

Enacting Union Citizenship

Patricia Mindus

What scope is there to decouple the concepts of nationality and European Union citizenship? Professor Mindus probes a key question in this excerpt from European Citizenship After Brexit, her timely study available free to download from Palgrave. She teaches legal theory at the Philosophy Department, Uppsala University, Sweden.

Before the involuntary loss of status imposed on British citizens on both sides of the border, it seems that the possibilities of challenging this provision are quite limited and unattractive.

The EU organs cannot by themselves push for decoupling. There is not much the Commission can do to hinder an exiting state from stripping those nationals who belong exclusively to the exiting state of the Union's *status civitatis*. There is a slight possibility that the European Court of Justice might push in this direction, on the basis of the *Rottman* doctrine. Doing so would pose serious risks: if impetus to decouple Union citizenship from nationality derives from a decision by the European Court of Justice it can be attacked on democratic grounds and be found at odds with the current constitutional arrangement of the European Union. The Court of Justice could exploit this window of opportunity, but only at the cost of showing itself uninterested in obeying democratic standards and perhaps also disposed to perturb the constitutional arrangement.

The EU member states are in a better position to further decoupling in order to save the status for (at least some) British nationals. Some scholars have suggested they use this position to create 'a form of Union citizenship unmediated by any prior national citizenship' (Morgan 2016). Of course, there is the impervious road of re-drafting the Treatises but, given its political improbability and legal impracticality, I shall put this option aside. None the less, the Council may help to co-ordinate member states wishing to ease naturalisation for locally residing British citizens,

automatically transform the status of permanent residents into third country national long-term residents, or in other ways seek either to maintain the status of Union citizen for post-European Brits or to freeze rights. Whereas a member state is not free to engage in mass naturalisation on its own initiative (lest it violates the principle of sincere co-operation), co-ordinated member states are not liable to objections about undemocratic or unconstitutional behaviour to the same extent as a court.

Last but not least, there is another way to save the status that has hitherto been overlooked: Union citizens themselves might push for decoupling. This can be done in two different ways.

The first way consists in activating a citizens' initiative (Art. 11 § 4 Treaty on European Union – see below). If a million EU citizens, coming from at least seven member states, sign an initiative and the Commission decides to propose legislation as a result of it, the status of Union citizenship may well prove to be 'destined to become the fundamental status' of nationals of (former) member states as well. It is politically remote that, first, Union citizens show much solidarity with *remainers*; and second, that the Commission, who, in its role of guardian of the Treaties, generally endorses the traditional reading of nationality matters being *domaine reserve*, would favour decoupling. As a matter of law, it remains possible for Union citizens to help British citizens who have been stripped of the status they once shared. There are constitutionally foreseen venues, so unsettling of the arrangement would not be necessary. **The democratic quality of such an initiative would not be challenged as it emerges bottom-up:** it is the very role of citizens within a polity to be mindful about the primordial political right of defining the *demos*.

Moreover, the citizenship initiative introduced by the Treaty of Lisbon is itself a supranational political instrument. The citizens' initiative introduced by the Treaty of Lisbon was framed specifically for giving voice to cross-national political concerns on the basis of a political conception of EU citizenship: the *Regulation of the EU Parliament and the Council on the citizens' initiative* from 2010 emblematically fixes the threshold at '0.2% of the *population*'. Also, there would have been no point in setting different thresholds for different countries if the petition names were to stand merely for national interests rather than a cross-national opinion.

It is one of the elements that allow the claim that Union citizenship does not merely consist in mutually recognised privileges, but also in supranational political rights. Using it to save the supranational political rights of citizens who risk losing these – because of decisions possibly made by a member state government following a non-binding referendum



in which the most affected were effectively disenfranchised – strengthens the claim that an initiative on decoupling with the purpose of saving the status as Union citizens for British resident in the Union ought to be taken seriously even by a Commission otherwise reluctant to move in this direction. Were the Commission to take up the challenge, it would find that the *Rottman* doctrine of the European Court of Justice would go a long way in doing the job of explaining why loss of Union citizenship cannot be imposed unilaterally by one's (ex member) state of nationality.

There are solutions that would enable the Union citizenry to *enact* its citizenship, as Engin Isin has called it (*Enacting European Citizenship*, Cambridge University Press, 2015, by E Isin and M Seward), by becoming politically active and willing to contest arbitrary exercises of power.

Another way to enact citizenship is the second way for Union citizens to push for decoupling. The two ways are not alternative and can be pursued in parallel. Given the passivity of the non-British public before Brexit, the disenfranchised British citizens, with no other member state nationality to rely on, that are being deprived of the status of Union citizens, in a way that will also result, in a number of member states, in losing their local political citizenship, may petition the European Parliament to ask for a decoupling that will allow them to keep their status. The Parliament, even though sometimes reticent towards the activism of the European Court of Justice in nationality and citizenship matters, is, contrarily to the Commission, the institution potentially most favourable to decoupling. It has on several occasions viewed its own mandate as representing the *population* of the Union and not merely the sum of nationals of member states. Petitioning Parliament does not amount to political initiative, but it could lead to a declaration by the Parliament inviting the Council and the Commission to provide for the loss of status. Since it would only concern former Union citizens and not all residents, there are chances a plea might be taken seriously.

This way to 'save' the citizenship of deprived British nationals remains open after Brexit occurs. All residents may petition the Parliament and there are reasons for believing that British citizens currently resident in the Union will see their residence rights frozen.

Patricia Mindus, *European Citizenship after Brexit: Freedom of Movement and Rights of Residence*, *Palgrave Macmillan*, 2017

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Article 11 Treaty on European Union

1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.
2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.
3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.
4. Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.

The procedures and conditions required for such a citizens' initiative shall be determined in accordance with the first paragraph of Article 21 of the Treaty on the Functioning of the European Union.

Article 20 Treaty on the Functioning of the European Union

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 be additional to and not replace national citizenship.
2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:
 - (a) the right to move and reside freely within the territory of the Member States;
 - (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;
 - (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;
 - (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

**Article 21 Treaty on the Functioning of the European Union**

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.
2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.
3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament.



PEDANT —A man who likes his statements to be true.

The Good Citizen's Alphabet
Bertrand Russell, Gableocchus Press, 1953
Drawings by Franciszka Themerson

