

## **Brexiting European Citizenship through the Voice of Others**

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### **Introduction**

The British vote on 23<sup>rd</sup> June, opting by a rather slim majority to leave the European Union, has sent waves of uncertainty rippling through the island and the continent, as well as through some milestones of European integration. One of these is European citizenship. Paradoxically, it receives a hard shake at the hand of national citizenships,<sup>1</sup> exercised through a referendum.

Any student of European citizenship has learnt a few things by heart. First, European citizenship derives from national citizenship, to which it adds without replacing it.<sup>2</sup> Second, it is a condition centered on the right to free movement, to the point that European citizens not exercising their right to free movement are subject to reverse discrimination.<sup>3</sup> Last, according to the European Court of Justice, it is destined to be the “fundamental status” for nationals of EU Member States.<sup>4</sup>

The British vote, if eventually leading to real Brexit rather than just national political farce, shows new facets of each of these citizenship tenets. This essay questions these new facets, reflecting on the new vulnerabilities that the link between national and European citizenship reveals; on the condition of mobile European citizens held to ransom from static ones; and on the opportunity that recent events entail for the Union to reaffirm a direct link to its citizens. The essay ultimately endeavors to distil from the dismay of the first hours an initial post-referendum research agenda on the prospects of supranational citizenship, in Europe and beyond.

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<sup>1</sup> In plural, in consideration of the fact that nationals of other Commonwealth countries resident in the U.K. were allowed to vote in the referendum.

<sup>2</sup> Treaty on the Functioning of the European Union, 2012 OJ (C 326), 47, art. 20.

<sup>3</sup> See Case C-64/96 and C-65/96 *Uecker and Jacquet v Land Nordrhein-Westfalen*, EU:C:1997:285.

<sup>4</sup> See, e.g., case C-184/99, *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, EU:C:2001:458.

### Exit through Voice

Much ink has been spilled on the relation between national and European citizenship. Some have argued that supranational citizenship devalues national, to the point that “residence is the new nationality”.<sup>5</sup> I have argued elsewhere that European citizenship actually enhances national citizenship.<sup>6</sup> The Brexit vote greatly enhances the power of national citizenship to inflict a fatal wound on supranational citizenship. This is a corollary of the “*ius tractum*” nature of European supranational citizenship.<sup>7</sup> European citizenship follows national citizenship like a shadow follows the body that carries it along.<sup>8</sup> This means, among others, that European citizenship is lost together with national citizenship. It is precisely in this latter perspective that the European Court of Justice has issued its strongest warning on the exercise of national powers in terms of acquisition and withdrawal of nationality.<sup>9</sup> Relevant powers, albeit belonging to the Member States, have to be exercised in compliance with EU law, and in particular taking into account the rights of European citizens. Denaturalization decisions that cause a national of a Member State to lose European citizenship are subject to an assessment of proportionality.<sup>10</sup>

The Brexit vote, assuming that it is eventually determinative of a UK Brexit decision,<sup>11</sup> blows up all these legal bulwarks protective of the status of European citizenship. European citizenship, this time, is not lost as a side effect of the loss of national citizenship, but rather it is going to be lost by decoupling national and European citizenship. This decoupling is impliedly admitted by the provisions introduced by the Treaty of Lisbon that formalized the possibility of withdrawal of a Member State.<sup>12</sup> A Member State could

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<sup>5</sup> Gareth Davies, “*Any Place I Hang my Hat?*”, or: *Residence is the New Nationality*, 11 EUROPEAN LAW JOURNAL 43 (2005).

<sup>6</sup> See, e.g., Francesca Strumia, *Individual Rights, Interstate Equality, State Autonomy: European Horizontal Citizenship and its (Lonely) Playground in Trans-Atlantic Perspective*, in CITIZENSHIP AND FEDERALISM: THE ROLE OF RIGHTS (Dimitry Kochenov ed., forthcoming 2016)

<sup>7</sup> Dimitry Kochenov, *Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights*, 15 COLUMBIA JOURNAL OF EUROPEAN LAW 169 (2009).

<sup>8</sup> FRANCESCA STRUMIA, SUPRANATIONAL CITIZENSHIP AND THE CHALLENGE OF DIVERSITY – IMMIGRANTS, CITIZENS AND MEMBER STATES IN THE EU (2013), at 315.

<sup>9</sup> Case C-135/08, *Janko Rottman v Freistaat Bayern*, EU:C:2010:104.

<sup>10</sup> *Id.*

<sup>11</sup> Something on which some doubts begin to linger according to the reactions of politicians as well as constitutional scholars in the UK. See, e.g., Nick Barber, Tom Hickman, Jeff King, *Pulling the Article 50 ‘Trigger’: Parliament’s Indispensable Role*, U.K. CONST. L. BLOG (June 27, 2016), available at <https://ukconstitutionallaw.org/>.

<sup>12</sup> See Treaty on European Union, 2012 OJ (C 326), 13, art. 50.

decide that it is in the best interest of the country to secede, with all the citizenship consequences that secession entails. The dynamics of Brexit are however particularly troubling. It is the very citizens that have made the democratic choice to give up their supranational status, as well as to strip it off their dissenting fellow nationals. From the point of view of this latter group, a new Achilles' heel of supranational citizenship is revealed, one that has a legal as well as a democratic face.

From a legal perspective, supranational citizenship emerges extremely vulnerable. It turns out that notwithstanding the activism of the European Court of Justice in shoring up one of its most ambitious creatures, European citizenship remains fragile. Under the Universal Declaration of Human Rights anyone has a right to a nationality.<sup>13</sup> International law entails protections against statelessness. However no one has a right to a supranational citizenship, and in fairness most people live their lives without one, or with one that they do not exercise. The referendum result makes one thing clear: legal protections, when it comes to supranational citizenship and its rights, only go so far.

From a democratic perspective, a popular vote on continued membership of the EU may seem a victory in the context of an entity that has been accused for decades of carrying along a democratic deficit.<sup>14</sup> Yet it is a pyrrhic victory from the angle of supranational citizenship. The very political exercise of national citizenship potentially ends up silencing, for many, their supranational citizenship and its political side. Voice on the basis of national citizenship may determine the exit from supranational citizenship. The problem is that, for the significant minority that opposed Brexit with their vote, it is the voice of others that forces exit. This is, of course, the regular course of democracy: winner takes all. In this case, however, the winner takes away from all, winners and losers, part of the political self that supranational citizenship entails: voice in the European Parliament, and for migrant British citizens, voice in local elections in other Member States. Any supranational loyalties that some British citizens may have developed together with such political self are going to be automatically disabled.<sup>15</sup>

Ultimately these results qualify some of the above mentioned scholarly arguments on the effect of supranational citizenship on national citizenship.<sup>16</sup> Residence based on

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<sup>13</sup> Universal Declaration of Human Rights, art. 15.

<sup>14</sup> See Joseph H. Weiler, *Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy*, 12 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 94 (2014), at 100-101.

<sup>15</sup> This is Hirschman's triptych: exit, voice, and loyalty. See ALBERT HIRSCHMAN, *EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES* (1970).

<sup>16</sup> See *supra*, notes 5 and 6.

supranational citizenship “is the new nationality”<sup>17</sup> only until national citizenship does not outlaw such residence. And while supranational citizenship enhances national citizenship in many ways, it does so in a rather contingent manner.

### Supranational Citizens Held to Ransom

Supranational citizenship’s enhancement of national citizenship has to do with the free movement rights that supranational citizenship entails. It allows partaking, through the principle of non-discrimination on the basis of nationality, of the rights of nationals in a host Member State. It also allows exporting entitlements that a national has in the Member State of nationality so that these can be enjoyed in the Member State of residence.<sup>18</sup>

European supranational citizenship is centered on the right to free movement. In fact, it is only activated in situations that are not purely internal, that is, situations that involve a European citizen residing, working, or travelling to a Member State other than his own.<sup>19</sup> This transnational character of European citizenship has attracted various criticisms. Accounts of European citizenship focus on the tiny minority of migrant European citizens and unduly disregard the perspective of the static citizens, to whom European citizenship means little or nothing.<sup>20</sup> Also, the promise of supranational equality that European citizenship brings about is watered down by reverse discrimination of static citizens: not only the European citizens who stay at home enjoy no protection, they may find themselves treated less favorably, for instance for purposes of family reunification, than migrant European citizens.<sup>21</sup>

The Brexit vote brings new viewpoints on these considerations. It represents the revenge of the static European citizens against the migrant ones. And, based on the data that has

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<sup>17</sup> See G. Davies, *supra* note 5, at 56.

<sup>18</sup> See, e.g., Case C-499/06 *Halina Nerkowska v Zakład Ubezpieczeń Społecznych Oddział w Koszalinie*, EU:C:2008:300; case C-503/09 *Lucy Stewart v Secretary of State for Work and Pensions*, EU:C:2011:500; (the rationale for the judgments in these cases is that obstacles to fruition of benefits while residing outside the Member State of nationality unduly restrict the freedoms conferred by the Treaties on European citizens)

<sup>19</sup> The doctrine of the genuine substance of European citizenship, inaugurated by the Court in *Ruiz Zambrano*, case C-34/09, *Ruiz Zambrano* EU:C:2011:124, overcomes this requirement but is left with uncertain prospects.

<sup>20</sup> See, e.g., Agustín José Menéndez, *Which Citizenship? Whose Europe? – The Many Paradoxes of European Citizenship* 15 GERMAN LAW JOURNAL 907 (2014).

<sup>21</sup> See Alina Tryfonidou, *Reverse Discrimination in Purely Internal Situations: an Incongruity in a Citizens’ Europe* 35 LEGAL ISSUES OF ECONOMIC INTEGRATION 43 (2008).

been released on the correlation between age group and vote, a revenge of the perpetually static against the potentially mobile.

Hence it turns out that the minority of migrant European citizens, who are so tightly protected in their rights by the legal architecture of supranational citizenship, are held to ransom by the majority of their static fellow nationals. If the latter pull the cord, their supranational citizenship and the transnational opportunities that it brings about are gone. In the light of this, the relative weight and meaning of supranational citizenship, including for settled versus migrant supranational citizens, need some rethinking. As does the vertical link that supranational citizenship weaves between the Union and its people.

### **Caring for the Discrete and Insular Minorities?**

In the early days of European citizenship, several studies compared it to federal citizenship.<sup>22</sup> If European citizenship were a real federal citizenship, it would entail a direct link between the Union and its citizens, with which the Member States would not be able to interfere. In that respect, federalism really “splits the atom of sovereignty”.<sup>23</sup> However, such accounts have lost traction in the EU context, and arguments along these lines have gradually gone quiet, while the study of EU citizenship has rather focused on its potential as transnational citizenship, on its political capacity, on its repercussions for solidarity.<sup>24</sup> An echo of the early federalist aspirations survives perhaps in the Court’s proclamation, less adamant as of late,<sup>25</sup> that European citizenship is destined to be the fundamental status for nationals of the Member States. The Brexit vote may, on the one hand, be the latest disproof of the Court’s mantra. On the other hand, it presents an opportunity to reconsider the nature and the prospects of the feeble direct link between the Union and its people. After all, this is the first time in EU history that a pocket of European citizens who had automatically acquired their supranational citizenship with the Treaty of Maastricht raises its political voice to clearly state that they want to remain European citizens.<sup>26</sup> If this

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<sup>22</sup> See, e.g., CHRISTOPH SCHÖNBERGER, *UNIONSBÜRGER: EUROPAS FÖDERALES BÜRGERRECHT IN VERGLEICHENDER SICHT* (2006).

<sup>23</sup> See *US Term Limits v. Thornton* 514 US 779 (1995) (J. Kennedy concurring), at 845 (Federalism requires ‘a relationship between the people of the Nation and their National Government, with which the States may not interfere’).

<sup>24</sup> See, e.g., Dora Kostakopoulou, *European Union Citizenship: Writing the Future* 13 *EUROPEAN LAW JOURNAL* 623 (2007); Jo Shaw, *Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism*, in PAUL CRAIG AND GRÁINNE DE BURCA (EDS.), *THE EVOLUTION OF EU LAW* (2011); Michelle Everson, *A Citizenship in Movement*, 15 *GERMAN LAW JOURNAL* 965 (2014).

<sup>25</sup> See, e.g., Case C-333/13, *Dano*, EU:C:2014:2358.

<sup>26</sup> European citizenship did not formally exist at the time of the 1975 UK referendum on EU membership. On the other hand citizens voting in the EU accession referendums in the context of the 2004 enlargements were not European citizens beforehand.

pocket represents a defeated minority at national level, is it a minority that the EU can disregard in shaping its position towards the UK?

Beyond the significant minority of the British remainers, the referendum result leaves the EU with a number of other minorities, whose interests have been squeezed out of the political process: the EU citizens residing in Britain, and the UK nationals residing in the rest of the EU, particularly those that British electoral laws have left disenfranchised. The way the EU will deal with all these minorities will be revealing of the nature of supranational citizenship and of the strength of the vertical link between Union and citizens. Important questions arise: should, or could, the EU take the interests of the British remainers into account? Should it protect UK nationals residing in the EU? Should it protect the EU citizens in the UK?

The answers to these questions depend in good part on how one interprets the link between the citizens and the Union. If supranational citizenship is a horizontal extension of national citizenship, entirely dependent on the sorts of the latter, then there is little that the EU can or should do. It should certainly protect the interests of the EU citizens in the UK, as these remain through their national citizenship, full supranational citizens. However, the Union from this perspective owes no duties to the UK nationals, who willingly or unwillingly are renouncing their supranational citizenship. On the other hand, if supranational citizenship, albeit rooted in a mechanism of mutual recognition of national citizenships,<sup>27</sup> engenders some kind of direct link between the Union and its people, then the Union owes some consideration to its discrete and insular minorities that have remained defeated, or excluded, from relevant political processes.<sup>28</sup> Of course, this does not mean that the EU could ever contradict or disregard the results of a national political consultation, or the ensuing position of the relevant Member State. But it may mean that in shaping its negotiation with a withdrawing Member State it has to internalize the interests of its unwillingly exiting citizens.

Answers to these questions bear important consequences beyond the contingencies of the moment. First, they harbor important signals for other constituencies of European citizens. Second, they point to the outcomes of a project, supranational citizenship, which was ultimately rooted in an attempt to win the people to the cause of integration by extending

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<sup>27</sup> See Francesca Strumia, *EU Citizenship and EU Immigration: Walking the Line between Third Country Nationals' Right to Belong and Member States' Power to Exclude?*, EUROPEAN LAW JOURNAL (forthcoming 2016).

<sup>28</sup> See *United States v. Carolene Products Company*, 304 U.S. 144 (1938) (footnote 4).

'special rights' to Community citizens.<sup>29</sup> The ways those special rights may be lost or taken away matters for the very texture of the citizenship they contributed to shape.

### Conclusion

Once the dismay and inebriation of the immediate referendum aftermath will have waned, the world may be left with a crumbling Europe, and researchers will be left with some hard thoughts. Some of these, it has been suggested, pertain to supranational citizenship. Events of the last few days cast old principles under new light and prompt a renewed research agenda on the prospects of supranational citizenship. The latter concept may seem left in agony, in the wake of resistance to migration, strained transnational solidarity, burgeoning nationalism and now popular opt-out. Yet it is still one that attracts much attention around the globe. While the British vote to relinquish their supranational citizenship, Mercosur countries in South America, countries belonging to the Gulf Cooperation Council, and countries in the Caribbean Community are working hard to build one, looking at European citizenship for guidance and inspiration.<sup>30</sup> The curiosity and reliance it has inspired set a challenge for European supranational citizenship. In the face of the small contingent that has chosen to proclaim: "Cives Europaei esse nolumus", and regardless of the eventual effect of that proclamation, the concept needs to compose itself and regain its way. The way forward begins from addressing the legal and political questions that the British vote has raised.

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<sup>29</sup> See Pietro Adonnino, *A People's Europe. Reports from the ad hoc Committee*, BULLETIN OF THE EUROPEAN COMMUNITIES 7/85 (June 27, 2016), available at <http://aei.pitt.edu/992/>.

<sup>30</sup> See Decision of the Council of MERCOSUR, 'Estatuto de la Ciudadanía del Mercosur. Plan de Acción', n. 64/10, December 2010; Economic Agreement of the Gulf Cooperation Council, preamble; DAVID S. BERRY, *CARIBBEAN INTEGRATION LAW* (2014), at 258-259; Caribbean Court of Justice, *Shanique Myrie v. Barbados*, [2013] CCI 3(O), par. 66-71.

