CHAPTER 7

Towards a Functionalist Reading of Union Citizenship

Abstract In this final chapter some conclusions as to the nature of Union citizenship are drawn. Union citizenship is found to constitute, as a reflection of the Union itself, a status sui generis: It consists of both supranational and transnational elements. Some parallels are also drawn to the way citizenship and interstate equality is framed in American constitutional case-law. Being clear about what European citizenship is helps us to resolve the constitutional dilemma formulated in Chapter 4: Do we need to choose between sacrificing EU citizens’ rights or taking Article 50 seriously? The chapter shows why this is not the case.

Keywords European citizenship · Brexit · Freedom of movement · Right of residence · EU law · Migration law · International law · Interstate equality

No matter its shape, Brexit brings changes to the territorial scope of application of the Treatises. This impacts on what has been called one of the major achievements of EU integration: The citizenry of the Union. It will shrink in size, change in composition and some parts of it will be very exposed. Especially those individuals who have relied on free movement in making their life choices. Many are worried about losing residence rights and being subjected to a different migration status. The reduction of rights will affect not only British citizens but also European citizens in

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the UK and their family members. On both sides of the emerging border there will be much insecurity. In many member states British nationals living there will also lose local political citizenship.

What is more is that, for the first time, European citizens face a collective and automatic lapse of status. Loss of citizenship en masse, by the automatic workings of the law, will affect all EU citizens of exclusively British nationality. It was long claimed that the only way to lose EU citizenship was by losing nationality. Brexit proves this wrong: Indirectly Article 50 adds a ground for losing Union citizenship. Legally speaking, this loss of citizenship is not voluntary: It is not fruit of (individual) renunciation. In the case of Brexit one may also make the political claim that it is involuntary because 48% expressed their will to remain; certain territories voted massively in favour of staying and non-resident UK citizens were disenfranchised.

In this theoretically grounded contribution we addressed some of the most urgent policy questions in the wake of Brexit: How to deal with Brits living in the rest of the EU, and other Europeans living in the UK. The inquiry started out by briefly outlining the history and the status of European citizenship (Chapter 2). Union citizenship was found to constitute, as a reflection of the Union itself, a status civitatis sui generis. It consists of both supranational and transnational types of entitlements. We took the issue to a deeper and more intriguing level by asking which rights can be frozen (Chapter 5) for different categories of people who, having made use of freedom of movement, are left in a legal limbo after Brexit, awaiting indication about how their position will be regulated in migration and nationality law. This limbo was characterised by reference to a series of potential hard cases to come (Chapter 3). The complicated issue of competence in the area of Union citizenship was also addressed, in particular with reference to loss of the status. The various options were presented and the anticipated consequences for both the UK and EU states fleshed out. Venues for challenging the loss of status were also discussed (Chapter 6). What overall enabled the analysis was the functionalist theory of citizenship (Chapter 4).

The key finding is that while member states are in principle free to revoke the status of Union citizen, former member states are not unbounded in stripping Union citizens of their acquired territorial rights. The European Convention of Human Rights steps in and protects the residence rights of those lawfully residing in the territories covered by EU law at the moment of independence. Also, the supranational rights of
Union citizens being subjected to massive lapse of status can be vindicated by the citizenry of the Union.

Moreover, it was shown that the UK is not well-equipped to prevent instrumental use of multiple citizenships. Generally speaking, there is a tradition of tolerance towards multiple citizenship in the UK.

Policy suggestions were outlined. It was found that provisions on loss of citizenship need to be read in the light of the general principle of the UN Declaration of Human Rights banning arbitrary deprivation. International law has elaborated a series of guiding principles for framing arbitrary deprivation. These principles have to be observed not only if the loss or deprivation would cause statelessness, but in all cases where a person would be stripped of a citizenship. So Brexit loss provision would need to obey these principles.

Nationality law belongs to the domaine réservé but domestic choices are not neutral vis-à-vis Union citizenship. There may be incentives for the UK to adopt or modify domestic provisions in a way, however, that would need to pay ‘due regard’ to European law. Under the banner of taking back control, the UK may be spurred to restrict pervasive (ab)use of multiple citizenships and/or to tolerate it only in some cases; and/or to penalise instrumental naturalisation by its own nationals living in other member states. There are many ways to do so. But such incentives would need to be resisted for quite some time. Indeed, after having invoked Article 50 and throughout the negotiation phase, the UK could not:

- Pass domestic nationality provisions easing naturalisation only for some EU citizens since it would violate the principle of non-discrimination
- Change domestic nationality provisions with the effect of barring, or rendering more difficult or overly onerous, naturalisation of second country nationals since such a policy would violate the principle of legitimate expectations
- Fight instrumental naturalisation of its own nationals by stripping them of their British nationality and/or residence rights in case of naturalisation abroad
- Re-introduce additional criteria, such as the requirement of ‘a genuine link’ for people with more than one nationality
- Make applications for indefinite leave to remain harder to obtain

During this phase, European law would still hold and modifications to policies, including immigration and nationality law, may come to be
scrutinised by the Union. Were the UK to modify its policy in ways incompatible with European law, it could be subjected to infringement procedure by the Commission and judicial review by the European Court of Justice. Overall, it would be detrimental to negotiations to harden UK nationality laws and/or immigration laws.

On the other hand, there are limits to what member states can do to both assist and deter British citizens from continuing living in the Union and eventually naturalising there. Rendering family reunification for British citizens harder, say, would violate the principle of legitimate expectations. Member states are also prevented from, say, naturalising Brits en masse because of the principle of sincere cooperation.

There are also a number of policies that all actors – EU institutions, member states and the UK – could adopt to make the transformation of second country nationals into third country nationals easier for Brits in the Union and for making the passage from being second country nationals to becoming simple foreigners under the British legal order for European citizens living in the UK. Chapter 6 dealt extensively with these different policy options. Here is a summarising scheme (Fig. 7.1): We are now in a position to answer those who fear the constitutional ‘dilemma’ referred to in Chapter 4. Does Brexit imply that we need to make a choice between sacrificing EU citizens’ rights on the altar of the referendum or sacrificing the will of Brexiters on the altar of the rights of Union citizens? No, we do not: The dilemma is apparent.

On one hand, we do not need to sacrifice Union citizens’ rights to allow Brexit. The supranational rights of Union citizens being subjected to massive lapse of status can be vindicated by the citizenry of the Union: By petitioning and organising a citizens’ initiative the possibility is given to the citizenry of the Union to enact itself as a ‘body politic’ and call for the ‘inter-citizenship’ distinctive of any composite republic so as to save the status of those who are placed ‘in a position capable of causing them to lose the status conferred by Article 17 EC.’

On the other hand, we need not sacrifice the will of Brexiters to save residence rights. Many are thus worried in vain. More precisely, the reasons of worry here are more of a political nature, not strictly legal since law does offer remedial solutions. Even if Union citizenship is lost due to changed legal status of a territory, the European Court of Human Rights steps in and protects the residence rights of those lawfully residing in the territories covered by European law at the moment of independence. This will be so at least until the EU adheres to the European Convention of Human Rights,
Fig. 7.1 Policy suggestions for EU institutions in treating Union citizenship after Brexit, for Member states (MS) in treating British citizens (former Union citizens), and for the United Kingdom in treating second country nationals (SCNs) as well as its own citizens in reference to their loosing European citizenship.
an idea that lost traction in the wake of the ECJ’s Opinion 2/13 from 2014. It seems that a person can enjoy certain rights commonly associated with Union citizenship even in the case the status as such is no longer held.

Some Brexiteers, unsurprisingly, will understand this to be a form of Hotel California doctrine, according to which ‘you can check out any time you want but you can never leave.’ This impression is, however, mistaken since the Kuric formula would ‘cement’ the existing residence rights, but would not extend the applicability of EU law to the territories exiting the Union. However, the politically uncomfortable fact remains that the doctrine allows freezing of residence rights. Freezing is possible no matter if states decide to share sovereignty or to jealously rein it in within national borders.

Is it then a coup? As emphasised in Chapter 4, to some, Brexit offers a constitutional test: If rights are saved and decoupling occurs, shifting citizens’ entitlement to jointly decide about membership in the polity from the national to the European level would ‘amount to a coup d’etat’ (Dawson and Augenstein 2016). Would such a freezing of rights mean that Union citizenship deprives Article 50 of its effet utile?

There is no coup, to be sure: For Brexit to yield anything like a constitutionally jeopardising form of decoupling between nationality and Union citizenship it would require extremely fanciful inventiveness of behalf of the Commission; or, the European Court of Justice would need to be sparked to open the constitutional contention over the loss of the status by referring to the Rottman doctrine in the case – in my view remote, albeit technically not impossible – of a first country national, that is, a British citizen not having made use of his or her right to free movement, challenging the loss provision before a British court which requires a preliminary ruling, during the interregnum, that is, after the invocation of Article 50 but before effectuating the exit.

Nonetheless, it is possible for Brexit to yield a form of decoupling between nationality and Union citizenship that would not, however, be constitutionally jeopardising. Such a solution would need to rely on the enactment of Union citizenship and/or adoption by member states of a naturalisation procedure for former Union citizens that would not violate the general principles of European law.

Many claimed in the wake of the referendum, that Union citizenship is not a ‘federalist element’ of the European integration project since Union
citizens enjoy their ‘fundamental status’ and ‘citizenship rights’ only Solange (so long) as the member state of which they happen to have the nationality does not invoke Article 50. Has Brexit shown this to be the case? Is Union citizenship, after all, nothing but a concession made by the Masters of the Treatises that can be called back at political convenience? Is EU citizenship somehow ‘meaningless’?

A positive implication of adopting the functionalist theory is that answers to these questions are of no consequence for the analysis conducted. It does not matter for the functionalist theory whether the citizenship is ‘real’ or a case of rhetoric. The theory is only committed to the fact that citizenship is a status, putative or not. The theory is agnostic towards ‘thick’ concepts associated with citizenship such as identity and recognition. This is due to the fact that it is not a theory suggesting a conception of citizenship. There are arguably many such conceptions, the pros and cons of which have been debated in great detail over the last decades by citizenship scholars (Mindus 2014).

The functionalist theory offers a concept of citizenship, not a conception. The concept of citizenship that the theory develops only requires a very minimal ontological commitment: That status civitatis is, conceptually speaking, a middle-term. As such, it is not true, nor false. As such, it does not ‘correspond’ to any empirical fact. It can, nonetheless, be investigated from an empirical perspective. There does not need to be anything ‘out there’ to which the concept corresponds for it to work. What is required of status civitatis is to connect grounds for acquisition and loss with legal positions. This characterisation does not only fit the legal facts. It is fully able to explain the constitutional dimension of citizenship policy. No ontological commitments to people’s identity or ability to identify with others are needed for this purpose. The theory is in line with the tradition of Scandinavian legal realism, a corpus of philosophical literature concerning this very point that has too often been neglected by legal scholars to their detriment.¹

In keeping with this tradition, there is no need to believe that the legal concepts used somehow exist to provide insightful analysis into how they work. As Alf Ross famously argued in relation to the concept of ownership, it might be the case that it is in reality a meaningless word, a form of rhetoric, without changing the fact that, by looking at how it connects the conditioning facts and the conditional consequences in the law, we can understand perfectly well how the concept works – et pour cause, scrutinise it critically. I submit that the same is true
for citizenship. By treating it as a middle-term – ‘a technique of presentation’ (Ross 1957, p. 821) or ‘a vehicle of inference’ (Lindahl 2004, p. 182) – it is possible to investigate both the conditioning facts (here: modes of acquisition and loss of the status) and the conditional consequences (here: entitlements connected to the status); then, to test whether they fit one another. The functionalist theory helps us to test the internal consistency of the status, and indicate under which conditions the loss of status civitatis is legitimate. Being a conceptual channel, status civitatis can be more or less capable of providing connection. The theory allows for critical analysis without subscribing to any specific substantial, ‘thick’ normative conception.

Is the post-Brexit loss of status illegitimate? As seen in Chapter 4, whether the loss is legitimate depends on the type of entitlements the status is connected to. According to the correlation thesis, legitimacy is dictated by fittingness of criteria (for acquisition and loss) to content. If content of the status is constituted by ‘special rights’ or mutually recognised privileges, unilateral imposition of loss of the kind that Brexit involves would be legitimate. If content of the status is constituted by supranational political rights that are as such generative of something else than that which generated it, unilateral imposition of loss of this kind would be illegitimate. Put differently, if supranational political rights constitute the content of the status, its loss is not only ‘involuntary’ in the technical sense (not fruit of renunciation) but also in the moral-political sense (not grounded on will). The answer to the question ‘who gets to withdraw supranational entitlements?’ cannot be any member state that so wishes. A fortiori, this authority cannot lie with a former member state, who would then have the authority to take away supranational entitlements to political participation in a Union of which it is no longer part.

Union citizenship consists of both categories: It comprises special rights grounded on mutual recognition as well as supranational political rights. The first kind of entitlements allows aggregation of member states. The second type of entitlements allows association of member states. Aggregation sums reciprocal state interests, defined by borders. Association produces common interests of individuals across borders. Consular protection is an example of the first kind. Citizens’ initiative is an example of the second kind. Since the intension of Union citizenship is constituted in this way, a state that exits can legitimately withdraw some entitlements, but not others. However, such a solution is not technically
feasible because the status – in a way characteristic of middle-terms of this kind – ‘contributes a bundle, the value of which depends on incorporating components [. . . that] jointly accomplishes a synergic effect’ (Lindahl 2004, p. 199).

The intension of Union citizenship as a ‘bundle’ explains the ‘miracle’ which Poiares Maduro speaks of in the opinion cited in incipit to this book, taken from his Opinion on the Rottman case: ‘[T]hat is the miracle of Union citizenship: It strengthens the ties between us and our States (in so far as we are European citizens precisely because we are nationals of our States) and, at the same time, it emancipates us from them (in so far as we are now citizens beyond States).’

Some contents of Union citizenship strengthen the ties between us and our States insofar as they are privileges that we enjoy abroad. Some contents of Union citizenship emancipate us from our Staatsangehörigkeit, by constituting an interstate community in which we stand in relation one with another notwithstanding the states to which we belong.

As Wittgenstein recalls in his Lecture on Ethics, the truth is, of course, that the scientific way of looking at a fact is not the way to look at it as a miracle. From the scientific perspective, the ‘miracle’ is, to be precise, the effect of an unsettling asymmetry in the construction of the key dimensions of the status civitatis. The intension does not rim well with the extension. If the consistency of the status is to be raised, extension will need to follow intension. Member states are currently too free in managing a status that does not reflect solely on their members. Maintaining the link between national and European citizenship provides a strong argument for common European standards with regard to criteria determining acquisition and loss of Union citizenship through the nationality laws of member states. While prospects of instituting European conditionality for loss of the status are weak, Brexit offers a possibility for the citizenry of the Union to enact its citizenship.

Most ‘private citizens’ around the Union worry about their transnational rights of free movement and connected entitlements, their portable right not to be discriminated against as they move across borders, which is the European equivalent to the American doctrine of interstate equality, developed to protect the right to interstate travel.2 These same individuals are also citoyens in a different meaning: They also enjoy local and supranational political citizenship in virtue of the same status.
It is well worth recalling that the US Supreme Court has dwelt on the link between equal protection, right to interstate travel and citizenship in a quite instructive way: In *Saenz* from 1995, the Court linked the horizontal protection of rights of the newly arrived in a state to their federal political capacity; that ‘citizens have two political capacities, one state and one federal’ adds special force to their claim that they are to be treated on the same footing as the other citizens.\(^3\) Interstate equality, a horizontal bond among ‘private citizens’ thus relies on the fact that all citizens are equal in their federal political capacity, which constitutes a vertical link between the political community and its members. In this perspective, safeguarding the possibility of enacting citizenship is a crucial aspect of citizenship, of which horizontal citizenship is a reflection. This is so because citizenship in its political meaning constitutes membership of the kind that Justice Cardozo had in mind when he famously claimed that ‘the people of the several states must sink or swim together.’\(^4\)

**Notes**

1. It has been suggested to me that the point is compatible also with, for example, Quinean explications of terms. The reference to Scandinavian legal realism is to be preferred nonetheless since it is chronologically prior and that the point was developed in explicit reference to legal terms of art by the participants in the realist movement and members of the so-called Uppsala school.

2. See Strumia 2016.

3. *Saenz* n. 26 § 504, quoting *US Term Limits v Thornton* 1995.

4. *Baldwin v GAF Seelig, Inc.* 294 US 522 [1935] § 523.

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