

# ***Scala Civium: Citizenship Templates Post-Brexit and the European Union's Duty to Protect EU Citizens***

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## **I. Introduction**

Legal realities are complex constructs designed to reflect and to condition social and political realities. Beneath the layer of objectivity, however, there exists an experiential reality relating to the applicability, and relevance, of legal rules to the daily lives of individuals.<sup>1</sup> Empowered by the establishment of European Union citizenship at Maastricht,<sup>2</sup> influential rulings by the Court of Justice of the EU,<sup>3</sup> the adoption of the Citizenship Directive in 2004,<sup>4</sup> and a number of decisions, reports and programmes adopted by the European Union institutions,<sup>5</sup> European Union citizens have been increasingly keen to exercise their fundamental rights of free movement and residence under the Treaties. Notwithstanding the existence of formal EU citizenship rules, however, EU citizens have experienced, and continue to experience, obstacles in their daily lives.<sup>6</sup> But the impact of such obstacles has been tempered by the

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<sup>1</sup> Legal formalism was criticised by the American legal realist movement. Its protagonists were Oliver Wendell Holmes (1841-1935), Karl Llewellyn (1893-1962) and Jerome Frank (1889-1957). Sociological research also commented on the existence of multiple realities. See Alfred Schutz, (1945).

<sup>2</sup> Treaty on European Union, OJ C 191 of 29.7.1992. The Treaty entered into force on 1 November 1993.

<sup>3</sup> For an overview, see Kostakopoulou (2015, pp. 170-3).

<sup>4</sup> Directive 2004/38/EC, OJ L 229 of 29.6.2004.

<sup>5</sup> For an overview, see B. de Witte and H.-W. Micklitz (eds.) (2012).

<sup>6</sup> See EU citizenship consultation 2015, European Commission, Luxembourg 2016, ISBN 978-92-79-57029-2.

The consultation provides a detailed account of EU citizens' perceptions and views on their Union citizenship

realisation that in the eyes of the law they are almost equal partakers in collective processes and practices in the Member States of residence.<sup>7</sup>

Sharing a community of space necessarily implies a ‘shared’ or ‘intersubjective’ time. Interestingly, EU citizens have never been placed in the periphery of host societies or in a state of probation until they meet integration conditions imposed by the host communities. This is forbidden by EU law. Their co-presence as contributors, collaborators and burden-sharers has been authorised by the Treaties and European Union law has consistently ensured that no ‘patriot games’ played by state elites or non-governmental groups could deny them ‘shared’ or ‘public’ time. And ‘sharing a community of time implies that each partner participates in the on-rolling life of another ... . In brief, consociates are mutually involved in one another’s biography’ (Alfred Schutz, 1953, reprinted in Natanson, 1963, p. 316).

The outcome of the referendum on the UK’s continued membership of the European Union on 23 June 2016 has fractured shared communities of space and time across the EU. Brexit opened the way for the ‘restoration’ of British sovereignty and, if an EEA model (or an EEA-like model) is ruled out, EU citizens settled in the UK will have to apply for either UK nationality or indefinite leave to remain.<sup>8</sup> The same applies to UK nationals permanently

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rights as well as on their experiences of living in another country. See also EU Citizenship Report 2010, Dismantling the obstacles to EU Citizens’ Rights, COM (2010) 603 final, Brussels 27.10.2010, p. 2; 2016 Standard EB on EU Citizenship and EU Citizenship Report 2017 (Luxembourg: Publications Office of the EU).

<sup>7</sup> EU citizens do not have the right to vote in national parliamentary elections in the Member State of residence. And they cannot apply for civil service positions that involve the exercise of official authority and are associated with rights and duties stemming from the bond of nationality. On the conditions attached to the rights of entry and residence, see chapters II and III of Directive 2004/38, n. 4 above.

<sup>8</sup> In November 2016, Mr Guy Verhofstadt, suggested the idea of ‘associate citizenship’ in the UK. The idea did not gain currency because the creation of associate citizenship would require a Treaty amendment. But

residing in other Member States who will lose their EU citizenship status following the UK's withdrawal from the EU. Unexpectedly, EU citizens have been transformed into 'guests' or 'foreigners' in communities they call 'their own'.<sup>9</sup> Similarly, if the forthcoming Brexit negotiations yield no agreement, former EU citizens would have to apply for either permanent residence or naturalisation in the countries in which they reside. As expected, the uncertainty surrounding the status of EU citizens has given rise to distress, confusion and considerable debate at national and EU levels.

At the same time, the process of the 'othering' of EU citizens in the UK, that is, their depiction as EU migrants and foreigners in official discourses, the media and in administrative practices has already commenced.<sup>10</sup> Their identities and lives are looked upon completely differently from the previous year. A new system of relevancies emerges anchored in British nationality or 'in-group' status.

In this article, I examine various citizenship templates following the activation of Article 50 TEU and engage in institutional design thinking. By combining top-down and bottom-up perspectives, that is, 'how institutions think' (Douglas, 1986) or 'seeing like a state' (Scott, 1998) as well as citizens' views and vision, I discuss possible policy options

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compare the related European Citizen Initiative at <http://ec.europa.eu/citizens-initiative/public/initiatives/open/details/2017/000005>.

<sup>9</sup> 1.22 million UK nationals reside in other Member States. The most recent Census showed that 2.68 million people from other EU countries live in the UK. However, the Labour Force Survey estimated that 3.16 million nationals of EU countries live in the UK; see House of Commons Library, Briefing Paper on Migration Statistics, Number SN06077, 25 October 2016, pp. 23-26.

<sup>10</sup> An increase in racially motivated crime following the referendum was noted by official statistics in the UK. Mr Arkadiusz Jozwik was beaten to death in a racially motivated attack in Essex and at a vigil for him two Polish men were assaulted.

concerning the status of EU citizens affected by Brexit and differentiated citizenship arrangements (a *scala civium*) and argue that there is room for institutional innovation in the domain of citizenship.

The discussion is structured as follows. In section II, I deploy an analytical lens in order to theorise citizenship and its governance in the EU and to differentiate national citizenship from EU citizenship. Section III discusses the domicile paradigm which features at the top of the normative agenda for the development of EU citizenship and argues that it would have a limited applicability to citizenship rights post-Brexit. The advantages and disadvantages of possible citizenship or permanent residence templates at national level are explored in section IV. Section V presents, and defends, the proposal for a special EU protected citizen status for both EU citizens living in the UK and UK nationals living in other Member States while section VI contains the concluding remarks.

## **II. Isolating Questions of Concept**

Engaging in institutional design thinking and contemplating citizenship templates post-Brexit requires a prior attention to the concepts of national citizenship and European Union citizenship. The European Union has had a multi-layered citizenship regime, within which national, subnational, supranational citizenships have been nested and interlocked (for early accounts see Meehan, 1993; Preuss, 1995; Weiler, 1995; Kostakopoulou, 1996; O’Leary, 1996; de Burca, 1996; Wiener and Della Sala, 1997). The Brexit outcome of the referendum has brought forth their possible disentanglement. In this section, I deploy an analytical lens in order to examine national and European Union citizenships and to clarify their differences. This is envisaged to provide the background for discussing below how these citizenships could be disentangled and the possible absorption of complex citizenship by national

citizenship. Although such a change would be a subtraction and subtractions unavoidably lead to reduced possibilities, I will intentionally refrain from perceiving Brexit as an indicator of the resilience of national citizenship and, accordingly, of the alleged fragility of EU citizenship and, more generally speaking, of forms of postnational citizenship.

European Union citizenship has been conditioned on either the possession or the acquisition of national citizenship since its formal establishment by the Treaty on European Union (1 November 1993). Although it is formally a derivative citizenship (i.e., only nationals of the Member States can be EU citizens), it differs from national citizenship in a number of ways. The most important difference is that Union citizenship is premised on mobility, that is, on national border crossings and on the prohibition of discrimination on the ground of nationality.<sup>11</sup> National citizenship, on the other hand, has been a sedentary status. Owing to its close links with territorially bound communities organised as nation-states, national citizenship has been internally inclusive and externally exclusive (Goodin, 1996; Baubock, 2007). An inclusive ‘we’, that is, a public consisting of national and naturalised citizens, is juxtaposed to others, that is, to foreigners or non-nationals. So, whereas at the national level heterogeneity or ethnic diversity has been used as a justification for the exclusion of racial, ethnic and national minorities and for measures designed to promote national cohesion, for the European Union it is a source of strength and unity. Heterogeneity is thus seen to be a premise for co-existence, connectivity and the development of multifarious associative relations.

In addition, whereas national citizenship needs socially legitimating myths, ‘big ideas’, rituals and symbols in order to perform its integrative functions, EU citizenship is a juridico-political institution. It has not established a sacrificial culture and has not turned domestic societies into societies of control and surveillance. It has merely conferred

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<sup>11</sup> See, for instance, European Council (1985), Adonnino Report, Bull. EC (Suppl) 7/85.

rights directly on Union citizens which are enforceable before national as well as European Union courts. More importantly, it has done so without eroding national cultures. By so doing, it has confirmed Wildavsky's (1987, p. 11) observation that it is wrong to believe that inconsistent cultures do not (- or cannot) cohere (see also Kratochwil, 2001). Of course, the exercise of EU citizenship rights is bound to rub off against the settled powers of the state and national administrative authorities thereby causing irritations and frictions. And irritations provoke criticism and, on occasions, resistance, but neither states nor cultures have been eroded by it. Accordingly, workers, work-seekers, self-employed persons, students, pensioners, persons of independent means, family members of Union citizens, service recipients and posted workers, all have been encouraged to exercise their free movement rights and, through their citizenship practices (Wiener, 1998; Magnette, 2005), they have formed direct bonds with the European Union.<sup>12</sup>

A broader, more cosmopolitan political community has thus emerged in the European setting due to institutional efforts to overcome the disabilities of 'alienage' and national discriminatory and restrictive practices. Occupational barriers anchored on nationality, national protectionism and even unnecessary obstacles to free movement and residence have been progressively removed so that 'outsiders' can become 'insiders' and rightful participants in the host societies. This radical normative change<sup>13</sup> has enriched socio-political life and has revealed the admirable working of the logic of equality. By respecting human beings and treating them equally, dynamic and open societies are created. The logic of equality, or to be more precise of equalisation, thus triggers a complete shift of perspective in how one thinks

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<sup>12</sup> See Standard Eurobarometer 81, European Citizenship Report, Spring 2014:

[http://ec.europa.eu/public\\_opinion/archives/eb/eb81/eb81\\_citizen\\_en.pdf](http://ec.europa.eu/public_opinion/archives/eb/eb81/eb81_citizen_en.pdf).

<sup>13</sup> Akerlof and Kranton (2011) have commented that one of the most radical regime changes is a change in the norms of who is an insider and who is an outsider.

about community, the bonds that tie citizens together and what can be legitimately required on the part of human beings for their admission into bounded communities. Integration is a matter of socio-political inclusion. In contrast, the logic of national identity underpinning national citizenship demands the conversion of ‘aliens’ into co-nationals, that is a process of dis-identification and re-identification with a view to their reclassification as members of the body politic. Here, naturalisation is a state device for controlling membership and filtering out movement.

Premised on different foundations and having a different rationale, EU citizenship has not demanded the naturalisation of EU citizens in the Member State of residence. It has shifted the boundaries of membership from the outside through the conferral of rights to citizens which the Member States need to respect and enforce. True, the recognition of EU citizens as resource bearers and ‘*pantoporoi*’,<sup>14</sup> that is, capable of going everywhere, has been called into question in the UK and elsewhere. But irrespective of the new interpretations of free movement of persons in the post-Brexit landscape, we cannot sidestep the differences between EU and national citizenships for this would leave us with a partial understanding of the law and policy options concerning the status of the EU citizens affected by Brexit.

### **III. Isolating Normative Questions and Desirable Reforms**

In section II I examined the conceptual issues surrounding national and European Union citizenships and discussed their differences. These differences have been the point of departure for innovative thinking about EU citizenship. Before proceeding to discuss options for the citizenship policy challenges facing the UK and the European Union in the post-Brexit

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<sup>14</sup> I have borrowed this expression from Sophocles’ *Antigone* (Verses 360-361): ‘*pantoporos: aporos ep’ouden erchetai to mellon*’. Compare Fligstein (2008).

landscape, it is worth paying some attention to the normative agenda for the reform of EU citizenship and the domicile-based model of EU citizenship since UK nationals living in the EU could benefit from its future establishment.

Because the European Union lacks the commonalities, myths and symbolisms that have characterised national communities, scholars and policy practitioners argued in the 1990s that its model of citizenship should not be based on Member state nationality. Instead, it should be based on a five-year lawful residence in the territories of the Union. Such a reform would transform EU citizenship into a genuinely postnational model of citizenship reflecting the complex interconnections that individuals have by virtue of living, working and participating in the socio-economic and political life of their place of residence (Preuss, 1995; Soysal 1995; Kostakopoulou, 1996, 2001; Shaw, 1997; Soysal, 1995; Maas, 2007; Kochenov and Plender 2012; Tonkiss, 2013; but compare Olsen, 2012). It would also provide a solution to the situation of UK nationals living in EU Member States following Brexit and it has been favoured by NGOs.<sup>15</sup>

In addition to being normatively defensible, grounding EU citizenship on domicile would instantiate Simmel's (1949/50) notion of society as an inter-human reality. Reflecting on social relations in 1908, Simmel posed the pertinent question 'How is Society possible?'. By contrasting nature with society, he argued that societal unification is based on connecting individuals and on their activities (Aradau, Huysmans and Squire, 2010). Understanding, love and common work make individuals societal members; they come to recognise concrete others as 'fellow sociates'. According to Simmel (1923), each social element (each individual) is interwoven with the life and activities of every other, and this produces the external framework of society.

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<sup>15</sup> I have in mind NGOs, such as New Europeans, Europeens sans frontières and the European Citizenship Foundation. For a full explication of EU citizenship based on domicile, see Kostakopoulou (1996; 2001; 2008).



The relating or connexive process of society creates communities of ‘concern and engagement’ (Kostakopoulou, 1996; 2001). This has important implications for national citizenship and identity since it severs the link between national communities and the enjoyment of political rights. By transcending the ordering process of society on which national statist communities have been built, the future development of EU citizenship could include the grant of voting rights in national parliamentary elections to EU citizens, the formation of transnational political parties and the revision of the restrictive procedural requirements surrounding the European Citizens’ Initiative.<sup>16</sup> Being together in welfare and in a common political life in a common European space would also require the recognition of social rights and duties (Ferrera, 2009; Maas, 2014) and the establishment of a European solidarity fund and of a minimum basic income allowance.<sup>17</sup> Additional reforms might include the strengthening of the links between European institutions and the European civil society,<sup>18</sup> the more effective protection of national and ethnic minorities (Carrera, 2014), and coordinated action to tackle obstacles to the family reunification of EU citizens and the resurgence of discrimination, xenophobia and racism in austerity-ridden Europe. All these

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<sup>16</sup> The European Citizens’ Initiative is based on Article 11(4) TEU and was an innovation introduced by the Lisbon Treaty. Between 1 April 2012 and 1 August 2016, 56 ECIs were proposed and 29 were registered. However, the success rate was very low. See <http://www.citizens-initiative.eu/#home>.

<sup>17</sup> See Philippe Van Parijs (2004). A number of proposals have also been made by Herwig Verschueren, ‘European citizenship: not for the poor’, Paper presented at the 23rd International Conference of Europeanists Philadelphia, April 14-16, 2016.

<sup>18</sup> See ECIT’s proposals for a stronger, inclusive and coherent European citizenship, Brussels, 29 August 2016.

reforms would enhance democratic participation and provide opportunities for the empowerment of citizens.<sup>19</sup>

What should be mentioned here is that, although the existing political climate might not be receptive to a transformative European Union citizenship agenda, it is important not to lose sight of the fact that existing institutional limitations and non-receptive political environments tend to serve as both barriers and invitations to further institutional reform. In this respect, the subsequent discussion on citizenship templates should not be taken to imply that the normative agenda for the development of EU citizenship should be forgotten and that the domicile paradigm of EU citizenship serves no use.

#### **IV. The Law of the Excluded Middle: Opening the Naturalisation Gates Or Permanent Residence**

Although the normative proposals for the development of EU citizenship continue to inspire the activities of non-governmental organisations and the European civil society,<sup>20</sup> if an intergovernmental solution to the position of former EU citizens is sought during the Brexit negotiations, EU citizens who are resident in the UK and UK nationals resident in other Member States will be offered either permanent leave to remain or the option of applying for national citizenship.<sup>21</sup> In fact, given that the UK and other Member States have viewed EU

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<sup>19</sup> In addition to these reforms, for the incorporation of a humanist perspective see *The Human Face of the EU* (Nuno Ferreira and Dora Kostakopoulou, eds., 2016).

<sup>20</sup> See note 14 above.

<sup>21</sup> The public international law concept of 'acquired' or 'vested' interests is unlikely to apply because, unlike the ECHR, the EU Treaties do not provide for acquired rights and Article 70 of the Vienna Convention applies to states as parties of international treaties - it is not concerned with the legal position of individuals. See the

citizenship as interfering with their right to treat the holders of that citizenship as foreigners (Guild, 2014, p. 424), Brexit might give rise to claims to make the determination of the status of EU citizens ‘a purely internal situation’ triggering the application of domestic procedures and laws.<sup>22</sup>

The procedure of applying for permanent residence or indefinite leave to remain is one of them. The latter entails the freedom to enter, live and work the country of residence either indefinitely or initially for a prescribed period of time (e.g., for ten years in France and five years in Italy), but it can also be revoked in certain circumstances. In order for one to travel outside the country of residence, (s)he would have to use his/her nationality passport and to obtain a visa as a national of the country of origin. In several Member States, an individual cannot apply for national citizenship without acquiring first permanent residence. In addition, several Member States condition the grant of permanent residence on civic integration requirements, including linguistic requirements, employment status and financial stability. In the UK, permanent EU citizens, that is, those who have lived in the UK for five years, have been offered a ‘settled status’ which would grant equal access to healthcare, education, benefits and pensions, but excludes the jurisdiction of the Court of Justice of the EU as well as the full range of rights EU citizens enjoy at present by virtue of EU law. The

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Study on ‘The impact and consequences of Brexit on acquired rights of EU citizens living in the UK and British citizens living in the EU-27’, Policy Department for Citizens’ Rights and Constitutional Affairs, European Parliament, April 2017. On 22 June 2017, Mrs May, the British Prime Minister, proposed a new ‘settled status’ for EU citizens living in the UK which would grant equal rights in ‘healthcare, education, benefits and pensions’ in Brussels. Mrs Angela Merkel, the German Chancellor, characterised Mrs May’s offer as ‘a good start’; *The Guardian*, 23 June 2017; *The Times*, 23 June 2017.

<sup>22</sup> In reality, this cannot be an internal situation since the residence of EU citizens has been authorised by EU law and thus there is a connecting factor with it; see A. Tryfonidou (2009).

British Prime Minister made the offer of a 'settled status' conditional upon reciprocal arrangements for the UK citizens living in the EU.<sup>23</sup> However, under EU law, UK nationals living in the EU legally and continuously for a period of five years would automatically become EU long-term residents under Directive 2003/109.<sup>24</sup> Under the Directive, the host Member States can demand compliance with national integration measures (Article 5(2)), request evidence of stable and regular resources, and can reject an application on grounds of public policy or public security. The rights afforded to recipients of this status are inferior to those attached to EU citizenship status and the Directive does not confer true free movement. It confers a right to reside for more than three months in a second Member State subject to certain conditions and the labour market situation of the Member State concerned (Articles 14 and 15). Given these limitations, coupled with the facts that permanent residence can be revoked in many circumstances, does not grant full citizenship rights (including the right to vote in all elections and to stand for office), often functions as a gate for the acquisition of nationality and it lapses if permanent residents spend a short period away from the country of residence (two years in the case of the UK), most former EU citizens are likely to find naturalisation more attractive.

Naturalisation would lead to the absorption of the status of EU citizenship by national citizenship. Such a proposal would be consonant with Eurosceptic and nationalist ideology which favours a restrictive notion of national citizenship and clearly demarcated boundaries between nationals/members and non-nationals/foreigners. In fact, nationalism has been based

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<sup>23</sup> N. 21 above.

<sup>24</sup> Directive 2003/109/EC on the status of long-term residents OJ L 16 of 25.11.2003. Highly skilled UK nationals could invoke Directive 2009/50/EC and would be issued with an EU Blue Card; Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155/17 of 29.5.2009.

on what might be termed ‘the law of the excluded middle’, that is, on clear distinctions between members and non-members, ‘ins’ and ‘outs’ (Kohn, 1967; Smith, 1979). According to its ethnic variant, the national community is premised on a shared ethnicity (ethnic nationalism) while civic nationalism relies on the commonalities of a common culture, history, language or values which non-nationals allegedly do not share (Breuilly, 1993; Miller 1996).

Under the law of the excluded middle, fuzzy membership or shades of membership, such as denizenship, are not easily accommodated. Non-national residents can enter into associative relations but they are not formally included in the polity; they do not belong to the nation in a political or cultural sense. Complexity, hybrid identities and plural senses of belonging also disrupt the ‘closed sets’ of nationalist thinking (Gellner, 1964; Anderson, 1983). This explains why EU citizenship has been perceived to be a rather dangerous supplement by nationalist parties and elites since its establishment at Maastricht. As highlighted in sections I and II above, it blurs the distinction between members and non-members by granting citizenship rights, including electoral rights and a right to equal treatment, to non-national EU citizens in the Member State of residence.

If the law of the excluded middle prevails and the solution to the question concerning the status of EU citizens is sought within the domain of national citizenship, then both the UK and the other Member States would embark upon a horizontal opening of the citizenship gate in order to include EU citizens living in the UK and UK citizens living in other Member States. At first sight, this might appear to be a simple, natural and feasible policy option. In reality, however, it has an inner complexity. I envisage two distinct possibilities here. First, it might be agreed that ordinary naturalisation procedures should apply to EU citizens. This would mean that they would have to satisfy all the requirements applying to third country nationals before being granted nationality by public authorities. These include civic and

linguistic requirements, participation in citizenship ceremonies and public oaths, in addition to meeting the ordinary residency requirements which in some Member States are quite long (10 years).<sup>25</sup> If an investigation on the merits of this option is carried out, one can quickly discern numerous difficulties.

First, the variability of naturalisation laws in the 28 Member States would result in divergence and inequalities in the treatment of EU citizens.<sup>26</sup> Their status would essentially depend on a Member State lottery. Variations in naturalisation laws will be accompanied by variations in processing times and naturalisation rates across the Member States. The European Union itself will not be able to step in to protect former EU citizens who are placed at the risk of national discretion and/or erroneous decision-making. Secondly, in those Member States that do not permit dual or multiple nationality, the voluntary acquisition of the nationality of that state will result in the loss of their Member State nationality thereby placing certain EU citizens in an invidious position. Interestingly, in the EU, twenty two Member States permit multiple nationality, while Denmark, Norway, Estonia and Lithuania require the renunciation of the former nationality upon the voluntary acquisition of their nationalities without exception. Poland and the Netherlands require this, too, under certain conditions. Thirdly, it would be difficult to justify the conversion of EU citizens into nationals through tests, classes, oaths and citizenship ceremonies. The new taxonomy of citizenship consisting of the ‘ins’ and ‘outs’ will be seen to be an unnecessary and costly imposition as well as being wholly unsuitable for EU citizens who have been incorporated

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<sup>25</sup> The residency requirements vary significantly; Spain, Slovakia, Poland, Latvia and Lithuania require 10 years’ continuous residence whereas Belgium and Portugal require 5 and 6 years, respectively. Most other EU Member States require a residency period of 7-8 years. For more details, see Sarah Wallace Goodman’s analysis on [www.eudo-citizenship.eu](http://www.eudo-citizenship.eu). Compare also de Groot, 1998; 2006.

<sup>26</sup> For an excellent analysis, see the national reports on EUDO, EUI, Florence.

into host societies and have been treated as rightful participants until now. It would deny their formal co-equality, with the exception of electoral rights at national parliamentary elections. In addition, by creating a new positional relativity which would invite executive discretion, that is, the rejection of naturalisation applications from EU citizens who are deemed to be ‘undesirable’ or ‘not yet ready for full inclusion and citizenship’, the evolutionary sequence of naturalisation may look at first sight incorporative, but, in reality, is founded on distancing, separation and discrimination.

Because of these weaknesses, a different policy option might be preferable. The second option would be to exempt EU citizens from the normal naturalisation procedures and to facilitate their automatic or semi-automatic naturalisation by registration or by declaration of option. This would require an application for citizenship, but the process would be quick, more inclusive and non-discretionary. The UK and other Member States could in theory still require residency requirements and the absence of a criminal record. They could also differentiate between periods of residence. For instance, residence for a period exceeding ten years could prompt automatic naturalisation while shorter periods of residence would activate semi-automatic naturalisation. Naturalisation by declaration of option, on the other hand, would grant EU citizens the possibility of opting out from national citizenship if they wished to retain their citizenship of origin or not to compromise it in any other way.

Although there are important differences among the policy options mentioned above, the latter is more normatively defensible bearing in mind EU citizens’ existing rightful membership. It does not assume the existence of deficiencies on the part of EU citizens which need to be overcome before their formal admission to the body politic. It recognises their ‘enculturation’ and effective links with society. More importantly, it avoids the temporalisation of their presence and the concomitant impression that their status is precarious because they are easily removable.

The policy of treating EU citizens as national citizens-to-be post-Brexit may appear to be feasible and appropriate from the standpoint of states, but it presupposes the reform of naturalisation laws in the Member States and conflicts with the rationale and status of European Union citizenship. The ‘why’ of it seems to be a preponderantly important question. In fact, as national citizenship is superimposed on EU citizenship, the latter’s emphasis on non-discrimination on the ground of nationality and equalisation is being sidelined by a nation-centric logic which requires the conversion of ‘aliens’ into nationals via naturalisation, irrespective of the form this might take. But why should national citizenship be given methodological and political primacy since the rights EU citizens enjoy are derived from EU law and not from national laws? We need a more panoramic perspective. ‘Seeing like a state’ (Scott, 1998) is only a partial view.

Yet, critics might object, here, this is the road that politics has travelled thus far. In what follows, I show that this is not the case and that Union citizenship must be taken more seriously. More importantly, EU citizens are not invisible,<sup>27</sup> nor do they lead invisible lives. The EU cannot delegate their protection to the Member States, nor can it rely on the generosity of spirit of national elites. It has a duty to protect its citizens post-Brexit and to re-affirm the normative and political weight of European Union citizenship.

## **V. The Alternative: A Special EU Protected Citizen Status**

If the naturalisation of EU citizens in the Member State of residence following Brexit is not an appropriate policy option for the reasons outlined in the foregoing section, indefinite leave to remain in the UK or long-term residence in other Member States does not guarantee

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<sup>27</sup> N. 9 above.



security of residence and a panoply of rights and a domicile paradigm for EU citizenship is ruled out on the grounds of political pragmatism (section III above), one needs to search for alternatives. The search for a more suitable policy option cannot disregard the conceptual and juridico-political underpinnings of EU citizenship (section I above) and the purposes which its founders had in view.

Although the free movement provisions of the Treaty of Rome were viewed as an incipient form of EU citizenship by the European Commission in the early 1960s,<sup>28</sup> it is, nevertheless the case, that the formal establishment of EU citizenship at Maastricht is the outgrowth of the idea of granting ‘EU nationals’<sup>29</sup> special rights in the Member State of residence. Indeed, in the 1970s and the 1980s, the debate on creating ‘a People’s Europe’ was centred on the grant of special rights to EU nationals.<sup>30</sup> The special rights included the right to vote and to stand as candidates in local elections in the Member State of residence. This was considered to strengthen the feeling of belonging to a single legal community. Although concerns about the impact of this proposal on national citizenships were expressed by the Member States, brave thinking led to the adoption of a proposal which promoted equalisation (i.e., Community nationals had to be treated as if they were citizens of these states) rather than the opening up of the naturalisation gates. Indeed, this option prevailed because ‘the emphasis should remain on residence rather than nationality’ (European Commission, 1975, p. 32). Considering the historical trajectory of EU citizenship and the role played by the idea

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<sup>28</sup> See ‘the Free Movement of Workers in the Countries of the European Economic Community’, Bull. EC 6/61, 5-10. See also W. Hallstein (1972 [1969], pp. 173-4).

<sup>29</sup> This is a term used by the institutions of the European Community at that time. It did not denote an assumed common European nationality.

<sup>30</sup> European Council (1985), Adonnino Report, Bull. EC (Suppl) 7/85. For a detailed exposition of all the proposals, see Wiener (1998); Kostakopoulou (2001) and Maas (2007).

of creating special rights (common European rights), it is only natural that EU citizenship remains *a special* status for EU citizens living in the UK and UK nationals living in other Member States following Brexit.

Creating a special EU protected citizen status would ensure that all EU citizens affected by Brexit, that is, EU citizens living in the UK and UK nationals living in the EU, would continue to enjoy their EU citizenship rights and to be subject to the same conditions relating to their residence, employment and family reunification which apply to all other EU citizens. The only difference would be that this legal status would not be automatically transmittable to all those who would become members of their families following the entry into force of the UK's withdrawal agreement. This group of people would have to rely on national laws and the ECHR for the protection of their rights. Needless to say, this EU protected citizen status would not materially change the existing rules governing the loss of the right of permanent residence, namely, (a) consecutive absence from the territory exceeding 24 months and (b) public policy, public security and public health considerations under Chapter VI of Directive 2004/38.<sup>31</sup>

Such a special EU protected citizen status would not undermine national citizenship. It would merely maintain the legal effects of Union citizenship and ensure that the existing European Union citizenship space would not contract. Although the inspiration for such a special status is derived from the proposals on special rights that were on the European Community's policy agenda in the 1970s and 1980s, it might be worth noting that there exists an institutional precedent in the field of citizenship and nationality law.

In UK nationality law, the special status of British protected persons was established by the British Nationality Act 1948 (in force on 1 January 1949). It was built on a pre-

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<sup>31</sup> Note 4 above.

existing status conferred under the Royal Prerogative (see the British Protected Persons Order 1938) which had imperial roots. The statutory British protected persons status was granted to individuals from territories which were originally British protectorates or protected states or states over which the Crown had exercised jurisdiction without their inclusion into the Crown's dominions. The last such state was Brunei. It also included individuals from mandated and trust territories<sup>32</sup> for which Britain had international responsibility. According to s. 32(1) of the 1948 British Nationality Act, British protected persons could naturalise or register as British subjects or citizens of the United Kingdom and the Colonies if they took an oath of allegiance to the Crown. They retained the status in so far as they did not acquire the citizenship of the state declaring independence or of any other country. Under the British Nationality Act 1948, they were excluded from migration controls. This status has been gradually phased out due to the limited opportunities for its transmission to the children of British protected persons (Blake, 1996, pp. 682 et seq.).

Section 38(1) of the British Nationality Act 1981, which replaced the 1948 Act, stated that: 'Her Majesty may by order in Council made in relation to any territory which was at any time before commencement: (a) a protectorate or protected state<sup>33</sup> for the purposes of the 1948 Act; or (b) a United Kingdom trust territory within the meaning of that Act, declare to be British protected persons for the purposes of this Act any class of persons who are connected with that territory and are not citizens of any country mentioned in Schedule 3 which consists of or includes that territory'. Although the British protected persons status is

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<sup>32</sup> Britain had been given administrative responsibility for mandated territories under the League of Nations and for trust territories by the United Nations after 1945.

<sup>33</sup> The difference between protectorates and protected states was that Britain had established an internal administration in protectorates while protected states enjoyed internal autonomy. In both cases, defence and external relations were controlled by Britain.

considered to be a nationality status under public international law, it does not confer a right of abode in the United Kingdom itself and its beneficiaries are not exempt from immigration controls. On 1 January 1983, British protected persons were the citizens or nationals of Brunei, existing holders of the British protected persons status and those who were born stateless in the UK or an overseas territory because, when they were born, one of their parents was a British protected person.

Although critics could point out the colonial roots of the status and the violence associated with it,<sup>34</sup> its historical existence does not negate the possibility of a different institutional design in the EU. It also demonstrates a generalised awareness of the responsibility of a political unit to protect individuals following political change as well as an acceptance of its complementarity with other nationality statuses. With respect to the latter, in *Motala and Another* it was held that: ‘A person born in a British Protectorate was a British protected person by reason of s.32(1) British Nationality Act 1948 read in conjunction with s.9(1)(a) British Protectorates, Protected States and Protected Persons Order in Council 1940 SI.140. That status differed from that of a citizen of the UK and Colonies but one status added nothing to the other and it did not follow that one status was inconsistent with the other. Persons could be both citizens by descent and protected persons by birth.’<sup>35</sup>

Path dependencies and history may well provide inspiration for an EU protected citizen status for all those EU citizens affected by Brexit and the normative considerations examined above lend support for it. I believe that this proposal fits well into the constellation of analytical and normative ideas of which it is a part (sections I and II above). In what

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<sup>34</sup> I recall, here, Robert Cover’s observation that law is laced with violence and that ‘legal interpretation takes place in the field of pain and death’; Robert Cover (1986, p. 1601). See also Austin Sarat and Thomas Kearns (eds.) (1992).

<sup>35</sup> *Motala and Another v. Attorney-General* [1991] 3 WLR 903.

follows I would like to provide two additional justifications. The first justification is a legal one and is premised on the fundamental status of EU citizenship. The second justification, which centres on the question ‘whose duty is to protect EU citizens post-Brexit?’, furnishes an argument for the EU’s responsibility in this area.

Following a cautious approach during the first few years of the establishment of EU citizenship, the Court of Justice of the EU began to innovate and to create norms. In *Grzelczyk*, the Court ruled that ‘Union citizenship is destined to be a fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality’.<sup>36</sup> One year afterwards, it stated that Article 21(1) TFEU (formerly 18(1) TEC) is directly effective, that is, it confers rights that are enforceable before national courts.<sup>37</sup> This rights-enhancing case law of the Court has made EU citizenship a norm which national and European authorities have to respect. Respect for citizenship as a fundamental status now requires the subjection of denationalisation (and naturalisation) decisions taken by Member States to judicial review<sup>38</sup> and the protection of EU citizen children and their third country national parents from expulsion from Member States as well as the Union as a whole, if such national measures would ‘[deprive] EU citizens of the substance of the rights attached to EU citizenship’.<sup>39</sup> Given the fundamental status of EU citizenship, any loss of EU citizens’ rights following Brexit would transform EU citizenship into a contingent status. My proposal for a special EU protected citizen status is thus consonant with the EU citizenship norm.

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<sup>36</sup> Case C- 184/99 *Grzelczyk v. Centre Public d’Aide Sociale d’Ottignes-Louvain- la Neuve* [2001] ECR I- 6913, at para. 31.

<sup>37</sup> Case C- 413/99 *Baumbast and R v. Secretary of State for the Home Department* [2002] ECR I- 7091.

<sup>38</sup> Case C-135/08 *Rottmann v. Freistaat Bayern* [2010] ECR I-1449.

<sup>39</sup> Case C-34/09 *Ruiz Zambrano v. Office national de l’emploi (ONEM)* [2011] ECR I-0000.

An additional justification can be derived from the direct, that is, independent, legal effect of rights that strike at the heart of EU citizenship law. These rights are premised on a direct bond between the EU legal order and individuals and thus do not depend on the Member States' recognition<sup>40</sup> or consent. In fact, it would contravene the principle of the full effectiveness of EU law<sup>41</sup> and Union citizens' legal positions which are protected by it, if a Union citizen found himself/herself stripped of all his/her rights overnight, totally unprotected in the territory of the host Member State. As Brexit interferes with individuals' EU-based legal position and their free movement and residence rights, the European Union has the responsibility to step in and to protect vulnerable EU citizens.<sup>42</sup> After all, EU law has been the source of their rights. Since European integration has authorised their 'right to have rights',<sup>43</sup> it can be plausibly argued that it is the duty of the European Union to prevent the unilateral erasure of their citizenship status by a transient and slim majority in the United Kingdom. Accordingly, some form of continued EU citizenship status, such as the one proposed here, would provide a safety net for EU citizens, both EU citizens resident in the

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<sup>40</sup> For a differing view, see P. Magnette (2007); F. Strumia (2013).

<sup>41</sup> As the CJEU stated in Joined Cases C-46 and 48/93, the full effectiveness of Community rules and the effective protection of the rights which they confer are principles inherent in the Community legal order; *Brasserie du Pecheur v Germany and R v. Secretary of State for Transport ex parte Factortame* [1996] ECR I-1029.

<sup>42</sup> Interestingly, the Stockholm Programme for the AFSJ which was adopted by the European Council in Brussels on 10-11 December 2009 had the subtitle 'An Open and Secure Europe Serving and Protecting the Citizen'. In its Action Plan on *Implementing the Stockholm Programme*, the Commission emphasised the European Union's duty to 'protect and project' the values of respect for the human person and human dignity, freedom, equality and solidarity and to ensure that 'citizens can exercise their rights' (European Commission 2010, p. 3).

<sup>43</sup> This expression is borrowed from H. Arendt (1951).

UK and UK nationals resident in the EU, who find themselves being transformed overnight from rightful subjects to mere objects of political negotiations between the EU and the UK.

## **VI. Conclusion**

Legal norms should reflect social practices and citizens' lived realities. Brexit has brought forth a new political reality which threatens to undo legal rights and to unsettle EU citizens' lives. They have no power to contest this development and to object to their de-citizenisation and re-classification as either third country nationals living in the EU or EU citizens living in a third country. A decision taken by a transient majority on 23 June 2016, therefore, effectively shatters individuals' lives, the life horizons they have built following decades of residence, socio-economic and (partial) political membership in the host Member States and the future of their families. It has also revealed the nationalist underbelly with all its unpleasant reactions, prejudices and assumed hierarchies. Accordingly, there is an urgent need to consider possible citizenship templates for more than four million people and to engage in institutional design thinking.

Although either indefinite leave to remain or naturalisation in the state of residence might be seen to furnish a fully recognised status for EU citizens, I have argued that it is not an adequate policy option. The conceptual differences between national and EU citizenships are immense (section II above). The latter is based on non-discrimination on the ground of Member State nationality while the former is conditioned on nationality. At the same time, a domicile paradigm for EU citizenship (see section III above) would not help EU citizens living in the UK. By resisting the temptation to shut ourselves up in the present and apply the 'available', other policy options might emerge. In this article I have explored the advantages and disadvantages of possible citizenship templates and have defended the idea of an EU protected citizen status.

Admittedly, this status is far from perfect in the light of the sophisticated normative agenda for the development of EU citizenship (section III above). In addition, it would effectively create a *scala civium* in the EU, that is, a system of graduated statuses. But, under the present circumstances, it would do justice to all those EU citizens who are enmeshed in their states of residence and have been sharing those states' burdens without any complaints for years or decades. It would also continue to reflect the fundamental status of EU citizenship and to safeguard the freedom of relating to, and co-operating with, human beings without discrimination on the ground of nationality.

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