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RSCAS 2018/14
Robert Schuman Centre for Advanced Studies
Global Governance Programme-296
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EU citizenship: still a fundamental status?

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EUI Working Paper **RSCAS** 2018/14

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ISSN 1028-3625

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Printed in Italy, March 2018
European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy
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Abstract

Written as a standalone essay as part of an edited book based on citizenship forums published on the GlobalCIT website, this essay is intended to explore the trajectory of EU citizenship, under pressure from forces inside and outside the EU. The focus of the discussion is on three issues: the autonomy of national citizenship laws in the face of EU citizenship; the citizenship consequences of Brexit; and the choices made and actions taken by individuals and groups that may impact upon the future of EU citizenship. This discussion is prefaced by an initial exploration of the challenges and complexities of EU citizenship and of the relationship between citizenship and concepts of integration and Europeanisation.

Keywords

European Union, citizenship, immigration, Brexit, Europeanisation, constitution

This is the pre-print version of an essay to be published in Rainer Bauböck (ed.) *Debating EU Citizenship*, Springer, IMISCOE series, 2018.

Introduction*

Modern history is littered with the corpses of failed federations and busted unions. These processes of breakup have had significant and often damaging citizenship consequences on many occasions and in many places. Examples can be found in the dissolution of Yugoslavia and of the Soviet Union, as well as in the dismantling of the various European empires and the creation of numerous new (and generally arbitrarily defined) states, often as part of the decolonisation process.¹ Breakup may, of course, eventually be the fate of the European Union. Or it may be the opposite – the transmutation of the EU into something more like a federal state, through an intensified constitutionalisation process.

This essay explores some of the pressures that are being placed on the concept of citizenship of the Union at the present time, highlighting how these stem both from exogenous pressures (assuming Brexit can be thought to be such) and endogenous forces such as Eurosceptic voting publics and a resistance to showing solidarity across the member states in an era of austerity.

EU citizenship is paradoxical in nature: formally constitutionalised in the Union's treaty framework, yet dependent upon national citizenship to provide the gateway to membership. Its fate remains intimately tied to the broader question of the trajectory of European integration, as well as to changing perspectives about the character of citizenship as a membership status. To highlight that paradoxical character, I offer below some brief reflections on the autonomy of national citizenship laws, on the consequences of Brexit, and on how choices and actions by individuals and groups may impact upon the future of EU citizenship. This discussion is prefaced by an initial exploration of the challenges and complexities of EU citizenship and of the relationship between citizenship and concepts of integration and Europeanisation.

Challenges and complexities of EU citizenship

The current difficulties faced by the European Union are many and varied. They include the pressures caused by the UK's Brexit vote, the effects of increasingly illiberal, populist and anti-constitutionalist regimes in Hungary and Poland, the lingering impacts of the financial crisis, among them austerity and challenges to the health of the Eurozone, and the continued aftermath of the migration/refugee crisis. These all raise questions about the vitality of citizenship of the European Union as a political, socio-economic and constitutional construct of a supranational kind, and many of them are debated in different ways by the various multi-author 'forums' presented in this book. Whether these difficulties do or do not pose an existential threat to the EU and thus to EU citizenship lies beyond the scope of this essay. Even so, contemplating the possibility of disintegration and/or de-Europeanisation is central to the task of reinterpreting EU citizenship, 25 years after it formally entered into force through the Treaty of Maastricht in 1993. This is because of the centrality and overwhelming importance of the Brexit challenge (both for the individuals directly affected and also for the historical trajectory of the European Union), to which we will return later in this short reflection on some of the 'constitutional' characteristics of EU citizenship.

It is important to remark, however, that at the current stage of the European integration, no person deprived of their EU citizenship through dissolution of the Union or departure of a member state would normally be at risk of losing their *national* citizenship and their anchor within the system of

* This essay was written whilst I was holding a EURIAS Fellowship at the Helsinki Collegium for Advanced Studies, and the financial support of the EURIAS Programme and HCAS is acknowledged with thanks. I am very grateful to Rainer Bauböck for comments on a draft.

¹ For an overview of different 'imperial' repertoires see Gammerl, B. (2017) *Subject, citizens, and others: Administering Ethnic Heterogeneity in the British and Habsburg Empires, 1867-1918*. New York/Oxford: Berghahn Books.

states, their ‘right to have rights’.² Although the functions and forms of citizenship are dispersed across the multi-level structure of the EU polity and EU citizenship is established constitutionally in Article 9 TEU and Articles 20 and 21 TFEU, at the present time states retain a monopoly over determining who their citizens are, and would continue to do so were the EU to dissolve in the future.

At whatever point we choose to ‘stop time’ and write a historical reinterpretation of the EU’s experiment with a form of supranational citizenship, it will always be a complex and contested story. It is important to resist the temptation to take a ‘frozen in time’ approach to explicating this story. On the contrary, we should remind ourselves, by reference to classic texts such as that of TH Marshall,³ that the location of citizenship forms and functions has always been a mobile process, morphing at different points in history between the local (e.g. the city), the regional, the national and the supranational. In fact, we can use the concept of citizenship across all of these levels, wherever there are institutions of political authority.

The idea of the link between a community of citizens and a political authority was not really the starting point for EU citizenship. The European Union began its journey towards recognising a uniform legal status for individuals at the supranational level not by acknowledging and supporting the political agency of individuals as citizens, but by giving them rights and freedoms. Specifically, it was through the civil and socio-economic rights and freedoms that are inherent in the idea of a single market that a notion of the individual having a stake in the integration project originally emerged. Much of the power of these rights and freedoms to effect a transformation of individual rights lay in the recognition of individuals as autonomous legal actors within the European legal order by the European Court of Justice (CJEU). This was an important conclusion, which the Court derived from a purposive reading of the founding treaties. In addition, some further contributions towards the development of the rights of EU market actors were also made by the EU legislature, especially when it came to giving effect to the principles of non-discrimination on grounds of nationality and mutual recognition. Most of this work predated the formal establishment of the legal concept of the Union citizen.

Only later was a modest edifice of political rights constructed (once the Treaty of Maastricht had entered into force and the constitutional provisions we recognise today had been introduced) and it was even later still that we have come to see a closer legal and constitutional intertwining of the legal statuses of EU citizenship and national citizenship, again largely as a result of the interventions of the CJEU. We will come back to this dimension of EU citizenship shortly. What has been most noticeable about this process has been that the idea of the ‘civil’ (a ‘Europe of law’) has underpinned and accompanied every stage of the putative building supranational citizenship. This looks, at first blush, like a wholly top-down construction of citizenship that does little to illuminate the broader political quest to identify ‘who are the Europeans?’⁴

Another way of highlighting the idiosyncracies of EU citizenship involves looking at the classic elements commonly associated with modelling citizenship as a form of full membership (e.g. status, rights, identity, duties). It is only in the sphere of rights that EU citizenship seems well developed. As to the issue of identity, the sense of ‘Europeanness’ that exists across the collectivity of citizens is relatively thin in nature, again focused on rights, and it is hardly comparable with the form of societal glue that gives community cohesion to the national (and subnational) polities on which the EU is

² Arendt, H. (1967) *The Origins of Totalitarianism*. London: George Allen & Unwin, 296.

³ Marshall, T.H. (1950) *Citizenship and Social Class*. Cambridge: Cambridge University Press.

⁴ See generally Shaw, J. (2011) ‘Citizenship: contrasting dynamics at the interface of integration and constitutionalism’, in: P. Craig and G. de Búrca (eds), *The Evolution of EU Law*, 2nd Edition, Oxford: OUP, 575-609.

built.⁵ Moreover, the status itself remains derivative from national citizenship – only citizens of the member states are citizens of the Union.

And yet despite all of this negativity, there is also a more optimistic reading that suggests that EU citizenship could be evolving into a different sort of concept than was perhaps anticipated when the member states originally set up the legal framework, mainly as an additional bonus for market participants. Scholars laud EU citizenship as an emerging postnational concept that escapes ‘narrow’ nationalist constraints of state-based citizenship regimes.⁶ The comparison with other forms of supranational citizenship, such as Commonwealth citizenship, makes EU citizenship look like a relative success story. Commonwealth citizenship largely withered on the vine because of the evisceration of most of the rights attached to it (e.g. right of abode in the UK), or the non-adoption of the concept by Commonwealth countries. By contrast, we have a rich, if sometimes contradictory, case law of the Court of Justice on the status of EU citizens resident in other member states that ensures that in many spheres of life EU citizens have to be recognised as holding rights under the precise same conditions as nationals of the host state.

Furthermore, there is now a discussion, as evidenced by section 3 of this book on citizenship duties and social solidarity, as to whether this dimension of EU citizenship should be filled out in due course, in ways that would make EU citizenship relevant not only to mobile citizens, but also to those who remain in their member state of origin. At that point, EU citizenship could be said to be moving much closer to being a recognisable variant, at the supranational level, of the classic national model of membership as a status and as a reference point around which citizens can cohere, even if it not (yet) recognised in international law as a form of ‘nationality’. In order to achieve this transformation it would, however, have to be no longer just a ‘citizenship of mobiles’. Only then could it also become the vehicle for a wider sense of citizen mobilisation.

Europeanisation and de-Europeanisation in EU citizenship

It will already be evident that many of the concepts I have tossed around in these short paragraphs are contested and hardly have stable meanings. This complicates considerably the task of reinterpreting EU citizenship, whether constitutionally or politically. The concept of EU citizenship needs to be understood in the context of both citizenship theory and integration theory. Our interpretation of the distinctive features of EU citizenship requires a combination of the analytical frames offered by both citizenship studies and European Union studies. It is only by this means that we can construct a historically and contextually sensitive interpretation of this evolving and contested concept. To put it another way, EU citizenship is a product not only of a hesitant process of polity-building beyond the state but also of a move away from a predominantly state-centred conception of citizenship. It relies equally on rethinking ideas about ‘integration’ and on rethinking citizenship as a relational concept and not a fixed structure,⁷ combining both plural and multi-level institutional elements and also the bottom-up practices of citizens as legal and political actors in a non-state context. Rethinking integration in turn requires acknowledgement that the story of the EU is not one of linear progress towards ‘an ever closer union’, even though it is quite common still for EU citizenship to be lauded as somehow embodying this historic mission. The better view, however, is to recognise that there is no unidirectional process of Europeanisation in which the elements and constraints generated by EU citizenship are simply downloaded onto national citizenship regimes, with alterations to policies and

⁵ Bellamy, R. (2008) ‘Evaluating Union citizenship: belonging, rights and participation within the EU’, *Citizenship Studies* 12(6), 597-611.

⁶ Kostakopoulou, D. (2018) ‘*Scala Civium*: Citizenship Templates Post-Brexit and the European Union’s Duty to Protect EU Citizens’, *JCMS: Journal of Common Market Studies*, doi: 10.1111/jcms.12683.

⁷ See Wiesner, C. et al. (2018) ‘Introduction: Shaping Citizenship as a Political Concept’, in: C. Wiesner et al. (eds.), *Shaping Citizenship*, New York: Routledge, 10.

institutions made accordingly.⁸ In fact, uncovering and analysing the narrative of EU citizenship reveals that there is no such story of linear progress, but rather a set of complex and often countervailing narratives of Europeanisation and de-Europeanisation, which together combine to make up the full picture.

For the purposes of this essay, we need to think of Europeanisation as more than just the principle that membership of the EU means that member states must comply with EU law and implement legislative measures and new administrative requirements introduced by the EU legislature (in which they participate). It is also a two-way track in which elements of national choice and institutional 'style' find their way into EU-wide measures and approaches to policy-making as well as into its institutional forms, not least through the participation of member states in the legislative process. This is a broader and more sociological concept of Europeanisation than is commonly deployed in political science, and it incorporates also aspects of legal culture as well as formal compliance with EU law. A similar approach is also useful when analysing counter moves of de-Europeanisation. At the collective level, there is the trend towards intergovernmental approaches to become once again the norm, with a resurgence of control by the member states vis-à-vis the Commission or the Court of Justice. At the level of member states it encompasses not just deviations in compliance, but equally the alienation of (some) member states from the core requirements or principles of integration, through practices such as flexibility and differentiated integration. Finally, it includes also the hitherto unique phenomenon of Brexit, where a member state is negotiating a formal exit from the EU, but also, for the future, a revised relationship perhaps akin to association or membership of the EEA via a 'Norway' or EFTA model. Under the latter model, some of the underpinning principles of EU citizenship, such as free movement, may continue to apply, which is one reason why it is presently very controversial in the UK as a possible post-Brexit scenario.

We can now take a closer look at some of the criss-crossing pathways of Europeanisation and de-Europeanisation. What might be seen as opposing trends of 'integration' and 'disintegration' are in fact occurring simultaneously. First we examine the extent and character of the apparently increasing EU law constraints upon the citizenship laws of member states. This raises the question of how autonomous national citizenship laws may be in the future. Second, we explore some of the main 'citizenship consequences' of the Brexit vote and the anticipated departure of the United Kingdom from the EU. The two issues are interrelated in many ways, and not just through a common preoccupation with the question of the autonomy of different levels within the EU's current multilevel citizenship regime. Furthermore, the reflections below will help to show, amongst other insights, that EU citizenship is not just a matter of institutional choices but also, increasingly, of choices made and routes followed by individuals and groups. It has both a top-down and a bottom-up dimension.

How far does EU citizenship constrain member state sovereignty in matters of nationality law?

The EU has been accused of being 'over-constitutionalised'.⁹ That is, that too much in terms of substance and too many constraints on national sovereignty have been packed into its founding treaties, and handed over for authoritative interpretation and application to the CJEU. This has the effect of over-emphasising the role of the judiciary, both at the supranational and the national level (as the starting point for most pathways to the Court of Justice, especially for individual litigants, lies in the national courts, not the EU courts). Some have argued that there is no obvious legitimating factor justifying this function. It just looks like overpowerful and overweening judges, undermining political

⁸ For an extended analysis in these terms see Thym, D. (ed.) (2017) *Questioning EU citizenship. Judges and the limits of free movement and solidarity in the EU*. Oxford: Hart Publishing.

⁹ Grimm, D. (2015) 'The Democratic Costs of Constitutionalisation: The European Case', *European Law Journal* 21(4), 460-473.

constitutionalism.¹⁰ This unnecessarily subverts the role of elected institutions and thus of ‘the people’ who elect those institutions. Equally, EU legislative measures are often – of necessity – somewhat broad and protean in their drafting, and require frequent judicial reinterpretation even once they have been transposed into the national legal orders. They are also very difficult to amend because of multiple veto points within the system.

The field of EU citizenship is arguably ripe for such an interpretation. EU citizenship, established in Articles 20 and 21 TFEU, has operated as a backstop in cases where the most important secondary legislation, notably the so-called citizens’ rights or free movement directive,¹¹ does not apply. CJEU case law, on issues such as the rights of third country national family members of mobile EU citizens, has proved challenging for national authorities to accept and implement.

Exploring the well-known point that fears about loss of national sovereignty over immigration and about CJEU judicial power have been important factors in the Brexit vote, Susanne Schmidt has shown in some detail how this process has worked in the case of free movement, leaving little obvious leeway for national authorities to protect either the interests of the state or societal cohesion.¹² Of course, that sense of an infringement of sovereignty has largely emerged out of a narrow and restrictive interpretation of the idea of free movement as a unilateral track involving non-UK citizens (generally called ‘EU migrants’, not ‘EU citizens’) moving *towards* the UK, which has dominated in the Europhobic popular media. The choice to name certain social actions in terms of ‘immigration’ rather than ‘co-citizenship’ will always have consequences. Its impact should not be underestimated. It contributed to a strong perception in the UK – against the backdrop of an increasingly rigid immigration policy backed up by harsh enforcement actions against those falling foul of the law – that EU free movers are lucky, undeservedly lucky, migrants, doing better in the UK than UK citizens themselves, not least because the family reunion rules they benefit from are more generous than those applicable to UK citizens under UK law. On that count, they are not seen as sharing a status with UK citizens – i.e. that of EU citizen. And the sense that this status involves a twin track of mobility in both directions as well as the possibility to take common political action, e.g. in relation to European Parliament elections, is lost entirely.

It could be said that national reactions (and the UK is hardly alone in this) to the constitutionalising case law in the sphere of ‘citizenship’, especially in relation to the status and rights of mobile EU citizens and their families (including third country nationals) resident in other member states, has lain behind the retrenchment of that same case law in recent years. Judges are not immune from political pressures. They read newspapers. The newest case law has become more respectful of the welfare sovereignty of the member states, and has stated clear limits to the dictum that the Court once pronounced, that there should be a ‘certain degree of solidarity’ amongst the member states when it comes to the question of which set of taxpayers should support which types of economically inactive, or less active, citizens. But while the CJEU has been busy in recent years stating that free movement is not free from limits, this move may have come too late for the UK.

It is therefore perhaps surprising that we can see constitutional constraints on member state sovereignty continuing to accrete in relation to some of the choices that those states can make as regards the application of their domestic citizenship laws and its consequences, especially in the sphere of immigration and family reunion. It is well established that it is a matter for the member states to decide who may acquire their citizenship, thus making the member states the gatekeepers of access to EU citizenship, although from early on the CJEU has made it clear that member states may

¹⁰ See Bellamy, R. (2007) *Political Constitutionalism. A Republican Defence of the Constitutionality of Democracy*. Cambridge: Cambridge University Press.

¹¹ Directive 2004/38/EC [2004] OJ L158/77.

¹² Schmidt, S. (2017) ‘Extending Citizenship Rights and Losing it All: Brexit and the Perils of ‘Over-Constitutionalisation’, in Thym, D. above n.8, at 17-36.

not refuse to recognise an ‘EU citizenship’. In *Micheletti*,¹³ for example, Spain could not choose to treat a dual Italian/Argentinian national as simply Argentinian for the purposes of access to the territory or to benefits associated with presence on the territory. This is an early example of the CJEU requiring such national competences around nationality and the recognition of nationality to be exercised, in situations covered by European Union law, in a manner that has due regard to the requirements of EU law.

The ‘situations covered by EU law’ have included the type of scenario that arose in the case of *Rottmann*,¹⁴ where the applicant had moved from Austria to Germany, and had obtained German citizenship by fraud, failing to inform the authorities that he was the subject of possible criminal proceedings in Austria. The reversal of the naturalisation decision by the state authorities in the case of *Rottmann* fell within the scope of EU law because of that mobility, and thus Germany had to apply its withdrawal rules in a manner that had regard to the impact of the withdrawal on Rottmann’s status as an EU citizen and the loss of rights that would flow from this. By becoming German, Rottmann had lost his Austrian citizenship by operation of law. Thus depriving him of German citizenship left him, at least for the time being, stateless. The CJEU made it clear that measures withdrawing citizenship and depriving a person of their EU citizenship needed to be capable of judicial review at the national level and they needed to be proportionate, in order to comply with the requirements of EU law. In drawing this conclusion, the Court referenced the early case of *Grzelczyk* where it stated that citizenship of the Union is intended to be the fundamental status of nationals of the member states.¹⁵ In general, though, the Court indicated that withdrawal of citizenship on grounds of fraud during the process of naturalisation expresses a legitimate state interest. It declined to rule on the question of what, if any, measures Austria should take if Rottmann sought to recover his original nationality.

Rottmann is the only case thus far where a CJEU ruling has intruded directly into the field of citizenship law, although pending before the Court is the *Tjebbes* case on the effects of Dutch rules which deprive persons, by operation of law, of their Dutch citizenship on the grounds of habitual residence outside the EU for more than 10 years, where they have another nationality (whether acquired afterwards or before).¹⁶ It will be interesting to see whether the CJEU recognises habitual residence abroad as a legitimate state interest justifying withdrawal of citizenship and thus loss of EU citizenship, especially since such a withdrawal of citizenship *by operation of law* by definition deprives individuals, including children, of the possibility of individual (judicial) review of their cases. This case is especially interesting because after Brexit the UK is set to become be a third country *vis-à-vis* the EU. Thus EU citizenship will presumably not offer the counterbalance to the lack of recognition of dual nationality under Netherlands law, which currently reduces the options available to migrant Dutch citizens.

This case should be seen, however alongside interesting political developments. After the Brexit vote, the Prime Minister of the Netherlands appeared to double down on his country’s resistance to dual citizenship, despite pressure from Dutch citizens resident in the UK.¹⁷ However, perhaps as a harbinger of further changes to come in other member states in order to be responsive to the citizenship consequences of Brexit, the new coalition agreement reached in October 2017 as the basis

¹³ Case C-369/90 ECLI:EU:C:1992:295.

¹⁴ Case C-135/08 ECLI:EU:C:2010:104.

¹⁵ Case C-184/99 ECLI:EU:C:2001:458, para. 31.

¹⁶ Case C-221/17. For a brief commentary see de Haart, B. and Mantu, S. (2017), ‘Loss of Dutch nationality ex lege: EU law, gender and multiple nationality’, *GlobalCIT blog*, <http://globalcit.eu/loss-of-dutch-nationality-ex-lege-eu-law-gender-and-multiple-nationality/>.

¹⁷ ‘Dutch nationals taking UK citizenship ‘will lose Netherlands passports’’, *The Guardian*, 17 July 2017; <https://www.theguardian.com/politics/2017/jul/17/dutch-nationals-brex-it-uk-citizenship-lose-netherlands-passports-mark-rutte>; for details on loss of citizenship by acquisition of foreign citizenship, see GlobalCIT Citizenship Modes of Loss database, <http://globalcit.eu/loss-of-citizenship/>.

for the creation of the new government adopted a more liberal approach to dual citizenship. This had been the existing party policy of just one of the four coalition partners (the D66 Liberal Democrats party). It offers the prospect of legal reform in order to provide assurances to Dutch citizens resident in the UK that they will be able to keep their Netherlands citizenship after naturalising in the UK.¹⁸

Finally, the mantra of EU citizenship's fundamental importance for nationals of the member states has also been invoked in order to justify restrictions on national rules on the assignation or recognition of names,¹⁹ in the context of civil status laws,²⁰ and certain national rules restricting the right to vote in European Parliament elections.²¹ These cases buttress the argument that EU citizenship is emerging as an autonomous constitutional status for nationals of the member states.

In a small number of instances, the CJEU has defended a territorial principle in relation to the enjoyment of EU citizenship, finding in a series of cases from *Ruiz Zambrano*²² onwards that where a minor EU citizen would be forced to leave the territory of the Union if one or more of his or her third country national parents with direct caring responsibilities were to be deported from a member state (thus depriving the EU citizen of the enjoyment of his or her citizenship rights), then the parent(s) will enjoy derived rights of residence stemming from Articles 20 and 21 TFEU. Here, the constitutional effects of EU law are largely felt in the sphere of national immigration law, restricting decision-making in respect of third country nationals by reference to the status of the EU citizen dependent child.²³ The possibility of protection for third country nationals stems in this case from the effects of citizenship laws conferring nationality *at birth*. The principle can apply even if only one of the parents is a third country national. The key question is whether the EU citizen child has a primary relationship of care with the parent at threat of losing their residence.

Acquisition of a new EU nationality *after birth* (e.g. through naturalisation) has also become an issue, provided that the person naturalising still retains her or his original (EU) nationality. The CJEU concluded in the 2017 *Lounes* case²⁴ that an EU citizen who has made use of her free movement rights and naturalises on the basis of residence and integration within the host member state will no longer benefit from Directive 2004/38 (and thus no longer has the family reunion rights conferred under the Directive on mobile EU citizens). However, she will benefit still from her status as an EU citizen under Articles 20 and 21 TFEU. This means that the host state must grant her rights to family reunion that are no more restrictive than those laid down in the Directive. What makes this controversial is that the EU citizen in these circumstances benefits from EU law measures on family reunion that are notably less restrictive than the national rules applicable in most member states for citizens.²⁵

¹⁸ See 'Brexit: Dutch nationals living in Britain will be allowed dual citizenship', *The Guardian*, 10 October 2017, <https://www.theguardian.com/world/2017/oct/10/dutch-nationals-living-britain-allowed-dual-citizenship-brexit>. The details of how this might work are not as yet known. Details of the earlier D66 proposal, which cited research showing that the Netherlands is now an outlier in the matter of dual citizenship in Europe can be found here: <http://fasos.maastrichtuniversity.nl/weekly/macimide-dataset-cited-in-proposed-amendment-of-dutch-citizenship-law/>.

¹⁹ Case C-148/02 *Garcia Avello* ECLI:EU:C:2003:539.

²⁰ See Pataut, E. (2016) 'A Family Status for the European Citizen?', in Azoulay, L. et al. (eds), *Constructing the Person in EU Law Rights, Roles, Identities*. Oxford: Hart Publishing, 311-322.

²¹ Case C-650/13 *Delvigne* ECLI:EU:C:2015:648.

²² Case C-34/09 ECLI:EU:C:2011:124.

²³ For a recent analysis, see Peers, S. (2017) 'Think of the children: the ECJ clarifies the status of non-EU parents of EU citizen children living in their own Member State', *EU Law Analysis Blog*, 10 May 2017, <http://eulawanalysis.blogspot.com/2017/05/think-of-children-ecj-clarifies-status.html>.

²⁴ Case C-165/16 ECLI:EU:C:2017:862.

²⁵ See Peers, S. (2017) 'Dual citizens and EU citizenship: clarification from the ECJ', *EU Law Analysis Blog*, 15 November 2017, <http://eulawanalysis.blogspot.com/2017/11/dual-citizens-and-eu-citizenship.html>.

The lack of symmetry in the dual nationality rules applied by the member states across the EU means that this approach, while superficially attractive in terms of special protection of the interests of those who go so far as to naturalise in the host state, has an unhelpful aura of arbitrariness about its scope of application. For example, it would seem that if the *Lounes* case, involving a Spanish woman acquiring UK citizenship and keeping her Spanish citizenship, and benefiting from family reunion with her Algerian partner, were reversed, the position would not be the same. Suppose that a British woman resident in Spain were to acquire Spanish citizenship by naturalisation. The theoretically stricter requirements in relation to dual citizenship in Spain would mean that she would not be able to continue benefiting from her UK citizenship under Articles 20 and 21 TFEU because, at least as far as the Spanish authorities would be concerned, she would have renounced that nationality.

Can EU citizenship be retained after Brexit?

The developments in relation to the constitutional constraints generated by EU citizenship may prove to be of central importance when it comes to figuring out the effects of Brexit on EU citizenship (and indeed of EU citizenship on Brexit). The orthodox international law-based position would be as follows: once the UK leaves the EU, the Treaties and the various rights and obligations applicable under them no longer apply. Absent a consensual arrangement under Article 50 TEU in the exit negotiations, the treatment of EU27 citizens resident in the UK and UK citizens resident in the EU27 reverts to being a matter for national immigration law subject only to certain international human rights obligations. Each member of these two groups has to seek stable legal residence from their host state. At most, those in this situation could benefit from residual protection of their family life interests under the European Convention on Human Rights²⁶ or perhaps – where EU immigration law applies in the EU27 – protection under Directive 2003/109, which harmonises rights of long term resident third country nationals.²⁷ It is unsurprising that the EU has made the situation of these groups of EU citizens, who have previously relied upon their free movement rights, a priority within the Article 50 negotiations, and it can broadly be assumed that if there is an Article 50 withdrawal agreement then most of their rights will be protected under its provisions. This will not be just like benefiting from EU citizenship, but such a legal measure will surely, wherever it applies, institute a new category of relatively privileged alien, although there are bound to be plenty of cases of uncertainty that will generate litigation that will end up before the CJEU, or some specially constituted judicial institution.

This outcome marks the resurgence of the fundamentals of national immigration law over the postnational promise of EU citizenship, and the same could be said of the alternative, which is that the former beneficiaries of EU citizenship rights should seek naturalisation in the host state. According to Dora Kostakopoulou, this would ‘lead to the absorption of the status of EU citizenship by national citizenship.’²⁸ In any event, as is well known, naturalisation will not provide the answer in all cases, because of uneven member state policies on dual citizenship, not to mention other issues such as naturalisation tests and costs. That has not stopped many UK citizens (whether static or mobile) from exploring how they might access a member state nationality that would preserve their EU citizenship rights, or indeed many EU27 citizens from naturalising in the UK. Gareth Davies has argued that *Lounes* was decided by the CJEU with one eye on Brexit, but he is hardly complimentary about the nature of the CJEU’s reasoning.²⁹ But exploration of citizenship options represents just one of the many ways in which individuals are reacting to the difficult choices that Brexit is forcing on them.

²⁶ *Kuric and Others v Slovenia*, No 26828/06, [2013] 56 EHRR 20.

²⁷ Directive 2003/109 on the status of third country nationals who are long term residents OJ 2003 L16/44.

²⁸ See Kostakopoulou above n.6, 7.

²⁹ Davies, G. (2018) ‘The State of Play on Citizens’ Rights and Brexit’, *European Law Blog*, 6 February 2018, <http://europeanlawblog.eu/2018/02/06/the-state-of-play-on-citizens-rights-and-brexit/> and Davies, G. (2018) ‘*Lounes*,

Other pathways followed by those objecting on either personal or political grounds to the UK leaving the EU (and the circumstances in which it is doing so) include increased political activism, via well-established actors such as the European Citizens' Action Service, newly formed NGOs such as the 3Million (EU27 in UK) and British in Europe, or repurposed pro-EU NGOs such as New Europeans or European Alternatives which have been given a new impetus by the urgency of the issues raised by Brexit. Brexit has given rise to unprecedented civic mobilisation around demands for the protection of acquired rights, including several European Citizens' Initiatives registered by the European Commission.³⁰ Some have raised the possibility of EU citizenship becoming a freestanding status that can be acceded to other than through the nationality of the member states, with UK citizens being offered the possibility of 'associate citizenship',³¹ but at present such proposals remain utopian rather than practical in character. All of these initiatives unfortunately remind us what a divisive issue Brexit is and will remain especially, but not only, in the UK. Part of the reason for the Brexit vote was precisely that EU citizenship was not recognised as a social fact by the majority of voters. Yet even if EU citizenship could be said to be a prime example of conceptual change occurring before political, institutional and social reality changes, for a group of directly affected persons EU citizenship very definitely is an established social fact, as well as a source of legal rights. Once established, can the rights of EU citizenship simply be taken away by state *fiat*?

There have been several attempts to bring this issue before the CJEU, to see whether it may be inclined to engage in judicial activism in order to protect the status of EU citizenship. In a major victory for those who have been seeking to use law and litigation in the battle for EU citizenship rights,³² a Dutch first instance court faced with such a claim by UK citizens resident in the Netherlands initially decided in February 2018 to make a reference to the CJEU under Article 267 to seek authoritative answers to questions it saw as essential to deciding the case before it. It wanted to know whether withdrawal of the UK from the EU automatically leads to the loss of the EU citizenship of UK nationals and the elimination of the rights and freedoms deriving from EU citizenship, and if it does not what conditions should then be imposed. The decision to make a reference has now been appealed to the superior Dutch courts, but if the case does reach the CJEU it may be expedited for rapid resolution given the obvious urgency of the situation.

The issue being tested here is not the UK's future compliance with EU citizenship rights, but rather that of another member state, where a group of concerned UK citizens are resident. This is, of course, a hugely political question for the CJEU to be faced with, and it is likely to find ways to dodge the bullet because of the negative impact such a judgment would be likely to have upon its credibility. The Dutch district court was faced with the argument, put forward by the defendants in the case (the Netherlands and the city of Amsterdam) that the question was merely a political issue not a legal question, and that the dispute – at this stage – was purely fictional. The judge concluded, however, that there was a real and present threat of harm flowing from the possibility of Brexit, including UK withdrawal without an agreement under Article 50 TEU. The CJEU may, to the contrary, conclude that this is – at this stage – a purely hypothetical dispute and so the request for certain questions to be answered under the reference procedure is inadmissible. Even if the reference is accepted as

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Naturalisation and Brexit', *European Law Blog*, 5 March 2018, <http://europeanlawblog.eu/2018/03/05/lounes-naturalisation-and-brexit/>.

³⁰ See for example <http://ec.europa.eu/citizens-initiative/public/initiatives/open/details/2017/000005> and <http://ec.europa.eu/citizens-initiative/public/initiatives/open/details/2017/000003>. For reflection see Garner, O. (2017) 'The European Citizens' Initiative on a European Free Movement Mechanism', *European Law Blog*, 23 February 2017, <http://europeanlawblog.eu/2017/02/23/the-european-citizens-initiative-on-a-european-free-movement-mechanism-a-new-hope-or-a-false-start-for-uk-nationals-after-brexit/>.

³¹ See the discussion in Schrauwen, A, (2017) '(Not) Losing out from Brexit', *Europe and the World: A Law Review* 1(1), 1-18.

³² Maugham, J. (2018) 'Why I helped bring the Dutch case over Britons' EU rights', *The Guardian*, 18 January 2018, <https://www.theguardian.com/commentisfree/2018/jan/18/dutch-case-britons-eu-rights-brexit-uk-citizens>.

admissible, there are formidable obstacles to making the case that EU citizenship somehow maintains a life after Brexit,³³ even though applicants see themselves as relying upon the logical consequences of the line of case law leading up to and beyond *Ruiz Zambrano*, which has been defended extra-judicially by no less a personage than the President of the CJEU himself.³⁴ Perhaps the best that could be hoped for in terms of legal outcome for the applicants will not be the assertion that EU citizenship somehow continues as a status, but rather the sort of ‘freezing’ of basic rights articulated for the very different case of Slovenia after the administrative ‘erasure’ of certain non-citizens following independence in 1992 and adjudicated in the *Kuric* case before the European Court of Human Rights.³⁵ In fact, we do not really need the CJEU to tell us that these are the human rights obligations of the member states in the absence of a withdrawal agreement on the rights of EU citizens.

And yet we are led ineluctably back to the question of how far the constitutionalising effects of EU citizenship already go, and how much further they might stretch in the future. The referring judge in the Dutch case discussed above relied in his brief judgment on *Rottmann* and *Lounes*, building his reflections on the back of the classic dictum – no longer so frequently invoked by the Court of Justice and notably missing from the reasoning in *Lounes* – that EU citizenship is destined to be the fundamental status of the nationals of the member states.³⁶ On that analysis, EU citizenship can be seen as an independent source of rights for citizens, and once granted cannot be taken away unless the measures adopted would pass the proportionality test. One might agree with Davies³⁷ that with *Rottmann* and now *Lounes* the CJEU has already travelled most of the way down the road towards the conclusion that member states cannot just deprive citizens of rights once granted. However, it will doubtless come under heavy pressure to accept that the implementation of the consequences of a referendum held in the UK represents a legitimate and powerful state interest that outweighs the interests of individuals, if it comes to the question of implementing a proportionality test. Yet the Dutch judge has something to say about this matter too, embellishing the argument with some important – if controversial – democratic principles:

[5.22] the essence of a democratic constitutional state is that the rights and interests of minorities are protected as much as possible. The same applies to the functioning of the EU as a whole which forms a democratic community of (member) states governed by the rule of law.

What then, of the mythical ‘people’ so often invoked by the current UK government to justify pursuing a ‘Brexit means Brexit’ policy on the coat tails of a vote in which little more than 35 per cent of the overall registered voting population stated that the UK should ‘leave the European Union’ without being any more precise about how or with what consequences?³⁸ How can democracy be judged in such a contest between minorities and majorities, and what might be the legitimate role of a Dutch court to set in train a series of events that might lead to a legally legitimate decision of the UK electorate being constrained in its effects?

The stage could be set, therefore, for a constitutional confrontation of the highest order before the CJEU, where the limits of the CJEU’s capacity for judicial activism (or, as some might have it,

³³ McCrea, R. (2018) ‘Brexit EU Citizenship Rights of UK Nationals and the Court of Justice’, *UK Constitutional Law Blog*, 8 February 2018, <https://ukconstitutionallaw.org/2018/02/08/ronan-mccrea-brexit-eu-citizenship-rights-of-uk-nationals-and-the-court-of-justice/>.

³⁴ Lenaerts, K. (2015) ‘EU citizenship and the European Court of Justice’s ‘stone-by-stone’ approach’, *International Comparative Jurisprudence* 1(1), 1-10.

³⁵ See above n.26.

³⁶ See <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2018:605>. For an unofficial summary of key sections of the judgment, see <https://waitingfortax.com/2018/02/07/a-summary-in-english-of-the-decision-of-the-district-court-in-amsterdsm/>.

³⁷ See above n.29.

³⁸ What if everyone had voted in the EU referendum?, *UK and EU Blog*, 28 July 2016, <http://ukandeu.ac.uk/what-if-everyone-had-voted-in-the-eu-referendum/>.

legitimate protection of constitutional constraints on oppressive state action) will be tested. EU citizenship may remain very different to national citizenship, but it is possible that it has already acquired enough of its own distinctive 'sticky' qualities that it will come to haunt the Brexit negotiations in unexpected ways.

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