passport rights in the Union to other, non-Schengen, third-country nationals would prove a viable project, as the Union already has experience in this area.

<sup>280</sup> The process was not straightforward, requiring not one but three Treaties and a year for completion.

we understand it, i.e., the melding of the two states to form one, cohesive entity dates from October 3<sup>rd</sup> 1990, when West Germany effectively absorbed the East. Prior to the fall of the Wall, the “Germany” referred to as a Community member was, of course, *West* Germany.

In the light of the policy and social developments that were achieved in the 1970’s and early 1980’s the potential for a disparity in the status of East and West Germans was particularly troubling. An important consideration when talking about the motivations and urgency behind reunification is that, since the war, East and West Germany had been governed according to different political principles. The West’s had, of course, been in line with the sensibilities of the Union, but it was essential to achieve reunification with the East in a sympathetic fashion whilst maintaining the democratic and liberal objectives the Union had striven to oversee. This was all the more the case when recollecting that the discrepancies between East and West, combined with the powerful memories of the century’s geo-political history, had caused some States to be resentful and fearful of what might come.

Following the fall of the Berlin Wall on November 9<sup>th</sup> 1989 and the year-long negotiations to secure the existence of a single German state, there were questions to be addressed concerning citizenship status in the light of the different societal and political standards the two had previously enjoyed. Moreover, the reunification, or *Deutsche Einheit*<sup>281</sup>, had considerably ruffled feathers among the other Member States. Whilst the reunification was, effectively, initially kick-started by Mikhail Gorbachev applying pressure to the GDR’s then-government on a State visit in October 1989<sup>282</sup> in which he

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<sup>281</sup> There has been controversy concerning calling reunification “reunification” which centres upon two factors. One school of thought is that “reunification” should be so called because it refers to returning to a state of affairs formalised originally in 1871. Opponents of this, however, prefer the term *Deutsche Einheit*, or German Unity, because the end product was somewhat larger and slightly differently composed than the pre-WWII entity had been. German Reunification is celebrated on October 3<sup>rd</sup>, with *Tag der deutschen Einheit* (German Unity Day).

<sup>282</sup> [www.newworldencyclopedia.org/entry/German\\_reunification](http://www.newworldencyclopedia.org/entry/German_reunification) (last accessed 09/04/12) Gorbachev’s visit was to mark the 40<sup>th</sup> anniversary of the GDR’s existence, but he was promoting a more liberal perspective and pushed the GDR government to

tried to exert pressure to ensure that it embraced a more liberal approach to politics (one more in line with the then-Community's political ethos), the process itself was not as warmly received as might have been expected.

The Community as a whole, despite its commitment to democratic governance at a State level, did not relish the joining together of East and West: there was considerable suspicion on behalf of such principal States as France and the UK<sup>283</sup>. Between them, the two State leaders<sup>284</sup> strove to dissuade Gorbechov from aiding the union and Thatcher in particular seemed to fear what reunification might bring, stating in a private meeting:

“We do not want a united Germany. This would lead to a change to postwar borders and we cannot allow that because such a development would undermine the stability of the whole international situation and could endanger our security”<sup>285</sup>.

Whilst this fear was, of course, predicated upon the experience of two World Wars, the full cost of unification was, within Community borders, more likely to be felt as an economic and social effect and it is for this reason that the *Deutsche Einheit* most merited further consideration as a citizenship issue.

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embrace a more liberal form of governance. By November 8<sup>th</sup> 1989 most of the GDR government had resigned and new members were installed, leading to the removal of travel restrictions in Berlin on November 9<sup>th</sup>, which led to the meeting of East and West Berliners for the first time since 1961 and the pulling down of the Berlin Wall.

<sup>283</sup> “Thatcher Told Gorbechov Britain Did Not Want German Reunification”, The Times, September 11<sup>th</sup>, 2009 [www.timesonline.co.uk/tol/news/politics/article6829735](http://www.timesonline.co.uk/tol/news/politics/article6829735) last accessed 09/04/12.

<sup>284</sup> François Mitterand and Margaret Thatcher.

<sup>285</sup> As reported in Kremlin Politburo records “Thatcher Told Gorbechov Britain Did Not Want German Reunification”, The Times, September 11<sup>th</sup>, 2009 [www.timesonline.co.uk/tol/news/politics/article6829735](http://www.timesonline.co.uk/tol/news/politics/article6829735) last accessed 09/04/12.

Jacques Atali, personal aide to President Mitterand said to a senior Gorbechov aide, “France by no means wants German reunification, although it realises that in the end it is inevitable”.

A useful further consideration concerning the citizens of the new Germany arose for the six months between German Unity Day and March 15<sup>th</sup> the following year, when the Two Plus Four Treaty<sup>286</sup> came into effect. In this time period, there was the unusual situation of a Sovereign State not being free to claim absolute sovereignty over its citizens or territory. Instead the other States, occupying powers since the end of the War, retained some semblance of authority in the country, however weakly enforced. A tangential and, perhaps, unrelated issue covered by the Treaty of Maastricht was that of subsidiarity<sup>287</sup>: a means by which Member States could ensure that decisions were made as closely as possible to the people affected by them. By no means definitely aimed at the newly unified Germany, the benefits of such a policy would certainly have been felt within German borders.

The post-Wall reunification was not the only reason for a more concerted push towards a stronger citizenry and supranational form of citizenship: between 1970 and 1989 there had been three rounds of expansion<sup>288</sup> doubling the Community's membership. With so many people from across Europe now falling within the borders of the Community, troublesome questions about the nature of European government, the role of the citizenry in forming it and their overall status as units belonging to the Community and bound by its laws needed consideration. The existence of these issues led to greater debate about the politicisation of the Community and how best to address the needs of the people it both served and controlled, culminating in the official creation of European Union Citizenship under the Maastricht Treaty.

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<sup>286</sup> Treaty on the Final Settlement with Respect to Germany, as signed by the USSR, USA, France, UK and East and West Germany.

<sup>287</sup> Art.5 ECT, replaced in substance by Art.5 TEU.

<sup>288</sup> In 1973 the UK, Ireland and Denmark and, in 1981, Greece joined the Community while Spain and Portugal both acceded in 1986.

## Does Pre-Citizenship Conform to Modern Expectations?

It has come to be expected in modern times that the Marshallian tri-partite model of modern citizenship is the current gold standard for citizenship and its affiliated rights. This was equally the case prior to the formal genesis of European Citizenship in 1992. However, as has been previously established, there have been various models of citizenship through the ages that were, in their day, the expected and legitimate standard of the time.

If we apply various of the models discussed at length in Chapter 1 to the entity of pre-citizenship, there are some interesting conclusions to be drawn about the nature of citizenship in Europe between 1957 and 1992. Beginning with the “Classical” model as found in Ancient Greece and Rome, we can see that there are several immediately apparent differences. Like Classical citizenship, pre-citizenship was restricted in certain ways: the requirement that there be some cross-border activity of some kind to ‘trigger’ it being a major failing. That being said, its personal scope did not suffer from the mass disenfranchisement of an entire sex: therefore, we can conclude that it conforms to at least one element of modern citizenship unlike either the Greek or Roman Classical model. Between 1957 and 1975 pre-citizenship was most manifestly flawed in relation to political rights, something rectified by the implementation of European Parliamentary elections. The deficit prior to 1975 was one that would have been familiar to the *passive* citizens of Revolutionary France and the lower social orders in either Classical model; those who enjoyed the benefit of the title ‘citizen’ but who were not so fortunate as to be sufficiently wealthy, or deemed sufficiently worthy, to be able or allowed to participate politically in the running of the State.

However, with the implementation of direct European elections, the European model of citizenship moved beyond the failings of these earlier models, as outlined previously, and dragged supranational citizenship closer to the socio-politico-economic entity that Marshall had outlined in the 1950s. Whilst the pre-1975 embodiment of citizenship clearly falls short of modern demands, can we say that the post-1975 developments enable pre-citizenship to satisfy our current expectations? The ECJ had certainly taken the time to develop legal principles so as to ensure that national citizens were able to feel the benefit of EU legislation as direct rights and had sought to force through social changes designed to propel equality between the sexes. The other institutions had driven through Regulations and Directives that enhanced the rôle of the



individual in this new legal order, and yet, there was still the ineffable feeling that something was missing. That something was the formal recognition that national citizens belonged to something greater: that they too formed part of the new enterprise and that, perhaps, its success was contingent upon those citizens' continued support. It was this that led the Community to enact legislation that regenerated the Community and transformed it into the Union. It was this that fed the development of new spheres of competence and it was this, in turn, which led to the crystallised concept of European Citizenship. Art 17 ECT<sup>289</sup> seemed to promise a new era. "Citizenship of the Union is hereby established" sounded like an impressive promise to national citizens that, as Union members, they would enjoy a status that breaks free of geographical constraints and that places them on an equal footing with their European neighbours. It seemed as though, from 1992 onward, national citizens could expect to enjoy privileges by virtue of belonging to the Union. Did the reality reflect this innate promise, or has the reality been less satisfying?

As I will demonstrate, the ECJ shared the view that the EU was in new territory and it chose to take the opportunity to continue its development of the role of the 'citizen', this time more actively, more expansively and, arguably, more legitimately than it had before.

## **Conclusion**

Between 1957 and 1992 the Community did not formally recognise that it had created a form of supranational citizenship, despite that having been the desire and will of Monnet, arguably the Community's founding father. On a more informal basis, that entity plainly has been shown to exist, albeit in a putative state. Initially predicated on an economic platform the entity was developed and enhanced, both by the direct intervention of the Community institutions (most notably the ECJ, which provided a social aspect to the notion) and by the imposition of political facet to pre-citizenship which came with the implementation of direct Parliamentary elections.

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<sup>289</sup> Now Art.20 TFEU.

This does not mean that the pre-1992 entity was citizenship as we would recognise it either today or in 1993: instead it was an evolving concept, restricted in application, but full of potential for the future. From a Community perspective Economic citizenship was unintentionally created. Yet with the assistance of the ECJ and, most importantly, individuals willing to pursue Community aims to the fullest extent, pre-citizenship gained an economic foothold and finally became something that could be relied on before the courts when those Community rights were impeded or frustrated. By the time the Maastricht Treaty entered into force these tentative economic beginnings had been lent some political and social bearing, paving the way for future development in the coming years, with the ECJ poised as the chief architect and protector of the new European Citizenship and the rights it contained.

### Chapter 3. The ECJ as White Knight: Judicial Activism as the Citizen's Protector. Developments from 1992 onward.

#### Introduction

The European Community found itself at the centre of transformation in 1992. By the end of that year the Community was to become just one part of a much larger entity: the European Union. That Union was novel and, at least initially, controversial. Of most direct interest was the inclusion, under the Maastricht Treaty's Art.17<sup>290</sup>, of European Citizenship, a proposal that originated in a letter from the Spanish Prime Minister to the President in Office of the Council<sup>291</sup>. This proposal was initially limited to the formalisation of free movement, establishment and voting rights and, whilst supported by both the Danes and Italians, it was otherwise largely ignored. The proposition remained, however, largely at Spanish insistence<sup>292</sup> and was eventually acted upon in June 1990 when the European Council included it in the framework of "the 'overall objective of political union'"<sup>293</sup>. As has been demonstrated in Chapter 2 'European Citizenship' lacked recognition as a formal institution, despite considerable efforts on the part of certain EC institutions and policy initiatives to generate and develop citizenship-esque qualities and rights under the European framework. The

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<sup>290</sup> Art.8 ECT, now Art.20 TFEU.

<sup>291</sup> Closa, at p.1153.

<sup>292</sup> In 1990 the Spanish also generated a specific *Spanish Memorandum on European Citizenship* which pointed out the limitations inherent in merely codifying existing rights under the Rome Treaty and called for Union citizenship to establish equality between Member State nationals irrespective of whether they were resident in their home State or a host State, *ibid.*.

<sup>293</sup> Bull EC 6-1990 Annexe I Point I.35, p.15, in *ibid.*.

work done to pursue this objective had led to the establishment of a reasonable expectation of rights protection should an action be brought before the ECJ. With the shift to a Union and the increased scope for policy influence that came with it, it was to be hoped that the beginning of the Union age would see the coming to fruition of those auspicious beginnings.

The terms of the Treaty were at one and the same time promising and underwhelming. The single most positive effect of the ‘citizenship article’, (Art.20 TFEU) was the mere fact of its existence. Its first sentence proudly proclaimed: “Citizenship of the Union is hereby established”, making concrete something that had been previously nebulous and disparate. The possibilities alone promised by this affirmation were immense. There were other aspects of the citizenship article that provided much hope for the future. It seemed to reaffirm the free movement rights that had been enshrined previously in case law for workers alone and to accord to the “peoples of Europe”<sup>294</sup> various other rights that were to be expected when formulating a modern conception of citizenship, as alluded to by Marshall.

The disappointing features of the citizenship article stem from the original second sentence’s condition that Union citizenship should “complement and not replace”<sup>295</sup> its national equivalent. Such tethering between the supranational and national constructions of citizenship creates three difficulties that, it is suggested, must be overcome before the former can reach its full potential.

Firstly, it seems that the Article is self-limiting, restricting the scope for judicial intervention and development of Union citizenship on the part of the ECJ. Moreover, this tethering to national citizenship poses a serious question about whether the Union is to enjoy one standardised notion of supranational citizenship, or whether the Article has actually created as many European Citizenships as there are Member States. The final consideration stemming from this restrictive wording is one that, in modern politics, proves particularly contentious. The linkage of nationality and citizenship appears to overlook the fact that those who live in, and contribute to, the Union are not all Member State nationals. Indeed, some of those whose contribution to the economic growth of the Union was essential are, by virtue of this wording, guaranteed exclusion

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<sup>294</sup> See the Preamble to ECT.

<sup>295</sup> now included separately in the TEU.

from the benefits supranational citizenship had to offer. Thus the entire concept of third-country national rights was at once neglected and swept aside<sup>296</sup>.

It appears that the narrow focus of Art.20 has viewed “European identity as the ‘mirror image’ of national identity”<sup>297</sup> and that the important debate about migrant non-nationals has suffered, instead of fostering lively discussion in both national and supranational spheres. These considerations aside, the citizenship article gave a concrete and formal basis for supranational citizenship’s continuing development. The formalisation of citizenship under Art.20 has rendered a distinct change to national citizenship because, in supranational matters, national governments are no longer the sole guardian of their nationals or their nationals’ rights. Such a change is palpable, even if the States are unwilling to concede that it has occurred. Chalmers *et al.*, state that Union citizenship is “something that penetrates national citizenship”<sup>298</sup>, a statement that belies and challenges its supposed ‘complementary’ nature.

An evaluation of how Union citizenship has been realised following Art.20’s creation is now required. Jurisprudence is an essential constituent of Union citizenship – all the more so given that the Court took such great strides in conferring ‘citizenship rights’ upon the individual. It continues to play an important role because, only through an assessment of the case law is it possible to understand how the Union went from establishing Union citizenship to recognising as it as “destined to be the fundamental status”<sup>299</sup> of all Union citizens. Moreover, this jurisprudence can be used to track the continued interpretation and development of a variety of social and political policies, such as what is meant by a ‘social benefit’.

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<sup>296</sup> A discussion of the position of third-country nationals within the European framework is split between this chapter and Chs.4&5.

<sup>297</sup> Kostakopoulou, 2001a, at p.14.

<sup>298</sup> Chalmers, Davies and Monti, at p.446.

<sup>299</sup> C-184/99 *Grzeleczyk v. Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve* 2001.

## **The ECJ and Union Citizenship: Hephaestus' project?**

The forward thinking tendencies illustrated by the ECJ in the years prior to the Maastricht Treaty did not merely dissipate once the Treaty entered into force. Indeed, the ECJ's actions indicated that it had merely begun to build a head of steam: in a series of decisions stemming from the mid-to-late-1990's until the mid-2000's, the Court enhanced the status of the individual, whether economically active or otherwise. Furthermore, it furnished Union citizens with rights of access to various social benefits, political rights and, perhaps most importantly, it did these things whilst pursuing a dogged course of adherence to the principle of non-discrimination as enshrined in the Treaty<sup>300</sup>.

From one perspective, the ECJ was merely acting as a bastion, preventing any erosion of the edifice it had created prior to 1992. An alternative, altogether more radical viewpoint, is that the Court has used those powers conferred upon it by the Treaty to wield influence positively and forge a stronger, more rounded, cohesive and well-armoured entity than Art.20 ostensibly gave rise to. The alternative, less pleasing, perspective in the face of the positive effects of the ECJ's influence, is that the Court has systematically and egregiously exceeded the bounds of its conferred powers in order to gain a stronger, more influential, perhaps even legislative, role in the development of a central EU issue.

The less palatable perspective is significant and must be both addressed and refuted. Under the terms of the Maastricht Treaty the Court is imbued with powers to "ensure that in the interpretation and application"<sup>301</sup> of the Treaty, "the law is observed"<sup>302</sup>. From such broad brushstrokes are massive ambiguities possible. It seems to give the ECJ considerable latitude ensuring that not only the Member States and other institutions of the EU, but also the Courts, are able to interpret the Treaty in such a way as to ensure its enforcement. In addition, in the face of questions surrounding democratic accountability in the EU, to provide such powers to one body that is unfettered by accountability to the public, however honourably it discharges its powers, could be viewed as perpetuating the problem of the democratic deficit.

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<sup>300</sup> Art.6, then 12 ECT, now Art.18 TFEU.

<sup>301</sup> Art.220 ECT, ex Art.164 ECT.

<sup>302</sup> *ibid.*.

On the other hand, considerable time is spent in the Treaty delineating who is able to bring an action before the Courts. Whilst the Courts have a considerable role in adjudicating those actions brought by individuals, Member States and institutions against those in breach of Treaty obligations, the ECJ (and General Court) do not have the power to instigate hearings purely of their own volition. They are not, therefore, empowered to pursue an agenda or legislative lobbying merely because it strikes their fancy: decisions can be rendered only on those matters brought before them. Further limitations are imposed upon the Court's ambit of discretion by virtue of Articles 267-276 TFEU<sup>303</sup>, which clearly define those scenarios in which the Court is free to act. The list is not exhaustive but clearly demonstrates that constraints have been placed upon the Court's extensive powers. To say, therefore, that the Court has been pursuing a power trip of an unrelenting, baseless and inconceivable scale would appear to be unsupported. Moreover, the Court has, at times, effectively held back from returning decisions that would have extended the scope of Union citizenship<sup>304</sup> and made it an even more open and inclusive entity than is currently is. That the justices chose to exercise such restraint is the most effective refutation of charges of judicial over-reaching possible.

Consequently, it remains to show how the Court set about responding to violations of the Treaty, how those responses helped to develop those rights set out under Art.20 TFEU and to further develop those other "putative citizenship" rights set out before the Maastricht Treaty that formed the bulk of discussion of the preceding chapter. In order to do so, the jurisprudence of the Court will be divided according to the broader issues being discussed, e.g., discrimination on grounds of nationality, access to education, access to social advantages etc.. Whether the development of Union citizenship can be likened to a Hephaestean construct remains to be seen, but the course of development has been one of careful shepherding and, at times, the courts' *inaction* has stood in stark contrast to the notion that the ECJ has exceeded the bounds of its jurisdiction.

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<sup>303</sup> ex. Arts.177–183, then 234-240 ECT.

<sup>304</sup> *inter alia* C-85/96 *Martinez-Sala v. Freistaat Bayern* 1998.

### *The Court, Free Movement and a Right of Residence*

The issue of residence and its relationship to Union citizenship is one about which the Court has chosen to take a clear stance. It has done so by reliance on secondary legislation and, interestingly, the *travaux préparatoires*<sup>305</sup> from when that legislation was negotiated and subsequently enacted. The issue of residence is, of course, at the heart of the European project as a necessary tangent to that of free movement. The modern world has called for the Court to consider residence for those economically active, those economically inactive, minors and, crucially, for third-country nationals. Indeed it is possible to say that issues such as equal treatment, education and access to social advantages etc., radiate from the notion of a right of residence. By exercising free movement, citizens find themselves in a situation where they can be compared less favourably with Union citizens in the host Member State.

Conversely, the same can be said in situations of those who do not exercise their European freedoms. These so-called “internal situations” were routinely held beyond the reach of Community law prior to Maastricht<sup>306</sup>. However, it can not go without comment that situations can arise wherein nationals will be subjected to less favourable treatment than Union citizens, creating an internal hierarchy between the haves and have-nots, posing a critically important question: how fundamental can status as a Union citizen be if it is not to be enjoyed by all those it purports to be extended to? Thus it is with the issues of free movement and residence that a discussion of the ECJ’s approach to citizenship following Maastricht should commence.

There are several Directives directly relevant to this portion of discussion, the principal ones being Directive 90/364, Directive 90/365 and Directive 2004/38. The first two were enacted during the period of pre-citizenship, the latter is commonly known as the Citizens’ Directive. Together they form the centre of much judicial comment. The fact the initial directives relate to pre-citizenship afforded the ECJ considerable latitude: clearly the directives as they stood did not reflect the reality of a recognised citizenry, thus the Court was merely following its duty in interpreting them from a post-citizenship perspective. It was, however, still pursuing this objective by the millennium, some eight years after Union citizenship’s *naissance*. With the adoption of

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<sup>305</sup> E.g., C-162/09 *Secretary of State for Work and pensions v. Taous Lassal* 2010.

<sup>306</sup> e.g., C-136/78 *Ministere Public v. Auer* 1979 and C-175/78 *R. v. Saunders* 1979.



Directive 2004/38, it might well be assumed that the legislature had moved the issue beyond the long arm of the Court, even if only in the short term. Far from it. The existence of Regulation 1612/68 provided its own problems (see below) as did potential conflicts with the intentions and opinions expressed in the *travaux*. Therefore, rather than finding itself surplus to requirements, the ECJ was still to be found playing its role of Union watchdog and, for the most part, as the individual's guardian.

Cases involving residence are frequently linked to other issues, but there are some cornerstone decisions dealing almost exclusively with residence itself. For the most part they confirm that a Union aim is to achieve integration and that providing unwarranted bars to residence<sup>307</sup> of third-country nationals is not to be tolerated. The *Commission v Italian Republic*<sup>308</sup> case took a considerable step in reducing the States' capacity to restrict the eligibility of families to move *en masse*, albeit prior to the entry into force of Directive 2004/38. The Italian Government's assertion that certain entrants to the country had to present specified documentation and be in possession of resources higher than those required by beneficiaries of a different Directive was contrary to the aims of the Treaty. The ECJ reiterated that the States:

“must ensure both the basic freedoms guaranteed by the Treaty and the effectiveness of Directives containing measures to abolish obstacles to the free movement of persons between those States, so that the exercise by citizens of the European Union and members of their family of the right to reside in the territory of any Member State may be facilitated”<sup>309</sup>.

Residence in and of itself was an objective good and obstacles to its achievement had to be reasonable and uniformly applied which, in this instance, they were not.

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<sup>307</sup> There are, of course, exceptions contained in Directive 2004/38, such as public health and having sufficient sickness insurance that enable States to exercise an element of control when they apply residence rules. The Union aim is not to preclude Member State autonomy but, when a Community situation is involved, the ECJ has striven to ensure that an equal playing field applies to all citizens.

<sup>308</sup> C-424/98 *Commission v. Italian Republic* 2000.

<sup>309</sup> *ibid.*, at para.35.

Subsequently in *Pusa*<sup>310</sup> it was held that the financial considerations of an individual in one Member State could not be used to prohibit the exercise of free movement, but the case of *Taous Lassal* revisited the issue of residence once Directive 2004/38 was in existence. The important difference was that the ECJ had to decide upon an issue expressly addressed by the States when creating the Directive. *Taous Lassal* relied upon provisions of the Directive to provide support for its outcome, particularly the notion that permanent residence would strengthen citizenship as a whole<sup>311</sup> and the notion that, once gained, the right of permanent residence should not be subject to arbitrary removal<sup>312</sup>, or removal without considerable periods of absence from the host States<sup>313</sup>. *Taous Lassal* saw an attack upon these rights by a State, not over the existence of the rights, which were agreed, but over the timeframe in which those rights became applicable.

The States argued that the residence provisions took effect from the effective date of the Directive: in other words, all time accrued before the Directive was lost and previously long-term residents had to start to accumulate their time all over again. As the Directive would not enter force until mid-2006, the earliest date from which permanent residence would be attained could not be reached until 2011. The Court's reply was suitably dismissive as:

“... [s]uch an interpretation would amount to depriving the residence completed by citizens of the Union ... pre-dating 30 April 2006 of any effect for the purposes of the acquisition of that right of permanent residence”.<sup>314</sup>

The Court clearly felt that to follow such a narrow interpretation of the wording of the Citizenship Directive would effectively deprive it of its essential character and set back its integration aims by several years. Realistically, to have allowed the Member States' submissions to carry the day would have suspended the practical application of one of

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<sup>310</sup> C-224/02 *Heikki Antero Pusa v. Osuuspankkien Keskinäinen Vakuutusyhtiö* 2004.

<sup>311</sup> Directive 2004/38, Preamble, Recital 17.

<sup>312</sup> *ibid.*, at Recital 18.

<sup>313</sup> *ibid.*, Article 16(1), (2), (3) and (4).

<sup>314</sup> *Taous Lassal*, at para.35.

the fundamental rights stemming from the days of the Community and directly opposed the Directive's stated desire further to increase a sense of shared citizenship and, with that, integration.

These three cases highlight that the Court trod a fine line, balancing the aims of the Community against pre-existing decisions and a desire to see the Treaty rights applied to the greatest number on the most favourable of terms. However, the cases also dealt with Union citizenship as it applied to nationals: the Court would yet be required to consider how Union rights would apply to extended family members of Union citizens, an altogether more contentious issue.

#### *Residence for Families: Third-Country Nationals*

A surprising tangential issue arose concerning residence and the rights of family members who were third-country nationals. Obviously, in their own right, these non-nationals fall beyond the scope of the Treaty and so derive no rights independently of their Union citizen family member. However, legislation, ranging from the Treaties to the Charter of Fundamental Rights, guarantees the right to enjoyment of a family life to Union citizens. Where that family consists of both nationals and non-nationals, the right of residence of those extended family members becomes of interest to the Community. Consequently seminal cases such as *MRAX*<sup>315</sup> and *Metock*<sup>316</sup>, are worthy of consideration.

In *MRAX* the ECJ was asked to consider whether a spouse needed to travel with a visa and/or other travel documentation in order to gain access to the country. The issue was clearly of interest to many States as the Belgian government was not alone in making submissions and the situation had formed part of the earlier *Singh*<sup>317</sup>. The State submissions here amounted to an assertion that the requirement to obtain a

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<sup>315</sup> C-459/99 *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX) v. État Belge* 2002.

<sup>316</sup> C-127/08 *Blaise Babeten Metock v. Minister for Justice, Equality and Law Reform* 2008 (this case involved Metock and many others).

<sup>317</sup> C-370/90 *Singh* 1992.

visa prior to travel was essential in order to ease the burden on the host state of proving the third-country national is who he claims to be vis-à-vis the Member State national and, therefore, was not discriminatory<sup>318</sup>. In contrast, the Court received support for its eventual finding from the Commission's assertion that a non-national who is a Union citizen's family member enjoys a standing higher than that of other third-country nationals not enjoying a familial relationship and should accordingly be treated differently<sup>319</sup> as, having proven a family tie, he enjoys Community rights derived from it. The Court went further, stating:

“in the light of proportionality, a Member State may not send back at the border a third country national who is married to a national of a Member State and attempts to enter its territory without being in possession of a valid identity card or passport or, if necessary, a visa, where he is able to prove his identity and the conjugal ties”<sup>320</sup>.

In so doing, effectively non-national family members were accorded the same protections as Union citizens themselves enjoyed; a significant move, highlighting the importance of enjoyment of family life and extending the notion of non-discrimination to those brought under the Community umbrella by pure circumstance. That protection also extended to situations when a non-national remained after visa expiration<sup>321</sup>. In such circumstances the ECJ decreed that, as entry was lawful, the spouse enjoyed the same residence rights as the citizen and, therefore, could not be arbitrarily deported, even though another non-national in that situation (one not married to a Union citizen) would face deportation. Thus the Court demonstrated a flexible and sensitive approach to citizenship, reflecting a changing world where movement was more possible for a

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<sup>318</sup> *MRAX*, at paras.43-47.

<sup>319</sup> *ibid.*, at para.48.

<sup>320</sup> *ibid.*, at para.62. The Court went on to state that the non-national enjoyed a right of entry as long as he did not pose a threat to public policy, security or health, conditions outlined as grounds of refusal of entry for Union citizens as well.

<sup>321</sup> *ibid.*, at para.91.

greater number of people and in which that mobility might well produce marriages and children, or future Union citizens.

A year after this decision, the Court appeared to undermine the core value conferred by *MRAX*<sup>322</sup>, by returning a restrictive finding in *Akrich*<sup>323</sup> where, once again, the right of movement of a third-country spouse was in debate. This latter case had a different complexion: instead of dealing with first time entry into the Union, *Akrich* concerned movement with or following the spouse between Member States. The applicant had, unfortunately, a history of attempting to gain residence in the UK unlawfully, but had subsequently married a British citizen. After the marriage the applicant had once again been deported and joined his wife in Ireland. When she had the opportunity to return to England he wished to return with her and applied to have the deportation order rescinded: his application was refused.

Thus a substantive difference existed here, as the third-country national was attempting to regain entry to a State that had already deported him several times and had done so once as an existing spouse of a national. The UK government clearly felt that the couple had used *Singh* in an attempt to pursue a fraudulent<sup>324</sup> exercise of Community rights. The issue of fraud was dismissed by the ECJ<sup>325</sup>, but the broader point proved more tangled: whereas *MRAX* indicated that a spouse could not be deported even if they were unlawfully resident, *Akrich* indicated that, without lawful residence in one State, a non-national could not follow his spouse to another State and this bar on movement would not be deemed a restriction upon the Union citizen's free movement rights<sup>326</sup>. However, the most significant blow for Member States came with the ECJ's postscript, namely that States still had to have regard for the fundamental right to a family life. Arguably, therefore, even without lawful residence in one State, the fundamental rights of the parties might well serve to trump a Member State's reservations or opposition to a non-national's movement<sup>327</sup>. Not only had the ECJ

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<sup>322</sup> Currie, at p.321.

<sup>323</sup> C-109/01 *Secretary of State for the Home Department v. Hacene Akriich* 2003.

<sup>324</sup> *ibid.*, at para.41.

<sup>325</sup> *ibid.*, at para.55.

<sup>326</sup> *ibid.*, at para.53.

<sup>327</sup> Currie, at p.323.

conjured effective citizenship for non-nationals, it had also endowed these ‘extended citizens’ with enforceable rights, to the *chagrin* of the Member States.

*Metock* was a case equally worthy of discussion partly because it was a rare instance of the use of accelerated procedure<sup>328</sup> and partly because, once again, the ECJ was asked to revisit an issue, passing judgement on the effect of the transposition of Directive 2004/38. The Directive recognised that third-country nationals married to citizens fell within the scope of family member, but did not directly address the vexed issue of the necessity of prior lawful residence. Such an omission enabled the Court to find that, as it was not forbidden, the Member States could not have intended to create such a bar to movement. Indeed, textual reliance on Article 5(2) Directive 2004/38 enabled the court to find the very opposite, that the Directive expressly intended to allow movement where there was no prior lawful residence<sup>329</sup>. Thus the ECJ was skilfully able to overturn the *Akrich* limitations and show that the Community itself had enacted legislation designed to address a situation:

“where the fact that it is impossible for the Union citizen to be accompanied or joined by his family in the host Member State would be such as to interfere with his freedom of movement by discouraging him from exercising his rights”<sup>330</sup>,

freeing itself from any accusations of stepping beyond the bounds of its conferred powers. The recognition that being unable to move with a spouse could serve as a hindrance to free movement is refreshing when compared to the Court’s overlooking of this issue in *Akrich* and serves as a welcome reinforcement that the ECJ generally takes a broad-minded approach to the free movement provisions as they underlie and reinforce citizenship and its potential benefits.

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<sup>328</sup> *ibid.*, at p.315. The accelerated procedure indicated that the Court saw this issue as one requiring urgent intervention, giving, potentially, greater weight to its eventual decision.

<sup>329</sup> *Metock*, at para.52.

<sup>330</sup> *ibid.*, at para.63.

For the Member States, by contrast, *Metock* was probably decidedly worrying, as it wrested from them the notion that they ultimately controlled their borders and could turn away third-country nationals if they so chose<sup>331</sup>. Presumably the States felt secure that their interests were sufficiently protected by the requirements of the Citizenship Directive (those concerning adequate funds, sickness insurance etc.,) especially when combined with a narrow reading of the rights contained therein. Nonetheless, the emphasis placed upon fundamental rights in all three cases discussed above dispels that level of comfort and firmly hands to the individual a powerful tool when pursuing his rights.

*Metock* was followed a short while later by *Zambrano*<sup>332</sup> which involved a somewhat more convoluted instance of family members seeking to rely on Union citizens' rights. Like *Chen* before it, the Union citizens in this instance were minors (as distinct from *Jia*<sup>333</sup>, where the non-national seeking the benefit of residence rights was the parent of a non-national married to a Union citizen) whose parents were seeking to remain in Union territory. Columbians Ruiz Zambrano, his wife and son initially moved to Union territory claiming refugee status, but their initial claim to right to remain was refused<sup>334</sup>. Nonetheless, civil war in Colombia meant their return was impossible (nor was it sought by Belgium) and so they remained on Belgian soil, with Mr. Zambrano seeking to integrate himself in society<sup>335</sup> by learning French, ensuring his child entered into education and engaging in an employment relationship despite not holding a work permit<sup>336</sup>.

Several more applications for a right of residence were made between 2001 and 2006 but in 2003, the family gained a Union citizen<sup>337</sup> (followed by another in 2005<sup>338</sup>), providing an alternative avenue for the family to assert a right to remain. The children

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<sup>331</sup> Currie, at p.311.

<sup>332</sup> C-34/09 *Gerardo Ruiz Zambrano v. Office National de l'emploi* [2011].

<sup>333</sup> C-1/05 *Yunying Jia v. Migrationsservket* 2007.

<sup>334</sup> *Zambrano*, at para.15.

<sup>335</sup> *ibid.*, at para.16.

<sup>336</sup> *ibid.*, at para.18.

<sup>337</sup> *ibid.*, at para.19.

<sup>338</sup> *ibid.*, at para.22.

gained Union citizenship because of the vagaries of Colombian citizenship rules, and the Belgian authorities initially asserted that Mr. Zambrano, like Mrs. Chen before him had *deliberately* misused Union rules so as to gain a citizenship foothold<sup>339</sup>. Moreover, the States tried to rely on the internal rule<sup>340</sup> to preclude the family relying on any residence rights because the children had not exercised their free movement rights, difficult for toddlers to do under their own steam.

Thus ECJ had many decisions to make: did the internal rule apply; could the family rely on a right of residence and; having lost his employment, could Mr. Zambrano make an unemployment benefit claim deriving from his position as an ascendent of a Union citizen<sup>341</sup>? Not unexpectedly the Court found little difficulty in overcoming the first obstacle. Relying on Art.20, the ECJ first asserted that the children were undeniably Union citizens<sup>342</sup> and, as such, States were precluded from implementing:

“national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status”<sup>343</sup>.

Moreover, the recognition of citizenship’s fundamental nature meant that the children could not be disregarded and Mr. Zambrano’s case was immediately strengthened.

Refusing Mr. Zambrano either a right of residence or a work permit would have forced the family to migrate<sup>344</sup>: the enjoyment of the children’s right would, therefore, have been infringed. In one fell swoop, Zambrano was handed the tools to win his case and derive a right of residence for the duration of his children’s minority. However, the case is more important than it might seem as residence was not the only Union right at

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<sup>339</sup> *ibid.*, at para.23.

<sup>340</sup> A discussion of which follows later.

<sup>341</sup> This recognition would also prevent him being obliged to produce a work permit, which he did not have.

<sup>342</sup> *Zambrano*, at para.40.

<sup>343</sup> *ibid.*, at para.42.

<sup>344</sup> *ibid.*, at paras.43-44.



stake:. *Zambrano* indicates that not just social but economic rights can be secured by a relationship with (or dependence on) Union nationals.

Thus, *Zambrano* is a step beyond *Metock* and could be a crucial stepping stone to a broader notion of who might derive benefits from Union citizenship: links to Union citizens could prove profitable to third-country nationals in more ways than one in future and the ECJ has demonstrated a willingness to continue taking a liberal approach to citizenship rights. Enjoyment of those rights should not be curtailed by a lack of exercise of movement rights, nor by extreme youth: between them, *Chen*, *Metock*, *Akrich* and *Zambrano* show incremental developments in citizenship law and are a powerful tool for those who face being denied their rights in the Union arena. Developments in other spheres, when combined with those outlined above, have fortified citizenship in a way beyond the expectations of the Member States, giving it a strength far in excess of that envisaged in the pre-citizenship era.

#### *A Domestic Sidebar*

For all that the Courts have demonstrated a willingness to extend residence rights for Union citizens and their family members by respecting the needs and rights of the family, as well as seeking to address and redress nationality-based discrimination, there has been a decided demonstration of blindness (or caution) in one very important field: the internal situation. This ‘rule’ is one decreeing that those who have never exercised a Community right (i.e. have neither been involved in trade nor exercised free movement to/residence in a State other than their own) cannot activate the provisions of Community law to assist them in a dispute with their own State. It seems, therefore, that situations can arise where a Member State will be in a position where it treats third-country nationals more favourably than it does certain of its own, a situation known as reverse discrimination. It is ironic that this situation can exist under the umbrella of a supranational entity that proudly declares, “discrimination on the grounds of nationality shall be prohibited”<sup>345</sup>. The issue of the ‘internal rule’ has been addressed by the ECJ

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<sup>345</sup> Art.18 TFEU.

both before Union citizenship<sup>346</sup> and after. In answer to these cases the Court has traditionally responded that:

“the provisions of the Treaty on freedom of movement of workers cannot ... be applied to situations which are wholly internal to a member state, in other words where there is no factor connecting them to any of the situations envisaged by Community law”<sup>347</sup>.

This response fundamentally fails to address the dichotomy between the Union’s public attitude of intolerance towards intolerance and its private acquiescence in unequal treatment, all the more so as the discrimination involved under the internal rule is, for the most part, based on nationality.

Even more striking in the situation of reverse discrimination is the fact that both primary legislation and jurisprudence provide ample weight in support of its abolition. Art.20 TFEU’s description of Union citizenship at no point dictates that its activation is dependent upon the exercise of a Union right. Indeed the words, “every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship”<sup>348</sup>, convey that citizenship was, in its simplest formulation, extended to all those who were nationals of a Member State. There is no indication that “‘wholly sedentary’ citizens”<sup>349</sup> would be excluded from the benefits that citizenship had to offer. Subsequently the Court’s pronouncement in *Grzelczyk* about Union citizenship’s destiny as the “fundamental status”<sup>350</sup> of nationals appeared to confirm that citizenship was acquired by the mere accident of birth in a Member State. The ‘internal rule’, however, has since

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<sup>346</sup> *Auer* 1979 and *Saunders* 1979.

<sup>347</sup> *ibid.*, *Saunders* at para.11.

<sup>348</sup> Art.20 TFEU. The original wording of Art.17 ECT instead stated that citizenship “shall complement and not replace” national citizenship, but the gist is much the same and the inference remains that citizenship was intended to encompass all those holding a Member State’s nationality.

<sup>349</sup> Dautricourt and Thomas, at p.445.

<sup>350</sup> *Grzelczyk*, at para.31.

been confirmed as remaining ring-fenced, reinforcing a highly unfortunate (and surely undesirable) exclusion of those who may need to rely on Community law the most.

The ECJ was given an opportunity to revisit this issue in the 2008 *Flemish Welfare Aid*<sup>351</sup> case and, far from pursuing a liberal agenda, it reiterated its previous conservative stance. At issue was Belgian legislation in the Flemish region, concerning the conditions under which people could join a welfare aid scheme. The conditions were cumulative, not alternative, and amounted to undertaking gainful economic activity in the region *alongside* a residence requirement. It was the residence requirement that caused the reverse discrimination: residence of five years' duration in the Flemish region or in any other Member State<sup>352</sup>. The net effect was the exclusion of 'static' Belgian nationals not resident in the Flemish region, despite the fact that they engaged in economic activity in Flanders.

The case attracted attention because it was surprising that, given the raft of cases that had preceded it, the Court returned such a negative verdict, saying, "Community law clearly cannot be applied to such purely internal situations"<sup>353</sup>. Indeed the verdict flew in the face of the Opinion given by Advocate General Sharpston, who had argued against the internal rule by intelligently arguing that, whilst citizenship was not intended to apply in situations with no tie to Community law, the question first has to be considered 'what determines there to be no Community link'? As a national gains Union citizenship simply because of an accident of birth and that citizenship is additional to national citizenship, surely the holding of Member State citizenship automatically serves to bring the individual into the fold of the Union? So it appeared to AG Sharpston, as she argued:

"that the enjoyment of the status of Union Citizen should be considered as a sufficient link itself to bring a situation within the scope of the Treaty *ratione personae*, irrespective of the exercise of free movement rights"<sup>354</sup>.

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<sup>351</sup> C-212/06 *Government of the French Community v. Flemish Government* 2008.

<sup>352</sup> Dautricourt and Thomas, at p.439.

<sup>353</sup> *Flemish Welfare Aid*, at para.38.

<sup>354</sup> Dautricourt and Thomas, at p.442.

In other words, she applied a basic textual argument, founded on the face of the Treaty provisions, to call for the application of the citizenship protections to all.

One of the questions that must be raised, rightly, in the face of such assertions is whether the ECJ is guilty of actually restricting freedom of choice when it comes to movement. In the *Flemish Welfare Aid* case, the ECJ held that the situation was internal because it involved Belgian citizens in Belgium, but realistically the issue lay with regional devolution. The Flemish government was creating rules applicable to citizens resident in the Flemish region, but what of those who were Belgian, resident in Belgium, but in the Walloon region? According to the verdict of the ECJ they had no redress. However, this is an instance where there is clear discrimination on the part of a government against some of its own citizens and it has been argued that, where there is increasing regional devolution, the EU should be prepared to step in, in order to prevent clear instances of reverse discrimination in the name of EU integration<sup>355</sup>. In the *Flemish Welfare Aid* case, the 'static' residents of the Walloon region may not have exercised free movement, but as the legislation involved clearly provided for resident third-country nationals to gain access to the scheme, there clearly was a Community dimension of sorts involved in the issue.

Interestingly, the decisions returned in reverse discrimination cases both before and following the Maastricht Treaty highlight a troubling disparity between the treatment of goods and people. One of the fundamental objectives behind Maastricht was to ensure the completion of the internal market, including the abolition of all internal tariffs and barriers to trade. This abolition of barriers was also extended to situations where those barriers were intra-State as opposed to inter-State, as was achieved in *Lancry*<sup>356</sup> (and confirmed in others that followed). Following the *Lancry* reasoning, a London dealer cannot supply his goods to a trader from Brussels on more favourable terms than he would supply those same goods to a vendor from Manchester. The situations in the *Flemish Welfare Aid* case are not wholly analogous: the notion of human rights and individuality mean that we do not think of people as economic units or as commodities. Nonetheless, a barrier was placed upon access to a *service* (substituted for the goods in the *Lancry* example) that, in effect, had the same outcome

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<sup>355</sup> *ibid.*

<sup>356</sup> *René Lancry SA v. Direction Générale des Douanes* 1994.

as would have arisen were the London seller permitted to treat the Mancunian less favourably: the Walloon resident was treated less favourably than one in Flanders. That outcome was forbidden when it came to goods, but the same logical conclusion was not arrived at in relation to people. The ECJ's statement in *Lancry* that:

“the obstacle to the free movement of goods created by the imposition on domestic products of a charge levied by reason of their crossing that frontier is no less serious than that created by the collection of a charge of the same kind on products from another Member State”<sup>357</sup>

could easily be *inverted* in its application to people, with the effect that penalising those who have not crossed borders would be no less serious than penalising those who have.

*Flemish Welfare Aid* would be an instance of the ECJ demonstrating considerable restraint in the exercise of its powers, especially as they could have shielded themselves from complaint behind Art.18 TFEU and a broad reading of the free movement entitlement found under Art.20(2)(a) TFEU: “the right to move and reside freely within the territory of the Member States”. An enlightened and libertarian reading of this Article might well provide an addendum along the following lines: “the right to move and reside freely within the territory of the Member States, including where freedom of choice means remaining locally situated”. Given that the right to reside freely cannot fairly be construed so as to infer a *compulsion* to move, it must be the case that those who exercise their free choice and continue to reside within their own State cannot be *penalised* by the loss of their Community rights by availing themselves of one of the options that Union law gives them. To sanction such a formulation of the Treaty provisions is to silently condone a duplicitous approach to the non-discrimination bar found in Art.18 TFEU and, with it, reverse discrimination – an approach altogether at odds with the Court's perception as a champion for the individual.

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<sup>357</sup> *ibid.*, at para.28.

### *Access to Social Advantages or Pursuit of Economic Rights.*

An area where the ECJ has acted with a fairly free hand is in the pursuit of economic rights, largely building on a foundation that stems from pre-Maastricht decisions. Case law pertaining to access to social advantages is, therefore, nothing new: the Maastricht Treaty did not enter force and immediately give rise to a cause of action that had previously been denied. However, the existence of Art.20 provided another limb for claimants to rely on when pursuing a claim against an aberrant State. The ECJ's recognition of the right to equal access to social and tax advantages can be seen in pre-1992 cases such as *Reina*<sup>358</sup>, *Hoeckx*<sup>359</sup> and *Commission v. France*<sup>360</sup>. Why are these cases worthy of discussion when they occurred *prior* to the creation of the citizenship article? They demonstrate a longstanding commitment to equal treatment in the Community and were still deemed to be good law in the post-Maastricht era, indeed, they were cited by the ECJ in several post-Maastricht cases. *Reina* relied upon provisions of Regulation 1612/68 to assert that resident non-nationals enjoyed access to social advantages on the same grounds as nationals and concerned access to a childbirth loan “for the purpose of averting, alleviating or removing financial difficulties of families”<sup>361</sup>. Thus, the social advantage standing at the heart of this case was similar to the advantage being sought in *Martinez-Sala* some sixteen years later. The significance of *Reina* is considerable: it focuses on the free movement of workers and the right of non-discrimination on the grounds of nationality, traditional areas of judicial activity, as the backbone supporting a right of equal access to social advantages.

The case of *Hoeckx*<sup>362</sup> is similarly important and may be useful when considering later cases, including *Förster*<sup>363</sup>. Besides following a similar route to *Reina*, in basing the right of access to a social advantage (in this case the MINIMEX) on free movement and non-discrimination on the grounds of nationality, the Court delivered an incisive and telling statement at paragraph 25. It said:

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<sup>358</sup> Case 65/81 *Reina v. LandesKreditbank Baden-Württemberg* 1982.

<sup>359</sup> Case 249/83 *Hoeckx v. Openbaar Centrum voor Maatschappelijk Welzijn* 1985.

<sup>360</sup> C-307/89 *Commission v. French Republic* 1991.

<sup>361</sup> *Reina*, at para.2.

<sup>362</sup> *Flemish Welfare Aid*.

<sup>363</sup> C-158/07 *Förster v. Hoofddirectie van de Informatie Bebeer Groep* 2008.

“a social benefit guaranteeing a minimum means of subsistence in a general manner ... constitutes a social advantage ... a social advantage may not be made subject to the requirement that the claimant should have actually resided within the territory of a Member State for a prescribed period where that period is not imposed on nationals of that Member State”<sup>364</sup>.

This statement, apparently benign, has enormous potential to be used in the future to offset limitations imposed by States on those migratory workers who subsequently seek social or other opportunities the States would rather restrict to its own nationals for financial reasons<sup>365</sup>. *Commission v French Republic*<sup>366</sup> pursued a similar line, once again extolling the virtues of free movement and demanding that States be constrained from restricting access to social advantages (in this instance for surviving spouses of workers who had exercised their free movement rights) for fear that it might discourage the utilisation of free movement rights.

Discussion of these cases, whilst interesting, may seem irrelevant. However, they demonstrate that the ECJ had already built a considerable head of steam in this area by the time the citizenship article came into effect. Their influence could still be seen in post-Maastricht cases such as *Grzelczyk*<sup>367</sup> and *Micheletti*<sup>368</sup>, and it is to *Micheletti* that we turn next. It is noteworthy because it contained a novel and creative method of discrimination, one that the Court saw fit to quash. How so? The case involved a man seeking to exercise free movement and free establishment rights as a citizen. However, the complicating issue in what should have been a simple case was that Mr. Micheletti enjoyed dual nationality and only one of those was that of a Member State: Italy. By virtue of Italian law and Italian parentage, Mr. Micheletti acquired and enjoyed Union

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<sup>364</sup> *Hoeckx* at para.25.

<sup>365</sup> Perhaps this sentiment would have been useful to the Court when dealing with the later *Vatsouras* decision.

<sup>366</sup> *Commission v. French Republic* 1991.

<sup>367</sup> *Grzelczyk*.

<sup>368</sup> C-369/90 *Micheletti and Others v Delegación del Gobierno en Cantabria* 1992.

citizenship. However, he had grown up and been educated in Argentina. As part of a cultural recognition policy, Mr. Micheletti's *Argentinean* education and qualifications were accepted in *Spain* to which he was able to move to pursue a career as a dentist, later applying for permanent residence for himself and residence permits for his dependents.

The Spanish authorities refused to supply the full time residence permit, not because they failed to recognise Mr. Micheletti's *Italian* nationality, but because they recognised his pre-existing "habitual residence"<sup>369</sup> in Argentina. Here, then, was discrimination applied not on the basis of nationality as such, but because of domicile. As a Union citizen it was determined that Mr. Micheletti had the right to enjoy immunity from such discrimination. Most interesting here is that his right to remain, which was infringed by the Spanish authorities, stems from the heretofore unused Italian portion of his ancestry and yet his right to practice (which is what brought him within the bounds of the EU) stems from a mutual recognition scheme based on his *Argentinean* heritage. The Court was able to see past these competing interests stressing:

“the provisions of Community Law on freedom of establishment preclude a Member State from denying a national of another Member State who possesses at the same time the nationality of a non-member country entitlement to that freedom on the ground that the law of the host state deems him to be a national of the non-member country”<sup>370</sup>.

In other words, inconvenience to a host state cannot preclude a Union citizen availing him or herself of European rights. Once again, discrimination on the grounds of (dual) nationality is not to be tolerated, especially, when its infringement would lead to the detriment of the economic freedoms at the core of the European project. Thus we see the continued pursuit of economic aims that the ECJ had begun in the pre-Maastricht era.

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<sup>369</sup> *ibid.*, at para.11.

<sup>370</sup> *ibid.*, at para.15.



Perhaps the most recognised case when dealing with access to social or tax advantages is that of *Martinez-Sala*, but the cases of *Cabanis-Issarte*<sup>371</sup> and *Commission v. Belgium*<sup>372</sup>, both returned two years previously, indicate a continuing judicial trend of enforcing economic rights for Union citizens. In both cases access to social benefits was denied (in the former, social security, in the latter, an unemployment tideover allowance), stemming from ostensibly unequal treatment. In both cases it was held that imposing conditions more likely to be fulfilled by nationals than non-nationals amounted to unequal treatment and, therefore, nationality based discrimination. However, this sentiment was crystallised in *Martinez-Sala* which produced a standard that has been relied on subsequently over and over again in such seminal cases as *D'Hoop*<sup>373</sup>, *Trojani*<sup>374</sup>, *Collins*<sup>375</sup> and *Ioannidis*<sup>376</sup>.

*Martinez-Sala* once again dealt with access to social benefits: once again, the core of the case dealt with economic issues and fundamental freedoms central to the European idea. The Court reiterated its previous mantra that less favourable treatment of non-nationals will not be tolerated, which should not have surprised the parties involved. One feature did cause a stir, however: the required production of a residence permit from a third-country national in order to access an advantage, with no corresponding obligation for a national, was unconscionable. The mere act of lawful residence in the host State should, according to the Court, suffice to satisfy the local authority. The refusal to grant the maintenance to which Miss Martinez-Sala was entitled, purely because she failed to produce said permit<sup>377</sup>, was discrimination on the grounds of nationality and constituted unequal treatment<sup>378</sup>. Such a determination was an extension of the unequal treatment idea beyond the contemplation of the States and effectively raised the issue of the purpose/validity of residence permits *per se*. The Court pushed its policy of enforcing the economic rights of citizens but did so primarily by

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<sup>371</sup> C-308/93 *Bestuur van de Sociale Verzekeringsbank v. J. M. Cabanis-Issarte* 1996.

<sup>372</sup> C-278/94 *Commission v. Belgium* 1996.

<sup>373</sup> C-224/98 *D'Hoop v. Office National de l'emploi* 2002.

<sup>374</sup> C-456/02 *Trojani v. Centre public d'aide sociale de Bruxelles* 2004.

<sup>375</sup> C-138/02 *Collins v. Secretary of State for Work and Pensions* 2004.

<sup>376</sup> C-258/04 *Office National de l'emploi v. Ioannidis* 2005.

<sup>377</sup> *Martinez-Sala*, at para.16.

<sup>378</sup> *ibid.*, at para.54.

emphasising the claimant's status as a citizen, rather than focussing on Art.18 TFEU. The ECJ said:

“[a] national of a Member State lawfully residing in the territory of another Member State comes within the scope *ratione personae* of the provisions of the Treaty on European citizenship and can rely on the rights laid down by the Treaty which Article 8(2) attaches to the status of citizen of the Union, including the right, laid down in Article 6, not to suffer discrimination on grounds of nationality within the scope of application *ratione materiae* of the Treaty”<sup>379</sup>.

This statement is clear and unambiguous, but is one that, as will be demonstrated in various situations in the sections following, has not been applied as uniformly or straightforwardly as might have been expected.

### *The Development of the notion of 'Worker'*

Prior to 1992 the ECJ had shown some ingenuity in developing and expanding the workers' free movement articles in order to interpret the meaning of 'worker' as broadly as possible<sup>380</sup>. Cases such as *Lair*<sup>381</sup>, *Steymann*<sup>382</sup>, and *Reyners* are merely examples of how the Court determined to construe 'work' broadly and in such a way that worker status, once gained, could not be striped away at the whim of the States, so important was it to pursuing the aims of the Community. Consequently, economically active nationals were provided the opportunity to pursue European rights but the question after 1992 was whether Union citizenship added anything to the definition of 'worker', or continued to require expansion and redefinition of the worker notion. Given that

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<sup>379</sup> *ibid.*, at para.4.

<sup>380</sup> See Ch.2.

<sup>381</sup> C-39/86 *Sylvie Lair v. Universität Hanover* 1988.

<sup>382</sup> C-196/87 *Steymann v. Staatssecretaris van Justitie* 1988.

worker rights could only attach to a proportion of Member State nationals and the purpose of Art.20 was clearly to unite workers and non-workers in a post-Maastricht framework<sup>383</sup> it might seem that, as all nationals now fall into the Union citizen bracket, there would be few occasions where the provision of rights would turn on holding worker status and, therefore, that the benefits of being construed as a worker are, potentially, somewhat reduced.

Such a line of reasoning appears ill-founded when considering post-Maastricht decisions, as it becomes apparent that the Court has continued to ponder the notion of ‘worker’, especially as it pertains to access to certain social advantages and how it can be used, in conjunction with Union citizenship, to secure free movement rights. Just as in the pre-Maastricht era, the ECJ has been presented with situations in which the States appear to flout the stated aims of the Union. There have been occasions when the Court has been called upon simply to reiterate decisions it returned prior to 1992<sup>384</sup>, as if the States have either forgotten the contents of the previous body of case law, or questioned whether the impact of the citizenship article fundamentally eroded its foundations. Moreover, as has happened in several instances, the Court has at times had to address the very same issue from different perspectives<sup>385</sup>. Thus the ECJ has found itself returning repeatedly to this issue despite the fact that, following 1992, Member States might have been expected more readily to recognise the rights attaching to Union citizens *en masse*. Unfortunately, the ECJ has not followed a consistent path in its jurisprudence, as shall be explored below.

Both *D’Hoop* and *Ioannis Ioannidis* consider the provision of tideover allowances to work seekers (i.e., those unemployed) looking for their first job following completion of education. Interestingly, both concern the law as it was applied in Belgium, and both concerned education completed in a foreign Member State. The significant differences,

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<sup>383</sup> Fahey, at p.934.

<sup>384</sup> An example being C-413/01 *Franca Ninni-Orasche v. Bundesminister für Wissenschaft, Verkehr und Kunst* 2003, where the previous statement that work must not be purely marginal or ancillary was repeated, combined with the assertion that a fixed-term contract that has expired does not lead to an individual being voluntarily unemployed.

<sup>385</sup> Examples being C-148/02 *Carlos Garcia Avello v. État Belge* 2003 and C-96/04 *Standesamt Stadt Niebüll* 2006 and *D’Hoop* and *Ioannidis*, to be discussed below.

however, were that Miss D’Hoop was herself a Belgian national (Mr. Ioannidis was Greek). In both cases free movement had been exercised by the applicant, meaning that Miss D’Hoop’s was not an internal situation, and in both cases it was conceded that Belgian nationals who had completed their studies in Belgium and had engaged in “effective and genuine occupational activity”<sup>386</sup> would have received the allowance.

In *D’Hoop* the ECJ found it could not rely on either primary or secondary legislation to assist the applicant<sup>387</sup> and so had to pursue citizenship itself as an avenue for her rights. Consequently, it could not pursue its conventional methods of expanding the European protections. The ECJ then ran into a secondary problem owing to the general recognition that Member States retained certain discretions concerning the application of Treaty obligations: it had to act appropriately to balance those discretionary rights with the aims of the Treaty itself. It did so in its judgement, by asserting that the States retain the right to decide that there needs to be a “real and effective degree of connection”<sup>388</sup> between the applicant for an allowance and the job market. Nevertheless, holding that the requirement that a national had completed secondary education in the State in order to gain the allowance amounted to a disproportionate measure, resulting in unequal treatment vis-à-vis its other nationals, provided the other side of the balance, one that came down in the citizen’s favour.

Interestingly, in *Ioannidis* the ECJ’s decision was much easier to arrive at: Mr. Ioannidis was refused the grant on the same grounds as Miss D’Hoop before him, but as a foreign national exercising his right to free movement, the Belgian government’s decision was discrimination on grounds of nationality, pure and simple. He satisfied all the other requirements of eligibility for the grant, save for his place of education (a condition more difficult for him to meet than for a Belgian national) and it was not surprising, therefore that the Court said:

“it must be borne in mind that nationals of a  
Member State seeking employment in another  
Member State fall within the scope of Article 39

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<sup>386</sup> *D’Hoop* at para.18.

<sup>387</sup> *ibid.*, at para.20.

<sup>388</sup> *ibid.*, at para.39.

EC and therefore enjoy the right to equal treatment”<sup>389</sup>.

Thus the Court was able to depend on its line of pre-1992 reasoning concerning free movement for workers in his case, but combined that with the freedoms added by the citizenship article as it was used in *D’Hoop*<sup>390</sup>. In effect, therefore, the worker status rights were immediately strengthened by the Court’s coupling of them with Article 20 TFEU in this one judgement. Moreover, the ECJ was able to provide a third leg to its decision, by condemning not just overt, but also “covert”<sup>391</sup> discrimination (here, as in *D’Hoop*, that discrimination occurred because the requirement of a Belgian education was not proportionate to the ends sought), providing future applicants with a triumvirate of grounds that, where combined, should have provided insurmountable protection against States’ attempts to reduce access to the employment market.

The ECJ’s preoccupation with the worker continued beyond these cases. Much as it had prior to 1992, the ECJ has continued to build a considerable body of worker-related cases. This demonstrates, perhaps, that the Court recognised the economic origins of the Community and that only by securing free movement and equal opportunities for the economically active elements of the Union could true integration be achieved.

*Martinez-Sala* appeared to lay a solid basis for workers of the future when the Court did not find that the applicant was not considered a worker despite not having been in work for some considerable time. Combined with the declaration in *Ninni-Orasche* that the expiration of an employment does not deprive migrant workers of their movement rights<sup>392</sup>, it seemed as though the ECJ had reached a final position which would permit Union citizens migrating whilst genuinely in search of work to apply for social benefits on the same grounds as nationals of the State.

The Court continued to provide evidence for the belief that it had developed a benevolent nature when it returned the *Collins* decision. It emphasised once again that

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<sup>389</sup> *Ioannidis* at para.21.

<sup>390</sup> *ibid.*, at para.22.

<sup>391</sup> *ibid.*, at para.26.

<sup>392</sup> *Collins*.

the concept of the worker “must not be interpreted narrowly”<sup>393</sup>, but the ECJ nevertheless went on to rule that Mr. Collins did not constitute a worker as he had not been previously entered into the job market in the host State, which could have undermined the mere possibility of his being eligible to apply for jobseeker’s allowance, a social advantage. As it turns out, *Collins* can be deemed a beacon of hope for a broad interpretation of the application of individual rights. Mr. Collins was only found not to be a worker because the previous period of his involvement in the labour market had ended some 17 years earlier. Nonetheless, the ECJ held that jobseeker’s allowance fell within the scope of the Treaty<sup>394</sup> and as such, Mr. Collins’ application should have been protected by the Treaty’s non-discrimination provisions<sup>395</sup>. Whilst he was not, therefore, a worker, he was genuinely seeking work and, as he held Union citizenship, he could not be discriminated against in such a way as to prevent his being eligible for jobseeker’s allowance<sup>396</sup>. In much the same way as *Bidar* is held as the most desirable iteration of the Community approach to student rights, so *Collins* may well be the best outline of how Union citizenship can serve those seeking entry to the job market, whether they currently hold worker status or not<sup>397</sup>.

However, it must be borne in mind that Directive 2004/38 had yet to come into force<sup>398</sup>. Mere months later, the ECJ continued to assert the rights of the worker in *Trojani*. Whilst declining to reaffirm that Mr. Trojani amounted to a worker, the Court did not overrule its earlier *Steymann* ruling that payment in kind generated worker status and went on to find that a right of residence exists independently of worker status, derived directly from Art.20 TFEU.

The ECJ may not have taken any staggering leaps forward in its interpretation of the worker, but it quietly adopted a flexible approach to the notion and systematically found ways to shore up its previous decisions. That is not to say that the Court sought

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<sup>393</sup> *ibid.*, at para.26.

<sup>394</sup> *ibid.*, at para.45.

<sup>395</sup> *ibid.*, at para.48.

<sup>396</sup> *ibid.*, at para.63.

<sup>397</sup> Fahey, at p.945.

<sup>398</sup> The Directive had become active by the time of the *Vatsouras* decision, for a fuller discussion of which, please see below.

to overreach its powers and find rights where, objectively, there were none. *De Cuyper*<sup>399</sup> may appear to be another instance of the Court adopting a flexible attitude to ‘worker status’, but a closer reading of the case indicates that the Court was at pains to observe the requirements of proportionality. In no way did the Court *restrict* the notion of worker that it had worked so hard to expand and refine in previous decisions. Instead, it prevented States being exposed to potentially frivolous or fraudulent claims for social assistance that would encourage States formally to restrict access to social assistance in the longer term.

Viewed through that lens, *De Cuyper* can be construed as a highly significant case protecting the future rights of workers, enabling them to gain access to the market and secure a degree of integration in their host States with the least degree of opposition from the Member States. At the same time, it demonstrates that the ECJ is not pursuing a grudge against the States, or acting ‘for the little man’ at the risk of alienating them or jettisoning reason. It is this ability to balance the needs of the citizen against the restrictions of its own powers that has enabled the Court to continue gradually expanding the rights enjoyed by the individual: a step too far that damaged State confidence in the Court’s confidence would seriously hamper its ability to continue acting with such a free and liberal hand.

Thus we have seen that the ECJ has fortified the notion of the worker, from the notion of free movement as it was described at the outset of Community life, to a full-bodied right that provided the individual with significant rights vis-à-vis the Member States. The ECJ has not rested on its laurels and remains actively investigating the term ‘worker’, but there are recent and worrying examples of the Court acting to muddy what were previously clear pools. Contemporary examples are *Vatsouras* and *Koupatantze*<sup>400</sup> in which the Court was asked to consider several aspects of the rights derived from holding worker status. The ECJ dealt somewhat dismissively with the German assertion that neither applicant qualified as a worker under EU law: reiterating such seminal decisions as *Levin*<sup>401</sup>, *Lawrie-Blum*<sup>402</sup>, *Bettray*<sup>403</sup> and *Kempf*<sup>404</sup> the ECJ demonstrated that

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<sup>399</sup> C-406/04 *Gérald De Cuyper v. Office National de L’Emploi* 2006.

<sup>400</sup> C-22/08 and C-23/08 *Athanasios Vatsouras and Josif Koupatantze v. Arbeitsgemeinschaft (ARGE) Nürnberg 900* 2009, hereafter jointly referred to as *Vatsouras*.

<sup>401</sup> C-53/81 *Levin v. Staatssecretaris van Justitie* 1982.

neither the brief duration of the work relationship nor the paucity of income precluded the generation of worker status. Once more then, the Court doggedly stuck to its earlier, well established interpretations of worker, however, the curiosity of this decision is that the ECJ did not take the opportunity to challenge an attempt by the States to ring-fence certain powers that strip Union citizens of the value (financial and political) of provisions of EU law and its correlative benefits.

The real interest in the decision stems from the complete absence of reference to the citizenship article, especially as *Ninni-Orasche* had appeared to weld Articles 20 and 39 TFEU in order to fortify the worker concept and from the attempt by the Court to distinguish work seeker's allowance from the scope of a traditional social advantage<sup>405</sup>. It is troubling that *Vatsouras* appears to jettison reference to citizenship as part of its decision making process, as the end result is one much to "the detriment of the litigant"<sup>406</sup>. Its absence is all the more inconsistent in light of the referencing of *Collins*<sup>407</sup> which, as outlined above, rested upon the flesh of the citizenship article as its means of providing rights to the greatest number of individuals. However, what is most important is that the Citizen's Directive, which contains the derogation from equal treatment where workers are concerned, may prove to be detrimental to those who are judged to be workers. What we are left with is a situation in which Union citizenship is the fundamental status of all nationals, unless they happen to be workers in need of a helping hand, at which point they find that all citizens are equal, but some are more equal than others.

For many years the Court has striven to provide a clear path where workers are concerned. Long established criteria have been oft repeated so that deciding whether an individual is a worker becomes a simple matter of asking whether they undertake genuine and effective work under the supervision of another, for which they receive some form of remuneration. The level and nature of that pay, the number of hours

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<sup>402</sup> C-66/85 *Lawrie-Blum v. Land Baden-Württemberg* 1986.

<sup>403</sup> C-344/87 *Bettray v. Staatssecretaris van Justitie* 1989.

<sup>404</sup> C-139/85 *Kempf v. Staatssecretaris van Justitie* 1986.

<sup>405</sup> *Ioannidis*, at paras.34-46.

<sup>406</sup> *Fahey*, at p.944.

<sup>407</sup> *Vatsouras*, at paras.37&39.



worked and the length of that employment duration are all inconsequential, as long as the individual can demonstrate that he satisfies the criteria. Subsequently the Court appeared to combine worker rights with those of the citizen to reinforce the rights they had created and enforced. However, *Vatsouras* leaves citizenship vis-à-vis the worker in a difficult position and with the lingering, unanswered question “is it more valuable to be a citizen than a worker after all”?

### *Social Advantages and Dependents*

Until this juncture the discussion of judicial activity has largely concentrated on those social advantages conferred directly upon the citizen/applicant. However, the ECJ has not forgotten the issue of minors or dependents. In both *Garcia Avello*<sup>408</sup> and the subsequent preliminary ruling case, *Standesamt Stadt Niebüll*<sup>409</sup>, minors were at the heart of the issue. The question at hand was not of social advantage in the traditional economic vein. Rather it was concerned with potential social *disadvantages* arising because of surname recognition. In the former decision, the surname issue arose as the children enjoyed dual nationality, in the latter as a result of the parents’ exercise of free movement.

In *Garcia Avello*, the ECJ firmly pronounced that, despite being minors, the possession of nationality of one or more Member States automatically brought the children within the ambit of Union citizenship<sup>410</sup> and enabled them to enjoy the concomitant rights. The Belgian authorities submitted that permitting a change of surname to reflect the mother’s name as well as the father’s, in accordance with Spanish custom, endangered social cohesion as the “immutability of surnames is a founding principle of social order”<sup>411</sup> and would lead to confusion for the children in future. In a move akin to the rules surrounding mutual recognition for goods<sup>412</sup> the Court stated that:

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<sup>408</sup> *Garcia Avello*.

<sup>409</sup> C-96/04 *Standesamt Stadt Niebüll* 2006.

<sup>410</sup> *Garcia Avello* at para.21.

<sup>411</sup> *ibid.*, at para.40.

<sup>412</sup> (C-120/78) *Cassis de Dijon*.

“far from creating confusion as to the parentage of the children, a system allowing elements of the surnames of the two parents to be handed down may, on the contrary, contribute to reinforcing recognition of that connection with the two parents”<sup>413</sup>.

The ECJ was, therefore, involving itself in an area previously acknowledged as falling within the sole purview of the Member States<sup>414</sup> because it felt the State had failed to apply its laws in accordance with Community laws, discouraging the free movement objectives of the Union.

Moreover, it is commonsensical that, where cultural convention in one State dictates that children’s surnames be derived from both parents, other States should not fail to recognise that convention merely because they do not follow suit themselves. For a lack of mutual recognition to be permitted to persist would seriously hamper the continued integration between peoples and the sense of solidarity that was called for in the later *Taons Lassal* and recital 17 of Directive 2004/38. In the case of Belgium, where double-barrelled names were not forbidden, opposition to recognition of a child’s heritage by refusing the name change from Garcia Avello to Garcia Weber is even less justifiable than in the *Standesamt Stadt Niebüll* scenario. German law contained an express prohibition on double-barrelled surnames for children but the (German national) child was resident in Denmark, where there was no such bar, when the application for registration was made. Unfortunately, the outcome in this scenario must only be surmised as having been likely to follow *Garcia Avello*.

*Garcia Avello* remained the lone voice in this situation, as the ECJ was unable to provide a preliminary ruling over the validity of the German law: the referring body was adjudged to lack sufficient standing<sup>415</sup>. However, a similar situation arose in the *Grunkin-Paul*<sup>416</sup> case and the Court was *not* limited by standing. The child at issue had German nationality (although he was born and raised in Denmark) and, according to Danish law,

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<sup>413</sup> *Garcia Avello* at para.42.

<sup>414</sup> *ibid.*, at para.25.

<sup>415</sup> *Standesamt Stadt Niebüll*.

<sup>416</sup> C-353/06 *Stefan Grunkin, Dorothee Regina Paul* 2008

was given a double-barrelled surname. The fact remained that German law contained a prohibition on such a surname and the ECJ was asked to consider whether Member State authorities could, in line with Art.18 ECT, refuse to recognise a surname considered as valid in another Member State. The answer was most emphatic:

“In circumstances such as those of the case in the main proceedings Article 18 EC precludes the authorities of a Member State, in applying national law, from refusing to recognise a child’s surname, as determined and registered in a second Member State in which the child – who, like his parents, has only the nationality of the first Member State – was born and has been resident since birth”<sup>417</sup>.

Unlike *Garcia Avello*, where there was an issue of cultural heritage at stake, the Court had a free hand to make a more sweeping statement and *Grunkin-Paul* appears to be a significant step forward in citizenship’s development. This finding serves significantly to strengthen integration between States and citizens, as well as reflecting a change in social construction away from a patriarchal model, to one where married couples often elect to keep their pre-marital surnames for employment or other purposes.

In these cases the child as an individual was recognised, whereas previously they had formed the abstract recipient of the Court’s reasoning, particularly as the intended beneficiaries of ‘large family allowances’. In essence this was again reliance on the traditional construction of social advantage as a fiscal advantage. *Commission v. Greece*<sup>418</sup> addressed precisely this issue. Greece had implemented what they claimed was a “demographic policy”<sup>419</sup> that was “intended to assist large families resident in Greece, whether or not the persons were workers”<sup>420</sup> and as such, they claimed, was not within the scope of Community competence<sup>421</sup>. Naturally the Commission took a different view, indicating that Greece’s actions were blatantly discriminatory on the grounds of

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<sup>417</sup> *ibid.*, at para.39.

<sup>418</sup> C-185/96 *Commission of the European Communities v Hellenic Republic* 1998.

<sup>419</sup> *ibid.*, at para.9.

<sup>420</sup> *ibid.*.

<sup>421</sup> *ibid.*.

nationality and interfered with the exercise of free movement. The awards attached to 'large family status' were not designed specifically to benefit children but, rather, their parents. However, they were a clear beneficiary of the scheme, either by reason of greater family stability or amelioration of family finances.

Coming before even this case, in the same year as the formalisation of Union citizenship, was *Bernini*<sup>422</sup> which enjoyed submissions from five of the then twelve Member States. Once again the ECJ dealt with social advantages, but viewed the notion through a new and, perhaps, unexpected lens. Officially the advantage benefitted the father of the applicant, as he enjoyed worker status and had exercised free movement rights. At the time of the judgement the 'child' was thirty years old and at the time of the original (refused) application for study finance, she was twenty-three. Thus, the benefit requested was neither being secured for a minor, nor for a student just leaving home after secondary education. With some creative interpretation the Court construed Regulation 1612/68's intention to "prevent discrimination to the detriment of a descendant dependent on a worker"<sup>423</sup> very broadly, so as to encompass a scenario where a worker's child, irrespective of his age, could demonstrate dependence on the worker.

The actions of the Court in this area served to strengthen citizenship as a meaningful entity for dependents. Initially the Court's decisions developed along a fairly conservative line, extending pre-existing Community principles in order that economically active citizens, or adults, ostensibly derived the greatest portion of benefit. Subsequently the ECJ changed tack in cases such as *Garcia Avello* and *Chen*<sup>424</sup>, taking a bolder approach and recognising the child as citizen in his own right, shedding the previous notion of a requirement for an activation of rights. By recognising and promoting the standing of minors and young adults, the ECJ took an important step in ensuring uniformity of application and abolishing any notion of age discrimination, enabling citizenship to be deemed a more inclusive and rounded reality.

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<sup>422</sup> C-3/90 *MJC Bernini v. Minister van Ondernijns en Wetenschappen* 1992.

<sup>423</sup> *ibid.*, at para.29.

<sup>424</sup> See Ch.4.

## *Education and Citizenship: a Changing Dynamic*

The immediate and unrestricted access to education has become an increasingly important issue in the post-Maastricht era especially as the rights to free movement and non-discrimination on the grounds of nationality mean that it is both easier and, for some, desirable to travel in order to seek education. Moreover, students across the EU are entitled to exercise their free movement rights and receive their education at the cost of a “home student”: “international student” no longer means anyone receiving tuition who is not a national, but instead anyone not an Union citizen. Given that “the foundation of every State is the education of its youth”<sup>425</sup>, unfettered access to education is fundamental to the health of the EU as a whole because it provides for the transfer and spread of expertise, skills and knowledge<sup>426</sup>. Thus the arguments behind enforcing equal access to education follow much the same line of argument behind the enforcement of workers’ free movement.

The importance of access to, and support when undertaking, education has not gone unnoticed by the Court. Nor has its activity in making education available to the greatest number of people been confined to the post-Maastricht era. Nonetheless, the existence of Art.20 has facilitated the ECJ in extending the right to receive an education to the greatest number. Prior to 1992 the ECJ had, in such cases as *Gravier*<sup>427</sup>, *Blaisot*<sup>428</sup>, and *Brown*<sup>429</sup>, addressed the issue of education of a vocational nature, i.e., when it would lead directly to employment activities making the recipient an economically active person, i.e., a worker. Thus, vocational study (that pertaining directly to subsequent employment) had already been declared to fall within the ambit of the Treaty (even when it occurred in a University<sup>430</sup>) and barriers imposed to restrict access, whether

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<sup>425</sup> Diogenes Laertius.

<sup>426</sup> Art. 7a Regulation 1612/68.

<sup>427</sup> C-293/83 *Gravier v. City of Liège* 1985.

<sup>428</sup> C-24/86 *Blaisot v. University of Liège* 1988.

<sup>429</sup> C-197/86 *Brown v. The Secretary of State for Scotland* 1988.

<sup>430</sup> *Blaisot* demonstrates quite clearly that deciding what is vocational will depend on the nature of the studies undertaken in University, but veterinary studies will be deemed “vocational”. In *Blaisot* the Court defined vocational training as: “Any form of education which prepares for a qualification for a particular profession, trade or

financial or otherwise, that are disproportionate for EU nationals vis-à-vis Member State nationals routinely have been declared insupportable<sup>431</sup>.

The question of whether a right of equal access to education imposes on Member States a correlative duty to provide financial support was also addressed by the ECJ in *Brown*. Therein it was decided that “assistance given to students for maintenance and for training falls in principle outside the scope of the EEC Treaty for the purposes of Article 7 thereof”<sup>432</sup>. Moreover, there might be occasion to sanction maintenance payments for a student (potentially flying in the face of *Brown*) because said student is the dependent of a migrant worker. The social advantage accrues not for the student, but for the parent, who also happens to be economically active (reaffirming the ECJ’s pre-Maastricht focus on the economic aims of the Union) provided that he/she continues to support the student<sup>433</sup>. That, then, seemed to be the Court’s position immediately prior to Union citizenship’s arrival. The realisation of citizenship following Maastricht led to considerable change, where the ECJ was able to pursue a right to education as a self-evident good, rather than as being inherently linked to burgeoning economic activity.

The most significant early alteration also brought with it the oft-repeated pronouncement that “Union citizenship is destined to be the fundamental status of nationals of the Member States”<sup>434</sup>. *Grzelczyk* visited the issue of whether or not students had a right to remain in a host-State once their means of support had expired.

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employment or provides the necessary training and skills ... University studies constitute vocational training not only where the final academic examination directly provides the required qualification for a particular profession, trade or employment but also in so far as the studies in question provide specific training and skills needed by the student for the pursuit of a profession, trade, or employment, even if no legislative or administrative provisions make the acquisition of that knowledge a prerequisite for that purpose”, in paragraph 1.

<sup>431</sup> *Gravier*.

<sup>432</sup> *Brown* at para.18. Art.7 at that time prohibited discrimination on the grounds of nationality.

<sup>433</sup> *Bernini*.

<sup>434</sup> *Reina*, at para.31.

Having supported himself for several years of his tertiary education, Mr. Grzelczyk requested the MINIMEX in order to support himself through the final, more complicated, stages of his course (amounting to nine months' support in total). His application was approved locally but the Belgian State refused to honour payment, based primarily on the grounds of nationality. Various interested States submitted opinions to the Court surrounding this issue, mostly advocating a conservative approach in the area, with the general thrust of their submissions (except the Portuguese) being that Union citizenship did not provide:

“rights that are new and more extensive than those already deriving from the EC Treaty ... The principle of citizenship of the Union has no autonomous content, but is merely linked to the other provisions of the Treaty”<sup>435</sup>.

Such a pessimistic interpretation begs the question – if this is correct, exactly what is the purpose of the citizenship provisions? Fortunately the Portuguese submission indicated a more enlightened attitude towards the Union's new creation. They suggested that the rights provided in various Regulations pre-dating Maastricht should be extended from those satisfying the established 'worker status' criteria to all EU nationals<sup>436</sup>. It is this approach that highlights the opportunities that *could* arise for all EU nationals and the degree to which citizenship could become an invaluable tool for people across the breadth of the Union. The Portuguese approach, whilst at odds with that of other States closely resembles the end outcome that Monnet had envisaged for his creation and is something that, in its fullest meaning, still eludes us today.

In the end, the Court ploughed a more reasoned line by explicitly overturning the earlier decision in *Brown* and stating that, as Union citizens, maintenance to students now fell within the scope of the Treaty<sup>437</sup>. Moreover, the Court intimated that it understood that a student's financial status is not guaranteed to be stable: the precariousness of finances should not be used as an excuse to prevent the student finishing his studies, when reasonable support can be provided to ensure completion

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<sup>435</sup> *ibid.*, at para.21.

<sup>436</sup> *ibid.*, at para.23.

<sup>437</sup> *ibid.*, at paras.34-35.

and financial support would be a given for State nationals<sup>438</sup>. Tied to this finding was one that indicated a student would not lose his right of residence because he found himself impecunious – the State may decide not to renew a residence permit but finding oneself impoverished and requiring financial support to complete studies would not *automatically* result in the withdrawal of residence rights.

The overall consequence of *Grzelczyk* should not be underestimated. Not only is it significant that the Court chose not to focus on the vocational nature, or otherwise, of Mr. Grzelczyk's studies, but the Court's resistance to the considerable pressures exerted by the States in their submissions is admirable. By focussing instead on citizenship and its attendant rights, the ECJ was able to provide a means for students to enter into studies with a more strongly founded expectation that they will be able to enjoy that education uninterrupted. In so doing, the Court did not merely follow the new interest in securing an education for all, but ensured another fundamental freedom was also preserved: the right to movement. Whilst removing an impoverished student from State bounds might be in the economic interests of Member States, a more liberal and flexible interpretation of the 'sufficient resources' criteria provides the fullest, broadest interpretation of free movement available under the Treaty.

Moreover, *Grzelczyk* proves a foundation for much that followed in *Baumbast*<sup>439</sup>, wherein the ECJ decided that children of an EU national would be entitled to remain in a Member State in order to finish their education, even where they were not that State's nationals and when their parent's worker status had been questioned. In fact:

“children of a citizen of the European Union who have installed themselves in a Member State during the exercise by their parent of rights of general residence as a migrant worker in that Member State are entitled to reside there in order to attend general educational courses there

“... children of a Community worker can, even if he has ceased to pursue the activity of an employed

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<sup>438</sup> *ibid.*, at para.45.

<sup>439</sup> C-413/99 *Baumbast*, R v. *Secretary of State for the Home Department* 2002.



person in the host Member State, undertake and, where appropriate, complete their education in that Member State<sup>440</sup>.

Thus we see that the Court was willing to imbue minors with rights in their capacity as citizens, in much the same way as they had in *Garcia Avello*, albeit rights that derived from their parents' initial activity. The inference here is that the child cannot by herself activate EU rights, but once a parent has done so and the child has entered into a programme of education<sup>441</sup>, then she will be treated as an active participant in the Union. This judgement quite possibly opened the door to the later *Chen*<sup>442</sup>, where the child's (or, more accurately, baby's) movement was sufficient to secure rights vertically for her parent.

Crucially, *Baumbast* cannot be viewed merely through the lens of Mr. Baumbast's children, as it was a joined case, linked to R pertaining to rights of residence for children, here children of dual nationality. As was the finding subsequently in *Chen*, the children's mother was a non-EU national and, therefore, had no right of residence independent of them. A complicating factor was that the parents involved had divorced and the mother had subsequently remarried a UK national, granting her the right of residence that the domestic courts had previously determined to be lacking<sup>443</sup>. The children were found to enjoy a right to enjoy their education<sup>444</sup> but the salient finding, much as in the case of Mrs. Chen, was that R could not be deprived of a right of residence as the primary carer for the children, because to do so would render ineffective the rights to be enjoyed by the children<sup>445</sup> (as well as flying in the face of the

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<sup>440</sup> *ibid.*, at paras.63 & 69.

<sup>441</sup> Something which had been absorbed into the fold of Community objectives with Maastricht developments.

<sup>442</sup> C-200/02 *Chen v. Secretary of State for the Home Department* 2004.

<sup>443</sup> This alteration in her personal situation provided the ECJ with an ideal opportunity to simply rule that this case no longer needed an answer: they proceeded to extend the rights to her regardless.

<sup>444</sup> *Baumbast*, at para.58.

<sup>445</sup> *ibid.*, at para.75.

right to enjoy family life as outlined under the ECHR<sup>446</sup>). Given the Member States' recalcitrance concerning this notion, reaching such a finding twice in quick succession is noteworthy and may provide an avenue for future applicants, perhaps even third-country nationals, to enjoy the benefits of EU residence, provided they have a sufficient link to a Union citizen.

Indeed, looking at *Baumbast* and *Chen* in light of pre-citizenship cases, we should not be surprised that the ECJ has pursued an open interpretation of citizenship and what benefits it should convey. Cases such as *Michel S*<sup>447</sup> and *Casagrande*<sup>448</sup> demonstrate that the "liberal interpretation"<sup>449</sup> of Regulations affecting the citizen have a lengthy history, one culminating in the *Teixeira*<sup>450</sup> and *Ibrahim*<sup>451</sup> decisions. Both decisions (returned on the same day) related to an interpretation of Article 12 Regulation 1612/68 and a child's right to pursue/continue education as the child of a migrant worker. *Baumbast and R* had already provided a ruling that the child's right must not be interfered with merely because a parent ceases to keep an independent right of residence, but provisions of the subsequent Directive 2004/38 potentially handed the Member States an effective tool to threaten that right: the requirements to have sufficient insurance and not prove a burden to the host State, neither of which a child would be capable of proving without some form of assistance.

*Teixeira* and *Ibrahim* both had to consider the impact of Directive 2004/38 on the pre-existing case law and the questions concerning the parents' right to remain. In *Ibrahim* the question is particularly interesting as, although separated from an EU national, Ms. Ibrahim is herself a third-country national. Her children were receiving a British education but at no point was she capable of supporting herself (or the children) adequately, meaning that the family as a whole fell foul of the Directive's provisions. Interestingly, the father had already left (and later returned to) the UK as his worker

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<sup>446</sup> Art. 8 ECHR.

<sup>447</sup> C-76/72 *S. v Fonds National de Reclassement Social des Handicapés* 1973.

<sup>448</sup> C-9/74 *Casagrande v Landeshauptstadt München* 1974.

<sup>449</sup> Starup and Elsmore, at p.572.

<sup>450</sup> C-480/08 *Maria Teixeira v Lambeth LBC* 2010.

<sup>451</sup> C-310/08 *Harrow LBC v Nimco Hassan Ibrahim, Secretary of State for the Home Department* 2010.

status had lapsed. Harrow LBC declined to follow *Baumbast* owing to the family's lack of self-sufficiency<sup>452</sup>. The ECJ disagreed, placing the children's rights above a reading of Directive 2004/38's narrow interpretation. *Teixeira* was also significant, not because it dealt with a third-country national, but with a divorced Union citizen whose worker status was intermittent, but who was not a worker at the time her daughter's education commenced. Part of the custody ruling was that she should have as much contact with her daughter as the latter wished<sup>453</sup> and the daughter subsequently resided with her mother full time. As a result, the mother applied for housing benefit, which Lambeth LBC refused because she was not self-sufficient as required by Directive 2004/38.

*Baumbast* should have provided ample grounds for these cases being decided liberally, but in both instances the Council involved felt that subsequent EU law (the Directive) superceded and, in effect, nullified that decision. Moreover, the Councils were effectively supported by submissions from various Member State governments. The ECJ, therefore, had carefully to balance its pre-existing decisions against later legislation agreed upon by the States. The outcome reached in both cases was heavily hinted at from the outset by the continuous references to *Baumbast*, but they were careful to weigh Regulation 1612/68 against Directive 2004/38 in clear terms, providing guidance for specific cases to come. Rather than pursuing the Directive to the detriment of children's rights, the ECJ relied on two powerful principles. The first stated:

“Article 12 of Regulation 1612/68 must therefore be applied independently of the provisions of European Union law which expressly govern the conditions of exercise of the right to reside in another MS”.<sup>454</sup>

The second, more fully articulated principle was outlined as follows:

“... there is nothing to suggest that... the legislature intended to alter the scope of Article 12

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<sup>452</sup> Starup and Elsmore, at p.577.

<sup>453</sup> *Teixeira* at para.22.

<sup>454</sup> *ibid.*, at para.53.

of that regulation, as interpreted by the Court, so as to limit its normative content...

“... Article 12 of that regulation was not repealed or even amended by Directive 2004/38. The European Union legislature thus did not intend thereby to introduce restrictions of the scope of Article 12...

“... the *travaux préparatoires* to Directive 2004/38 show that it was designed to be consistent with the judgement in *Baumbast and R* ...

“... In circumstances such as those of the main proceedings, to make the application of Article 12 of Regulation No 1612/68 subject to compliance with the conditions set out in Article 7 of that directive would have the effect that the right of residence of children of migrant workers in the host Member State in order to commence or continue their education there and the right of residence of the parent who is their primary carer would be subject to stricter conditions than those which applied to them before the entry into force of that directive.”<sup>455</sup>

Taken together these principles gave the Court a solid basis for their decisions that both sets of parents qualified for social benefits, because to deprive them would significantly hinder the children’s *independent* right under the Regulation. Showing due deference to the *travaux* was a significant demonstration in *Teixeira* that the Court was not overreaching. Moreover, disagreeing “with the submissions of various national governments, the Court said the 2004 Directive does not presently constitute the *sole* basis for the conditions governing the exercise of the right of residence”<sup>456</sup>, meaning

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<sup>455</sup> *ibid.*, at paras.56-58, 60.

<sup>456</sup> *Starup and Elsmore*, at p.579.

that the implications of these two rulings are potentially crucial for the future of citizenship and citizens whose rights are treated restrictively by the States. Directive 2004/38 is the current tool under which Member States define their residence policies: should the ECJ continue down a path that provides concrete evidence for residence founded beyond the Directive, citizens (and students in particular) might well find that the Court has equipped them with hefty tools enabling them to remain in a State in times of adversity<sup>457</sup>.

Both *Teixeira* and *Ibrahim* serve as powerful indications that the ECJ intends to pursue a coherent and liberal policy when considering minors enjoying education. Similarly, when dealing with those enjoying tertiary education, *Morgan*<sup>458</sup> looked set to continue the trend of liberal interpretations of citizenship. The Court relied heavily upon the citizenship articles to determine that an attempt made by the German authorities to preclude Ms. Morgan from a training benefit available for those in higher education, on the grounds that her studies occurred abroad and did not follow a year's study in Germany, was unlawful as it contravened a citizen's right of free movement<sup>459</sup>. Key to this determination was the fact that Ms. Morgan could not study the course of her choice in Germany: the Court was most determinedly not opening floodgates with this decision, flying in the face of potential criticisms of judicial overreaching. However, its decision meant that States could not readily conclude that they were absolved of an obligation to support their citizens merely because they had taken the opportunity to study elsewhere. Such an open-minded interpretation of the free movement principles considerably extends the value of Union citizenship to an individual: should a

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<sup>457</sup> It should be noted that the ECJ did not, however, engage in a discussion about the issue of self-sufficiency *per se*. Instead, they discussed the issues in the cases in terms merely of the relationship between Article 12 Regulation 1612/68 and the provisions of Directive 2004/38 as they related to a child's rights to education. Should the issue of an adult's self-sufficiency form the core of the case (in a non-education related context), it is likely that the Court would not follow this train of cases and would, instead follow the wording of the Directive on the grounds that it was enacted by the States. *ibid.*, at p.582-3.

<sup>458</sup> C-11/06 *Rhiannon Morgan v. Bezirksregierung Köln* 2007.

<sup>459</sup> *ibid.*, at para.51.

maintenance grant not be forthcoming in a host state there is a possibility, albeit remote, that national citizenship may provide a supranational remedy.

By linking each judgement to a core value of the Union<sup>460</sup>, the ECJ succeeded in securing a rapid expansion of the scope and application of Union citizenship in the sphere of education. Moreover, these links to traditional axioms of the EU provide the ECJ with a useful fig leaf in the face of criticism of over-reaching: its actions can be easily brought under the umbrella of Art.220 ECT<sup>461</sup> as it has merely been ensuring consistent interpretation of the Treaties and secondary legislation. The fact remains, however, that the States clearly did not intend the ECJ to reach the conclusions it did – the frequency of Member State submissions that fly in the face of the Court’s ultimate determination serves as sufficient illustration. Creatively, the Court had secured a material development in citizenship and secured benefits for (potentially) millions of citizens. The actions of the ECJ had served, almost exclusively, to extend the scope of a right to education and looked set to continue this trend. In 2005 it issued a decision that appeared to confirm this opinion<sup>462</sup> but its actions subsequently<sup>463</sup> indicate that the Court’s final position is far from resolved.

*A Court at odds? Bidar v. Förster and why the situation may not have altered.*

Crucial to any assessment of the state of citizenship vis-à-vis education is a discussion of the inter-relationship of the *Bidar* and *Förster* decisions. Despite the long series of judicial developments culminating in *Bidar*, the later outcome has the appearance of substantial backtracking, making the position of students moving to and studying in a Member State not their own once again uncertain. The principles entrenched in *Baumbast* and *Collins*<sup>464</sup> having been unceremoniously abandoned by the Court, it would seem, *Förster* must be discussed and, if possible, distinguished lest the

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<sup>460</sup> Various non-discrimination, free movement etc..

<sup>461</sup> replaced by Art.19 TEU.

<sup>462</sup> C-209/03 *The Queen (on the application of Danny Bidar) v. London Borough of Ealing, Secretary of State for Education and Skills* 2005.

<sup>463</sup> *Förster*.

<sup>464</sup> *MRAX*.

citizenship rights so long fought for, particularly those of non-discrimination, slide into ignominy.

Following *Baumbast* and *Grzelczyk* it appeared that non-national students studying in a State had a reasonable expectation of an almost continuous right of enjoyment of their education, irrespective of age and, perhaps, financial circumstances. Member States nonetheless continued in their attempts to restrict access to funding for higher education using the wording of the secondary legislation, such as the Citizenship Directive<sup>465</sup> and the Students' Residence Directive, concerning residence requirements, to assist them. Instead of gaining traction and restricting the flow of students into educational institutions, the Court seized the opportunity once more to deliver creative jurisprudence that best ensured provision of the greatest opportunities for the maximum number of citizens to enjoy European rights. *Bidar*, whilst perfectly illustrating the ECJ's ability to forge an increasingly liberal interpretation of the notion of citizenship, drew upon a notion that was first drawn on in *D'Hoop*: degrees of integration (in that case the existence of a sufficient link between the applicant for an allowance and the geographical market they will enter into<sup>466</sup>). The test constructed under *Bidar* was one that appeared to satisfy the pre-existing principles of proportionality whilst testing the long established position on non-discrimination on nationality grounds.

The ECJ's reasoning concerning proportionality was quite clear. Danny Bidar sought a student loan from his local education authority in order to attend University, something common amongst British students. However, being a non-national, he was not applying on the same grounds and thus *could not* satisfy the requirements of Britain that an applicant be "settled in the United Kingdom"<sup>467</sup> as specified under the Immigration Act 1971. This was not acceptable to the ECJ. It showed a manifest disregard for its previous rulings. Lest we forget, *Grzelczyk* called for solidarity between Member States and their nationals<sup>468</sup>: that solidarity was lacking here. Nonetheless, for the sake of proportionality, the ECJ reiterated that States could be the judge as to

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<sup>465</sup> Directive 2004/38.

<sup>466</sup> *D'Hoop*.

<sup>467</sup> *Bidar* at para.15.

<sup>468</sup> *Grzelczyk* at para.44.

whether fulfilling these requirements would impose an unreasonable burden upon them<sup>469</sup>, hence their capacity to make a determination concerning the degree of integration of a given student in their society. Thus armed with these concessions, it seemed unlikely that a favourable outcome awaited Mr. Bidar and the Court may well have paved the way here for the Dutch to be able to justify, later on, their position concerning Ms. Förster. However, the UK in this instance had not adequately weighed up Mr. Bidar's degree of integration. Having completed a portion of his secondary education in the UK prior to his University applications was considerably in his favour: the wording on this issue was that there must be "established a genuine link"<sup>470</sup> with the Member State's society. The burden seemed reasonably easily satisfied by prospective applicants whilst balancing a State's right to restrict the scope of its potential economic liabilities.

Interesting by its absence, however, was discussion of the notion of non-discrimination on nationality grounds. It is implicit in the sentiments conveyed in the decision, but there is little specific reference made to it, in stark contrast to, *inter alia*, *Baumbast*, *Collins* etc.. The proportionality of a "genuine link" is something that the Court cannot easily demonstrate: by leaving their definition at being resident in a State for a "certain time"<sup>471</sup>, the ECJ left an exceedingly wide margin of discretion for the future and, arguably, left citizens and Union citizenship occupying something of a no-man's land, one open to subjectivity on the part of the States should they determine that a category of citizen is undesirable<sup>472</sup>. The judgement, at the time, seemed like a trumpet call heralding a great advance in citizenship's development, one that echoed previous calls for solidarity and the creation of a European people<sup>473</sup>. However, its relationship to the subsequent *Förster* case casts that in shadow and must now be assessed.

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<sup>469</sup> *Bidar* at para.56.

<sup>470</sup> *ibid.*, at para.62.

<sup>471</sup> *Bidar*, at para.37.

<sup>472</sup> This is not altogether unforeseeable when considering the degree of unrest among certain States about migrant communities such as travellers, or the Roma in countries like France.

<sup>473</sup> e.g., in the Preamble to the ECT.



There was a mere two year gap between the two decisions, but academic opinion<sup>474</sup> following *Förster* would seem to indicate that it equated to a sea change in citizenship conceptions. Once more, the ECJ was asked to preside over a case concerning students exercising their free movement rights but seeking financial support, in this instance one who had been both economically active and unemployed. The issue of her worker status might well have been deemed important in reaching the decision<sup>475</sup>, much as issues of links between employment and training had been important in *Brown* and *Blairot* beforehand. The Court side-stepped the issue entirely, focussing instead upon the issue of duration of residence, which had provided the bar to Ms. Förster's capacity to secure financial help. The lack of clarity in *Bidar* concerning what is meant by "genuine links" or being resident for a "certain time" here proved instrumental in the outcome of the decision: the Dutch authorities exploited the apparent loophole to impose a lengthy period of residence before economic aid could be granted and it seemed that this had the immediate result of excluding nearly all non-national (yet EU) students from the bracket of those eligible for these awards in future. Therefore, the decision was one that derogated from the equal treatment provisions as found in the Treaty, relying on Directive 2004/38, Art.24(2) and must have done so more than was foreseeable when *Bidar* was decided.

*Förster* would appear to represent a watershed moment: Union citizenship had been elevated to the "fundamental status"<sup>476</sup> of the ordinary national, yet the case made no mention of that and, in fact, appears to have turned that principle on its head creating a citizenship hierarchy, with students appearing close to the bottom of the pile. Moreover, the reliance by the Court on Art. 24(2) Directive 2004/38 departs considerably from the earlier decision in *Micheletti* which provided the maxim that Member States' self-interest should not be used to override the rights of Union citizens. Moreover, this restrictive approach to the Directive seems at odds with the expansive view of citizenship that the Court was to deliver in *Metock*, giving the impression that the Court is at odds with itself. At times it appears to have forgotten earlier decisions and, bearing *Metock* in mind, seems to have conferred more expansive rights on third-

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<sup>474</sup> Chalmers *et. al.*, and Kaczorowska.

<sup>475</sup> O'Leary, at p.619.

<sup>476</sup> *Grzelczyk*.

country nationals than it has on students. Yet it is these realisations that, ironically, provide the greatest hope that *Förster* will prove an aberration.

The subsequent *Vatsouras* (self-employment) case demonstrated that the Court has no intention of overturning the derogation found in Art. 24(2), Directive 2004/38, in spite of the confusion that can arise from it. Nonetheless, in another open-ended finding, the ECJ referred once again to the notion of a “real link”<sup>477</sup>, this time between the job seeker and the market and, furthermore, held that financial assistance when making a genuine effort to enter the job-market cannot be construed as “social assistance” and must, therefore be awarded to an applicant<sup>478</sup>. It must be noted that, once again, the ECJ eschewed an opportunity to define what constituted a ‘link’ and that the Court applies different standards to different *types* of citizen. In *Förster* the link must be determined by residence of five years or more, but in *Vatsouras* the applicant had been resident less than four months, and employed only three<sup>479</sup>, before receiving the initial grant of his allowance and yet the Court deemed that sufficient to constitute the presence of a real link to the employment market. Plainly the Court has adopted principles at odds with one another and, it might well be claimed, contrary to their own principles of equal treatment.

The fact that a similar approach was not taken for students, creates an uneven playing field whose longer-term economic and social consequences<sup>480</sup> surely cannot go

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<sup>477</sup> *Vatsouras* at para.38.

<sup>478</sup> *ibid.*, at paras.45-46.

<sup>479</sup> *ibid.*, at para.17.

<sup>480</sup> What ‘longer term consequences’ are envisaged? If education is viewed as the principal stepping stone to securing more desirable and more specialised employment then restricting access to the education market (as it must be deemed since most students are expected to pay for the benefit of tertiary education) will inevitably lead to fewer candidates being adequately qualified to carry out certain tasks. The skills shortfall has two potential further consequences: a requirement for increased non-EU migration to fill the void or market stagnation and loss of social mobility. The latter consequence flies in the face of stated aims and, therefore, it seems that now that barriers to trade and movement have been lifted, removal of barriers to completion of education and all that entails must follow suit.

unconsidered without a subsequent decision restoring *Bidar* as the current standard for citizenship vis-à-vis students. The reversion to a shorter timeframe being the basis for a “genuine link” in *Vatsouras* might well provide the ammunition needed to successfully overthrow *Förster* in *Bidar*’s favour for *all* students. Should this not be the result, we are left with a further question: will the Court make a *Vatsouras*-esque distinction in future, should financial assistance be sought in relation to distinctly *vocational* education and how widely will the court read the notion of vocational training? Should *Förster* stand, the Court appears to have taken a decidedly backward step in the development of citizenship as it relates to students, returning to a position not seen since *Blaziot*, *Brown* and *Gravier* were in vogue.

Moreover, a factual/temporal argument exists calling for *Förster* to be distinguished from the line of education-based decisions that culminated in *Bidar*: the facts that led to Jacqueline Förster being refused a maintenance grant arose prior to the decision of *Bidar*, even though the latter was considered in the ECJ’s decision. In addition, the reasoning given for the refusal of the maintenance grant renewal was because she had been unemployed for a five to six month period<sup>481</sup> – this in spite of settled case law determining that worker status can remain attached to an individual for six months after the date of last employment<sup>482</sup>. Once again, therefore, the decision to overlook the question of her worker status seems anomalous as it might well have materially affected the case’s outcome.

Thus the ECJ had acted in such a way as to restrict the value of Union citizenship as it related to millions of citizens as a valuable commodity. However, by leaving three ostensible routes of attack as a potential future avenue for overturning *Förster*, deliberately or not, there is considerable reason for optimism that the *Förster* decision is both ill-founded and likely to be overturned in the near future. Placing students at a distinct disadvantage in relation to other citizens at a time when education is both priceless, in terms of entering the employment arena, and costly to the individual is something that can not be seen as permissible, or a viable long-term scenario.

Furthermore, there is an interesting and, perhaps, inconsistent development in the application of Union citizenship rights vis-à-vis students. *Förster* appeared to fly in

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<sup>481</sup> *Forster*, at para.21.

<sup>482</sup> *Ninni-Orasche*.

the face of multiple cases expanding the scope of citizenship as it applied to students, creating a negative hierarchy in which they were at the bottom. However, *Teixeira* and *Ibrahim* between them provided a platform *elevating* certain citizens provided they either have, or are, a child in full time education.

### Miscellaneous other Rights

In addition to those rights already discussed at length, the ECJ has seen fit to return decisions in manifold other areas. Two notable examples of the breadth of the Court's interests are *Bickel and Franz*<sup>483</sup> and *Eman and Sevinger*<sup>484</sup>, both dealing with utterly different issues but nonetheless equally critical to the enjoyment of citizenship of any kind. The former is an apt illustration that, even where criminal law is at issue, the ECJ has determined that due process must be carried out fairly. The latter deals with another fundamental right of citizenship, democratic participation. These cases form an essential part of the discussion about the ECJ's activities after 1992, as they are removed from access to economic rights or the pursuit of free movement *per se*, considered the more traditional forum for judicial intervention.

*Bickel and Franz*, whilst having practical ramifications in the criminal sphere, fundamentally dealt with the notion of non-discrimination and non-imposition of bars to free movement, in that non-national defendants involved in prosecutions were deemed equally worthy of due process *in a language they can understand* as nationals would be in their stead. Italy (the State with jurisdiction over the criminal proceedings) submitted that it had national rules applying to a small number of its nationals who had mixed ethnic heritage and that the right to have proceedings conducted in German and not Italian fell within its sovereign competence. In other words, they contended that the

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<sup>483</sup> C-274/96 *Bickel and Franz* 1998.

<sup>484</sup> C-300/04 *M.G. Eman, O.B. Sevinger v. College van Burgemeester en Wethouders van Den Haag* 2006.

issue fell beyond the scope of the Treaty, which the ECJ refuted absolutely<sup>485</sup>, as it felt that:

“the exercise of the right to move and reside freely in another Member State is enhanced if the citizens of the Union are able to use a given language to communicate with the administrative and judicial authorities of a State on the same footing as its nationals”<sup>486</sup>.

Instead of treading lightly relative to this issue, because criminal proceedings traditionally fall within the ambit of Member State responsibility<sup>487</sup>, a strong argument in favour of increasing integration between citizens was produced, allowing an expansive reading of the Court’s competence in this area. Moreover, the ECJ also found that, as there was clearly provision for Italian nationals with non-Italian heritage to have non-Italian proceedings, Germans (or any other Member State nationals) travelling to Italy were placed at a decided disadvantage should they require judicial or administrative aid. Therefore, the non-discrimination principle, widely used by the ECJ (as discussed in a variety of examples above) was employed by the Court in what, for it, was an unusual circumstance in order to continue down the path of a Union without internal frontiers of whatever kind.

What of a situation where the Court sought to extend the abolition of those internal frontiers to extra-EU territories? *Eman and Sevinger* is one such example, pertaining to the securing of democratic rights of citizens no longer resident in conventional EU territory. Dutch nationals resident in Aruba discovered that they had been barred from registering to vote in European Parliament elections, despite the fact that Aruba was a Dutch colony, and they sought redress in order to ensure political participation. Despite the potential for conflict between the EU institutions and its Member States, the ECJ determined to pursue a rigid interpretation of the citizenship article (that it applied to all Member nationals), in order to underpin the subsequent finding that that Dutch government had acted erroneously in preventing Aruban-

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<sup>485</sup> *Bickel and Franz*, at para.18.

<sup>486</sup> *ibid.*, at para.16.

<sup>487</sup> *ibid.*, at para.17.

resident nationals registering on the European Parliament electoral roll. The Court showed reliance on long established principles such as equal treatment and non-discrimination<sup>488</sup> to enable the enjoyment of a democratic right. This was all the more relevant as the case bears some similarities to the later *Flemish Welfare Aid* case: nationals belonging to the same State, but living in different ‘regions’<sup>489</sup> facing different treatment by their governments. Interestingly, the ECJ here chose to decide that what was, essentially an internal situation (the movement in question happened between Dutch territories) still fell within the Community remit. This makes *Flemish Welfare Aid* seem all the more important: with the ECJ’s decision here indicating that, if the matter is sufficiently important to the heart of the project, the Court will interfere in matters that fall within a grey area, the response that the 2008 situation was entirely internal and, therefore, not a matter for Community law, is a striking indication either that the Court does not value all issues equally or that it has taken a backward and highly conservative step when exercising its powers.

## Conclusion

When the Maastricht Treaty came into force, Union citizenship became a force that was, in and of itself, valuable and important to the individual. The Member States had acquiesced in its formalisation: many of the uses that they envisaged it being put to (given their submissions to the Court in various cases) ran along those lines outlined in pre-1992 jurisprudence. In other words, relying on the original “complementary” wording of what was then Art.17 ECT, the States appear to have assumed that more of the same was to follow. As has been amply shown, the ECJ confounded their expectations in many ways, whilst opting to pursue a conservative approach in other surprising situations.

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<sup>488</sup> *Eman and Sevinger* at para.57.

<sup>489</sup> ‘Regions’ here is being used to equate Flanders and the Walloon region to Aruba and the Dutch Antilles. The two are not exactly analogous, but the situation, wherein nationals are being treated differently whilst under the umbrella of their State, is.

In the almost twenty years since Maastricht the ECJ has had ample time to flesh out a concept that ran to three lines in the Treaty text. Its actions enabled it to plough new ground for the beneficiaries of Union citizenship, expanding access to social advantages beyond economic migrants to all those exercising their European rights, a move it was unable to complete in the pre-citizenship era. It acted to empower students to travel for their education, finding novel ways to secure their free movement and their ability to complete their studies with funding in the event of unforeseen events.

Most importantly, the Court has fixed its sights on three core values to ensure that citizenship has not become stilted or restricted. Concentrating on non-discrimination, the right to free movement and the right to enjoy a family life the ECJ has delivered decisions from which modern European catchphrases have spawned. These three principles constitute such a significant part of the jurisprudence returned since 1992, that it is possible to say that they currently provide the backbone to Union Citizenship.

In the face of its many open-minded and expansive decisions, however, there have been numerous recent decisions that indicate the ECJ has not reached a settled policy when it comes to citizenship's harmonious and consistent application. Some decisions, rather confusingly, have left citizenship seemingly robbed of its forcefulness: by muddying previously well-defined principles, the ECJ may well have rendered citizenship almost delicate and has certainly cast a shadow over the application of rights for many citizen groups. Decisions made in the near future will prove very telling about the subsequent direction of citizenship and the plans the ECJ has for it.

Nonetheless, when weighed in the balance, Art.20 has not been allowed to become a prison for Union citizenship: instead the ECJ has used the two decades following its formalisation, combined with its interpretive creativity and jurisprudential might, to demonstrate that the citizenship article's formulation was merely a spring board from which it could launch into something altogether more powerful. Union citizenship "is destined to be the fundamental status" of all Member State nationals, but it could not seriously be so considered had the majority of the ECJ's actions been in a less liberal and commonsensical vein.

## **Chapter 4. A Political Trinity – European Citizenship, Third Country Nationals and the Stateless Nomad: Nationality and Identity in the Supranational Arena.**

### **Introduction**

In the almost twenty years that Union Citizenship has been in existence it has undergone a transformation in perception, largely owing to the involvement of the ECJ. As was widely discussed in earlier chapters, Union Citizenship has developed both through the Court's actions and, at other times, its silence. A significant area in which its development has remained underwhelming relates to its acquisition and loss.

When dealing with a polity whose population is in excess of 500 million citizens this issue must be contemplated. It highlights the existence of a conflict between the Member States and the Union that must be addressed if Union citizenship is to become a heavyweight political entity. How and why does such a conflict arise and of what does it consist? The ECJ (and for that matter the Union itself) has long held that determining nationality (the stated mandatory qualifier for Union citizenship<sup>490</sup>) remains solely within the province of the States themselves<sup>491</sup>. However, this recognition poses an interesting set of additional questions: is citizenship synonymous with nationality and *vice versa*; is citizenship an essential adjunct to nationality; does citizenship have the capacity to exist independently of ideas of nationality and, if the answer to the first two questions is affirmative and the latter negative, what status can Union citizenship have as a political entity at all?

In the preceding chapters a clear progression has been outlined charting the gradual development, crystallisation and expansion of a citizenship designed to benefit

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<sup>490</sup> Kostakopoulou, 2001b, at p.180.

<sup>491</sup> An assertion repeated in many cases.



the nationals of the Member States. At the heart of this drive has been the ECJ following its initiative and using more general policies<sup>492</sup> of the Union and its institutions as the bare bones on which to drape its new creation. However, at its root, this strategy of development has struck at the core of the State's belief that it has control over its borders and notions of sovereignty and bounded citizenship, establishing a direct conflict between the Union and its constituents.

Central to this conflict and the questions surrounding citizenship's function and, indeed, destiny are the twin notions of nationality and identity. With that in mind, and taking the Treaty provisions at face value, a European Union citizen cannot hold that status without first being a Member State citizen meaning that we must ask what nationality means to an individual and consider whether Union citizens at the supranational level might, in fact, share features of 'nationality' with citizens from States other than their own. Moreover, recent case law<sup>493</sup> and apparent indecision on the part of the ECJ draws attention to the wider implications of the Treaty's restrictive wording concerning Union citizenship's foundation and the gaping chasm it leaves for those who find themselves stateless. In addition to the stateless, third-country nationals, who are long term residents in the EU (potentially creating new citizens and who abide by its laws without having the opportunity to use its benefits) also fall into the gap created by Art.20 TFEU, bereft of access to 'European' rights. These issues will form the basis of the discussion that follows, culminating in proposals for a re-examination of the formulation of citizenship that better addresses the needs of all the Union's subjects. A new genesis would be arrived at by uncoupling Union citizenship from the yoke of particular nationality requirements and focussing on Human Rights, both as they pertain to all based in the Union and as are catered for by the Union's own legislation<sup>494</sup> and jurisprudence. Moreover, it would be pertinent to address whether novel expectations of Union citizenship could be better informed by revisiting successful innovations from past models<sup>495</sup>, several of which had to contend with issues concerning disparate populations and varying ethnicities like those facing the EU today.

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<sup>492</sup> As discussed above in Ch.2.

<sup>493</sup> E.g. C-135/08 *Janko Rottman v. Freistaat Bayern* 2010.

<sup>494</sup> The Charter of Fundamental Rights, (the Charter).

<sup>495</sup> See Ch.1.

## A Political Trifecta: Nationality, Identity and Citizenship

Nationality and statehood as tools for individual and collective expression are vast and complex issues. Their complexity does not make them something to shy away from, but the breadth of issues involved in determining nationality's construction and value is considerable, forming the basis of multiple works dealing with nationality as a single issue<sup>496</sup>. Here it is viewed as one element of the interpretation of a broader issue: supranational citizenship. The discussion of nationality that follows is, therefore, a mere overview of a much greater whole, covering issues such as how nations and conceptions of nationality have developed and the entanglement of nationality and citizenship as a means of self-identification vis-à-vis others and the state.

Nationality is intrinsically tied up with notions of belonging, identity and what makes 'the state' an entity. These ideas are neither novel nor unique to modern political discourse. Aristotle pondered their inter-relationship, musing that the State is actually a:

“certain number of citizens; and so we must consider who should properly be called a citizen and what a citizen really is. The definition of citizenship is a question which is often disputed: there is no general agreement on who is a citizen. It may be that someone who is a citizen in a democracy is often not one in an oligarchy”<sup>497</sup>.

That last sentence is particularly relevant in view of the multi-national nature of the modern polity that is the EU: is it possible that some nationals can get left behind when considered as part of the greater whole? The seemingly clear wording of the Treaty's citizenship provisions is addled by the Union's, at times, confused jurisprudence which creates uncertainty about whether all nationals are, in fact, Union citizens at all times<sup>498</sup>.

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<sup>496</sup> One example being Miller, 2000. Nationality forms part of many other works dealing with citizenship, *inter alia*: Schulze 1994, Kostakopoulou, 2008, Cessarini and Fulbrook, 1996, Rubio-Marín, 2000.

<sup>497</sup> “Politics”, Aristotle, p.84-5.

<sup>498</sup> Developments in 2011, with seemingly contradictory judgments being returned on ostensibly the same issue (see *Zambrano* and *Dereci*) exacerbate this tension.

The conferral of Treaty status to the Charter should, to a considerable degree, remove fears that the internal rule<sup>499</sup> still applies, precluding some nationals enjoying their Union citizenship status. The mere suspicion that Aristotle might prove correct in a modern, democratic, supranational entity is cause for concern, especially as the EU will expand to include Croatia and looks likely to extend further, with Serbia, Macedonia and Turkey all candidates for entry to the behemoth.

However, one aspect of Aristotle's musing seems piercingly accurate to modern ears – citizenship indeed does not conform readily to a “single definition”, although almost all conceptions view citizenship exclusively through the lens of the nation. As discussed in Chapter 1, modern states construct their national citizenships in a variety of different ways: methods such as *ius soli* (birthplace) and *ius sanguinis* (ethnicity), either independently or in conjunction, are common<sup>500</sup>. When considering naturalisation the applicable rules vary considerably: gaining and shedding nationality is neither universally easy nor universally cost effective. The lengths to which States go in order to guard their citizenship's acquisition (either at the time of its initial conferral or when pondering adding older members to the polity) indicate the different values each State places on its citizenship and its differing expectations of its citizens' behaviour.

On a supranational level, however, if Aristotle was correct in his assessment of the diminished status of the individual in an oligarchy then the EU faces a significant, worrying and damaging accusation concerning the existence of a democratic deficit<sup>501</sup>. Rather than being in a position to claim this issue is more one of perception than reality<sup>502</sup>, the diminished capacity of those intended to be at the very core of the

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<sup>499</sup> Whereby citizens cannot access their European rights unless they have engaged in cross-border activity, (Although this assertion too is challenged by the finding in *McCarthy*).

<sup>500</sup> EU examples of these are France and Germany, discussed at length by Brubaker and Rubio-Marín (2000).

<sup>501</sup> i.e., a lack of accountability to the people making up the States making up the Union, discussed in the Introduction.

<sup>502</sup> For instance, the various institutions could be deemed democratic owing to consisting of a mixture of those directly elected at the supranational level (the

European project<sup>503</sup> would question Union citizenship's value to the individual, especially as Member State nationality is currently the sole vehicle by which people are elevated to Union citizen status, to the exclusion of resident third-country nationals<sup>504</sup>. As a result, 'nationality' warrants further examination.

### *Nationality and the Making of a Nation*

Nationality is the lens through which the 'people' of a state view their relationship to both their government and their fellow countrymen and through which the State views its obligations towards individuals. It provides, the answer to

“one of the most pressing needs of the modern world, namely how to maintain solidarity among the populations of states that are large and anonymous, such that their citizens cannot possibly enjoy the kind of community that relies on kinship or face-to-face interaction”<sup>505</sup>.

This presents nationality as a nebulous and abstract formulation of the ties between people, irrespective of whether people actually share in the belief that those ties *actually* bind them. Undeniably, the State views its nationals as special cases. By recognising them as its responsibility, the State “embraces the citizens to provide protection in various forms and to extract resources”<sup>506</sup>, indulging, therefore, in a truly symbiotic relationship. At first glance, it appears that one cannot exist without the other.

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Parliament), those directly elected nationally (the Council) and those appointed to their positions by the latter (the Commission).

<sup>503</sup> Preamble to the TFEU.

<sup>504</sup> A series of bilateral agreements between the Union and certain third countries gives quasi-citizenship rights to certain third-country nationals (to be discussed later): others are unfortunate not to be encompassed by these arrangements and the gulf between them and Union citizens is only further highlighted.

<sup>505</sup> Miller, 2000, at p.32-33.

<sup>506</sup> Guild, 2004, at p.1.

Thus, the nation state is both determined by its nationals *and* determines who its nationals are: a classic situation befitting the children's conundrum "which came first..."? Modern political developments in Eastern Europe demonstrate this problem in sharp focus. In the aftermath of the break-up of the USSR and the Former Yugoslavia there has been reclassification both of national borders and the constituent elements of the State: rather than a sense of nationality developing over time, as is the case in, e.g., Britain, France or Greece, the emerging states either desired to reclassify who belonged to the new polity<sup>507</sup> (as in the case of Slovenia) or had to develop a sense of identity *immediately*<sup>508</sup> – the exclusions resulting from this forced 'self-identification' will form part of the subsequent discussion on statelessness and its implications.

How, then, does nationality originate? After all, countries did not magically form as complete entities with convenient ready-made borders separating one tract of land from another as maps suggest. Let us imagine for a moment the metaphor offered by the Hundred Acre Wood. Winnie-the-Pooh, Piglet, Rabbit and their friends populate the Wood under the 'leadership' of Christopher Robin. The animals share a defined geographical area (the Hundred Acre Wood), a common language and are bound together by virtue of (belonging to) Christopher Robin and their love for and reliance upon him. Other than these commonalities, what links the animals in such a way that they could determine the Wood a 'State'? There is only one Pooh Bear, one Piglet, one Eeyore, one Rabbit (although he does have multitudinous friends-and-relations): therefore the community based upon "kinship"<sup>509</sup>, alluded to by Miller, cannot be said to exist. Regardless, the animals clearly feel themselves to belong together as a community, embarking on the occasional "expedition"<sup>510</sup>, helping to search for one another's relatives when lost and offering each other comfort and places to live when times are hard. Thus, it would seem that the Hundred Acre Wood conforms to the standard conception of a nation state insofar as "national communities are constituted by belief: a nationality exists when its members believe that it does"<sup>511</sup>.

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<sup>507</sup> Zorn (a), 2011, at p.195-229.

<sup>508</sup> Vetik (b), 2011, at p.160-171.

<sup>509</sup> Miller, 2000, at p.32-3.

<sup>510</sup> Milne, 1926, at p.101.

<sup>511</sup> Miller, 2000, at p.28.

It may be the case that nationality exists when nationals are *told* that it does. Certainly, that would serve as an explanation for the development of citizenries in the ‘new’ European states such as Estonia and Slovenia. What of those nationalities said to have ‘emerged’ in the cases of France, Germany, Britain etc., (i.e., the ‘old’ European states)<sup>512</sup>? Over the course of centuries that may well be true, but when these states were themselves being formed, ‘nationality’ was in effect imposed by the ruler upon his subjects in perpetuity: bonds between the subjects in terms of shared experience, history, language etc., subsequently had the opportunity to come into being. Schulze would have it that the early States (and consequently nationality) came about by chance and as a direct result of the feudal system, its allegiances and the ties that bound serf to lord:

“The feudal relationship was originally a bond for life: if the overlord or vassal died, then the fief lapsed. The newly emerging state, however, was intended to be permanent, its authority was to be on an enduring footing that was not confined to particular individuals”<sup>513</sup>.

Nationality, therefore, was originally more a matter of imposition resulting from a disparity of power between social classes and power-based co-operation between nobles. However, since the longest established European state is France, the theory of vassalage cannot be used to explain fully the states and nationality relations that followed.

Therefore, later theorists such as Hobbes, in “Leviathan”, expounded the notion of the social contract as explaining the relationship between the individual and the State. Given that man’s inclination was selfish and warlike, he could not be trusted to remain free without fear of ongoing wars and, as

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<sup>512</sup> Britain, as an island, could be considered a case apart: its natural border is the sea.

Therefore, other than in the case of invasion by sea, vast and sudden changes in cultural identity were, to put it mildly, unlikely.

<sup>513</sup> Schulze, at p.9.

“men feared death ... and aspired to a life of ease they yearned for peace. To achieve this peace ... men must have made a contract amongst themselves, by which they renounced their natural right to slay each other. They handed this right over to the state, which combined in itself the total power of all the contracting parties ...”<sup>514</sup>

and thus the ‘nation’ once again finds itself with ‘subjects’<sup>515</sup> who recognise it as having authority over them and their fellow nationals.

Gradually, the nature of the relationship between state and national transmogrified with perceptions of the nature of that relationship shaped by contemporary social realities. (Hobbes’ view of the state/subject relationship could well be said to have been shaped by the English Civil War and its ramifications). In this way there is a link between the development of perceptions of the state and the importance of nationality and the growth of citizenship. If Hobbes’ theory was dominated by an internal social/civil conflict, it is logical to see Marshall’s perception of citizenship as shaped by social upheaval flowing from an Industrial Revolution and two World Wars in (historically speaking) quick succession.

The question remains, however, are nationality and citizenship, in effect, one and the same thing? As the days of Ancient Athens and Rome have long since gone, since the distinction between serf and freeman is no longer relevant and following the abolition of the difference between *active* and *passive* citizenship, the answer to this question appears to be ‘yes’. The continuing use of both appellations stems from the existence of an internal and external perspective of the individual. Guild suggests that the:

“most fundamental status of an individual in the nation state is that of belonging or not, as expressed in law as

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<sup>514</sup> *ibid.*, at p.51.

<sup>515</sup> Considerations of *why* states and their leaders are obeyed by nationals, as discussed by, *inter alia* Austin and Hart, fall beyond the scope of this thesis.

nationality. The content of belonging ... is often expressed as citizenship”<sup>516</sup>.

For Guild, the two things are the same, but one is a label of identification in relation to others and the other describes the benefit derived from that identification. More succinctly, “the national is the citizen viewed from outside the state”<sup>517</sup>. Both observations are well made, but I think it possible to take the definition further. “Citizenship” is indeed a set of rights and duties to be enjoyed by all those belonging to the same ‘group’, but it does not follow that the group in question has to equate to a nation: it could be smaller or larger, geographical or political in nature and yet the benefits and obligations of the ‘populous’ could still be a realisation of our expectations of citizenship.

Nonetheless, in modern times nationality and citizenship have, in almost all respects, become synonymous and symbiotic – at the very least in the public imagination. Surprisingly, this merging is not a particularly recent development as it was already the case by c.1800<sup>518</sup>. Consequently:

“the predominant conceptions of modern citizenship ... posit that populations are organized within nation-state boundaries by citizenship rules that acclaim ‘national belonging’ as the legitimate basis of membership in modern states ... hence, what national citizenship denotes is a territorially bounded population with a specific set of rights and duties, excluding others on the grounds of nationality”<sup>519</sup>.

Determining nationality (and the citizenship that either flows from or is a condition of it) is, therefore, wrapped up in an understanding of geographical limitations and a sense of identity about what it means to ‘be’ X, often generated by a romantic and mythologised shared history. When considering modern nationality, it is commonly

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<sup>516</sup> Guild, 2004, at p.235.

<sup>517</sup> *ibid.*, at p.21.

<sup>518</sup> Kostakopoulou, 2008, at p.23.

<sup>519</sup> Soysal, in Cessarini and Fulbrook, at p.18.



asserted (Weale<sup>520</sup> being a case in point) that there must be some homogeneity of language, culture, beliefs and a general sense of cohesion. Transferring focus from the national level momentarily and in consideration of the sheer size of the EU's citizenry, it would seem nigh on impossible for all these commonalities to exist at a supranational level. Indeed, allowing that the EU is comprised of various peoples<sup>521</sup> and, therefore, multiple nationalities, Union citizenship can be shown already to exist (to a degree) independently of the constraints of a schema of 'national' identity.

Increasingly, States need to contend with their nationals holding multiple nationalities, although some States forbid their nationals to do so. Furthermore, naturalised nationals may maintain some link (whether emotional or more tangible) to their origin State. Nationality is capable of accepting this duality, absorbing and even evolving in light of it, which is far preferable to rejecting this simultaneous multiplicity:

“new forms of interconnections can only be naturally expected in an interrelated world which increasingly sees nation-states as giving way to infra- and supra-national political spaces ... whatever the degree of possible commonalities in modern societies, it ought not to be selectively defined”<sup>522</sup>.

Put another way, if globalisation and integration are worthwhile aims from which States seek to benefit, they must do so with open eyes and open arms. Clinging to restrictive models of nationality serves to frustrate the broader aims of supranational co-operatives such as the Union, which require the goodwill of the individuals who participate in them to achieve their goals and thrive beyond the short-term. As more people utilise migration rights, more 'nationals' will be born with multiple nationalities. Each State will have a claim on them *as they will on the States*: a restrictive approach to nationality on the part of any or all of these States will, far from fostering Miller's sense of solidarity, perpetuate social exclusion to the detriment of State, citizens and supranational polity alike.

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<sup>520</sup> Weale, in Weale and Nentwich, at p.52.

<sup>521</sup> Supported by the wording of the Preamble to the Treaty.

<sup>522</sup> Rubio-Marín, 2000, at p.123.

Returning to the Hundred Acre Wood metaphor, Pooh and friends are aware of the existence of places beyond the borders of their Wood: some have travelled beyond the Wood's boundaries, as is the case with travel between states in the real world. Just as the animals coexist merrily throughout "Winnie-the-Pooh" in the manner of citizens in a State, we also see how these 'nationals' respond to immigration or the unfamiliar 'other' (*metics* in terms of Athenian citizenship) in Eeyore's response to the exuberant newcomer Tigger. In a voice not dissimilar to that heard on many streets, Eeyore says:

“ I don't mind Tigger being in the forest ...because it's  
a large forest and there's plenty of room to bounce in.  
But I don't see why he should come into my little  
corner of it, and bounce there. It isn't as if there was  
anything very wonderful about my little corner. Of  
course, for people who like cold, wet, ugly bits it is  
something rather special, but otherwise it's just a corner  
... ”<sup>523</sup>.

Other than a recognition that every national sees their country as "special", this statement is also significant because it is clearly not one of outright hostility toward immigrants, nor is it distrust of 'the other'. Instead, it indicates a readiness to accept migrants and people of different ethnicities in principle, just not on the immediate doorstep. This metaphor applies both to immigrant communities in nation states and, perhaps more aptly, in the supranational arena, as a response to migration between the EU States. Taking a real world view of this sentiment it is clear that, were migrants not welcomed more heartily in some quarters, there would be little migration of any kind. As an aim of the Union, free movement of persons is welcomed for its economic and integration benefits and the skills that can be passed between communities<sup>524</sup>.

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<sup>523</sup> Milne, 1928, at p.101.

<sup>524</sup> However, an overview of the British press and speeches by the German and British premiers reflect the attitudes of some native populations towards mass-migration. Merkel and Cameron delivered speeches in 2010 and 2011 respectively bemoaning the death of multiculturalism: a discussion of their impact follows below. See also *Defrenne* 1976, which considers the Treaty's social aims and the need to "ensure social progress and seek the constant improvement of the living conditions".

Taking Eeyore's sentiments rejecting the unfamiliar at face value and assuming the validity of their application to the real world would, however, indicate a popular perception of nationality as equating to an *ethnos*, i.e., that the state is founded on *ethnic* homogeneity. However, these sentiments would also seem to foreshadow anti-multiculturalism movements that threaten to divide States, let alone inter-governmentalist enterprises like the Union, where ethnic uniformity is not difficult but impossible (and undesirable) to expect, achieve or maintain. Such is the diversity of most modern nations that, even to non-anthropologists, such an assertion in the contemporary nation state setting is absurd. Thus Miller's assertion that "our nationality is an essential part of our identity. Sharing a national identity provides the trust and solidarity required for social co-operation"<sup>525</sup>, founders in the wake of racism between nationals: after all, "racist attacks are hardly prefaced with a polite query as to the victim's legal status"<sup>526</sup>.

Racism is a very real bar to the notion of fellow-feeling or 'solidarity' advocated by Miller but the essence of his point is that, in philosophical terms at least, nationality is envisaged as a collective unifier, a means of making the members of a defined group feel an association toward one another that is absent from any relationship with those beyond that group's membership. Whether or not that bond is more fantasy than reality, the successful running of a State depends upon the mass acceptance of an invisible bond in order to "sustain collective policies. Solidarity and trust are vital to any cooperative endeavour"<sup>527</sup>. Thus the State not only nurtures its nationals, it is in turn nurtured by them: the "collective endeavour" envisaged by Bellamy must include the willingness on the part of nationals to continue life as part of the State. Where that collective attitude is missing or becomes contested there is internal disharmony (as is the case in Belgium), or at its most extreme, civil war (as beset the former Yugoslavia) and state fragmentation (such as occurred in Czechoslovakia which became the Czech Republic and Slovakia at the turn of 1993). Love for one's nation is not acquired at birth but, instead grows<sup>528</sup> (or wanes) with an awareness of what the state stands for and

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<sup>525</sup> Miller, 1995, at p.10.

<sup>526</sup> Fulbrook and Cessarini, in Cessarini and Fulbrook, at p.215.

<sup>527</sup> "Citizenship: A Very Short Introduction", Bellamy, at p.70.

<sup>528</sup> Berns, in Kostakopoulou, 2008, at p.58.

the benefits it conveys, irrespective of whether an individual *actually* has a shared heritage with fellow nationals.

Far from highlighting the fragility of nationality, however, these weaknesses most satisfactorily demonstrate both its robustness and elasticity. As the vehicle through which a State “perpetually reconstitutes itself”<sup>529</sup>, nationality has endured great shifts in geographical boundaries (both in terms of expansion and contraction), wars and, most importantly, *social* evolution. In the wake of each challenge it has survived. One nationality may turn into two (echoing Miller’s solution to the problem of divided conceptions and expectations of nationality<sup>530</sup>). If an alternative nationality seems more appealing, an individual may shed one nationality and gain another. Alternatively, the social climate may lead to changes in how nationality is envisaged and affects individuals, effecting greater inclusion of those bound to obey laws without recognition as equals in society<sup>531</sup>.

Taking nationality and citizenship as one entity, it becomes apparent that those properties that have allowed nationality to endure and evolve could equally well be applied to the supranational arena. Whilst Miller is opposed to this possibility, stating that “The idea of a purely political citizenship, unsupported by a shared public culture, is unfeasible”<sup>532</sup>, it is nonetheless the case that polities (whether narrowly or broadly construed) could be the basis for a similar foundation of togetherness and fellow-feeling. Mason posited such a suggestion in polities where:

“citizens ‘identify with their major institutions and practices, and feel at home with them, without believing that there was any deep reason why they should associate together ...’ According to Mason, the

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<sup>529</sup> Brubaker, at p.XI.

<sup>530</sup> Miller, 2000, at p.89.

<sup>531</sup> It is in the face of this reality that there is the greatest scope for seeing a divergence between nationality and citizenship. Whilst popular and academic thought has come to view the two terms as synonymous, it is evident from the need for a civil rights struggle in 1960’s America and the struggle for recognition of gender equality that nationality and citizenship are *not always* one and the same thing.

<sup>532</sup> Miller, 2000, at p.89.

various benefits which are thought to flow from a shared national identity, such as stability and a politics of the common good might be secured by a sense of ‘belonging to a polity’<sup>533</sup>.

Recognising that the sentiments commonly believed to emanate only from nationality could also similarly occur in a successfully run multi-state entity presents a powerful basis for the implementation of European-level citizenship that is cut adrift from nationality. Nationality’s proven adaptability and endurance means that, even with the possibility of a supranational citizenship that has a basis other than nationality, nations (and their nationalities) will continue to exist and function without hindrance.

Having charted the growth of nationality and concluded that in modern parlance it has become synonymous with citizenship, it follows that we can also conclude that the essential constituents of both citizenship and nationality (the sentiments of belonging and togetherness) could exist independently of the nation. Nonetheless, just as nationality has many successes that can be transplanted to other arenas, it is also afflicted with shortcomings, as illustrated by its difficulty in remaining a cohesive unifying force when faced with internal divisions. This issue, combined with the nation states’ close control over the conferral of nationality to outsiders is part of the reason why statelessness can arise and why it remains a problem.

### **Third Country Nationals, Statelessness and the Invisible Minority**

The self-limiting requirement of Member State nationality possession before Union citizenship becomes active alienates those resident in States as third-country nationals, or holding disputed nationality, or devoid of any nationality at all who consequently find themselves excluded from Union citizenship’s benefits. It might be assumed that the EU’s protectionist attitude about who can utilise citizenship rights<sup>534</sup>

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<sup>533</sup> Mason (1999), in Kostakopoulou, 2008, at p.57-8.

<sup>534</sup> Realistically a manifestation of the anti-integrationist attitudes of the Member States themselves when negotiating the wording of the Treaties.

would be echoed by the ECJ, who in turn would be equally cautious when it came to overseeing when those rights are removed. It is surprising, then, that the ECJ should permit a situation to arise where a Union citizen could, in one fell swoop, be stripped of nationality *and*, under a strict reading of Art.20 TFEU, his Union citizenship rights. Whilst such an outcome might have been beyond their contemplation at the time the decision was made (or even the opposite of their intention), that is the situation in which Janko Rottmann<sup>535</sup> now finds himself.

If it were the case that the statelessness problem in the EU constituted solely Dr. Rottmann the issue might be less discussion worthy in the context of Union citizenship and its potential benefits. His case would instead register as an interesting aberration in a field of jurisprudence that has, mostly, sought to extend the scope of Union citizenship's influence. However, the lack of a heterogeneous schema of naturalisation laws across the States<sup>536</sup> provides individuals with a situation little better than a roll of the dice when it comes to citizenship's acquisition and loss, for current national citizens, third-country nationals and the stateless alike.

Citizenship at the European level is inherently lacking in uniformity in spite of the desire for harmonious and universal application of its content evident through the ECJ's long line of jurisprudence. This disparity in application arises primarily because the EU recognises that determining nationality criteria remains the province of the Member States<sup>537</sup> and that the principles for making that determination, as intimated in Chapter 1, vary wildly. Such disparity has worrying consequences for those finding themselves lacking in, stripped, or devoid of nationality. In addition, the sheer volume of third-country nationals and stateless people already within the EU's borders (whether resident in States whose accession was dependent on satisfying the Copenhagen Criteria, or otherwise) means that statelessness has an inevitably damaging effect on a supranational citizenship predicated upon holding nationality of one of a select group of states. Thus, statelessness is not merely a phenomenon found in new Member States

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<sup>535</sup> See discussion below.

<sup>536</sup> See Ch.1.

<sup>537</sup> According to the Edinburgh Declaration 1992, in Guild, 2004, at p.39.

and untraceable in the older: although there is a higher incidence in Eastern Europe<sup>538</sup>, in 2008 there were 17,600 stateless individuals in Germany, Denmark and the Netherlands combined<sup>539</sup>. This figure is notably lower, however, than that in Estonia alone, where:

“as of 31 December 2009, there were 104813 persons with undetermined citizenship in Estonia, including 2153 children under 15 years of age who held long-term residence permits and whose both parents had undetermined citizenship. This number is particularly glaring in a country with a population of less than 1.4 million ...”<sup>540</sup>.

The scale of the statelessness problem in the Union makes it apparent that the issue cannot be swept under the carpet or spoken of in hushed tones in the hopes that nobody has noticed. Therefore, the remainder of this discussion shall focus on the *Rottmann* decision, its consequences, the broader issues facing third-country individuals and the evident disparities between the Union’s aspirations and achievements.

### *Statelessness, Third Country Nationals and Their Implications for the Union*

The volume of people legally residing in EU territory who do not satisfy the requirements of Art.20 TFEU and so cannot be classed as Union citizens signifies a substantial problem for the EU in relation to democratic deficit charges. Traditionally, these people are called third-country nationals and they enjoy certain rights despite their lack of relevant nationality. Indeed, the Union implemented a Directive<sup>541</sup> that focussed on those who have made the EU their home and can be understood as “long-term residents”. Between the Directive and the Court’s jurisprudence, there have been

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<sup>538</sup> This is particularly the case in the Baltic States and it will also prove to be a problem in the candidate states from the former Yugoslavia.

<sup>539</sup> Figures accurate as of 2008, in Blitz and Sawyer, in Sawyer and Blitz, at p.5.

<sup>540</sup> Vetik (b), 2011, at p.162.

<sup>541</sup> Directive 2003/109.

definite efforts on the part of the Union to integrate these actors within the Union fold and both these aspects engender some consideration and will be evaluated below. Significantly, the relative success, or failure, of this enterprise reflects the strengths and weaknesses inherent in the Union political system and the tensions that exist in a polity composed of different political entities, as opposed to Federation<sup>542</sup>.

### *Case Studies and the Position of Third Country Nationals.*

#### *Third Country Nationals*

Before citizenship became an issue for the Union (or Community) there were migrant third-country nationals – some hailed from former colonies, others arrived hopeful of new opportunities. On face value, the original freedoms at the core of the EC contained no nationality bias: they spoke merely of ‘workers’, i.e., economic actors entitled to move freely between the States. Even at that time, however, third-country nationals were, apparently, beyond the tolerance of the States. Fortunately, third-country nationals found allies in both the European Parliament and the Commission, who “have taken issue with the inequitable status of third-country nationals”<sup>543</sup>. However, the Council, as the Member States’ mouthpiece, has proven a roadblock in the quest for recognition as equals. Even after a concerted effort by both these institutions since the mid-1980s, the best that has been achieved is a “limited and qualified inclusion”<sup>544</sup> of third-country nationals in European affairs. Following a variety of Resolutions from the European Parliament aimed at supporting third-country nationals<sup>545</sup>, the Commission in 1992 proposed a Directive that would have resulted in free movement and establishment rights for those who could demonstrate five years’ legal residence, on the same basis as Union citizens. These efforts came to naught.

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<sup>542</sup> It would be prudent to ask oneself whether the Union is a forum in which full inclusion of these individuals is currently even possible.

<sup>543</sup> Kostakopoulou, 2001, at p.181.

<sup>544</sup> *ibid.*.

<sup>545</sup> European Parliament Resolution on the Free Movement of Persons A3-0199/91, on Union Citizenship A3-0300/91, on Immigration Policy A3-0280/92 in Kostakopoulou, in Weale and Nentwich, at p.170.



Despite benefitting from these non-national ‘interlopers’, the intergovernmentalists in the Union were reluctant to see the benefits of membership of the club extended to others. Thus politically and socially they have been treated as second-class and have been cut adrift. There have, however, been signs of change and the ECJ has again taken the role of White Knight. Better equipped to force an issue than either the Commission or European Parliament (both of which are reliant on other institutions to enact change), the ECJ has handed to third-country nationals quasi-citizenship rights by virtue of their relationship to present Union citizens. *Chen*, *Baumbast*, *Akrich* and, more recently, *Zambrano* entertain the notion that third-country nationals may become more than paying guests. The earlier *Kaur*<sup>546</sup> decision failed: despite a colonial link to a Member State, in the wake of revision of her citizenship status by the UK, Mrs. Kaur could not, unlike R., point to a Union relation resulting in insufficient ties to the Union<sup>547</sup>. Besson and Utzinger assert that “third-country nationals’ *social* rights are expanding, even though they are not followed yet by an extension of EU citizenship’s *political* rights”<sup>548</sup> and the actions of the ECJ lend weight to this opinion. R’s right of residence<sup>549</sup> flowed from her children’s right to enjoy a right to family life, but that right *could* develop into an indefinite right to remain: when does a family lose the right to geographical proximity to form cohesion? There is little question that these individuals were asked to demonstrate an affiliation with the cultural tradition of their European contemporaries – instead integration was the key test for their inclusion and it was satisfied by familial linkage, whether the right sought was residential<sup>550</sup> or economic<sup>551</sup>.

The situation is complicated, however, by the simple realisation that third-country nationals are not all treated as equally ‘foreign’. If identity via citizenship is about identifying the “other”, then it is apparent that the Union doesn’t really see some third-country nationals as ‘other’ at all. In Chapter 2, the Schengen agreement was

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<sup>546</sup> C-192/99 *R. v. Secretary of State for the Home Department ex. parte Manjit Kaur* 2001.

<sup>547</sup> The ECJ’s decision was grounded on the right of Member States to determine for themselves who amounted to a ‘national’.

<sup>548</sup> Besson and Utzinger, at p.580.

<sup>549</sup> *Baumbast*.

<sup>550</sup> *Chen* and *Baumbast*.

<sup>551</sup> *Zambrano*.

mentioned, albeit briefly, in the field of passport rights. Although it has been subsumed in the Union's constitutional order, Schengen is but one of a series of multilateral agreements that elevate the standing of some third-country nationals in relation to others in the Union order. So, there are tiers of non-citizens in the Union and nationals of some countries enjoy a better standard of recognition (and concomitant rights) than others. Beneficiaries of these agreements across the Union are *inter alia* nationals of the Schengen countries (who enjoy benefits in all Member States *except* those who declined to sign), workers from Turkey<sup>552</sup>, Algeria<sup>553</sup>, Morocco, Tunisia and some successor states to the USSR. In many cases, these bilateral agreements could be the legacy of colonisation on the part of the existing Member States, but their interesting shared feature is that (particularly in the case of the Schengen countries):

“the struggle of the foreigner to secure his or her residence and access to the labour market lies no longer exclusively with the Member State and its determination of the right of identity”<sup>554</sup>.

This has the appearance of providing something of a quasi-citizenship status for these third-country nationals, but (with the exception of the Schengen countries who do seem to enjoy a genuine right of free movement and residence) the rights mainly pertain to the *employment paradigm*. Thus, if discrimination is manifested in another arena beyond the ambit of ‘work’, the third country national finds himself excluded from the non-discrimination protections offered to ‘genuine’ Union citizens and can be easily denied his residence, or right to remain, by the State itself – the Union is excluded from the mix.

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<sup>552</sup> They enjoy non-discrimination protection in relation to their employment and related benefits (e.g., social security), but not in terms of residence, movement etc., placing them in an interesting quandary whereby they may be compelled to endure unequal treatment in all other aspects of their life but for their employment contribution to the Union.

<sup>553</sup> Although this agreement remains to be ratified by some Member States.

<sup>554</sup> Guild, 2004, at p.153.

The flaws pertaining to the system of bilateral agreements indicates how simple it is to discriminate between the haves and have-nots in the Union citizenship realm. However, Directive 2003/109 furnishes a further illustration of the shortcomings inherent in the Union legal order. As with all Directives, their uniform binding nature is more deceptive than first appearance may have it. Directives are not necessarily Union-wide measures: Member States can, and do, decide not to sign them (when they have an opt-out) and the ‘Long-term Residents’ Directive is no exception. Thus its contents actually exacerbate the hierarchical non-citizenship paradox and prove a simple manifestation of how non-Union nationals can be less favourably treated when compared to other non-Union nationals on seemingly arbitrary grounds.

The germination of Directive 2003/109 stretches back some years. Following the Tampere Council European Council meeting in 1999 (which resulted in a Directive concerning third-country nationals’ expulsion), in 2001 the European Commission proposed a Directive that would affect those third-country nationals deemed ‘long-term’ – a term in itself capable of sounding alarm. Its aim was to:

“bring the rights of legally resident third country nationals closer to those of citizens of the Union and in particular to provide for free movement rights ... within the whole of the Union for economic and study purposes”<sup>555</sup>.

Long-term, in the context of the Directive, meant five years (noticeably shorter than the decade-long residence required by the 1997 Convention on Nationality for automatic qualification for naturalisation). Interestingly, the Union specified that ‘long-term’ residents also accounted for third-country nationals born in Union territory who had not acquired the State’s nationality<sup>556</sup>. Once that time-frame has elapsed, it is highly

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<sup>555</sup> *ibid.*, at p.223.

<sup>556</sup> An interesting situation would arise should a minor third-country national who benefitted from this Directive find an antecedent family member in danger of being exported: would the minor’s quasi-citizenship right provide the same right to remain guaranteed to R and Mrs. Chen?

significant that, irrespective of whether the State had granted a long-term residence permit, the individual has “a right to EU status”<sup>557</sup>.

The Directive itself appears to have plenty to offer the third-country individual. It re-states the significance of establishing the internal market: an essential element of which is free movement of persons. Echoing the Tampere Council’s call to make the “legal status of third-country nationals ... approximated to that of Member States’ nationals”<sup>558</sup>, it created a citizenship equivalency, indicating the aspiration for a *de facto* Union citizenship for third-country nationals. The conditions applied to obtaining this “approximated” status required individuals to possess a residence permit (i.e., demonstrate lawful residence) and to have “put down roots in the country”<sup>559</sup>, foreshadowing the integration test specified in *Bidar*.

The Directive’s scope is limited. Article 3 supplies a list of six categories of individuals who do not qualify for long-term resident status, including certain economic actors and types of student<sup>560</sup> who would, under the conventional paradigm of Union citizenship, as Member State nationals be afforded recognition. To establish long-term residence, a third-country national must have achieved five years’ legal residence (significant in light of the provisions in the later Directive 2004/38) prior to making an application for recognition, a hurdle that a national of a Member State would not be expected to surmount. Assuming that long-term status is applied for and granted, the rights that follow include a right of movement to other Member States (where further long-term residence can be garnered) and various other rights reflecting those available to ‘true’ Union citizens. In light of the case law to be discussed below, perhaps the most significant of the rights enunciated in the Directive is that of family reunification. This right applies both in the first member State in which long-term residence is achieved and in subsequent States that are moved to: the right of workers, as it developed (discussed in Chapter 2), entailed not only a free movement right for themselves, but also their family. Thus, the Directive (and Directive 2003/89 providing the right of

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<sup>557</sup> Guild, 2004, at p.224.

<sup>558</sup> Directive 2003/109 para.2.

<sup>559</sup> *ibid.*, at para.6.

<sup>560</sup> *ibid.*, Art.3(a),(e) – N.B., Art.4 indicates that periods of residence for vocational training will be halved for the purposes of calculating residence duration.

family reunification) can be seen as redressing the imbalance between non-citizens and citizens and enabling the Union to respect the family life rights found under the European Convention, even before Lisbon's promise of accession.

It is important to note, however, that this Directive whilst promising both in terms of reducing a democratic deficit in the Union and as a means of showing a will amongst the Member States to include foreign nationals amongst those enveloped in the Union citizenship fold, has not gone unqualified. Depending on the field of employment undertaken by the national in question, the Directive may or may not apply<sup>561</sup>, whilst States maintain a prerogative over when they wish to lift the limitations on formal residence: if they don't like a particular individual they can still ultimately determine whether to accord him or her permanent residence<sup>562</sup>, a prerogative not enjoyed in the case of Union citizens.

The degree of integration of the non-national is also a matter for concern. Whereas Member States do not generally demand other Member State nationals to show integration in order to enjoy Union rights (although *Bidar* certainly opened the door for this line of expectation to develop in future), the Council inserted the possibility that the States may make such a demand in respect of third-country nationals. In other words, if citizenship is about identifying 'us' and 'them', the States could require that long-term residents lose some of their 'them-ness' before permitting them to enjoy Union citizenship rights. Equally, even if we accept that the limitations of the Directive speak more to the shortcomings of the nature of Union law as opposed to a shortfall in aspiration, the position of third-country nationals has seen far from uniform treatment at the hands of ECJ.

#### THIRD-COUNTRY NATIONALS AND THE ECJ: CHEN, MCCARTHY, ZAMBRANO, DERECI

In the past decade the ECJ has appeared to be a strong supporter of the third-country national cause, albeit through the lens of supporting the rights of Union

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<sup>561</sup> Guild, 2004, at p.225.

<sup>562</sup> *ibid.*, at p.224.

citizens. A notable example, as discussed in Chapter 3, was that of *Baumbast and R*<sup>563</sup>, in which the Court relied on R's children's right to enjoy their family life and education to confer upon R a right to remain in the UK in the face of an order to leave. In a similar vein, the seminal case of *Chen*<sup>564</sup> is well worth consideration.

*Chen* concerned the rights to free movement and residence of a Member State national, a minor, born of a non-EU national. The girl at the heart of the case, Catherine Chen, was born in Northern Ireland, to which her mother (a Chinese national married to another Chinese national) had come specifically in order to obtain EU citizenship for the child<sup>565</sup>, taking advantage of the Northern Irish Constitution which was more liberal than the UK's and provided greater opportunities to obtain national citizenship. Catherine had undoubtedly obtained that citizenship by virtue of her birth on Northern Irish soil<sup>566</sup>, however, as a minor, she was also undoubtedly dependent on the presence of a parent to maintain her as she could in no way support herself. Her mother moved to Wales and the issue in the case surrounded this exercise of free movement. Given that Catherine was in no way able to exercise that right herself (or, arguably could be desirous, or capable, of giving expression to a desire for such a move) the right was, in fact, being exercised by a non-EU national. Consequently, the case can be construed as concerning the ability of the rights of Union citizens to be extended upwards to parents or guardians, for as long as the citizen is a dependent. By the end of Catherine's minority, her mother would have been resident in a Member State for sufficient time to have applied for naturalisation herself and, were that application successful, have gained Union citizenship in her own right. Therefore, the extension of the rights to cover Catherine's mother, albeit by virtue of enforcing the rights of a minor, is significant in that it shows the ECJ's willingness to place citizenship at the forefront of EU policy, irrespective of the Member States' displeasure at the outcome.

The decision reached by the ECJ was that Catherine (in reality, her mother) should have the right to remain because she had obtained Northern Irish (and therefore

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<sup>563</sup> C-413/99 *Baumbast, R v. Secretary of State for the Home Department* 2002.

<sup>564</sup> C-200/02 *Chen v. Secretary of State for the Home Department* 2004.

<sup>565</sup> *ibid*, at para.11.

<sup>566</sup> A 'loophole' which was changed by the enactment of the 27<sup>th</sup> Amendment of the Constitution of Ireland in 2004, preventing this from being the case in future.

European) citizenship perfectly legally: the terms for the acquisition of national citizenship lying firmly at the discretion of the States themselves<sup>567</sup>. Consequently, the UK was obliged to recognise Catherine's (and her mother's) right to remain: any denial of that right would necessarily exclude the daughter and deprive her of her rights under Art.21<sup>568</sup>. Moreover, the ECJ concluded, despite free movement being contingent upon possessing sufficient resources to support oneself<sup>569</sup> and not be a burden on the host state, it would have been a "disproportionate interference with the exercise of the fundamental right of freedom of movement and of residence upheld by Article 18 EC"<sup>570</sup> to expect Catherine to have such means at her disposal and not to allow her to rely on her parents' resources. Mrs. Chen's position was not one which fell under the auspices of EU legislation: as such she should not have been entitled to remain in the territory as she was not a dependent of Catherine's. It was never envisaged that a person in her position should obtain and be able to exercise the rights attached to Union citizenship and yet that was the only consequence of the ECJ's decision and one they could not have been blind to.

*Chen* should not be seen as a floodgates decision: undoubtedly afraid that it might prove to be the case, the Northern Irish government altered the Constitutional provisions that had allowed Catherine to obtain national citizenship and the Member States in general jealously guard access to their national citizenships. Nonetheless, the Court's willingness to allow a "primary carer"<sup>571</sup> to enjoy the right to remain with a minor (but in the future, perhaps, a disabled dependent) leaves the possibility open for other third-country nationals to enjoy the rights of Union citizenship despite falling outside the 'technical' definition, causing a *de facto* expansion of Union citizenship beyond the confines originally envisaged by the Member States. This possibility builds upon those instances when rights have been granted to third-country nationals via their Union citizen dependents, i.e., in *Baumbast and R*, and probably paved the way for

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<sup>567</sup> See Ch.1 and *Micheletti*.

<sup>568</sup> Art.18 ECT, now Art.21 TFEU.

<sup>569</sup> The Court referred to Directive 90/364, replaced by Directive 2004/38.

<sup>570</sup> *Chen*, at para.33.

<sup>571</sup> *Chen*, at paras.45-47.

*Zambrano*<sup>572</sup> and is an essential constituent of any assertion that the Union is a standard-bearer for “universal” human rights.

The liberal approach the Court took in *Chen* and again in *Zambrano* appeared to be a positive sign for third-country nationals who had family member in the Union – as long as those family members are Union citizens themselves. This makes the ECJ’s subsequent decisions all the more surprising and, in some cases unwelcome. *McCarthy*<sup>573</sup> is a case in point. Shirley McCarthy was the main applicant in the case, a British national with an Irish passport, but in reality the application was made on behalf of her husband, a Jamaican, who was facing deportation. She freely admitted that she had only applied for her Irish passport on the basis that it brought her within the scope of Union law, but as she did not have to travel in order to receive the document, the Secretary of State was able to argue successfully that she was not a ‘qualified person’<sup>574</sup> to receive the full benefit of Union rights. It should be noted that, in addition to not having exercised her right of free movement, Mrs. McCarthy had also never been classed as a worker, self-employed or self-sufficient – the original economic actor test described in Chapter 2, if applied to Mrs. McCarthy, would also have seen her fail.

Although the ECJ did confirm that this was not a purely internal situation<sup>575</sup> they nonetheless went on to determine that Directive 2004/38 (which might have provided Mrs. McCarthy with a right to keep living with her husband) could not apply in this situation, as the right of movement and residence contained within it applied in States ‘other’ than that of original nationality. However, the ECJ reiterated the fundamental finding it had hit on in *Zambrano*, namely that “Article 20 TFEU precludes national measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status”<sup>576</sup>. Surely this should have been the tonic that Mrs. McCarthy (and her husband) sought? Why should Mrs McCarthy’s right to enjoy her family life matter less as a Union citizen, simply because she had neither been economically active nor exercised her right of free

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<sup>572</sup> See Ch.3 for a discussion of both.

<sup>573</sup> C-434/09 *Shirley McCarthy v. Secretary of State for the Home Department* 2011.

<sup>574</sup> *ibid.*.

<sup>575</sup> Following the line of reasoning in *Schempp*.

<sup>576</sup> *McCarthy*, referencing *Zambrano* at para.45.



movement, especially if it is true that “Union citizenship is destined to be the fundamental status of nationals of the Member States”<sup>577</sup>? And why should Mr. McCarthy’s right to enjoy his family life and enjoy residence with her<sup>578</sup> (a concept so reasonably embraced in *Chen* and *Zambrano* alike) be impinged simply because the Union citizen he, by chance, fell in love with and married had not exercised a right of free movement? The essence of a right is surely the freedom to pursue or refrain from it without suffering penalty on either account.

The Court differentiated this case from *Zambrano*, although both required a third-country national to receive rights to which they might not have been entitled, by stating that the UK’s decision to eject Mr. McCarthy did not deprive Mrs. McCarthy of genuine enjoyment of Union rights. In other words, the Union offered her a choice: stay in the UK, minus your husband or move to another Member State, however briefly, with him. An interesting sidebar here is that, although Art.21 TFEU provides an independent right of movement between Member States<sup>579</sup>, the requirements concerning possession of sufficient funds for stays longer than three months in Directive 2004/38 might mean successful migration was impossible and, therefore the Court’s decision actually *did* result in the impingement of genuine enjoyment of her rights. Had Mrs. McCarthy collected her Irish passport in person this case might have been decided differently, although the general tenor of the entire judgement is more negative than that in *Zambrano*.

Despite the attempt at differentiation between *McCarthy* and *Zambrano*, this case represents a troubling retraction of the rights that third-country nationals seemed to be able to exert when tied to a Union citizen. However, it seems not to be an anomaly, as the *Dereci*<sup>580</sup> case achieved a similarly surprising and distressing result, flying in the face

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<sup>577</sup> *Grzelczyk*.

<sup>578</sup> C-325/09 *Secretary of State for Work and Pensions v. Maria Dias* 2011 is a case concerning residence and a third-country national family member in which the ECJ again arrived at a decision which deprived the individual involved of rights they might otherwise have expected to be exert, by virtue of taking a restrictive approach to the concept of qualifying periods of residence.

<sup>579</sup> Although one the ECJ expressly stated Mrs McCarthy was not in a position to enjoy.

<sup>580</sup> C-256/11 *Dereci, Heiml, Kokollari, Maduik, Stevic v. Bundesministerium für Inneres* 2011.

of such well-established jurisprudence as *Baumbast and R* and *Chen* alike. *Dereci* focussed directly on the third-country national's right to remain in Austria with their children (just as *R* sought to remain with her children). However, owing to the conjoined nature of the case, not all situations were the same. The common theme was that all applicants had ties to citizens/residents in Austria (thus enjoying Union citizenship) and all were rejected when making applications for residence permits. Mr. Dereci had entered Austria illegally, but had married and had children: another applicant's entrance to Austria was perfectly lawful, but an application for a permit had been rejected all the same. Thus, illegality of an original action was not the unifying factor on which the Court based its findings.

Nonetheless, the ECJ reached a decision that, if it doesn't overturn the previous case law, significantly undermines it. The children in *Dereci* had not exercised a right of free movement – nor had the children in *Zambrano*. In this instance, however, that lack of movement was to prove the Achilles heel. Crucially, the Court ruled:

“European Union law and, in particular, its provisions on citizenship ... must be interpreted as meaning that it does not preclude a Member State from refusing to allow a third country national to reside on its territory, where that third country national wishes to reside with a member of his family who is a citizen of the Union residing in the Member State of which he has nationality, who has never exercised his right of freedom of movement, provided that such a refusal does not lead, for the Union citizen concerned, to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a citizen of the Union”.

The phrasing is highly reminiscent of the wording in *Zambrano* but used to altogether different ends. Once again it raises the inevitable question as to how this decision could do anything *other* than deny genuine enjoyment of rights: the turnaround from *Baumbast* is palpable. Running the gauntlet of the Court as a third-country national has become rather perilous – even the link to a Union citizen is now insufficient to provide a guaranteed shield against a Member State seeking exclusion or removal. The reality for

the children in *Dereci* is that they, like Mrs. McCarthy face the stark choice of remaining a cohesive family unit by moving away from friends and family to another Member State, or life without a present father figure. In this case, two tangential factors make the decision even more striking. Firstly, unlike in *R*'s situation, Mr. Dereci remains married to his children's mother – *R* was a divorcée whose subsequent remarriage actually made the ECJ's finding redundant as it affected her, but useful for others. His continual presence in the family household would surely make his later absence all the more distressing for his children. The second factor is that this finding came about in a time of economic distress for the Union, yet the Court has effectively demanded that Mrs. Dereci must leave her place of employment in the hopes of finding work abroad at a time when the employment market is feeling incredible strain.

The uncertainty resulting from these cases, combined with the lack of harmonious application of Directive 2003/109 demonstrates that third-country nationals may contribute to the Union on an equal footing with Union citizens and may in some Member States have access to certain social and tax benefits but, in terms of a solid enjoyment of rights, they continue to be treated as lesser mortals. Therefore, the positivity with which Besson and Utzinger view the incorporation of third-country nationals<sup>581</sup> now seems rather ill-founded. Moreover, the fact that these decisions come so long after the initial cases that seemed to elevate the stature of the third-country national (long-term resident or not) could be the alarm call of a more conservative court with a narrow view of the rights the Union has claimed to hold dear. Moreover, in the wake of the Lisbon Treaty's promise of accession to the ECHR, these decisions seem to run counter the spirit of the Convention. Whatever the motivation behind these decisions, the outcome is that, despite the notion that certain third-country nationals should enjoy a status "approximated" to Union citizenship, the hierarchy of non-citizens is still apparent and the current trend of judicial thought has been to marginalise those who, in years gone by, would have fallen within the scope of Union protection.

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<sup>581</sup> Besson and Utzinger, at p.580.

The traditional argument for limiting the scope of Union citizenship to Member State nationals is based on concern about diluting nationality, but the fact that certain non-national Union citizens enjoy equivalent rights to national citizens without a diminution in nationality's standing means it is highly unlikely that third-country nationals would cause damage of that nature. Given the cosmopolitan nature of many modern states, what is to say that third-country nationals would not share in the cultural identity of many nationals? If, as both Magnette<sup>582</sup> and Kostakopoulou<sup>583</sup> assert, Union citizenship is “more than a supranational addition or complement to national citizenship”<sup>584</sup>, it follows that it should do more than replicate national considerations at the EU level and the fact that it is actually discriminatory towards active denizens, whose participation is essential to the continued functioning of the Union, is a veritable disgrace.

What remains true is that third-country nationals, while in a better position than the stateless, occupy something of a no-man's land in the European domain. The institutions seem divided about how to deal with them and yet, their importance to the polity in terms of skills, economic advances and production of future Union citizens is beyond contestation. When we recall that the Commission:

“still uses these terms to promote citizenship of the Union: ‘Citizenship of the Union is both a source of legitimation of the process of integration, by reinforcing the participation of citizens, and a fundamental factor in the creation among citizens of a sense of belonging to the European Union and of having a genuine European identity’”<sup>585</sup>,

the exclusion of third-country nationals, to whatever extent, from Union rights (particularly in the wake of the Charter's inclusion in the legal order) undermines that search for legitimation and highlights the divisions existent in the Union and the

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<sup>582</sup> Magnette.

<sup>583</sup> Kostakopoulou, 2007.

<sup>584</sup> Besson and Utzinger, at p.589.

<sup>585</sup> European Commission “Third Report on Citizenship of the Union” 2001, in Magnette, 2007, at p.669.

participation denied to otherwise willing actors. If a 'European' identity is a genuine aim, the exclusion of third-country nationals from the citizenship framework fails to achieve it, generating instead an unrepresentative 'identity'. Rather, the framework has failed to erode the geographical borders traditionally associated with nationality and only emphasises that Art.20 TFEU remains a missed opportunity to formulate a more accurate reflection of the Union's intentions. Nonetheless, legal and long-term residence in a Union State gives the third-country national a standing that is both legitimate and capable of becoming more. The same *cannot* be said for stateless individuals, for whom the absence of legitimate residence acts as a substantial bar to the enjoyment of many participatory rights that we expect to enjoy in modern democracies.

### *The Statelessness Conundrum*

The position of third-country nationals in the Union legal order has been discussed at length and the shortcomings of the Union's approaches towards incorporating them in the fold highlighted. However, they are not the only group of Union residents who face unfavourable treatment on a day to day basis. The UNHCR lists a variety of groups it deems "people of concern"<sup>586</sup>. These include refugees, people in refugee-like situations, asylum seekers, internally displaced persons and the stateless. Groups, or subsections of these groups exist within Union territory and face daily struggles in their search to establish better lives. Each group deserves protection and incorporation into citizenship's fold, but all groups bar the stateless 'enjoy' some form of citizenship even if they are seeking refuge or protection from it. Thus, they have some form of international recognition. In their case, an alternative form of citizenship, supranational in nature, may help to provide them with some haven and degree of integration and acceptance in the new places they have made their home.

All the groups listed (and counted) by the UNHCR are to varying degrees invisible in the day to day running of States and it suits governments to keep it that way. The stateless, however, are the most vulnerable of the groups. Their utter lack of nationality makes them truly invisible and extremely vulnerable. Their weakness lies in

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<sup>586</sup> More information can be found at <http://www.unhcr.org/cgi-bin/texis/vtx/home> last accessed 09/04/12.

their lack of legal movement, residence, marriage etc., although many find ways to become involved in the States where they reside<sup>587</sup>, yet suffer from a lack of formal recognition. International instruments have long existed, seeking to combat this issue. Despite the existence of both the 1954 *Convention Relating to the Status of Stateless Citizens* and the 1961 *Convention on the Reduction of Statelessness*, there remains a significant proportion of people, globally and within the EU, who have become and remain stateless. In the EU context, this exacerbates both the democratic deficit and highlights interesting institutional Human Rights shortcomings. In light of Aristotle's concerns about the (potentially reduced) role of the individual in an oligarchy<sup>588</sup> it is sadly significant to conclude, some fifty years after Hannah Arendt gave voice to the same notion, that:

“nationality has been described as the ‘right to have rights’ and statelessness as tantamount to the ‘total destruction of an individual’s status in an organised society’”<sup>589</sup>.

Thus the pursuit of political, social and economic rights at either national, regional, or supranational level is frustrated. In the absence of any other current extra-national method of applying citizenship to the individual, the fact remains that “those who lack nationality have great difficulty in exercising their rights and therefore enjoy a precarious existence”<sup>590</sup>. The consequence for a democratic polity like the EU is that those who would be citizens, whether third-country nationals or stateless, are, in large part, denied the opportunity to utilise their rights, something that has not gone unnoticed by EU spokespersons.

The Commissioner for Human Rights (2009), Thomas Hammarberg, spoke on June 9<sup>th</sup>, 2009 about the plight of the stateless, noting that:

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<sup>587</sup> See discussion below.

<sup>588</sup> Aristotle, p.84-5.

<sup>589</sup> Van Waas, in Blitz and Lynch, at p.40.

<sup>590</sup> Blitz and Lynch in Blitz and Lynch, at p.2.

“Some of them are refugees or migrants, having left their country of origin. Others live in their home country but are still not recognised as citizens”<sup>591</sup>.

He drew attention to those affected by the break-up of the former Yugoslavia and the former Soviet Union, as well as to certain racial groups, such as the Roma. These issues are relevant to the EU’s future, be it in the form of the candidate states, or on the individual level. Hammarberg highlights that in already established States such as Latvia and Estonia, many children are also affected by a lack of citizenship, and, while his ‘recommendation’ was that “steps be taken to grant citizenship automatically to children and to relieve older people from the requirement to go through tests for naturalisation”<sup>592</sup>, (a solution that is still predicated upon a nationality-based conception of citizenship), the vast extent of the problem is one that has been clear for some time.

Whilst a promising indication that European officials are inclined to be mindful of and, indeed, promote the causes of stateless people in Union territory<sup>593</sup>, Hammarberg’s speech provides little evidence that the Union has a definite plan to resolve the growing problem in its borders. Nor does his speech prove illuminating in terms of illustrating broader thinking in the Union about expanding the focus of citizenship. Such broader thinking would have been particularly positive as it could provide a platform for integrating the stateless within the European framework (granting them citizenship’s associated rights and freedoms) in a more efficient and effective way. Instead, despite highlighting the growing plight of the “legal ghosts”<sup>594</sup> present in the Union, Mr. Hammarberg presented little hope that he expects *the Union* to resolve this crisis at all. He said:

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<sup>591</sup> “No One Should Have to be Stateless in Today’s Europe”, Thomas Hammarberg at [www.coe.int/t/commissioner/Viewpoints/080609\\_en.asp](http://www.coe.int/t/commissioner/Viewpoints/080609_en.asp) last accessed 09/04/12.

<sup>592</sup> *ibid.*.

<sup>593</sup> Mr. Hammarberg said “The fact that Stateless persons are excluded from participation in the political process undermines the reciprocal relationship between duties and rights. In fact, non-citizens also tend to be marginalised in areas where formally they have rights”. *ibid.*.

<sup>594</sup> *ibid.*.

“the problem of statelessness in Europe should be given higher priority. The victims have in most cases little possibility themselves to be heard and are in many cases silenced by their fear of further discrimination. It is most important that governments, ombudsmen, national human rights institutions and non-governmental organisations take action for the rights of stateless persons.”<sup>595</sup>

His emphasis appears to lie with these non-supranational actors and the legal framework provided by the Council of Europe, rather than focussing on opportunities that could be provided by inter-governmental co-operation and an integrationist manner of incorporating those without nationality within the Union fold.

That is not to say that there is an absence of international law in this field. There are two international Conventions in the area of Statelessness and one, more recently agreed, Euro-centric Convention concerning nationality that States have to take into their contemplation when acting vis-à-vis nationality and the individual. The two foremost (and older) instruments are the 1954 and 1961 Conventions that call for signatory States to adhere to strict principles when considering the withdrawal of nationality from individuals (where that would result in statelessness), but there are certain grounds providing justification for nationality’s withdrawal. The 1954 Convention “was initially conceived as a protocol on stateless persons that was intended to be included as an addendum to the 1951 *Convention relating to the Status of Refugees* but was later made into a Convention in its own right”<sup>596</sup>. It now finds itself the principal legislation in the area. The 1961 Convention, while building upon the earlier one, nonetheless suffers from what could be deemed a significant failing. Despite its title, it contains no prohibition on the removal of nationality, surely failing in its objective as a result.

More recently, however, the Council of Europe created the *European Convention on Nationality* of 1997, whose aim was to modernise and simplify rules about the acquisition and loss of nationality in the European area. Between 1997 and 2003 an

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<sup>595</sup> *ibid.*.

<sup>596</sup> Blitz and Lynch, in Blitz and Lynch, at p.2.



impressive 17 of the then Member States had ratified the Treaty. It repeats the same adages in relation to the determination of nationality being the State's province<sup>597</sup>, the right of every individual to hold nationality<sup>598</sup> and the desire to avoid statelessness<sup>599</sup>. Refreshingly, it provided express protection to women when they entered into marriage<sup>600</sup>: it was the cultural heritage of some States that, upon the marriage of a female national to a non-national the woman lost her claim to the original nationality. In some cases, where that marriage ended in divorce she then lost her 'adoptive' nationality without receiving restoration of the original. This Convention sought to put an end to such occurrences.

Further admirable qualities of the 1997 Convention include its express recognition of dual nationality<sup>601</sup> and the requirement that non-nationals receive equal treatment in the spheres of economic and social rights<sup>602</sup>, as well as an imposed obligation to allow all those lawfully and habitually resident (for a decade or more) the opportunity to naturalise and a requirement to facilitate the acquisition of nationality for both the stateless and refugees<sup>603</sup>. This is progressive thinking indeed when bearing in mind that the Convention is not the brainchild of the Union. Instead, the emphasis placed on these human rights and the bonds they are intended to create between peoples (which should not be altogether surprising given that the Council of Europe is also behind the ECHR) extends beyond the bounds of the Union. It serves as an indication that Union citizenship could, by following similar Human Rights principles, achieve similar inclusive effects, a perspective echoed by Guild, who suggests that the Convention:

“may in due course and on future signature and ratification by Member States, take a place as an aid to

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<sup>597</sup> European Convention on Nationality 1997, Article 3.

<sup>598</sup> *ibid.*, at Article 4a.

<sup>599</sup> *ibid.*, at Article 4b.

<sup>600</sup> *ibid.*, at Article 4d, also Article 7.

<sup>601</sup> *ibid.*, at Article 17.

<sup>602</sup> *ibid.*, at Article 20.

<sup>603</sup> Guild, 2004, at p.41.

the interpretation of the lawfulness of acquisition and loss of citizenship of the Union”<sup>604</sup>.

However, just like the 1954 and 1961 Conventions before it, the 1997 ultimately is rendered ineffective by its very lack of enforceability and lack of universality. Thus, the statelessness that it seeks loftily to forestall is free to continue both within and without the Union’s borders and does so to a considerable degree.

#### *Statelessness, its Manifestations and Importance*

Despite the many international instruments designed to combat statelessness, the issue remains pressing. Moreover, the problems with these instruments is that they are principally designed to focus on *de jure* as opposed to *de facto* statelessness. The terms are worth further definition – their difference is subtle but important. In the case of *de jure* statelessness, the statelessness is absolute. The individual finds himself without nationality and, therefore without a state in which he has the right to reside and which is obliged to offer him various protections.

Alternatively, *de facto* statelessness is rather more insidious. Whilst the individual maintains his nationality on paper, the reality is that he is barred from utilising its concomitant rights in a meaningful way. A person can be *de facto* stateless while remaining in his own state or can become so having exercised a right of movement. If the *de jure* stateless man is invisible to the public eye, the *de facto* stateless one finds himself caught in red tape. For example, imagine a country ravaged by civil war, where individuals fled their homes in an effort to escape the worst of the conflict. In the aftermath of that conflict, those individuals now find themselves unable to return ‘home’ because, once new states emerged from the breakup, they were no longer in possession of the relevant travel documentation and are incapable of obtaining new documents because, in order to do so, they must travel. It is a Gordian knot, which cannot be either cut or untied without some external actor providing a means of intervention<sup>605</sup>. Nonetheless, it is a pertinent illustration of how individuals can become

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<sup>604</sup> *ibid.*, at p.42.

<sup>605</sup> For a contextual discussion, see Ch.5.

trapped owing to circumstances beyond their control. Whereas the UNHCR keeps track of *de jure* stateless individuals<sup>606</sup>, it is much harder to quantify (or even identify) the *de facto* stateless, meaning that this problem could be far more pervasive than it first seems.

Despite the international conventions dealing with this issue, there clearly remain stateless individuals both globally and within Union territory. In terms of 'Union citizenship' the deliberate use of Member State as a foundation for activation of Union rights has delivered at least one casualty: Janko Rottmann. The most visible personification of the Union's statelessness problem, Rottmann began life as a Union citizen, exercised Union rights and, through the legal process of naturalisation eventually fell through the looking glass, entering a state of nothingness where he lacked legal protections and formal recognition.

### *Statelessness in the Union: Rottmann and its Practical (But Perhaps Unintended) Implications*

In all likelihood, the ECJ did not anticipate that the decision reached in *Rottmann* ultimately would render Dr. Rottmann stateless. The case before them concerned an Austrian man who had sought and successfully gained German nationality. Before leaving Austria he had been a person of interest in a fraud enquiry, a fact he failed to disclose as part of his naturalisation application. Following his successful nationality change the German authorities were informed that an arrest warrant had been issued for him in Graz, prior to his naturalisation application. These facts culminated in Germany eventually withdrawing its nationality from him and Dr. Rottmann's case being brought.

The Austrian submission to the ECJ made it clear that anyone voluntarily shedding Austrian nationality loses it permanently, with no automatic right of reacquisition following a future unforeseen circumstance resulting in the loss of their subsequent nationality<sup>607</sup>. In light of this, the withdrawal of German nationality

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<sup>606</sup> The figures are released annually online, <http://www.unhcr.org/pages/4a0174156.html> last accessed 09/04/12.

<sup>607</sup> *ibid.*, at paras.9, 11.

rendered Dr. Rottmann *to all intents and purposes* stateless and, seemingly stripped him of Union citizenship as well. The ECJ had to assess the legality of the German retraction<sup>608</sup>, as well as whether the issue even fell within the ambit of Union jurisdiction<sup>609</sup> and its judgement has been both praised<sup>610</sup> as heralding a new dawn for Union citizenship (and its potential) and criticised<sup>611</sup> as a challenge to pre-existing jurisprudence such as *Grzelczyk*<sup>612</sup> and the notion of Union citizenship's destiny as the 'fundamental' status of all citizens.

The ECJ stopped well short of declaring Janko Rottmann stateless and altogether avoided confronting the issue head on by "asserting that it was not contrary to EU law, in particular Art 17 EC, for Germany to withdraw a citizenship obtained by deception, provided the withdrawal is proportionate"<sup>613</sup>. Moreover, the ECJ skirted the issue of whether Austria could be obliged to repatriate him "by finding that it had not yet finally decided not to"<sup>614</sup>, nor had Germany reached a final determination on its withdrawal of nationality. Nonetheless such obfuscation and prevarication does nothing to improve Dr. Rottmann's current legal circumstances. As an isolated individual he could be considered an unfortunate who has slipped through an unconsidered crack but, in light of the vast numbers of *de jure* and *de facto*<sup>615</sup> stateless residents in the Union,

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<sup>608</sup> The ECJ was also asked about the Austrian obligation to repatriate Dr. Rottmann. It declined to pass judgement on something that had not yet arrived at a decisive conclusion.

<sup>609</sup> Both AG Maduro and the Court reached the conclusion that Union law was applicable, albeit according to different understandings of the reach of the EU.

<sup>610</sup> D'Oliveira.

<sup>611</sup> Konstadinides.

<sup>612</sup> In particular in relation to the idea of Union citizenship's destiny as the fundamental status of all Member State citizens.

<sup>613</sup> Sawyer, in Sawyer and Blitz, at p.104.

<sup>614</sup> *ibid.*.

<sup>615</sup> The difference between *de jure* and *de facto* statelessness, it is suggested, is one of semantics. The *de jure* stateless are those legally judged to be without nationality, whereas the *de facto* stateless hold nationality but are, to all intents and purposes, unable to exercise the rights attached to it. Politically both find themselves facing similar significant disadvantages.

he is potentially the poster child for a new construction of citizenship, one unfettered by Art.20 TFEU's attachment to nationality.

### *A Closer Look at Rottmann*

Academic opinion is not unanimous in its criticism of the ECJ's reasoning in *Rottmann*, despite his current lack of status. A closer reading of the ECJ's finding explains why: the Court initially considered both the German and Austrian arguments explaining their wish to deny Dr. Rottmann's case as well as considering the international law obligations that should have aided him in his suit. Citing Article 15 of the Universal Declaration of Human Rights<sup>616</sup> (UDHR), the 1954 and 1961 Conventions as well as the more modern, Euro-specific *European Convention on Nationality* of 1997, the ECJ indicated both an awareness of customary procedure in the area and a desire to weigh up national and individual interests in the name of achieving a just resolution. Thus the ECJ clearly weighed up a variety of factors, rather than leaping to an ill-considered opinion: Dr. Rottmann's fate was, therefore, the result of careful thought. Moreover, the ECJ plundered its previous jurisprudence in order to demonstrate a developed line of reasoning, consistent with other citizenship decisions.

In particular, *Micheletti*<sup>617</sup> was referenced, with an emphasis placed on the requirement that States must, when exercising their powers "in the sphere of nationality, have due regard to European Union law"<sup>618</sup>. It is this reference that has led to split opinion about the virtues of the *Rottmann* decision, as the ECJ seemed uncertain in its own reasoning. Did the States retain control over nationality laws, or did the final say now lie with the EU institutions? Despite clever (or perhaps desperate) arguments by the Member States that this amounted to a purely internal situation (since becoming German, Dr. Rottmann had not exercised his free movement right) which the ECJ deftly swept aside, there remained questions concerning whether this was really a matter

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<sup>616</sup> Article 15 UDHR "1. Everyone has the right to a nationality. 2 No one shall be deprived of his nationality nor denied the right to change his nationality".

<sup>617</sup> C-369/90 *Micheletti and Others v Delegación del Gobierno en Cantabria* 1992.

<sup>618</sup> *Rottman* at para.45.

for ECJ discussion, centring as it does on questions of nationality. The ECJ's response here was emphatic:

“It is clear that the situation of a citizen of the Union who ... is faced with a decision withdrawing his naturalisation, adopted by the authorities of one Member State, and placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by Article 17<sup>[619]</sup> EC and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law.”<sup>620</sup>

Hence, the decision gives cause for much celebration as it provides ample evidence for a belief that the ECJ will, from this point forward, be inclined to involve itself in situations surrounding nationality's (and, therefore, Union citizenship's) loss and acquisition.

Furthermore, (and perhaps more positively for people in Dr. Rottmann's position with the addition of a family) the ECJ gave its clearest indication that the preservation of citizen status would be deemed more important than any concession to the States in relation to nationality determination. This warning for the future was clearly expressed in the following terms:

“Having regard to the importance which primary law attaches to the status of citizen of the Union, when examining a decision withdrawing naturalisation it is necessary, therefore, to take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his

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<sup>619</sup> Now Art.20 TFEU.

<sup>620</sup> *Rottman*, at paras.42, 48.

family with regard to the loss of the rights enjoyed by every citizen of the Union”<sup>621</sup>.

Whilst there are various factors that the ECJ must weigh up before it can make a pronouncement in such a case<sup>622</sup>, it is evident that maintaining the status of citizen overrides other considerations, even if the Court, may, in some eyes have acted in such a way that it not only subjected “national regulatory power to mighty standards of review but ... rendered national citizenship thinner”<sup>623</sup>. Whether national citizenship is ‘thinner’ as a result of this decision, it nonetheless manifestly continues to exist without being mortally wounded. Indeed, Konstadinides could be open to accusations of hyperbole with his assessment: Member States, for so long protective of their nationality powers ultimately still determine how that privilege is conferred to an individual, albeit with a greater number of considerations to factor into the process.

A cautionary note, is found in the same decision. In conjunction with highlighting the need for States to respect Union law, the ECJ appeared to sit on the fence when it came to the issue of competence for making nationality related decisions indicating both that Member States retain control over bestowing nationality<sup>624</sup> and that the Court will, where Union citizenship is concerned, occupy the role of monitor<sup>625</sup>. The fundamental problem with the case, however, lies in the answers the ECJ gave to what has to be considered to be the central issue to the case: that of Dr. Rottmann’s possession of nationality and his retention of Union citizenship.

As has been stated, the Court articulated the view that this case fell within its purview *because* the loss the of Member State nationality could affect the retention of Union citizenship. However, by ultimately sitting on the fence, the ECJ missed a prime opportunity to extend the *Grzelczyk* principle to a point that would render Union citizenship unassailable. To do so would, given the eurozone crisis and the resultant political tensions, stir considerable debate and cause a furore, as the ECJ would face (not altogether unwarranted) accusations of having exceeded its delegated powers and

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<sup>621</sup> *ibid.*, at para.56.

<sup>622</sup> Most clearly the Court is bound to observe the principles of proportionality.

<sup>623</sup> Konstadinides, at p.404.

<sup>624</sup> *Rottman*, at para.39.

<sup>625</sup> *ibid.*, at para.41.

of, in effect, rewriting a Treaty provision in order to pursue its own objectives. Such an eventuality would have stood in stark contrast to, for example *Costa*, wherein the Court used an existing Treaty provision (i.e., negotiated and agreed to by the States themselves) in order to justify its decision to extend a policy. Here there would be no veneer of Member State approval: the Court would have directly overridden, or ignored, the Treaty (and therefore, the States' desires) by expanding the scope of Union citizenship beyond the States' contemplation.

Nonetheless, it would seem that the ECJ was showing deference to the Member States' free will with *Rottmann*, owing purely to nationality's sensitive nature. This is all the more likely as *Rottmann* was shortly followed by *Zambrano* where the ECJ once more demonstrated its activist and progressive thinking extending EU rights to a non-EU national. Reminiscent of *Chen* (Catherine's mother) in this respect, *Zambrano* was a further illustration of the ECJ's desire to free citizenship from considerations of the internal rule and accordingly it builds on *Rottmann*. Should a situation arise in future where a State seeks to remove nationality from an individual who may never have come within the cross-border paradigm, *Zambrano* and *Rottmann* together should ensure the ECJ's interest in the case, even if it can not guarantee the retention of citizenship. Thus, *Rottmann* remains an unsatisfactory decision for both Euro-sceptics and pro-integrationists. Those seeking to shore up the States and their rights over nationals will feel that the ECJ's declaration of interest in nationality matters is an indication of judicial overreaching. Meanwhile, those wishing to see a more robust elevation of Union citizenship status following the *Grzelczyk* principle will feel that *Rottmann* does not go far enough, shying away from an affirmation of the continuation of citizen status at all costs.

*Rottmann* is an illustration of statelessness as it affects Union citizens, but what of individuals resident in Union territory who contribute to the 'European' problem? A significant proportion of the stateless population in the Union reside in Member States which joined the Union in the last major round of expansion<sup>626</sup>. Over the past decade, significant field-work has been conducted in two of those States, making them ideal

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<sup>626</sup> 2004.



candidates for a discussion of the broader pan-European statelessness issue and its negative effects.

*Statelessness in Eastern Europe: Slovenia and Estonia in Focus*

Whilst it would be a gross overstatement to assert that statelessness is endemic in the Union, there are places where its prevalence is such that sizeable portions of residents within states find themselves invisible and lacking the means to make themselves heard. One such example, mentioned already above and to be examined further, is Estonia, which plays host to a stateless body of former citizens that would amount to approximately 10% of its population<sup>627</sup>. However, the second example to be explored in greater depth is Slovenia where, following the breakup of Yugoslavia, some 25,671 long term (i.e., formerly legitimately recognised) residents found they had, unknowingly, become “Erased”<sup>628</sup>, *de facto* stateless in a country where they had previously resided happily side by side with native Slovenians. As was the case in Estonia, which has more than 100,000 stateless, the erased souls found themselves ethnically discriminated against, reclassified and so deprived of political, social and economic rights and recognition, the epitome of “legal ghosts”<sup>629</sup>.

So much for the numbers involved in this crisis. The most pressing feature of this problem is not so much that these individuals often do not find out that they are to lose their nationality or status until after the fact. Instead, it is the problems they face in gaining subsequent recognition and the difficulties that blight their day to day lives. In a Union with its own Charter documenting the human rights to be enjoyed by citizens, these hazards should be recognised as insupportable. Why chose Slovenia and Estonia as case studies for statelessness? It is true that there are other notable instances of peoples going unrecognised in Member States, the *sans papiers* in France being a ready example. However, discussing statelessness in every emanation would be both a lengthy and (in terms of conclusions to be drawn) moderately repetitive enterprise. Moreover, the topic has been covered elsewhere<sup>630</sup>. However, Estonia and Slovenia are the chosen

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<sup>627</sup> Vetik (b), 2011, at p.162.

<sup>628</sup> Zorn (a) 2011, at p.196.

<sup>629</sup> [www.coe.int/t/commissioner/Viewpoints/080609\\_en.asp](http://www.coe.int/t/commissioner/Viewpoints/080609_en.asp) last accessed 09/04/12.

<sup>630</sup> See, *inter alia*, Blitz and Lynch, Sawyer and Blitz, Thiele (2005) and Spiro (2010).

case studies because they illustrate the problems of state succession *and* provide illustrations of the problems to be faced with European expansion – when Estonia joined the Union, the latter *inherited* a pre-existing statelessness problem. Moreover, both Vetik and Zorn’s lengthy field studies interviewing those directly affected by being stateless, providing first hand information about its immediate impact: rather than theoretical discussions of the impact of statelessness, their research lends the stateless a voice and provides credible and up to date information about the challenges faced by individuals who might otherwise be, metaphorically, swept under the carpet.

## SLOVENIA

As a newly formed State in 1991 (before it entered the EU), Slovenia was surrounded by war-torn states and played host to a variety of peoples who, formerly as part of a larger unified republic, had enjoyed two-tier citizenship at federal and local levels<sup>631</sup>. For many, this multi-level citizenship would prove beneficial in obtaining post-breakup Slovene citizenship. For others, however, this route to new status in what had been their home was effectively blocked<sup>632</sup>, either by an inability to travel beyond Slovenia to the war-ravaged states of their birth/ethnic origin in search of relevant supporting documentation, or by “inaccurate”<sup>633</sup> information received from workers in municipality centres responsible for processing these applications.

The new State accorded a six month window for applications for Slovene citizenship<sup>634</sup>, the short duration of which compounded difficulties for some would-be applicants. The production of a birth certificate<sup>635</sup> was a mandatory part of the process

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<sup>631</sup> Zorn (a), 2011, at p.199-200.

<sup>632</sup> Zorn (b), 2011, at p.69.

<sup>633</sup> *ibid.*.

<sup>634</sup> A window that opened before Slovenia had received international recognition as an independent and sovereign country. Its future was, therefore, still a matter of some doubt. Zorn (a), 2011, at p.202.

<sup>635</sup> As it happened, some 30% of the applicants for the new citizenship had been born on Slovenian soil and a considerable proportion of these people were in their thirties and forties at the time of the process, *ibid.*, at p.200.

but obtaining a duplicate proved nigh on impossible for many of those hailing from other Yugoslavian countries seeking to become Slovenian. What was to become of those who wished to maintain their long-term residence status but did not share either ‘solidarity’ or ‘fellow-feeling’ with Slovenians and so desired to maintain their precious classification? For unsuccessful or unwilling applicants the issue was taken out of their hands by the Slovenian government. Unannounced, on February 26<sup>th</sup> 2002<sup>636</sup> the Ministry of the Interior removed (or erased) from the register of permanent residents those who had not obtained Slovene citizenship: their passports became invalid but they received no formal notification of their changed status, allowing no formal petition filing complaints: many only found out by chance<sup>637</sup>. Notably long-term residents of non-Yugoslavian States did not find themselves in a similar position because the:

“Constitutional Court claimed that depriving legal residents of Slovenia of their statuses was in violation of the principles of equality before the law, trust in the law and legal safety.”<sup>638</sup>

These considerations, effectively a recognition of the human rights pertaining to individuals legally recognised by the State were not transferred to those who had, to all intents and purposes previously belonged to the same entity. The desire to set itself apart from the other Former Yugoslavian states meant that the Slovene government, instead of starting out as a State that wholly endorsed those principles espoused by its Constitutional Court, stripped thousands of people of their right to remain (in effect making them legally homeless) and removed such rights as access to healthcare, access to education and the right to enjoy family life, equal access to social assistance and the right to free legal aid.

It took ten years for formal acknowledgement of the erasure to be made, but, as of January 24<sup>th</sup> 2009 only 7,313 of the 25,671 people made stateless had been granted Slovene citizenship despite a long and co-ordinated campaign to highlight their plight<sup>639</sup>. Zorn’s empirical research carried out amongst those affected by the Slovenian

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<sup>636</sup> *ibid.*, at p.204.

<sup>637</sup> Zorn (b) 2011, at p.70.

<sup>638</sup> Zorn (a) 2011, at p.204.

<sup>639</sup> Zorn (b), 2011, at p.72.

government's actions is complicated by the fact that not all those made stateless desired to become Slovenian. Broadly speaking it was concluded that the pitfalls of a change in status affect all three aspects of modern citizenship: political disenfranchisement is made worse by social and economic impoverishment. Healthcare, education, employment opportunities, the right to enjoy family life and the right to be heard all suffered<sup>640</sup>. *De facto* statelessness ensued for many as, unable to leave Slovenia to return to a birth State, they were left illegal aliens in their own homes: as many had been born in Slovenia they were therefore unable to provide the proof of address outside the territory needed as part of a new application for a residence permit. Feelings of security and safety within the state are also compromised: people are more afraid to report crime when they are victims of it and are more inclined to fear the police generally, in case they face deportation and a life spent wandering between States without any form of security.

The broader implications of the Slovenian “Erased” provide a stark warning for the extended EU: should a European State face fragmentation (perhaps in the aftermath of an economic crisis), reclassification of citizens would have an impact both on the numbers of Union citizens and the fora in which they might expect to pursue rights they had, until that juncture, enjoyed. Overnight ‘Slovenians’ found themselves unable to avail themselves of basic rights they (no doubt) had taken for granted until then. It is not automatically the case that the Union has been deprived of thousands of citizens. The loss of legal residence is not in and of itself an issue for Union citizenship when those residents were thought to be in a position to rely on a previous (or underlying separate) nationality. Rather, the fact that their statelessness was *de facto* as opposed to *de jure* presents a problem because Union citizenship, as currently manifested, is not capable of providing them with another means of asserting those rights which were stripped from them.

To replicate the act of erasure at the supranational level, where political, social and economic rights have become an essential part of the fabric of citizenship, would be disastrous. It would undermine both the legitimacy of any future pronouncements about individual rights stemming from European institutions, and undermine the future of the European project by rendering it utterly devoid of democratic and civil legitimacy

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<sup>640</sup> Zorn (a), 2011, at p.205-223.

and removing the benefit of the free movement provisions that have ensured its success to date.

## ESTONIA

Estonia and Slovenia share many characteristics; both were formerly part of a larger Empire, both sought to establish their individual identities and both faced hardship following conflict. However, the scale of Estonia's statelessness problem far outweighs that of Slovenia. It centres far more on those deprived of citizenship (particularly from ethnic Russians who would nonetheless have considered themselves Estonian citizens prior to the reclassification) than of residence: thus the effect on Union citizenship is all the more direct and considerable.

The Russian Empire had a claim over Estonia until the end of WWI at which point it asserted its independence but, on the eve of WWII, Russia was able to exert her former influence (extended in lieu of military invasion<sup>641</sup>), which amounted to occupation. Shortly before that occupation took effect a census revealed Estonia to be largely culturally homogenous<sup>642</sup> and it was a desire to return to this state of homogeneity that largely fuelled the reclassification of citizenship and the hardening of naturalisation laws resulting in a vast increase in statelessness.

The reclassification of Estonian citizenship in February 1992 returned to an antiquated formulation from 1938<sup>643</sup>. Its limitation for ethnic Russians was the requirement of Estonian residence from before 1938 (or descent from such a resident). In other words, Estonian society was effectively segregated once the new definition of citizens became operative. Those who had migrated to Estonia in the intervening period (or were Estonian born, descended from those migrants) found themselves automatically denied access to the new citizenry: in 1992 approximately one third of the

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<sup>641</sup> Vetik (a), 2011, at p.231.

<sup>642</sup> The 1934 census reported that Estonia was composed of 88% Estonians. The rest was comprised of Russians and other nationalities, *ibid.*.

<sup>643</sup> Vetik (a), 2011, at p.232.

Estonian population was left stateless<sup>644</sup>. This proportion decreased dramatically prior to the 2009 figures referenced above but, despite “rather liberal”<sup>645</sup> naturalisation requirements, almost 10% of the population remains stateless. For some, the requirements were too onerous (particularly the language impediment<sup>646</sup>), for others it was easier to acquire foreign citizenship<sup>647</sup> (e.g., Russian) and for yet more, the requirement to engage in naturalisation of any kind was degrading, offensive and humiliating<sup>648</sup>. Why be asked to prove a nationality you feel you already had? Surely, “they should have been automatically granted citizenship after independence was restored”<sup>649</sup> in the same way as other Estonians: discrimination on these ethnic grounds, especially against those born and raised in the territory would be insupportable were it to happen in a State that was already part of the Union. Even those who could overcome this emotional barrier and wished to naturalise often found the same problems as did those in Slovenia: lack of information or misinformation delivered by the relevant officials<sup>650</sup>.

A further important reason why people in Estonia remain stateless is that many of those denied citizenship do not feel like they are suffering deprivation. Estonia, despite having a significant problem with statelessness, legally ensures that non-citizens “enjoy the same rights and free access to social protection as citizens”<sup>651</sup>. Unfortunately, despite the existence of general principles and legislation to this effect, access to employment, education, healthcare<sup>652</sup> and the ability to enjoy family life are all fundamentally hindered by the absence of Estonian citizenship, even where individuals

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<sup>644</sup> *ibid.*, at p.233.

<sup>645</sup> “Vetik (b), 2011, at p.162.

<sup>646</sup> Vetik (a), 2011, at p.248.

<sup>647</sup> *ibid.*, at p.249-250.

<sup>648</sup> Vetik (b), 2011, at p.164.

<sup>649</sup> Guild, 2004 at p.10.

<sup>650</sup> Vetik (a), 2011, at p.247.

<sup>651</sup> *ibid.*, at p.235.

<sup>652</sup> There is a stark difference in life expectancy between the resident Estonian and the ethnic Russian populations, with the Russian population dying significantly earlier than their compatriots. This is in spite of the assurance that everyone has equal access to healthcare. *ibid.*, at p.245-6.

possess valid residence permits<sup>653</sup>. For instance, public service (and some private sector) work is restricted to those with either Estonian (as opposed to Russian language) school education<sup>654</sup> or who subsequently pass language tests, whilst unemployment is higher among the non-Estonian population. Moreover, further education is dichotomous: Estonian education entitles students to study to tertiary and doctoral levels: those with a Russian language education find the opportunities for the latter non-existent. Many of these issues are also faced by non-citizens (i.e., lawful residents).

Despite these shortcomings there are indications that the practical differences between those holding citizenship and those without are little evident to the individual in the course of his daily life. The Constitutional guarantee that the “rights, freedoms and duties of each and every person ... are equal for Estonian citizens and for citizens of foreign states and stateless persons in Estonia”<sup>655</sup> has seemingly been honoured, at least for appearance’s sake. Vetik’s empirical research (conducted over a ten year period<sup>656</sup>) indicates that, as the stateless are able to engage in financial and business opportunities they are both less likely to apply for naturalisation and less likely to feel discriminated against. In reality, it was found that the absence of citizenship has a pronounced impact on numerous aspects of daily life, not the least of which were democratic participation, education and social mobility. Statelessness, then acts as a blight on the realisation of potential and generates a perpetual cycle of lower achievement and reduced expectations for generations of those it affects.

Ethnic statelessness in Estonia is not readily accepted. Its existence is opposed by both those bereft of citizenship for ethnic reasons and those who enjoy citizenship<sup>657</sup>. While acknowledging that this support may be entirely predicated upon a feeling of injustice and fellow feeling following the reclassification of citizenship, it nonetheless offers hope to the stateless in other countries that there may be support for

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<sup>653</sup> *ibid.*, at p.236-243.

<sup>654</sup> *ibid.*, at p.236.

<sup>655</sup> *ibid.*, at p.234.

<sup>656</sup> Vetik (b), 2011, at p.167.

<sup>657</sup> When surveyed, ethnic Russians expressed the belief that Estonian born Russians should have been granted Estonian citizenship and approximately half of ethnic Estonians supported this positions. Vetik (a), 2011, at p.251.

granting them citizenship on an equal footing. Moreover, although the law is not successful in ensuring equal treatment of the stateless, the fact that Estonian law *attempts* to recognise the stateless in a formal way is inspiring. Clearly, there is a school of thought which suggests that an entity, be it a State or a polity in another guise, could successfully integrate the stateless *alongside* pre-existing nationals. The disapproval of the Estonian public concerning ongoing statelessness provides hope that the Union could be the standard-bearer for promulgating a new form of belonging that would embrace the stateless alongside regularised nationals. It is to be hoped that the Estonian example indicates that it could do so with the understanding and full backing of the pre-existing citizenry.

## **Conclusion**

This chapter has focussed on issues which colour appreciation of Union citizenship as it stands apart from Member State nationals. By examining Union citizenship's dependence on nationality, one of the weaknesses inherent in the entity have been exposed. It is clear that notions of nationality have been developing over centuries, if not millennia, and interpretations of each evolutionary stage are susceptible to being coloured by political happenings of the time. Thus Hobbes' views were shaped by civil war and Marshall's perceptions affected by the speed of societal development from pre-industrial to post-war changes. Nonetheless, the Union's insistence that determining nationality remains fixedly within the ambit of the Member States themselves has acted as a thorn in the Court's paw when seeking to expand citizenship rights to third-country nationals. When Union citizenship is dependent upon possessing nationality of a Member State, it is in the States' interests to limit how and when their nationality will be passed to others, legally allowing multi-level, unequal standards of treatment of individuals to exist within individual State borders. We must, therefore ask ourselves a critical question about the nature of the Union: is it intended to appear as a 'State' in its own right, thereby justifying the imposition of restrictive nationality-esque citizenship criteria, or is something more open, intended to facilitate trade, travel and skills transfer, irrespective of national considerations? If the former is the case, the exclusion of third-country nationals as outlined in this chapter is more understandable,



even if it remains unpalatable. If the Union's aspirations are loftier, however, the approach towards non-national inclusion is more mystifying.

At first glance, the Union appears to have formulated a scheme of including third-country nationals within the citizenship paradigm without extending to them the formal title. By developing Directives designed to extend rights associated with citizenship to long-term residents, the Union institutions have shown their aspirations to achieve a truly inclusive polity. However, the manifestation of these legislative attempts falls short of this ideal. Not only are these efforts undermined by the choice of Directives as opposed to Regulations or Treaty articles to effect this outcome, the time-scale envisaged before third-country individuals will find themselves in receipt of these rights is a further cause for concern. The problem with the legislative efforts is that the integration test arrived at by demonstration of five years' legal residence fails to account for the fact that excluding these self-same individuals from those rights before the appointed threshold is *a posteriori* divisive and exclusionary. Magically achieving five years' legal residence does not make a person more or less deserving of inclusion within a community than an individual who has achieved the same thing for three years. The distinction is arbitrary and undermines the aspirations of the Union in becoming a rights and equality-based institution. Rather, the five year hurdle to quasi-citizenship status speaks rather more of naturalisation practices, as discussed in Chapter 1, than of inclusion: in this light, the failure to extend to these long-term residents the full gamut of citizenship rights as enjoyed by Member State nationals is all the more stark and difficult to justify. It damages the democratic pretensions of the Union, damage which is exacerbated by the *Rottmann* citizenship decision. If the five year residence requirement is viewed as akin to a naturalisation process, other obligations of the 'State' must also fall on the Union vis-à-vis its citizens: thus the obligation on States to prevent statelessness arising must be transferred to the Union level and the *Rottmann* decision seems a mis-step on the part of the Court.

This chapter has illustrated the conflicted approach of that traditional champion of the individual, the ECJ. At the start of the new millennium, the Court had returned several decisions indicating that third-country nationals with familial or dependent ties to Union citizens could enjoy quasi-citizenship status in their own right<sup>658</sup>. Whilst these

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<sup>658</sup> *Baumbast, Chen, Zambrano*.

decisions were returned through the lens of the Union citizen's rights, viewed from the obverse direction, it was clear that the third-country national also enjoyed some rights to the enjoyment of *their* family life, R in relation to her daughters despite her divorce (and separate living arrangements) from her former Union spouse and Mrs. Chen in relation to her infant and dependent Catherine. *Zambrano* intimated that this right might even extend further where the third-country national in question was economically active within the Union: although the Zambrano children could not be deprived of their "genuine enjoyment" of rights, Mr. Zambrano's previous record of hard work and social contributions also weighed heavily in his favour. From this juncture, how has the ECJ fallen from its pedestal?

The subsequent *McCarthy*, *Dereci* and *Dias* cases illustrate that the Union's treatment of third-country nationals falls rather short of its supposed aspirations as identified by Directive 2003/109. Instead of continuing to build on the libertarian foundations of *Chen* and *Zambrano*, the later cases have proven more restrictive and conservative than the ECJ's reputation could possibly have led us to expect. Prior to these cases the Court seemed to have achieved more for third-country nationals than had the legislative efforts of the Union: what the ECJ chooses to do next in relation to third-country nationals will prove most interesting. However, the mere fact that these cases have been returned in the manner shown within this chapter demonstrates that third-country nationals occupy uncertain ground in the Union: the Stateless in Union Member States find themselves on the lowest rung of the 'citizenship ladder', but other third-country nationals may find themselves somewhat further down it (and, therefore, less well protected) than they could possibly have anticipated. The lottery effect that these decisions have produced has an inevitable negative impact on the Union's legitimacy (democratic or otherwise).

Taken together, the inadequate inclusion of third-country nationals in the Union fold, the limitations of *Rottmann* combined with the issue of statelessness and the verbal constraints of the citizenship article provide ample basis for the re-evaluation of Union citizenship. A further factor not considered at length in this thesis, but which nonetheless highlights a weakness of Union citizenship as it is currently understood, relates to its lack of external visibility. Although consular protection is offered to

citizens when abroad<sup>659</sup>, the “external aspect of citizenship of the Union is much less developed than the inward focus”<sup>660</sup>, with the result that in one important facet Union citizenship is distinctly wanting: recognisability. Were it to be re-evaluated and re-launched in a radical fashion, detached from nationality conditions and recognising a far broader sector of ‘European’ society than previously envisaged, its novel and unique nature might ensure recognition beyond Europe’s frontiers. These issues will be considered at length in the final part of this thesis.

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<sup>659</sup> Art.23 TFEU.

<sup>660</sup> Guild, in Cessarini and Fulbrook, at p.39.

## Chapter 5. No Place Like Home: the Native, the Alien, the Yellow Brick Road.

### Introduction

In the preceding chapters, we have seen that the Union, initially unintentionally, has created a political status for the individuals at its heart, a form of liberal citizenship to be enjoyed by Member State nationals. Citizenship was part of Monnet's original vision for the Community<sup>661</sup>, albeit that his aspirations seemed destined to remain the stuff of his letters rather than reaching fruition. Nonetheless, the institutions springing forth from the Community in whose creation he was instrumental have *inter alia* generated a variety of special policies<sup>662</sup> and decided cases in such a way that the "fundamental and practical progress in uniting Europe's peoples"<sup>663</sup> that Monnet so wished for has become a reality.

The object of this chapter is to highlight that the citizenship project remains far from complete. We have discovered that the ECJ is continually redefining what Union citizenship means to those who hold it (resulting in a piecemeal evolution/diminution of the entity depending on the issue at hand). Moreover, the citizenship article's<sup>664</sup> wording, combined with problems of a democratic deficit and a lack of consistent recognition of either third-country nationals or the stateless, renders supranational citizenship ultimately hostage to the will of the States instead of empowering the individual. This chapter will refocus on the extent of the Union's statelessness problem and address why the Union should use the supranational citizenship it has already created to resolve it. In so doing, it will formulate a novel conception of citizenship, one that fosters a greater sense of integration between new and old Union nationals by

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<sup>661</sup> Monnet, at p.392-393.

<sup>662</sup> See Ch.2.

<sup>663</sup> Monnet, at p.495.

<sup>664</sup> Art.20 TFEU.

incorporating positive features of past citizenship models. At its outset this thesis investigated citizenship's history, alighting on several models which acted as precursors to the modern manifestation. Aspects of these past conceptions will prove instrumental in understanding how Union citizenship can be improved. By its completion, this thesis will suggest a novel formulation of a revised Union citizenship that will more appropriately achieve the Marshallian<sup>665</sup> (or Monnetian) outline of a modern, European, citizenship ideal.

### *Statelessness, the Union and the Obligation for Resolution*

The impact of statelessness on the individual was outlined in the preceding chapter, with a particular emphasis placed on two European States where extensive studies were conducted monitoring individuals over a number of years. While these studies have enormous value in illuminating how stateless individuals survive in daily life, they do little to provide concrete figures in digestible form, or to explain *why* it is that the Union should have responsibility for developing new ways to include these individuals who are otherwise left in the cold.

### *Facts and Figures*

As intimated in the previous chapter, international instruments designed to counteract this problem exist. However, they are insufficient to combat it meaningfully. An alternative form of solution is required, if only from a human rights perspective. But, before any assertion can be made that the Union has an obligation to act to resolve the issue, it would be advisable to put it in context. After all, the Union is not the sole actor that *could* make a meaningful contribution in this area.

The two States used to illustrate the European end to this problem in the preceding chapter joined the Union in the 2004 round of expansion. Therefore, it is pertinent to examine the scope of the problem prior to their accession and contrast it with the current day. The UNHCR collects annual statistics which are published on their website, documenting the number of people in each country who are “of

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<sup>665</sup> See Ch.1.

concern”<sup>666</sup>. From these ‘statistical yearbooks’ it is possible to extrapolate the precise numbers of unrepresented and vulnerable individuals residing in the Union across a range of years. At the end of 2004, the year of succession, the UNHCR records indicate that the numbers of *de jure* stateless individuals present in the original 15 Member States was large, but not overwhelming. Indeed, the number amounted to a mere 12,844 persons. In contrast, by the end of 2010, with the EU amounting to 27 Member States, the number of stateless individuals had exploded to a staggering 467,153. The *de jure* stateless are not the only category of individuals that the UNHCR monitors. Significantly, the Union also faces a huge challenge to incorporate refugees, asylum seekers and large numbers of internally displaced persons. Broken down, the figures for the original 15 Member States at the end of 2004 appear as follows:

Member State	Stateless Persons	Refugees	Asylum-Seekers	Total People of Concern
Austria	524	17,795	38,262	55,581
Belgium	93	13,529	22,863	36,485
Denmark	–	65,310	840	66,150
Finland	–	11,325	–	11,325
France	708	139,852	11,600	152,160
Germany	10,619	876,622	86,151	973,393
Greece	–	2,489	7,375	12,864
Ireland	–	7,201	3,696	10,897
Italy	886	15,674	–	16,560
Luxembourg	–	1,590	–	1,590
Netherlands	–	126,805	28,452	155,257
Portugal	–	377	–	377
Spain	14	5,635	–	5,649
Sweden	–	73,408	28,043	101,451
United Kingdom	–	289,054	9,800	298,854
<b>Totals</b>	<b>12,844</b>	<b>1,646,666</b>	<b>237,082</b>	<b>1,898,593</b>

**Table 1.** UNHCR figures for Member State Persons of concern, end-2004.

<sup>666</sup> <http://www.unhcr.org/pages/4a0174156.html>, last accessed 09/04/12.

Clearly, Table 1 illustrates that the number of stateless persons appeared relatively inconsequential, despite the troubles the individuals faced on a daily basis, and the Union might well have been able to continue to assert that the responsibility for resolving the crisis continued to lie with either larger international organisations or with the Member States themselves. Unfortunately, it is the case that the total population of concern, less the stateless population, still amounted to almost two million individuals, yet the Union did nothing. A decade after Union citizenship had been formalised, there were almost two million troubled individuals residing on Union territory who could not avail themselves of Union rights. More significantly, the Union had also, by 2004, illustrated that it had a strong commitment to the protection, if not the elevation, of human rights – perhaps a contributing factor in the enormous number of refugees and asylum seekers who made their way into Union territory. By this time, the Union had already created the Charter of Fundamental Rights, which was not yet binding but upon which the Court would shortly rely<sup>667</sup>. To continue allowing the disparity between those able to fully enjoy their human rights in *all* forms (economic, social and political) and those who face some curtailment (to whatever degree) undermines the democratic aspirations of the Union as a whole.

Nonetheless, the Union permitted the situation to continue. The best illustration of why this was a mistake is drawn when considering how the volume of “people of concern” has continued to increase. Using figures again collated from the UNHCR statistical yearbooks for all 27 current Member States (Table 2), it is easy to see that the problem is massively greater and difficult to see how the Union can curb it without creating its own unique instruments. At this juncture, surely the Union has at least to reconsider its position on revising Union citizenship?

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<sup>667</sup> The first instance of ECJ reliance on the Charter came in C-540/03 *Parliament v. Council* [2006] E.C.R. I-5769, although it made no difference to the outcome of the case. The later case, C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* [2008] E.C.R. I-271 ECJ demonstrated that the ECJ would use the tool as a decisive instrument in determining a case’s outcome: thus the Union clearly placed the protection of Union rights at its very core. It is not a stretch to conclude that, as human rights are by their nature universal, not restricted, the rights of resident aliens must be equally important as those of Union citizens.

Member State	Stateless Persons	Refugees	Total Refugees & Persons in Refugee-Like Situations	Asylum Seekers (Cases Pending)	Total Population of Concern
Austria	401	42,630	42,630	25,635	68,656
Belgium	691	17,892	17,892	18,288	36,871
Bulgaria	–	5,530	5,530	1,412	6,942
Cyprus	–	3,394	3,394	5,396	8,790
Czech Republic	–	2,449	2,449	1,065	3,514
Denmark	3,216	17,922	17,922	3,363	24,501
Estonia	100,983	39	39	10	101,032
Finland	3,125	8,724	8,724	2,097	13,946
France	1,131	200,687	200,687	48,576	250,394
Germany	7,920	594,269	594,269	51,991	670,462
Greece	260	1,444	1,444	55,724	57,428
Hungary	62	5,414	5,414	367	5,843
Ireland	–	9,107	9,107	5,129	14,236
Italy	854	56,397	56,397	4,076	61,327
Latvia	326,906	68	68	53	327,027
Lithuania	3,674	803	803	71	4,548
Luxembourg	173	3,254	3,254	696	4,123
Malta	–	6,136	6,136	1,295	7,531
Netherlands	2,061	74,961	74,961	13,053	90,075
Poland	763	15,555	15,555	2,126	18,444
Portugal	31	384	384	72	487
Romania	321	1,021	1,021	388	1,730
Slovakia	911	461	461	267	1,639
Slovenia	4,090	312	314	121	4,525
Spain	31	3,820	3,820	2,715	6,566
Sweden	9,344	82,629	82,629	18,635	110,608
United Kingdom	205	238,150	238,150	14,880	253,235
<b>TOTAL</b>	<b>467,153</b>	<b>1,393,452</b>		<b>277,501</b>	<b>2,053,448</b>

**Table 2.** UNHCR figures for Member State Persons of concern, end-2010

These figures present a much more worrying picture of the state of the Union. Not only is the number of stateless individuals more than 36 times greater than it was a



mere six years earlier, the sum of individuals of concern has risen by several hundred thousand. There have been sizeable increases in the number of refugees and asylum seekers in countries such as France and the Netherlands, although in countries which seemed overwhelmed with them a few years earlier, the numbers have decreased. Although the UNHCR figures cannot account for this change, it can be surmised that this decrease can be accounted for by the individuals in question having achieved long-term residence, naturalised or moved away. Nonetheless, they ceased to be persons of concern. If the first explanation proves correct, it is all the more urgent that the Union take remedial action and revise how it determines Union citizenship – vulnerable people who have fled one State may shrink at the prospect of having to engage with another State to invoke rights to which it is widely agreed they are entitled.

With an eye to the future, bearing in mind that the Union is to expand still further and with more States candidates for membership, a cursory appraisal of the UNHCR figures, collated in Table 3, reveals yet more startling information about the numbers of potential vulnerable people who may become the Union's responsibility.

<b>Candidate/Potential Member State</b>	<b>Stateless Persons</b>	<b>Refugees</b>	<b>Total Refugees &amp; Persons in Refugee-Like Situations</b>	<b>Asylum Seekers (Cases Pending)</b>	<b>Total Population of Concern</b>
Albania	–	76	76	23	99
Bosnia and Herzegovina	5,000	7,012	7,016	153	179,433*
Croatia**	1,749	863	936	81	25,903*
Iceland	113	83	83	39	235
Montenegro	1,300	16,364	16,364	5	18,042
Serbia and Kosovo	8,500	73,608	73,608	209	312,961*
Former Yugoslav Republic of Macedonia	1,573	959	1,398	161	3,132
Turkey	780	10,032	10,032	6,715	18,088
<b>TOTAL</b>	<b>19,015</b>	<b>108,997</b>	<b>109,513</b>	<b>7,386</b>	<b>557,893*</b>

\*Number inflated by Internally Displaced Persons

\*\*Already in the process of accession.

**Table 3.** UNHCR figures for Candidate State Persons of concern, end-2010

These figures make it abundantly clear that, should the Union decide to revisit the citizenship article in order to incorporate these vulnerable individuals, particularly the stateless, the number of Union citizens would considerably increase. If we assume that the number of citizens (adding the population figures of the current 27 Member States<sup>668</sup>) currently protected under the umbrella of Union law is 493.8 million, then adding the vulnerable persons resident in those States would increase the total population by approximately 0.5%. This total may not seem much, but, if we were to state it in terms of current country size, we would be adding more citizens than the combined populations of Cyprus, Malta and Luxembourg (0.8, 0.4 and 0.5 million respectively): democratically speaking it would be deemed unconscionable to exclude the citizens of these countries who make contributions of whatever nature to the Union, from its benefits. Nonetheless, that is how the situation currently stands.

	<b>EU 27 Member States (A)</b>	<b>EU 27 + Croatia</b>	<b>Candidate States*** (C)</b>
<b>Total Stateless</b>	467,153	468,902	19,015
<b>Total Refugees</b>	1,393,452	1,394,315	108,997
<b>Total Refugees &amp; People in Refugee-Like Situations</b>	1,393,452	1,394,388	109,513
<b>Total Asylum Seekers</b>	277,501	277,582	7,386
<b>Total People of Concern</b>	2,053,448	2,079,351	557,893*
<b>Total Potential new European Citizens (A+C)</b>			<b>2,611,341</b>

\*\*\*Taken from Table 3, including Croatia.

**Table 4.** Combined figures for European Persons of concern, end-2010

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<sup>668</sup> As determined by using the Union's own data accessible via [http://europa.eu/about-eu/countries/index\\_en.htm](http://europa.eu/about-eu/countries/index_en.htm), last accessed 09/04/12.

Exploring the realms of possibility still further, Table 4 is most illuminating. In expectation of Croatia's imminent inclusion in the Union, an additional 27,000 'people of concern' can be viewed as being the Union's responsibility. It may be many years before the other candidate States gain entry (if at all). Nonetheless, let us entertain the notion that the candidate States gain entry tomorrow. The original figure of 493.8 million Union citizens would stretch to a mammoth 580.05 million (making the Union almost twice the population of the USA<sup>669</sup>). Therefore the total figure of people of concern outlined in Table 4 would amount to approximately 0.45% of the new total population. Again, critics might argue that this figure is insignificant and can continue to be ignored. The easiest way of highlighting the ridiculousness of this statement is to put the figure in context. To continue ignoring these people is akin to ignoring the people of Montenegro, Iceland, Malta and Estonia (0.6, .03, 0.4 and 1.3 million respectively) in their entirety (ironic in the light of Estonia's mass contribution to the statelessness problem for the Union).

The 2.6 million 'people of concern' could, under a radical reformulation of Union citizenship, become Union citizens themselves. Effectively the population of several small countries resides in the Union without being able to exert the social, economic and political pressures they might because many of them are unrepresented and either lack the means to gain public recognition or are unwilling to expose themselves to authoritarian scrutiny. For the stateless, as was intimated in Chapter 4, fear can be an extremely motivating factor. The UNHCR monitors levels of *de jure* statelessness, but calculating the extent and whereabouts of the many *de facto* stateless is more difficult. As much as the *de jure* stateless encounter difficulties and restrictions on their daily actions, the *de facto* stateless find themselves considerably hampered too. The greatest difference is that making themselves recognised as suffering the limitations approximate to those of the *de jure* stateless is infinitely more difficult.

The argument that follows suggests that Union citizenship could be revised in such a way that it can fill the void between the rights enjoyed by Union nationals and those denied to third-country nationals (whether long-term or not), refugees, asylum seekers, IDP's and the stateless alike. Before such an assertion can be made in full,

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<sup>669</sup> In 2011, the US census found there were 311.6 million Americans <http://quickfacts.census.gov/qfd/states/00000.html>, last accessed 19/03/2011.

however, the issue of whether it is the Union's responsibility to instigate this change, particularly with respect to the stateless, must be considered – if other, more suitable authorities feel that the responsibility should lie with them, the Union could find that any such suggestions it promulgates are strongly opposed. The rest of this chapter will consider alternative avenues by which this problem might be addressed as well as the problems that confront Union citizenship in its current form (from an internal perspective), before developing a fulsome, rights-laden and independent form of supranational citizenship that will reconcile the needs of the Union to be representative, democratic and inclusive with the need to maintain a coherent and robust external frontier.

### *Hierarchical Levels of Solution*

The discussion immediately preceding hit upon an important question which must now be considered in greater depth. Whilst correctly identifying that there is a significant number of people who might, under an alternative construction, be considered European Union citizens, the question still remains: why is it the Union's obligation to incorporate these people at all? There are potentially three spheres in which this issue could be tackled. The first is the pan-global. As we have seen, in Chapter 4, there have already been international efforts to curb statelessness<sup>670</sup> and ancillary other issues, yet these have, for the most part, proven ineffective. In the western liberal (and developed) countries, we might well expect the statelessness problem to be purely a matter for the third world and developing countries. However, the Rottmann incident should disabuse us of this impression. Moreover, the volume of other stateless folk in the Union serves as ample evidence that the international initiatives have not yet achieved their goal.

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<sup>670</sup> As there have been to provide protection to refugees.

The second arena of action is the States themselves. Rubio-Marín has presented considerable argument on this point<sup>671</sup> and looked specifically (in Europe) at Germany. One of the arguments she propounded was that it is incumbent on States to incorporate both legal and illegal residents within their field of competence on libertarian grounds, as:

“the inclusiveness of a community affects its claim to being a liberal democracy, since the question of what constitutes a demos and who must be included in a properly constituted demos is essential to a democratic system”<sup>672</sup>.

The first part of this sentiment is entirely correct and has the greatest bearing when seeking to incorporate people of concern in any State that is part of the Union, or even the Union itself. Rubio-Marín also draws heavily on such theorists as Dahl and Bauböck, whose contributions to this area are surprisingly modern, given that they date from before Union citizenship existed (in the case of Dahl) or are applied to so many (Bauböck).

Turning first to Bauböck, his theory suggests that narrowly construing membership of the State leads to the danger of social and political marginalisation and vulnerability (a reality, as the figures outlined above demonstrate) most keenly felt by individuals

“when trying to develop freely and fully their individuality relying on the necessary means and protection to do so”<sup>673</sup>.

Returning to Dahl, it is clear that his theory, while suited to the national transformation of citizenship and inclusion, is more apposite for the argument that is put forward here, that the Union should bear the responsibility for including both third-country nationals

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<sup>671</sup> Rubio-Marín, 2000.

<sup>672</sup> *ibid.*, at p.25.

<sup>673</sup> Bauböck, at p.28.

and the stateless in its understanding of “citizens”. As Rubio-Marín highlights, Dahl most succinctly identifies two types of democracy in which :

“System X is democratic with respect to its own demos;

System Y is democratic in relation to everyone who is subject to its rules.”<sup>674</sup>.

Clearly, Dahl has hit upon both a flaw with democracy and the internal tension which States face on a daily basis. The tension to which I refer is this: States define themselves according to their nationals, to whom they owe obligations and by whom they are owed duties<sup>675</sup>. The reciprocal relationship is a happy medium but, were rights to be extended beyond nationals, this balance might be disturbed: nationals of States may question *why* they are subject to obligations if others are permitted to enjoy the same rights on an equal footing, without equal duties. Given that “Aliens and citizens are not equally situated as far as duties and commitment to the State are concerned”<sup>676</sup>, presenting equality of opportunity where rights are concerned may result in Statal instability.

In addition to the internal tensions facing States if they attempt to provide an equal platform to non-nationals, there is a further internal complicating factor, brought to the fore in speeches delivered by various European national and regional leaders in late 2010 and early 2011: the problem of coexistence in multi-cultural societies. Each speech was, on its own, passably innocuous: taken as a whole, however, they reflect a disturbing change of attitude towards national (and Union-wide) social migration and integration that threatens the ideals once at the core of the Community project.

“Of course the tendency has been to say, ‘let’s adopt the multicultural concept and live happily side by side, and be happy to be living with each other’. But this concept has failed, and failed utterly.”<sup>677</sup>

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<sup>674</sup> Rubio-Marín at p.26, referencing Dahl, R.A., 1989, “Democracy and its critics”.

<sup>675</sup> See Ch.4.

<sup>676</sup> Rubio-Marín at p.42.

<sup>677</sup> Angela Merkel, speaking at a Christian Democratic Union party youth wing conference in Potsdam in October 2010,

The words of Chancellor Merkel in October 2010 are a stark warning about the difficulties States have in reconciling non-homogenous groups within clearly delineated borders. Her sentiments were echoed on the same platform by Bavarian state premier Horst Seehofer, who succinctly stated, “multiculturalism is dead”<sup>678</sup>. Such a stark declaration, albeit one relating to a single State (as opposed to the entire Union), at a time when the broader EU is made up of almost 500 million people from diverse backgrounds and varying ethnicities, hints at an expression of a deeply held scepticism embedded in the States themselves about the future direction of the Union as a viable political entity. More importantly, these statements indicate that some States are in a position to absorb neither long-term resident third-country nationals nor vulnerable stateless as equal participants in their societies: these sentiments were not confined to the German sphere.

In February 2011, delivering a speech in Munich David Cameron made almost the same statement. His speech largely passed the British public by (yet created a stir internationally): he asserted that there needs to be “a lot less of the passive tolerance of recent years and much more active, muscular liberalism”<sup>679</sup>. This seems internally inconsistent: tolerance and liberalism being seen amongst the majority, however erroneously, as one and the same thing. More specifically, he went on to say:

“... we have allowed the weakening of our collective identity. Under the doctrine of state multiculturalism, we have encouraged different cultures to live separate lives, apart from each other and apart from the mainstream. We’ve failed to provide a vision of society to which they feel they want to belong. We’ve even tolerated these segregated communities behaving in ways that run completely counter to our values”<sup>680</sup>.

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[www.guardian.co.uk/world/2010/oct/17/angela-merkel-germany-multiculturalism-failures](http://www.guardian.co.uk/world/2010/oct/17/angela-merkel-germany-multiculturalism-failures), last accessed 09/04/12.

<sup>678</sup> *ibid.*.

<sup>679</sup> [www.number10.gov.uk/news/speeches-and-transcripts/2011/02/pms-speech-at-munich-security-conference-60293](http://www.number10.gov.uk/news/speeches-and-transcripts/2011/02/pms-speech-at-munich-security-conference-60293) last accessed 09/04/12.

<sup>680</sup> *ibid.*.

Rather than espousing a notion of the State as a reflection of its constituent parts, this statement indicates the expectation that the State will, instead, shape its constituents: it speaks far more of States which see themselves as echoing Dahl's "System X", not "System Y". More importantly, it helps to illuminate why the State is not the best forum for discourse on expanding conceptions of citizenship to include parties traditionally beyond the scope of the State's obligation. Instead, it is as if the State is expected to freeze at a given (unstated) point of time whereas, in reality, just like its legal instruments, the State is a living and continually evolving entity.

Rigidity in expectations of the State and how it both represents and is represented by its nationals leads to uncontrollable pressures, that can lead to schism: the troubles experienced by Belgium are an illustration of this on a much smaller scale than the multiculturalism at issue in these speeches. In the 21<sup>st</sup> century, it seems, discussion about nationality, far from being expansive, leads to a "growing tendency towards regionalisms, sometimes separatisms"<sup>681</sup> that "fragments the existing nations and nationalities into infinitely distinct ethnicities and cultural sub-units"<sup>682</sup>. Far from providing a sound basis from which state leaders can issue a rallying cry against separation of cultures, the States (by providing regional government) seem to foster and reward separatist tendencies: to admonish immigrant communities for observing the same tendencies as national populations smacks either of ignorance about one's country or political hypocrisy. Thus, the limited view of the State and what it can achieve provides a very real warning for the Union: if it is to evolve and be able to continue absorbing varied cultures, the Union must take heed of this restrictive understanding of the State and, I suggest, make every effort to accommodate *all* its peoples in an inclusive way, without seeking to stamp a stereotypically 'Statal' identity on them. If nations and nationalities cannot readily encompass divergent cultural identities, perhaps the Union can.

In the face of this pessimistic overview, it is interesting to note that both speeches bemoaning societal fragmentation (and a failure to welcome and reconcile alternative cultures) contain similar strands of thought concerning those same societies' evolution that should be cause for optimism. Cameron's call for a more "muscular

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<sup>681</sup> Soysal, in Cessarini and Fulbrook, at p.27.

<sup>682</sup> *ibid.*.



liberalism”, combined with his call for an end to segregated society echo Mr. Seehofer’s call for Germany to “get tougher on those who refuse to integrate”<sup>683</sup>, serving as a further reminder of *Bidar*’s call for integration in society before accessing social advantages. If these sentiments had formed more of the basis of their speeches, they would now stand as a platform for a more expansive interpretation of Union citizenship, hopefully acting as a call for further pan-European integration. That could be used to form the backbone of a movement behind the development of a more open-ended citizenship aimed at fostering relations between peoples, rather than treating them as groups of members belonging to an exclusive club. Moreover, they would have demonstrated a like-minded thinking with the ECJ, leading to the hope of greater co-operation and a shared determination between the States and Union institutions. For these reasons, it is argued, the State is not the best actor to address this imbalance in treatment, but that the politicians who busily highlight the frailty of the nation state as a mechanism for future inclusion instead throw light on the supranational arena as potential “Wizard of Oz” in this scenario: the Union may well be able to furnish third-country nationals, the stateless and other aliens with a yellow brick road leading to inclusion in European life which has been, heretofore, unprecedented.

#### *A Union Obligation?*

The final actor, and the one suggested to be uniquely placed to ameliorate the position of both third-country nationals and the stateless in Europe, is the Union. The States of the Union, many of whom are signatories to the main Conventions relating to statelessness, nonetheless continue to suffer from a statelessness problem themselves – a *Union* initiative to address the problem would pressure the States to act to combat the issue in a progressive way. The end result would maximise the number of Union citizens and increase the numbers of those eligible to vote in and stand for election to Union institutions. In such a way, Union citizenship could transform itself into a modern ideal, encompassing the positive elements of both republican and liberal citizenship models. Moreover, it would increase opportunities to engage in the civic virtues associated with reciprocal forms of citizenship whilst expanding the scope of

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<sup>683</sup> [www.guardian.co.uk/world/2010/oct/17/angela-merkel-germany-multiculturalism-failures](http://www.guardian.co.uk/world/2010/oct/17/angela-merkel-germany-multiculturalism-failures), last accessed 09/04/12.

citizenship vis-à-vis the numbers of people (young and old) in a position to enjoy its rights and protections, as encouraged under the liberal citizenship models.

Returning for a moment to Dahl's theory concerning 'System Y', the Union might well be said to exhibit this quality already – therefore tackling the issue at hand could be an easy and logical extension of an ethos which is already at the core of the Union's being. Given the efforts, critiqued in Chapter 4, to include long-term third-country nationals in the Union order (accompanied by the appropriate jurisprudence), there is scope to revisit Union citizenship in order to make it more inclusive (in all senses) than it currently is. The Union broke new ground when it first came into being. The six States which originally agreed to work together in 1952 have been joined by 21 others. Before Union citizenship was created in 1992, it was thought impossible that citizenship could, practically, survive beyond State bounds. In, I would argue, a limited capacity, the Union has demonstrated that presupposition to be unfounded. Nonetheless, citizenship discourse remains largely tied to traditional notions of nationality: the re-evaluation called for to redress the social, political and economic imbalance caused by statelessness and exclusion based on nationality *must* break free of this bond if it is completely to embody the spirit of Dahl's "System Y". This may prove a most difficult undertaking, but "citizenship is nothing if not a pliable concept"<sup>684</sup>.

Rubio-Marín and Bosniak both highlight the considerable limitations of traditional citizenship discourse most helpfully, further illustrating that the State is not best placed to counteract the problem of unequal status. Of the two, Bosniak is the least hopeful of reconciliation and inclusion. Despite lengthy discussions of different formulations of citizenship, her final observations indicate that she sees integration as a lost cause, self-defeating and impossible. She states:

"the quest for unmitigated inclusion within the community can therefore serve as a regulative ideal, but in actuality, such inclusion is a fantasy... However, ostensibly committed we are to norms of universality, we liberal national subjects are chronically divided over the proper location of boundaries – boundaries of responsibility and boundaries of belonging. It is

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<sup>684</sup> Bosniak at p.36.

precisely these divisions that are at stake in our debates over the institutions and practices and experiences we have come to call citizenship”<sup>685</sup>.

Thus Bosniak appreciates that those who seek to change the traditional citizenship paradigm face opposition,<sup>686</sup> but does not believe that fundamental change is possible at either State, or other, levels. The outlook, would, according to her, be bleak for stateless individuals and other aliens resident in the Union, whose position is altogether weaker than those third-country nationals who enjoy quasi-citizenship rights under the various bilateral agreements between Union Member States and their home countries, or who enjoy an elevated status under Directive 2003/109.

Rubio-Marín takes a more holistic approach to inclusion. Highlighting the danger that, where there currently is tolerance for inclusion, there is a restriction insofar as political inclusion is concerned<sup>687</sup>, it is, nonetheless the case that her view of inclusion is of *complete* integration. Although her comments pertain to the domestic arena, she raises a particular difficulty facing States that may not, in a Union setting, be applicable, adding weight to the claim that the Union is not only suited to this project, but that it is incumbent on it to at least try. Rubio-Marín’s concerns are that:

“imposing ‘citizen duties’ on aliens, even if not directly prohibited, is practically inefficient because such duties require, for their effective fulfilment, a ‘loyalty’ bond to the political community that cannot be expected from either foreigners or dual citizens”<sup>688</sup>,

even though she concedes that the exact nature of duties may be easily fulfilled<sup>689</sup> (law obedience, payment of taxes, jury service etc.). Fundamentally for States this is a problem – even though resident aliens may be more than capable of fulfilling each of the ‘citizen-duty’ requirements, the popular perception may well remain that they are

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<sup>685</sup> *ibid.*, at p.140.

<sup>686</sup> *ibid.*, at p.36.

<sup>687</sup> Rubio-Marín, p.43.

<sup>688</sup> *ibid.*, p.51.

<sup>689</sup> *ibid.*, p.52.

unable to do so: in such a way, nationality retains both its mystique and its specialness. However, for a multi-dimensional and broader-focussed polity, one that juggles several ideas of 'self' and yet still continues to function and evolve, the notion of 'citizen duties' is, or should be, far easier to reconcile. Precisely because of its international make-up, it is much more difficult to demand a "'loyalty' bond": instead, I would argue, there is a presumption that people reconcile obedience to Union laws with the benefits (economic, social and political) they receive in return. Therefore, as there is no "'loyalty' bond" as such for current Union citizens, extending Union citizenship to incorporate third-country nationals, the stateless and other resident aliens should engender far fewer complications than would arise in the national domain.

Shifting to a rights and residence-based formulation, with supporting documentation and passport rights, is also supported by Weiler, who insists that overcoming traditional, nationality-centred preconceptions of citizenship would enable such factors as shared values, understanding, rights, societal duties, obligations and a shared intellectual culture, all things that can be fostered by co-existence in the same surroundings, to come to the fore. Reconstructing Union citizenship would appear to provide a better forum for the expression of these values than the nation state can hope to: the divisive tensions existing at the State level, while receiving an international expression in European parliamentary election results, have yet to develop into popular expression in the Union. Weiler asserts that:

"the Union belongs to, is composed of, citizens who *by definition* do not share the same nationality. The substance of membership ... is in a commitment to the shared values of the Union as expressed in its constituent documents, a commitment *inter alia*, to the duties and rights of a civic society covering discrete areas of public life, a commitment to membership in a polity which privileges exactly the opposites of nationalism – those human features which transcend the differences of organic ethno-culturalism"<sup>690</sup>.

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<sup>690</sup> Weiler, in La Torre, at p.16.

Thus, like Kostakopoulou<sup>691</sup> (who has maintained that third-country nationals as active members of the polity warrant recognition), he sets forth a position that exposes the EU's position as internally inconsistent and suggests that the aspects of daily life common to all residents in the Union would be sufficient to unite Union citizens together, irrespective of their underlying nationalities.

Much literature focuses on one or the other, but not on both as equally important factors. For instance, Habermas has charted the development of what he calls "European Civil Rights"<sup>692</sup> while residence as the key to inclusion has been propounded elsewhere. Residence on its own (although often justified as a requirement of democratic legitimacy) is not a guaranteed method of extending citizenship in a polity: some State actors might extend the period of residence before citizenship can be acquired to such an extent that its acquisition is beyond the reach of the average individual. What of a citizenship predicated on rights? The existence of rights is useless without a guarantee of the right to maintain residence, as some Turkish worker beneficiaries of bilateral agreements with the Union can testify. The twinning of these notions is novel and should overcome the potential criticisms that Rubio-Marín suggests exist with a purely rights based model, that:

“a mere rights-based membership might not prove to be a sufficient link to bind people together, especially in times when few duties are specifically required from national citizens anyway. Feelings of belonging, exclusiveness, solidarity and sacrifice can be of extreme importance to encourage civic virtue and the responsible exercise of rights and freedoms”<sup>693</sup>.

By knitting both grounds for citizenship together the features that she calls for can be afforded the time to evolve.

Nonetheless, the foundations proposed are broad and potentially far more inclusive than would be workable, Reference to Guild is, therefore, at this juncture very

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<sup>691</sup> *Inter alia*, Kostakopoulou, 2008, at p.162, 2007 at p.643- , 2001b, at p.193 etc.

<sup>692</sup> Habermas, 1995, in Guild, 2000, at p.71.

<sup>693</sup> Rubio-Marín, 2000, at p.100.

useful. She outlines that “it is only against the background of who ‘belongs’ in law to the state that one can determine who the ‘other’ is”<sup>694</sup>. Apart from immediately associating this sentiment with the Union rather than the State, it is suggested that this determination actually needs to be *inverted*. Instead of defining who belongs, a rights and residence based view would do better by determining the *other*: whoever remains would be counted a Union citizen.

#### MULTICULTURALISM IN THE UNION

Having raised the issue of internal multiculturalist divisions in the States we must, of course, ask, is there a mirror-image at Union level that would threaten its ongoing activity? The EU has almost completed its sixth decade. Far from seeing itself as late middle-aged, this political behemoth has spent the past decade pursuing a radical course of development and expansion (in membership and policy aims), increasing its foreign visibility and diplomatic presence. Taken together these endeavours suggest that the Union sees itself as an inchoate polity rather than a settled club. The knock-on effect of these expansions has been an inevitable increase in traffic, (people and goods), between States, causing greater opportunities for exposure to new experiences and cultures. Indigenous minority groups have been afforded opportunities to expand and form conclaves, becoming politically more outspoken (e.g., the *sans papiers* in France) and, simultaneously, increasingly isolated (e.g., the Roma community). The inevitable result has caused internal civil disquiet and, in the context of France, international scrutiny and criticism.

Membership expansion, largely eastward, almost doubled the Union’s make-up resulting in a Union with a radically altered ethnic and cultural make-up. The East/West, Slavic/Greco-Roman dichotomy that resulted proved contentious. Differences that seemed unimportant when acceding to an economic and political co-operative, had considerable consequences when the free movement rights for workers<sup>695</sup> concomitant with membership were utilised. The hostility that resulted, perhaps

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<sup>694</sup> Guild, 2004, at p.3-4.

<sup>695</sup> E.g., Art.39 ECT, now Art.45 TFEU.

whipped into fervour by tabloid news purveyors<sup>696</sup>, received an outward manifestation at the Union level in European Parliamentary elections, wherein extremist parties received an increase in support. For example, in the UK the BNP<sup>697</sup> saw a considerable increase in its support between the 2004 and 2009<sup>698</sup> European elections, particularly worrying at a time when overall European electoral turnout has steadily decreased<sup>699</sup>. An increase in support for radical parties demonstrates an unwelcome anti-integration trend for the Union, even if such an increase does not result in mass representation of that element within the European Parliament itself<sup>700</sup>.

Following both recent rounds of accession<sup>701</sup> (and the possibility of future Turkish or Serbian accession to the Union), scepticism on the part of the older Members about maintaining a culturally diverse European cohort has been increasingly evident. France's actions have demonstrated clear hostility to accepting the full breadth of cultures found in the modern Union: tensions between the former French President, Nicholas Sarkozy, and the European institutions over the expulsion of (illegal) immigrant Roma communities<sup>702</sup> came to a head in September 2010 at a summit

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<sup>696</sup> See, for example the reaction of *The Sun* newspapers to the arrival of Polish migrants in April 2008 [www.thesun.co.uk/sol/homepage/news/1101165/First-Poles-Arrive-in-UK-2004-EU-opened-doors.html](http://www.thesun.co.uk/sol/homepage/news/1101165/First-Poles-Arrive-in-UK-2004-EU-opened-doors.html), last accessed 09/04/12.

<sup>697</sup> British National Party.

<sup>698</sup> [www.europarl.org.uk/section/european-elections/results-2009-european-elections-uk](http://www.europarl.org.uk/section/european-elections/results-2009-european-elections-uk) The official figures record that the BNP secured 808,201 votes in 2004 which increased by more than 16% to 943,598 in 2009. The UK was not alone in delivering such results, which speaks to a more widely-felt dissatisfaction with societal construction than politicians would, perhaps, be prepared to credit. Only two regions of the UK reversed this trend for increased support: the North West and Yorkshire and the Humber.

<sup>699</sup> [www.euractiv.com/en/elections/european-parliament-elections-2004-results/article-117482](http://www.euractiv.com/en/elections/european-parliament-elections-2004-results/article-117482), last accessed 09/04/12.

<sup>700</sup> The BNP has only 2 seats in the European Parliament to show for its increase in support.

<sup>701</sup> And with Croatia's Accession Treaty having been signed in December 2011.

<sup>702</sup> [www.guardian.co.uk/world/gallery/2010/aug/20/roma-france](http://www.guardian.co.uk/world/gallery/2010/aug/20/roma-france) last accessed 09/04/12.

intended to craft a unified European foreign policy. This ugly squabble, led to France being upbraided before the European Parliament and is not the only example of the problems overshadowing Europe's future: in such countries as the UK there were civil disputes when the BNP and EDL<sup>703</sup> marched through the streets voicing antagonistic opposition to both immigrants and culturally diverse nationals. This reaction is a far cry from the musings of the animals of the Hundred Acre Wood<sup>704</sup>: far from being open (however begrudgingly) to an influx of new people, the BNP and EDL actively seek to deport those who do not, to their minds, belong, even when they are nationals.

The multiculturalist problem facing the Union is an excellent illustration of the fallacy of building such a limited supranational citizenship, where membership of the polity is dominated by the acquisition of nationality. Even where third-country nationals are concerned, having the relevant non-Member State nationality is the key to obtaining certain rights: democratic rights tend to be withheld even from more favoured third-country nationals. In an attempt to reconcile the problems of multiculturalism and the lack of democratic accountability that can ensue, Kymlicka and Bashir address how multi-cultural communities can put aside differences and become a stronger more cohesive whole without sacrificing those aspects of their identities which define them. Addressing democracy (an important aspect of Union life since direct elections for the European Parliament were seen not just as desirable but necessary), they say:

“Any process of democratization that does not make conscious attempts to ensure the fair recognition and representation of diversity will quickly become (and become perceived as) a form of domination by one group over others. To be successful, therefore, the politics of reconciliation must itself be framed in light of ideals of democratic inclusion for a pluralistic society”<sup>705</sup>.

Even entertaining the notion of continuing to deny political rights in a residence-based model of citizenship to all “violates the vital principle of free government, that those

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<sup>703</sup> English Defence League.

<sup>704</sup> See Ch.4.

<sup>705</sup> Kymlicka and Bashir, in Kymlicka and Bashir, at p.5.



who are to be bound by laws ought to have a voice in making them”<sup>706</sup>. Universal enfranchisement is critical to achieving real democracy and is not something that has to be tied to nationality:

“Democracy ... presupposes an assumption of political equality ... [and] that each citizen is as capable as any other of making a public decision, or, more weakly, that there is no one class of citizens that can be guaranteed to be superior at making public decisions”<sup>707</sup>.

With such a realisation it becomes imperative to extend participatory political rights to Member State citizens, third-country nationals, refugees *and* the stateless<sup>708</sup>: by so doing the EU would become a model of democratic inclusion and a paragon for other supranational organisations to follow in future, as well as a pioneer in novel citizenship discourse.

The variation in cultures spread across the Union renders it practically impossible to determine a single ‘identity’ in its conventional sense. However, this is no problem if we are seeking to incorporate all peoples in a citizenship that defies previous expectations. Rather than fearing, as States seem to, that inclusion will lead to fragmentation, it is useful to recall, whether talking about modern or ancient Europe, that:

“Peninsula unity has never been assured. It has been an artificial condition achieved only with effort, fragile to maintain. Any strains imposed upon this unnatural condition normally result in the surfacing of fissile tendencies: the peninsula breaks down into its regional components”<sup>709</sup>.

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<sup>706</sup> Madison, in Held, at p.83.

<sup>707</sup> Weale in, Weale and Nentwich, at p.51.

<sup>708</sup> And Rubio-Marín would also insist on an extension to illegal immigrants.

<sup>709</sup> Fletcher, at p.13.

The Union, like all enterprises, risks failure. However, as a democratic entity that has its own Charter of Fundamental Rights, that is seeking accession to the ECHR and which demands membership of the aforementioned from all its Member States, it is unconscionable that it should neglect third-country nationals and ignore the other 2.6 million resident aliens (legal, illegal, vulnerable or protected), without providing a forum for them to enjoy rights that would be demanded by individuals who engage in its day-to-day life.

Europe has been the scene of a similar multicultural melting pot before. That too was precipitated by expansion and necessitated the simultaneous co-existence of a plethora of cultures, languages and religions. It arose long before Europe was constituted by States in a modern sense and in the wake of a crumbling “European” Empire riven apart by infighting. The Iberian peninsula was the scene of a remarkable feat of management and, in spite of the age being termed the ‘Dark Ages’, was a period of great enlightenment from which the whole continent benefited<sup>710</sup>. Instead of conflict between the ‘alien’ invaders and their indigenous subjects, largely, there was harmony. It is suggested that Al-Andalus under Moorish occupation operated in an equivalent manner to the modern Union but was able to do so by according political and legal status to its subjects, regardless of nationality, religion, or ethnicity. Furthermore, it is possible that lessons can be drawn from that good management, and other successful historical models of citizenship, that could assist modern integration efforts and prevent the Union’s seemingly inevitable stagnation. The rest of this discussion will focus on how the Union can reinterpret supranational citizenship so that it reconciles its internal divisions whilst expanding to provide equality of status to those individuals who warrant its protection.

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<sup>710</sup> Such was the wealth of knowledge in ‘Spain’ at that time that scholars journeyed across Europe in order to benefit from the era’s great teachers. Moorish Spain saw successful glaucoma surgeries, streetlights and toothpaste, unheard of elsewhere.

## Past and Future Intertwined

In the 8<sup>th</sup> century, following the disintegration of the Western Roman Empire<sup>711</sup>, the Iberian Peninsula became the focus of a brief but fierce conflict, followed by steady recovery that led to economic and intellectual stimulation. The following centuries saw sporadic fighting, but a steady increase in mobility, technological development, economic growth and a transfer of skills to the local population from an influx of new citizens. In this way, it can be seen that there are similarities between the ‘State’ created by the Arabs and Berbers and the modern EU. The impression left by Moorish occupation is no doubt more favourable because of its contrast with what came before. When the invading forces crossed the Straits of Gibraltar, they arrived in the kingdom of King Roderic, already plagued by rival claims to the crown resulting in societal instability and upheaval. Visigothic ‘Spain’ was familiar with religious and ethnic apartheid: a string of highly anti-semitic legislation<sup>712</sup> was passed in this era, creating a considerable contrast with the openness that was to follow.

The scope of the territory occupied during seven centuries of Arab rule was not fixed: the borders and peoples caught under Arab rule were, therefore, not fixed in geographical terms and the citizenship that resulted was freed from both ‘nationality’ and geographical constraints as they are understood in modern political discourse. The lack of geographical fixedness makes Al-Andalus an ideal comparator and inspiration for the modern EU: with its candidate states and mechanisms for withdrawal, the scale and cultural make-up of the supranational polity is certainly open to change. The conclusions to be drawn about the running of Andalusian society must be broadly rendered as the sources from which they are drawn are themselves open to criticism of bias<sup>713</sup> and, as a result of the destruction ordered by Ferdinand and Isabella following

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<sup>711</sup> The Empire disintegrated into an East and West half. The Eastern Empire had its seat in Byzantium, surviving well into the 15<sup>th</sup> century. The Western half, however, collapsed almost a millennium before that, late in the 5<sup>th</sup> century. In its wake, Spain came under the influence of the Visigoths.

<sup>712</sup> See Fletcher, at p.24 and Collins, at p.10 and 68.

<sup>713</sup> Biased in that open contemporary criticism of Islam was punishable and, as with any historical source, the author might have sought to flatter potential readers/rulers.

the reconquest<sup>714</sup>, there is little evidence left to corroborate the information they contain. Furthermore, the longevity of Al-Andalusian society makes any conclusions necessarily general: seven centuries of Moorish occupation far exceeds the sixty years of existence that the EU has enjoyed and covers a breadth of occurrences that merit a treatise in their own right. In this respect however, the longevity of Al-Andalus' survival and the fact that its society existed and flourished for so long leads to the inevitable conclusion that the Arabs' actions after their arrival in Spain were such as to prevent the destruction of their conquered lands and overcome the suspicions and civil revolt that are natural when establishing a new polity.

These considerations in mind, it remains clear that the Moors realised a society that would, with today's assumptions and sensitivities factored in, be deemed plural and open. Despite opposition to paganism<sup>715</sup>, the Moors showed remarkable tolerance for different cultures and a desire to reward talent and effort when it was applied. In light of the multiculturalism problems facing various of the Member States, the Moorish success in establishing a positively cosmopolitan society is a cause for optimism about the possibilities for the future direction and management of the Union. Moreover, they demonstrated that a polity can be run without causing unwarranted interruption to local level leadership by a process of shrewd politics and Treaty negotiation. Instead of lengthy sieges following invasion, the incoming forces offered simple terms to local leaders: surrender (signing a Treaty to that effect), remain in power but pay taxes to the new regime or pose armed resistance, lose and be slaughtered wholesale<sup>716</sup>. On the surface this situation does not apply to the EU, whose policy initiatives are not enforced under threat of armed force. However, there are clear parallels in that Treaty negotiation involving a reciprocal give and take occurs on a regular basis in the Union and, in both instances, those who ultimately gain the most are the citizens<sup>717</sup>.

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<sup>714</sup> Including burning the books contained in the great library in Cordoba.

<sup>715</sup> See Ch.1.

<sup>716</sup> A notable example of this policy, for whom records survive, was Theodemir.

Theodemir was a lord of seven Southern towns, including Alicante. He signed a Treaty with the Moors that, *inter alia*, imposed a requirement of payment of taxation (in money and in kind) and not to harbour deserters. Fletcher at p.18, Collins, at p.39-40.

<sup>717</sup> This parallel could appear to be a stretch, especially as official citizenship occupies only those Treaties created in the latter third of the Union's existence. However, as was

By utilising a pre-existing political framework, the Moors ensured they were able to implement a course of social and political change without having to recreate institutions and administrative procedures or appoint new personnel, consequently circumventing potential alienation of their new subjects during a period of transition. Fostering a spirit of co-operation between overlords and the pre-existing political élites by allowing them to remain in place enabled the Moors to begin a process of pluralism that encouraged the competent and capable to engage in the new nation and culminated in transforming Al-Andalus into the bright centre of the continent. Irrespective of background and ethnic or cultural tradition, the new society was inclusive (even a few women shone alongside the Moors) and, were this spirit of mutual appreciation to be replicated in the modern EU, it too could be the focus of a similar transformation. Effectively, by modernising Union citizenship in a Dahl-esque fashion, so that it is divested of its nationality robes, the Union could encourage more active participation in Union life by a wider range of third-country nationals, Member State nationals, refugees, stateless persons, and (more controversially) even otherwise illegal immigrants<sup>718</sup>, all on the basis of contribution to Union life, in whatever guise. Currently, some third-country nationals are included in the Union fold to a limited degree, largely on the basis of their economic contributions: the manifestation suggested here would significantly increase that proportion.

The essential features needed for such a transformation are all present: a set of principles, or freedoms, has formed the backbone of Union policy since its inception and has been steadfastly and steadily nurtured by the European Courts in a spirit of consolidation and integration. In order for a new conception of Union citizenship to fulfil the consociational role to which it aspires, it must look to some of the beneficial

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illustrated in Ch.2, prior to 1992 there were significant aspects of the Treaties that directly benefitted the individual, potentially beyond the scope of the Member States' intention.

<sup>718</sup> Rubio-Marín emphasises their inclusion, although she does so from the perspective of *national* citizenship. The solid foundation for her assertion is that a 'fairness' test demands that their contribution and feeling of belonging to society is seen to countermand the illegality of their actions (they have committed a 'crime' impossible for nationals to replicate) and weigh in their favour to grant them full social, political and economic inclusion. Rubio-Marín, at p.82-98.

actions of the Moors in recognising both the validity of, and opportunities offered by, different cultures and allowing them room to flourish alongside one another. Al-Andalus' meritocracy and the encouragement it gave to individual participation, growth and societal development was achieved by setting aside the traditional constraints of ethnicity and geographically contained citizenships. It also resulted in considerable social mobility, a rise in education and living standards and both personal and economic growth, the rewards of which were a boon to the State. The Union aspires to achieve all of these benefits in its own right, which serves to reaffirm Al-Andalus' role as a historical standard-bearer in citizenship's evolution. When combined with the positive aspects of both republican and liberal citizenship models<sup>719</sup>, history appears to offer many lessons for citizenship's future direction: the discussion has come full circle.

The Athenian notion of civic virtue, wherein "individuals could only properly fulfil themselves and live honourably as citizens in and through the *polis*; for ethics and politics were merged in the life of the political community"<sup>720</sup>, reminds us that participation in governmental affairs is pivotal to the role of citizen. Many third-country nationals and the stateless are deprived of this opportunity. Expanding the scope of Union citizenship to encompass all those bound by the Union's edicts (third-country nationals, stateless and nationals alike) would best create a notion of *civic virtue* to a populous that has proven uninterested in and apathetic to European affairs. Rather than a dichotomy between full-blooded citizens and denizens, a residence or domicile *and* rights-based citizenship would invigorate European discussion and debate and pursue a course of integration that would follow the ECJ's developmental path and "sustain social cohesion through characteristically Continental European policies"<sup>721</sup>.

When we consider that "EU law impacts directly on citizens ... and requires their acknowledgement of it as binding on them, and therefore their recognition of the EU as a rightful source of valid law"<sup>722</sup>, it becomes clear that citizens must be placed at the core of the Union, irrespective of their individual nationalities. In so doing, nationality's centrality to the premise of citizenship would cease and the focus can be

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<sup>719</sup> See Ch.1 in the context of Revolutionary France, Ancient Greece and Rome.

<sup>720</sup> Held, at p.14.

<sup>721</sup> Castle-Kanerora and Jordan, in Bellamy and Warleigh, at p.128.

<sup>722</sup> Beetham and Lord, in Weale and Nentwich, at p.17.

transferred to residence, or domicile (as advocated by, *inter alia*, Kostakopoulou), or another factor altogether. The volume of Union citizens would increase immediately. The EU would immediately be recognised as a “rightful source of valid law” and, at a stroke, the accusations of democratic deficit would be far reduced as all those affected by it would have a say in its running. Moreover, by withdrawing the geographical (or, in some instances, ethnic) reliance on defining citizenship as it currently stands in Art.20, the EU would become more inclusive, giving more of those affected by Union decisions both a say and a stake in the European polity. This goal has yet to be achieved. A bold strategem is now called for, and follows.

### **Union Citizenship for the 21<sup>st</sup> Century**

Whilst there are many positive features of Union citizenship, such as the right of free movement, the existence of political and economic rights and family rights allowing non-economic actors to travel with their active counterparts, there are also debilitating limitations. Principal among these is the narrow wording of the citizenship article itself and the restrictive scope of the citizenship-related legislation that flows from it. Although the nationality requirement can be explained by the Member States’ preoccupation with protecting their sovereign identities, it nonetheless prevents Union citizenship from achieving its potential. It is interesting to note that the Union currently entertains a stratified notion of citizenship: the first-class citizens are those formally recognised as such, its second class would be those third-country nationals who benefit from the Schengen Agreement, Directive 2003/109, or the multitudinous bilateral agreements, while the third-class, the least valued, most vulnerable and least represented element of the Union, would be all the Union’s other resident aliens.

The most timely illustration of this caste system comes from within the Union. Currently, Croatian citizens residing in the Union as third-country nationals fall into the third or second strata. Yet, such is the paradox of rigidity and fluidity of current Union citizenship, come Croatian accession in 2013, Croats will find themselves elevated to first class. Shachar calls this “the Birthright Lottery”, where an accident of birth can fundamentally affect one’s standing and rights in relation to others. Thus, it seems that,

like its constituent States, the Union ascribes to the “basic assumption of scarcity: only a limited pool of individuals can automatically acquire citizenship in a given polity”<sup>723</sup>. While Shachar debates citizenship as an element of property and finds current understandings lacking, she provides an important idea that, when combined with attributes of previous models of citizenship, may prove very useful: citizenship as property. Property can be bought and sold, inherited and transferred, lost and discovered. It has a transferability and flexibility that can be instructive for a modern political right: if Union citizenship took on some of these properties<sup>724</sup>, without the birthright/naturalisation connotation being central to its existence, then Union citizenship would find itself transformed from the elitist entity it currently is into a polity of equals. Fundamentally, it would help to overcome the problem where resident aliens are deemed to have little or no interest in the Union’s running. Indeed, aliens and natives alike “have multiple and variable bonds with overlapping political communities”<sup>725</sup>. It does not follow that retaining citizenship in a third-country (or being denied citizenship of any kind) excludes a claim of interest in the running of the Union, or a right to be considered a citizen at the supranational level. Such an assertion is akin to stating that a Pole resident in Madrid would have no interest in what happened in local government, or that a Croat resident in Germany would not genuinely hold an interest (or deserve a say) in German politics before July 1<sup>st</sup> 2013<sup>726</sup>.

Rights or residence as individual bases of supranational citizenship are not novel<sup>727</sup>, but for the first time the Union seems to have the apparatus to make the twinning of them a reality. The formalisation of the Charter of Fundamental Rights (‘the Charter’) imparted to the Union a codification of rights and instilled a very real obligation to deal fairly with its subjects. The significance of the Charter for third-country nationals and other aliens is not immediately obvious, given that it specifically defines citizenship as holding nationality of a Member State, but the Lisbon Treaty’s

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<sup>723</sup> Shachar, at p.7.

<sup>724</sup> Or in some respects, expanded to include them.

<sup>725</sup> Kostakopoulou, 2001b, at p.180.

<sup>726</sup> The proposed date of formal Croatian accession to the Union.

[www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/EN/genaff/126686.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/genaff/126686.pdf)  
last accessed 09/04/12.

<sup>727</sup> *inter alia* Kostakopoulou and Rubio-Marín have explored this possibility.



promise of Union accession to the ECHR and the universality of *human* rights leaves it difficult for the Union to delimit the scope of the rights it subscribes to solely to Member State nationals<sup>728</sup>. The Charter's elevation to Treaty status (under Lisbon) and the ECtHR's recognition of it in *Scoppola (No.2)* as a minimum standard of protection make it a useful tool for third-country nationals' and other aliens' Union recognition: human rights truly are universal, unless the Union is prepared to fall into a moral vacuum wherein, to paraphrase Orwell<sup>729</sup>, all humans are equal but some are more equal than others. As an international actor the Union would do well not only to observe the former maxim, but to be seen to observe it. Revitalising Union citizenship in the manner envisaged below would permit whole new categories of people to benefit from the Charter, albeit that the definition of citizenship contained within it (and, for that matter, as it is understood according to Directive 2004/38) would have to be altered accordingly.

The Charter assures citizens that they have the right to pursue a life free from discrimination, and yet, Union citizenship is innately discriminatory. Moreover, within the Union, the disparity of treatment accorded because of different naturalisation and nationality rules creates much uncertainty for immigrant workers and their families<sup>730</sup>. Obvious accusations can be made concerning reliance in the Charter as a means of implementing a new model: it explicitly defines Union citizens as Member State nationals and its references to third-country nationals are weak, to the stateless, non-existent. In addition, the only specific "citizenship" section, Chapter V, contains a paucity of rights when compared to the Marshallian expectation of citizens' rights. Nonetheless, the overall content of the Charter amounts to what we think of as citizenship rights, irrespective of the labels that have been applied. However, it is not proposed that the Charter *per se* is the instrument that specifically provides the means to expand our understanding and expectations of supranational citizenship. Rather, the

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<sup>728</sup> Moreover, by effecting the changes outlined below, the Union would be facilitating an idea encapsulated in Article 12(2) of the International Covenant on Civil and Political Rights, which calls for the individual to have the freedom to "leave any country, including his own". The Union would not necessarily give rise to this right on a pan-global scale, but would enable movement within in its own, considerable borders.

<sup>729</sup> Orwell, 1945.

<sup>730</sup> Weil, in Cessarini and Fulbrook, at p.85.

*ideals* encapsulated in the Charter (stripped away from the reliance on nationality, which is itself derived directly from the citizenship article) and which echo those of the ECHR, provide a potential scaffold for a new model, especially when coupled with the Union's other citizen-oriented legislation.

Citizenship derived from residence, based on rights and following a framework that already exists in Union legislation provides, it is suggested, the best answer to the Union's legitimacy shortcomings, provided that it is fully fleshed with economic, social and political aspects. Weale would support such a formulation, if it recognised that "in a democracy important public decisions on questions of law and policy depend, directly or indirectly, upon public opinion formally expressed by citizens of the community"<sup>731</sup>.

The new model of citizenship that follows must meet the following challenges: it must include free movement rights for all newly construed citizens; it must provide the stateless with documentation enabling them to enjoy societal inclusion at all levels; it must continue to include all those who are currently Union citizens on the same terms as the *new* citizens. The new model must also foster integration between individuals if it is to avoid the pitfalls of apathy and multicultural division which currently undermine citizenship at the national level. At the same time, it must be sufficiently open that it encourages the vulnerable aliens already resident to identify themselves and become part of the new society. It must do all these things (and potentially more) without alienating the Member States, devolving into Fortress Europe or opening the floodgates to mass migration from individuals whose circumstances may be pitiable, but who would become dependent on the Union in such a way that they eventually destroy it.

### *A Vision for the Future*

The model of citizenship discussed below first requires explanation of a few key terms. Henceforth, the term 'aliens' will be used to refer to all stateless individuals,

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<sup>731</sup> Weale, 1999, at p.14.

refugees and asylum-seekers, ‘long-term residents’ will apply to those third-country nationals already benefitting from either Directive 2003/109 or other bilateral agreements, while ‘third-country nationals’ will refer to other non-Member State individuals either resident in, or incoming to, the Union. The current version of Union citizenship will be referred to as “Mark 1” and the proposed conception as ‘Mark 2’.

The strong rights-and-residence-based approach to Mark 2 citizenship proposed here necessarily faces obstacles: it cannot simply be provided to every resident on Union territory regardless of the duration of their stay or input to the community. Holiday makers would, by such a construction, find themselves ‘citizens’ of the Union by virtue of a two-week presence<sup>732</sup>. Such a fluid construction of citizenship is a step too far and, yet, it is not too far removed from Mark 1 citizenship: overnight the status of new States’ citizens changes from non-citizen to citizen merely because of accession, which will be the reality for Croatians in 2013. Such a lackadaisical approach to citizenship is neither likely to be acceptable to the States nor desirable for citizens or travellers. If Union citizenship is to be truly meaningful it cannot be something unwittingly obtained by the mere act of “passing through” the Union *en route* to pastures new: that would render it trivial, frivolous and almost impossible to oversee.

On a cautionary note, residence as a grounds for citizenship may be forestalled by a fundamental and devastating problem: unlike third-country nationals, refugees, illegal immigrants<sup>733</sup> and the stateless are often unable to show lawful residence in a State, or able to present relevant identification documentation upon demand, a difficulty which Mark 2 citizenship must, and will, overcome. Estonia effectively demonstrates<sup>734</sup>, that stateless individuals can reside effectively, making considerable contribution to society, without posing a threat to national identity. Their inclusion in the Mark 2

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<sup>732</sup> And yet, as economic across contributing to overall prosperity, there might be a case for them to get something.

<sup>733</sup> Illegal immigrants are at the core of Rubio-Marín’s call for a broader interpretation of nationality. The reasons she gives for incorporating illegal immigrants into nationality are varied and democratically sound, but she does so from a perspective confined to the nation state as the arena of citizen activity.

<sup>734</sup> And is also the case in France with the *sans papiers*, where concerted efforts have enabled people to continue to reside without crippling fear of the authorities.

citizenship fold would be welcomed by fellow nationals who reject their social exclusion. Therefore, it is suggested that, under the novel paradigm, the stateless could continue to live almost exactly as they do now, but with additional legal protections offered by the Union allowing them to pursue family life, education, healthcare and political participation in much the same way that Mark 1 citizens do currently.

In such a way, they would evolve into a visible and effective social and political group, able to affect the course of their lives and achieve the social and economic mobility that is, in many ways, denied them under the current citizenship formulation. The benefits of this social inclusion should be obvious. Rubio-Marín suggests that “the idea that people ‘should belong to one state and one state only’ seems increasingly outdated”<sup>735</sup> and she is correct. But her arguments applied to horizontal relationships in Germany and the USA, rather than in a vertical context. I suggest that the feeling behind this statement applies equally to that domain. Nations have jealously maintained a hold on their nationals and choked off avenues of access wherever possible. The ECJ has intervened and wrested some of the control from the Member States, but, as the divisions over multiculturalism suggest, Mark 1 citizenship remains manacled by its dependence on nationality. If Union citizenship is destined to have fundamental status, as the ECJ would suggest<sup>736</sup>, it is essential that the weakest elements of society are equally robustly protected as those who are privileged to possess Member State nationality, as Dahl would posit is the case in ‘System Y’ States. Mark 2 citizenship would transform the Union into a Y-system.

The Estonian example is again relevant: the authorities there recognise the stateless and incorporate them into their legal order, but the absence of identification documents renders them prisoners to their local environment unless they become illegal immigrants elsewhere, at which point they will still face many, if not more, of the restrictions that dog their ordinary lives. Mark 2 citizenship, incorporating all resident outsiders on an equal footing with nationals and the more favoured third-country nationals, will require the creation of a new form of bureaucracy, administration, identity documents and active ‘consular centres’ throughout Union territory that will legitimise aliens and present them with the identification, travel and employment

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<sup>735</sup> Rubio-Marín, 2000, at p.128.

<sup>736</sup> *Grzelczyk*.

documentation necessary to enjoy all aspects of Union life without fear of oppression, marginalisation or stigmatisation. These citizenship rights form part of the ideas that modern citizens expect from their citizenship<sup>737</sup> – in order to achieve legitimacy, these elements are essential constituents of novel citizenship. We are not reinventing the wheel: Union citizenship has been in existence quite successfully for two decades. The goal is not to create something altogether unprecedented. As the previous chapters have demonstrated, both the Union and the Court have worked hard to pursue rights-giving enterprise. Citizenship already provides social, economic and political rights: these things merely need to be extended to Mark 2 citizens. A radical overhaul of the system is not called for, rather a reimagining is called for, enabling the chrysalis of Mark 1 citizenship to transform into something more befitting both the Marshallian and Dahl-esque visions.

### *Triggering Mark 2 Citizenship*

The bases of Mark 2 citizenship and the aspirations for its accomplishments have now been outlined. More concrete elements of the model remain to be elucidated. Principal among these is how Mark 2 citizenship would be triggered. Unlike Mark 1, which covers all nationals of the Member States as a matter of course (although *McCarthy* suggests that a cross-border element now be a necessary first hurdle for its application), Mark 2 citizenship needs a broader reckoning. Primarily, the sentiment expressed by the ECJ in *Grzelczyk* must remain sacrosanct: Union citizenship *must* be a fundamental status, but of *Union*, rather than Member State, nationals. Mark 2 citizenship would not impose *McCarthy*-ite limitations: residence in itself would act as the trigger.

Nonetheless, the latter model shares some common ground with its predecessor. Bosniak calls it the “hard outside, soft inside conception”<sup>738</sup>: essentially it means the concept of rigid borders with a fluid notion of the activities occurring within them. The appeal of this idea is that it provides some delimited scope of application for Mark 2 citizenship, whilst allowing the Union to develop a sense of internal solidarity

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<sup>737</sup> See the earlier empirical research analysis.

<sup>738</sup> Bosniak, at p.125.

between all its participants. Whilst this “neat solution to a messy problem”<sup>739</sup> (reconciling the competing national and democratic interests), it is essential to note that the hard/soft concept is a national one being borrowed for a supranational situation. The borders envisaged as ‘hard’ in this theoretical approach to delineating citizenship are not airtight: the Union has plans to grow and may, in unforeseen circumstances, shed members. The broader principle of a democratic foundation for Mark 2 citizenship is what is important as it provides a legitimate, liberal framework for the types of inclusion that will be required.

With Kymlicka and Bashir’s warning about “fair recognition”<sup>740</sup> ringing in our ears, it is nonetheless necessary for our “soft inside” to create three tiers to Mark 2 residence. The first tier encompasses all those currently deemed Union nationals and all those who would continue to be deemed Union nationals under the Mark 1 iteration. For simplicity’s sake this makes sense. Other than the desire not to reduce the number of citizens currently embedded in the Union, it is possible that this first tier will gradually expand to cover all new citizens’ descendants who would be born on Union territory. The second tier of Mark 2 citizenship is more interesting, being composed of the ‘alien’ portion of the novel citizen body. As the most vulnerable group of individuals in the Union, these people would benefit from immediate acquisition of citizenship upon application, as soon as they can demonstrate residence (legal or illegal) in Union territory. The emphasis placed on immediate conferral is essential for this group – only by providing instant acquisition of Mark 2 citizenship for these individuals can they hope to become more deeply integrated in European society. The third tier is that of long-term residents and third-country nationals: students, workers, employers and their respective family members, where residence would again be the passport to enjoyment of Union citizenship. The essential point about these tiers of citizenship is that they do not denote levels or standards of rights protection, merely modes of inclusion.

How are these tiers differentiated from nationality ties? Clearly the first tier could apply to those resident and absent from the Union – however, as the Union only enjoys competence over those affected by aspects of Union law, it can be argued that

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<sup>739</sup> *ibid.*.

<sup>740</sup> Kymlicka and Bashir, in Kymlicka and Bashir, at p.5.

these individuals would, for the purposes of Union citizenship, be unlikely to fall within its ambit. Residence is the crucial factor for both tiers two and three, although illegality of that residence will not automatically be a bar to enjoyment of Mark 2 rights.

For those in the third tier, there remains an outstanding issue, one of timing. A strong liberal conception of civil society would have it that all entrants to the society, whatever its scope, should immediately upon entering its domain be entitled to all the rights it has to offer. Rubio-Marín does not go as far as this in her theory, but offers a system whereby the onset of those rights is merely delayed whilst the State determines whether to include them<sup>741</sup>, whilst Bauböck proposes that resident aliens should be “granted citizen rights to acquire practical experience with the political and legal systems before they express a relevant commitment to them”<sup>742</sup>. Both perspectives are too limited to have relevant application at the supranational level: in Bauböck’s case the notion of withholding rights before achieving familiarity with a legal system could introduce an unnecessary hierarchy into Mark 2 citizenship, all the more so as first tier citizens may be extremely unfamiliar with the Union’s workings but would, nonetheless continue to enjoy unfettered enjoyment of their rights. It is suggested here that the provisions of Directive 2004/38 concerning residence would, if applied on a pan-Union scale to *all* residents, provide a suitable compromise.

Utilising the terms of the Directive, entrants to the Union from beyond the external borders would enjoy a limited right of residence for up to three months, echoing Art.6 of the Directive, upon production of a valid travel document (Art.5) issued in their state of origin. In order to remain for longer than the initial three month period, third tier entrants to the Union would have to meet the conditions of Art.7 (just as current citizens are obliged to do when they seek to invoke free movement rights), realistically unlikely to cause much of a problem as third-country nationals seeking to engage in longer term residence in Union territory will almost certainly be looking for, or in possession of, employment or a place in an educational establishment. The conditions attached to the Directive concerning not becoming a burden on the host State would also serve as a vital safeguard, preventing Mark 2 citizenship becoming an unstoppable right of access to the Union for all comers.

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<sup>741</sup> Bosniak, at p.131.

<sup>742</sup> Rubio-Marín, at p.122.

The danger of this residence-and-rights-based approach is that the external frontiers of the Union will be besieged by hopeful migrants seeking entry and a 'European' passport. To abate these concerns we must recall that there are already controls limiting immigration: a Union initiative to co-ordinate these policies may be required to achieve a truly universal approach, but as there is already a *de facto* control mechanism in place, just as is the case with migration between States under Directive 2004/38<sup>743</sup>, it would be over-pessimistic to see the revisions to the Mark 1 model as leading to an unstoppable influx of expectant migrants. However, the extension of citizenship status with its concomitant rights beyond the current scope operates on the Al-Andalusian premise that, if an individual has a contribution to make to society, it should be rewarded.

### *Rights and Obligations*

At the outset of this thesis, Marshall's theory of citizenship was explored in detail. His pronouncement that citizenship consists of a triumvirate of social, political and economic rights has continued to strike a chord in modern discourse and is the standard by which western liberal democratic states in the latter part of the 20<sup>th</sup> and early 21<sup>st</sup> centuries have judged emanations of citizenship. We must return to his pronouncement that:

"Citizenship is a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed."<sup>744</sup>

It is this vision which must lie at the heart of Mark 2 citizenship. The biggest flaw with Mark 1 citizenship, other than the Court's piecemeal expansion and diminution of the rights at its core, is that it does not speak of recognition of individuals as full members of society. Granted, the society is somewhat larger than we might find at almost any nation level but even modern cases like *Dereci*, *McCarthy* and *Förster* illustrate that, whether those at the core of an issue are resident aliens or Member State

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<sup>743</sup> See e.g., Arts.5, 6 & 7 Directive 2004/38.

<sup>744</sup> Marshall, at p.84.



nationals, there can be no guarantee that they will be able to enforce the rights they expect that they have. Therefore, Mark 2 citizenship must demonstrate that the Union recognises its active participants as “full members of the community”, with the result that they are all treated equally in relation to rights and duties. Consequently, Mark 2 citizenship must assign rights, and expect reciprocal duties from its subjects. Again, this requirement is Marshallian in nature, but to all intents and purposes is a feature of Mark 1 citizenship that is distinctly lacking.

In each conception of citizenship discussed in the opening chapter, *active* forms of citizenship have all entailed political rights. Bosniak writes that:

“the status of non-citizens, or aliens, is a product of citizenship’s exclusionary regime: these are people who are legally defined as lacking in full national membership, and who are subject to certain disabilities, including lack of political rights and potential deportation”<sup>745</sup>,

and it is precisely this difficulty that affects the current manifestation and must be shed under the new rendering.

The full array of political, social and economic rights (such as access to social benefits) must be accorded under the new formulation, including the right to vote in municipal and European elections (replicating those rights contained in Art.20(2) TFEU and replicated in the Charter under Arts.39 and 40. Fortunately, as rights have been an area well-developed under the Union legal order, the new citizens would be well provided for.

The idea of reciprocity is something nation states have well-developed, hence Bauböck’s support for providing would-be citizens with the opportunity to learn the ways of their new home before “committing to become part of it”. Legal orders and the idea of community, both entail some notion of obligation to others. In both Greek and Roman notions of citizenship the notion of reciprocity, or *civic virtue*, was central to the entire premise. Without civic virtue, neither formulation would have flourished: one of

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<sup>745</sup> Bosniak, at p.34.

the problems which has arguably stunted the development of Union citizenship is that it lacks a definite sense of direction concerning its expectations of those who possess it. Speaking in London in February 2012, Spaventa quipped “After twenty years, we still don’t know what citizenship is”<sup>746</sup>.

Imposing reciprocal duties for Mark 2 citizens akin to those expected under the Athenian and Roman models would help to foster a sense of solidarity between citizens and would serve to demonstrate a real effort to integrate in society. In such a way, a more rounded notion of citizenship would enable the Union to conquer the possible multicultural divisions which affect the nation states. Of course, identifying the type of reciprocal duties we expect Mark 2 citizens to fulfil is more difficult: Athenian conceptions of duties included such things as jury-service<sup>747</sup>, obviously beyond the competence of the Union at this juncture. However, whilst participation in the democratic life of a polity is a right, it can also be seen as a burden<sup>748</sup>. In that light, the rights that are afforded of an economic nature may also be seen as burdens: enjoyment of citizenship for longer than a three month period, after having engaged in the free movement rights, presents a burden on the would-be citizen to find and then maintain employment (or sufficient means to support themselves through education) to support themselves *and any dependent family members who migrate with them*. The obligation to support dependents after utilising a free movement right must surely be considered a heavy burden. As the Union is not a federation, there is the potential for future duties to emerge in time, but, it is not altogether surprising that there appears to be a paucity of duties at the moment.

#### *Physical Manifestations of Mark 2 Citizenship*

Citizenship Mark 2 will require the creation of certain physical attributes for those individuals benefitting from it. In turn these creations will also require institutional and administrative changes to the Union in order to make, record and deliver them to Mark 2 citizens. As nationality will no longer be the means by which

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<sup>746</sup> Spaventa, “EU Citizenship” conference, King’s College, London, 24/02/2012.

<sup>747</sup> Dunn, at p.35-7.

<sup>748</sup> Rubio-Marín, at p.239.

citizenship is triggered, it is obvious that some other means of proof of citizenship is required. Many European countries are familiar with the use of identification cards and the Union could incorporate this in a number of ways for Mark 2 citizens.

For instance, the Union, as discussed in Chapter 2, developed a passport policy which resulted in the European passport as we know it today<sup>749</sup>: it grants Mark 1 citizens a speedy right of transit through Union border controls. This passport would be an essential element of Mark 2 citizenship. However, it must be differentiated from the passports currently utilised through the Union, as they are predicated on nationality. Mark 2 Union passports would have to apply solely within the Union's territory and at its extreme borders, for purposes of entry. Therefore non-Member State nationals would have to maintain their national passports in order to travel beyond Union confines: evidently, Union passports would not provide the stateless with a universal right of free movement, but as this right is intended to be European in nature, the provision of a limited right is a vast improvement on its utter denial. The possession of a 'European' passport would help Mark 2 citizens pursue their right of free movement within Union territory, without distinguishing between them on the arbitrary ground of nationality: contribution to the Union and the notion of civic virtue must be allowed to flourish unencumbered.

More to the point, the development of identifying documentation for Mark 2 citizens is the only way that the most vulnerable group of aliens would be able to pursue their new movement rights. Chapter 4 discussed the movement limitations that trap stateless individuals wherever they happen to be. Mr. Rottmann will face the same difficulty, despite having previously enjoyed Mark 1 citizenship rights. In order to access these rights, the Union would have to introduce some sort of 'Embassy' scheme in each state to facilitate the stateless in applying for recognition, without fear that the local authorities would intervene. The proposal to produce intra-Union specific forms of identification that guarantee movement *on the same basis as current free movement*<sup>750</sup> should have the dual benefit of expanding the scope of rights without the Member States being deluged by hopeful migrants without recourse to pursue their removal in the event they become an unreasonable burden.

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<sup>749</sup> A process initiated in 1975 and completed in 1990.

<sup>750</sup> i.e., the same grounds as Arts.21 & 45 TFEU and as outlined in 2004/38.

By extension, the virtue of the passport (which could be transformed into a simple card) is that it can be used for adults *and* minors, whereas a driving licence has a limited scope of application. However, driving licences are another means of identification which Mark 2 citizens would have to be supplied with upon passing a standardised driving test: just as the passport is intended to provide a means of enabling free movement between the Member States without discrimination, third-country nationals and aliens would have to have an equal opportunity to become entitled to, and subsequently enjoy, this freedom.

Mark 2 citizenship would be utilising one of the successful elements of Roman citizenship in this regard. The Roman Empire instituted the use of documentation as proof of status: upon completion of a period of military service, honourably discharged soldiers were rewarded with a *diploma*<sup>751</sup>, a portable metal plaque, declaring their status to the rest of the world. It permitted a right of free movement throughout the Empire and afforded the beneficiary protections. The benefits of identification were clear to Claudius, who invented the practice, (the citizenship status it extended was much sought after and the absence of the diploma may well have been useful evidence of desertion) and they are instructive in modern terms too. As Chapter 1 indicates, the Romans encountered a wide variety of foreign cultures and nationals (many of whom were conquered races). Enemy combatants were often rewarded for considerable bravery or skill with an offer of citizenship and a considerable proportion accepted the proffer. In modern terms, the Union can use Mark 2 citizenship to extend the same courtesy to third-country nationals on a residential, economic and rights-laden basis.

One issue challenging any proposal for a widening of supranational citizenship, particularly in a post-9/11 world, is that of security. The Romans made their diplomas out of metal – difficult to tamper with. It is suggested that, as many modern nations already require presentation of biometric information before a passport will be presented to an individual, the Union could quite legitimately impose the same condition. Although, there are considerable privacy issues related to the collection, storage and subsequent use of such data, the Union has already made provision for

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<sup>751</sup> An example is exhibited in the Museum of London, having been found in the archaeology of the city.

judicial co-operation in criminal matters<sup>752</sup> and the biometric data collected and used for Mark 2 citizenship's identification purposes could help prevent future criminal activity, proving beneficial to the integrity of the Union as a whole.

The production of new documentation (and documentation that the Union already generates under Mark 1 on a greater scale), and the requirement that Mark 2 citizenship be triggered immediately for aliens will mandate offices and staff: not only would expansion of citizenship improve the representative and democratic legitimacy of the Union, a tangential yet significant benefit would also be stimulation to the employment market and additional revenues that could be generated.

### *The Balance Sheet*

The modified and expanded vision of Union citizenship offered above provides a novel platform for fulsome inclusion of Union residents of whatever nature. While other, nationally-based, models of citizenship have called for greater expansion, a similar notion for the Union platform has yet to be realised. While authors such as Kostakopoulou have propounded a domicile centred notion of Union citizenship, the model proposed here breaks new ground by investing the notion of residence with specific rights coupled with duties and tying citizenship to the provision of a specific, localised and rights-giving instrument: an internal passport for *all* resident aliens, including the stateless. Moreover, by utilising pre-existing legislation, the new model is able to build upon the Union's own values.

I do not claim that implementing citizenship of the type outlined here would be uncontroversial, easy or without specific difficulties. Without careful oversight, there is the danger that new residents could arrive and move between states every three months to avoid their obligations. Alternatively, too restrictive implementation could render the stateless in a situation little better than that they endure now: three months to find employment having been in an extremely vulnerable position may not be sufficient. Nonetheless, formalising their status, to whatever degree, provides them with more rights at the supranational level than they currently possess.

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<sup>752</sup> E.g., the European Arrest Warrant.

There are dangers to a novel approach. The hard exterior/soft interior approach taken here can be poorly applied: effectively the Union could become Fortress Europe, allowing people to exit but massively restricting entrance – largely defeating the purpose of revisiting the concept in the first place. Even were this not so, the Member States are likely to oppose any such alteration. The years that elapsed between the Tampere Council proposal to incorporate resident third-country nationals and the restrictive Directive that ensued were an indication of their reluctance to add to the polity, and the scale of expansion likely to follow from this revision is infinitely greater than was realised by that Directive. Furthermore, current Union citizens may be unwilling to pay for the documentation proposed as an essential element of Mark 2 citizenship: although the documents may not be too costly to acquire, there would be an inevitable amount of bureaucracy to complete that those who already enjoy rights may be disinclined to deal with.

Where does this leave the balance sheet? Whilst the negative connotations *could* be considerable, they are merely hypothetical. The benefits to be gained from modernising Union citizenship in such a way that it is no longer held hostage to nationality requirements are numerous. Whilst the Union is a co-operative of multitudinous States, the rights and benefits it confers are expressly intended to be free from discrimination on the grounds of nationality<sup>753</sup>: all the while it currently discriminates against a host of people precisely on the grounds of nationality. The chief benefit of reconstituting citizenship, then, is one of increased legitimacy. Not only would such a revision bring supranational citizenship closer to Marshall's ideal, it would also enable non-nationals to follow a simple pathway to inclusion in the polity which has a considerable say in governing their daily lives. The democratic ideal would become closer to reality and the democratic deficit plaguing the Union massively reduced.

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<sup>753</sup> Art.18 TFEU.

## Conclusion

This Chapter has built upon the issues outlined in Chapter 4 to highlight the extent of exclusion from Union life. It has addressed the various avenues by which that exclusion might be reversed and concluded that the most appropriate arena for correction of the issue is the Union itself. Whilst international instruments exist specifically created to combat some of the exclusion issues outlined, they have yet to prove truly effective. The nation state could be a forum for inclusion, but the nature of the symbiotic relationship between state and national means that states are reluctant to risk diluting the bonds that maintain their cohesion. However, the Union, as an unprecedented forum for international co-operation and integration, stands best placed to find new ways to fuel solidarity and fellow-feeling between disparate individuals.

The historical development of citizenship as outlined in Chapter 1 provided a useful means of reframing supranational citizenship: the considerable political and economic pressures besetting the Union make it more pressing than ever to assess how the Union must act if it is to ensure continued future cohesion. The democratic and political pretensions of the Union are cast in shadow if the visible manifestations of Union life, i.e., how it governs itself and treats and includes its subjects, are open to criticism.

The Union could develop a novel form of citizenship, with specific documentation affording free movement and access to other rights on a purely internal basis, by utilising pre-existing legislation and carrying it to its logical conclusions. Revising how citizenship is defined would help to ease the problems currently besetting Union citizenship. A construction of citizenship that relies less on nationality and more on inclusion of all those affected by Union life, whether in times of prosperity or hardship, would actually assist the Union's attempts to overcome the economic crisis that threatens to split the Union apart in a most dramatic fashion. By presenting all Union residents with a stake in the polity that plays a considerable role in their lives, the Union will better manage expectation and interests, with the possibility that links between people and mutual understanding will encourage individuals to play a greater role in European society.

Nicholas Sarkozy issued a grave warning by stating that “never has the risk of a disintegration of Europe been so great”<sup>754</sup>, while maintaining that its importance has never before been so apparent. An exclusionary and divisive model of citizenship does little to encourage people to work together and make the sacrifices necessary to ensure the continuation of the European project. A rights-and-residence-based citizenship may not provide the ultimate shield against division, but the Union is more likely to be supported in making difficult decisions, as well as popular ones, if those affected feel that they have been placed at the core of the project and that their interests have, *en masse*, formed part of the deliberative process: the formulation suggested in this chapter would go a considerable way to achieving that goal.

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<sup>754</sup> [www.telegraph.co.uk/finance/financialcrisis/8943635/Cameron-vows-good-deal-for-Britain-in-Europe.html](http://www.telegraph.co.uk/finance/financialcrisis/8943635/Cameron-vows-good-deal-for-Britain-in-Europe.html) last accessed 09/04/12.



## Conclusions

Two roads diverged in a wood, and I –  
I took the one less traveled by,  
And that has made all the difference.

ROBERT FROST

The idea of citizenship has stretched across the millennia. From Ancient Greece to modern European states, its permutations and manifold iterations have been charted and the conclusion to be drawn is that, in its national guise, citizenship is essentially a club. Inwardly it has the appearance of being a uniting force, but externally it is divisive, its purpose being to highlight divergence. It would appear that, even in modern Western liberal democratic states, citizenship is a tool to justify suspicions directed at the unfamiliar. Historically, citizenship has been a mixture of geographical and ethnic ties, yoking together peoples who may originally have had little in common apart from geographical proximity. Thus the original city-State idea of citizenship, as exemplified by Athens or Sparta, grew into a regional and then national idea. Over time, of course, nations grow larger and the ties that bind become mythologised, serving to make certain citizenships more desirable: not only are people proud to hold those citizenships, but it becomes desirable to others outside that group to hold it alongside, or in preference to, their own nationality: a prime example of this is found with the “Green Card Lottery” in the USA.

### *Nationality and Citizenship's Origins*

Nation states benefitted from cultivating the exclusivity of citizenship to the point where it became essential to them<sup>755</sup>, developing a symbiotic relationship that nurtured both parties and provided a system of reciprocal duties combined with rights, so as to engage the individual in the state's identity. This relationship endowed states with legitimacy and the right to govern *how* their subjects engaged in daily life. However, with social evolution the shortcomings of the earliest realisations were exposed and States were obliged to expand *who* they considered their subjects to be. Thus citizenship has grown from an androcentric and limited grouping of individuals to an open, plural and multi-faceted ideal<sup>756</sup>, where nationality and citizenship have come to be viewed as opposite sides of the same coin. This journey was neither fast nor smooth: along the way missteps were made; the illusion as opposed to the realisation of inclusion was achieved (e.g., the distinction between *active* and *passive* French Revolutionary citizenship) long before the modern understanding of what citizenship *can* be was outlined by Marshall.

Ultimately, it has been accepted that, in its national guise at least, in Western liberal democratic Europe, citizenship is composed of three elements: economic, social and political rights mixed with the individual's obligations of obedience to the State. That formula has proven acceptable to states and citizens alike, but it retains an exclusionary air, as non-nationals traditionally have not been afforded the same protections or recognition. Behaviour exhibited by the State towards the individual (or between individuals) that would prove intolerable in a citizen relationship is (often) acceptable when one party is a non-national. The reality is, however, that the nation state is no longer the sole forum for citizenship.

From the ashes of a second World War arose a trading block whose simple objective was to pool resources and, once and for all, prevent any possibility of further conflict and loss of life. In its nascent form, that trading corporatocracy saw individuals less as people than economic units and the notion of 'citizenship' appeared to be the mere fancy of one of its founding fathers. Once notions of citizenship entered into the

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<sup>755</sup> See Miller, 2000.

<sup>756</sup> Even if some States did take longer than others to engage in the concept of a plural society. For example, Switzerland's reluctance to extend the franchise to women.

thinking of both the Community institutions and the subjects whose interests they protected, however, a dynamic, unprecedented forum was presented, with novel possibilities for citizenship to enter a radical stage of evolution and to transcend its former expectations and limitations. The course that was chosen by the Community institutions has been extensively charted here, but the conclusion reached in this thesis is that supranational citizenship has fundamentally failed to reach its potential, or fulfil the expectations of anyone hoping for a novel manifestation of the citizenship idea.

### *Union Citizenship's Growth and Defects*

In this thesis I have examined European citizenship in its various guises. Beginning with the idea that an economic version of citizenship existed before 1992, I have explored the notion that the institutions of the Community gradually expanded it into something more closely resembling Marshall's tripartite model. Even at this early stage, the exclusivity of Community citizenship was clear for all to see: the emphasis placed on only certain categories of Community nationals being able to enjoy this putative form of citizenship (when they were economically active or had engaged in some type of cross-border activity) precluded vast numbers of residents being able to exercise these Union rights. When the Union decided to formalise the entity and make it open to all nationals of the Member States<sup>757</sup>, the hope was that Union citizenship would become open to all. This form of citizenship had social and political rights attached to it and was, through the careful shepherding of the Court, to become applicable to minors, workers, students, those seeking social advantages, those dependent on (or married to) them etc.. In the Court's own words, Union citizenship was "destined to become the fundamental status"<sup>758</sup> of Union nationals. However, it was clear from the outset that the limitations of the nationality view of citizenship had been transferred to the supranational arena. Thus, the same divisive and exclusionary tendencies that define the national model were visible in the Union's manifestation: third-country nationals, in this instance, being left on the outside of the new Union society. In some, limited circumstances, the benefits of Union citizenship have been extended, via relationships with Union citizens, to certain classes of third-country

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<sup>757</sup> Article 17 ECT.

<sup>758</sup> *Grzelczyk*.

national. It seemed that Union citizenship was on the verge of becoming something more far-reaching than could possibly have been anticipated even a decade earlier.

In recent years, however, these hopes have been dashed. Decisions like *Förster* appear to have undone much of the good of a long line of cases facilitating a right of access to education – the suggestion being that an unfunded right of access to education in an era when the costs of education are rising is, effectively, no right at all. Moreover, where children are concerned, the Union had actively developed a principle by which genuine enjoyment of Union rights could not be interfered with. Requiring that children move between territories (or worse still, be forced to leave Union territory altogether), in order to enjoy the right to family life<sup>759</sup> was held to directly impair that right of enjoyment (see *Zambrano*, building on *Chen*). However, the *Dereci* case undermined this line of case law also. Far from asserting that the *Dereci* children had a right to enjoy life with their father present in their home and in their homeland, the Court gave the green light to exclusionary practices against third-country nationals, even where there was a familial link to Union citizens and they were able to show a reasonable degree of integration in Union society.

### *Third-Country Nationals and the Union Order*

Within the bounds of Union territory, some third-country nationals enjoy a more elevated status. Taking Directive 2003/109 as a starting point (and drawing on the basis of the Schengen Agreement) the hierarchical nature of the treatment of third-country nationals has been revealed and recounted. The Directive gives precedence to those third-country nationals who can demonstrate continuous, lawful residence of five years' duration, with the aim of recognising them as “approximated” to Union citizens. The problem with this, once again, stems from the limitations of the wording of the citizenship article. Despite granting long-term residence on, more or less, the same terms as Directive 2004/38 was to do for Union citizens themselves, the issue of nationality (and possessing the right kind) was to stand in the way of engagement of Union rights.

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<sup>759</sup> Enshrined in the Charter of Fundamental Rights.

This group of third-country nationals is placed in a much more protected, even exalted, position than other groups. Third-country nationals with less accumulated residence, but still subject to certain bilateral agreements enjoy benefits of a kind, while still others, those with shorter residence, or who have spent time on Union territory in education, reside subject to the vagaries and whims of the Member States. These 'ordinary' third-country nationals enjoy no special standard of protection and find access to Union rights far more restricted. Far more disturbingly, this thesis highlights the problem of a category of "people of concern", including stateless individuals resident yet unrepresented.

This group of individuals has grown considerably owing to the Union's expansion into Eastern Europe: future continued expansion promises to increase the volume of stateless persons even further. Prior to the 2004 round of expansion, the statelessness problem was, comparably, minimal: the inclusion of greater numbers of States resulted in an explosion of unrepresented nationals finding themselves present on Union territory. Vetik and Zorn's studies, interviewing stateless individuals over a number of years, provides a fascinating insight into the difficulties of integrating in society while lacking the appropriate paperwork to travel, enjoy social benefits, vote or even prove who you are. The fear associated with statelessness, be it fear of deportation or the fear that every aspect of one's day to day life is lived outside the law, provides a strong impetus for stateless individuals to live as inconspicuously as possible. Their very, formal, invisibility also makes it possible for them to be treated in a highly discriminatory manner by the authorities who, it is suggested, should be responsible for their welfare.

This situation is all the more unpalatable in light of the Lisbon Treaty's promise of accession to the ECHR. While the Member States already have an obligation to uphold the principles of the Convention, the Union's promise of accession makes it extremely uncomfortable that this vulnerable group should remain beyond its purview. Constructing Union citizenship in an alternative fashion from its current manifestation would be an opportunity to address the shortcomings of a nationality-based model. The possibility, or impossibility of this enterprise formed the basis of the final part of this thesis.

### *Alternative Citizenship Models*

Throughout this project, I have sought to illuminate several key considerations. The foremost has been to address the nature and purpose of citizenship. If citizenship's purpose is merely to narrowly identify those who belong to a group and those apart from it, then Union citizenship in its current form would seem to be perfectly constituted. If, however, citizenship is intended to be something more idealistic, that denotes a shared interest in a community and is open and plural, irrespective of one's original background, then it is a concept with greater elasticity than nationality, and is capable of a much broader rendering than Union citizenship currently enjoys.

The second consideration has been to achieve a greater understanding of citizenship's content and application, both ideal and real. The historical approach taken in the opening chapter was essential in understanding the move from citizenship for the few (free men with the relevant birthright), albeit with social and political rights, to citizenships where elements of rights might be granted to some, but not all (particularly the case with the distinction between active and passive citizenships in Revolutionary France), to the model derived from the social changes wrought by the Industrial Revolution, where increased social mobility and economic growth fuelled democratic arguments over the fairness of withholding political rights. Whilst Marshall's model has been taken as the paragon of citizenship's possibility, it remains constrained by the idea of national boundaries. Supranational citizenship is, by definition, above the nation and yet its citizenship has been shown to suffer from the same limitations of the national model, magnified over a much broader area.

The third consideration has been to question whether Union citizenship has been interpreted in too constrained a fashion. The citizenship article specifically creates citizenship open *only* to a limited number of individuals. The image of a flexible citizenship has remained owing to the Union's ability to enlarge (and potentially decrease), but the polity is effectively closed. This limited realisation of citizenship led directly to the final consideration. The last consideration, has been to ask whether, for Union citizenship, there is the possibility of a better model, one that would achieve the open and plural ambitions described as an option above. The final part of this thesis has sought to deliver such an alternative model.

The model proposed has developed methods of triggering citizenship's application and has sought to derive both rights *and* duties for those who would fall within its ambit. Importantly, the model suggested would continue to include those currently caught by Union citizenship, but would provide an avenue for inclusion for those resident in Union territory who contribute to society without being granted equal standing. Proposing such a transformation and using the Union's own legislation as support for the claim that it is both feasible and within its (certainly the ECJ's) contemplation is far different from achieving its realisation. Although the model proposed would provide an effective answer to a legitimacy problem suffered when trying to reconcile the Union's supposed support for, and enforcement of, human rights (when they are seen as universal in nature) with its internal inequalities, I have recognised that even implementing this model of citizenship, with its reliance on obtaining an internal European passport, may lead those very individuals whom this model seeks to protect to shy away from its protections. Nonetheless, this model is a move beyond the pure residence-based models others have sought to develop and elevates this contribution to the existing literature to its own niche.

### *What the Future Holds*

Other than the recalcitrance and probable resistance of the Member State executives to the model of Union citizenship proposed in Chapter 5, a bureaucratic overhaul of the Union would be necessitated. Stateless individuals historically lack personal identification documents such as those generally required if one is to obtain passports, driving licences and other movement-related paraphernalia. A new system designed to encourage them to come forward is, therefore, essential, if the scheme is to be successful. Moreover, third-country nationals, already in possession of valid national passports would need to be given an independent *European* travel document to facilitate intra-State movement and identification. An essential element of the model, in relation to immigrants, and more particularly the stateless, is the creation of embassies where individuals can go, without fear of reprisal, in order to obtain the intra-Union travel documents.

The road ahead, therefore, is troubled and lengthy. It is unlikely that this aspiration will be met overnight. The bureaucratic revision I hope for must be

accompanied by Treaty change as the citizenship article I proposed in Chapter 5 would need approval and the subsequent Treaty revisions to give full effect to the proposal put forward would be extensive. With the unrest that has been evident in Member State relations over the 2011 economic crisis such changes may take considerable time to come about. Furthermore, additional work is required to demonstrate that these changes would be welcomed and understood by the citizenry: it is not desirable to seek to create an inclusive and plural form of citizenship if it ends up being frustrated and stratified because individuals do not understand, or approve of, its benefits

This research could lead in numerous directions. The historical approach taken in the first chapter could warrant much further work in its own right: the idea of citizenship is intriguing, particularly when it catches those who may not have thought of themselves as citizens. The historical approaches taken to citizenship would also lend themselves to comparative study: Al-Andalus provided a conveniently European example of mixed cultures, yet the opportunity to research models of citizenship beyond the limits of Europe would provide an interesting counterpoint to the work contained here. The ideas of inclusion and exclusion also serve as an interesting focus for further work on citizenship: the model proposed here still relies on inclusion and exclusion, thus the discussion over where those boundaries should lie will be fertile ground for future academic contemplation. One of the most fruitful areas into which this thesis could lead, however, is that of the inclusion of the stateless (and internally displaced persons): even without the incorporation of other third-country nationals in the Union fold. While much work has already been done concerning the Estonian stateless, the possibility of accession of the Former Yugoslavian states will bring with it yet more people of concern, whose histories make them unlikely candidates to engage with the Union in a whole-hearted fashion. However, their presence in Europe (the continent) provides further opportunities to understand more clearly not just the causes, but also the ramifications of statelessness and to develop policies aimed at combating this problem whilst restoring to these individuals some form of external recognition, enabling them to break free of the traps involved in being “unpersons” in international terms.



### *A Parting Thought*

The goal of this thesis has been to investigate and critique various models of citizenship with a particular focus being placed on supranational citizenship. Successes and flaws in different models have been highlighted and, in the context of the EU, the biggest failing has been exposed as its Iago-like quality: “I am not what I am”<sup>760</sup>. The emphasis placed on equality and non-discrimination is not uniformly applied because Union citizenship is intrinsically coupled with national citizenships. The pretension to comity is not, consequently, realised. The remedy for this problem has been suggested as a radical revision of Union citizenship, for the first time incorporating features of previous successful models of citizenship and generating an independent and truly unifying entity that would befit the Union’s self-proclaimed goals. It may not yet be in place, but the Union has huge potential to be a force for good and the manifestation of citizenship put forth here would, I believe, truly cement the Union’s place as a forward-looking polity that affords its subjects the time, opportunity and means to reach their full potential. Despite the difficulties inherent in making this possible, I believe such an outcome renders this ambitious endeavour most worthwhile. Where Roman citizens derived pride and security in the phrase, “civitas romanus sum” so might future Union citizens benefitting from this revision enjoy proclaiming to the world, “civis europeus sum”, or “I am a European citizen”.

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<sup>760</sup> “Othello”, Act 1, Scene 1, William Shakespeare.

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### **Non-Union Treaties**

Universal Declaration on Human Rights 1948  
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United Nations Convention on the Political Rights of Women 1952  
Convention Relating to the Status of Stateless Citizens 1954  
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### **Television**

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