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van den Brink, Martijn; Kochenov, Dimitry

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Against Associate EU Citizenship

MARTIJN VAN DEN BRINK¹ and DIMITRY KOCHENOV²

¹Ethics, Law and Politics Department, Max Planck Institute for the Study of Religious and Ethnic Diversity, Göttingen ²University of Groningen, Groningen

Abstract

UK nationals will lose their EU citizenship status as a result of the Brexit referendum. To prevent this, several commentators, including the European Parliament Brexit negotiator Guy Verhofstadt, proposed to grant associate EU citizenship to UK nationals to safeguard their rights as EU citizens after Brexit. We make the case against associate EU citizenship, dismissing it on three grounds. First, it violates the letter and the spirit of EU law. Second, it violates core EU values, including the EU's promise to respect the constitutional traditions of member states and the values of democracy and the rule of law. Third, it is against EU's interests, as associate EU citizenship fails to respect reciprocity in EU relations with third countries and undermines the coherence of the edifice of EU constitutionalism.

Keywords: EU citizenship; Brexit; associate citizenship

Introduction

The outcome of the UK referendum on continued membership of the EU and the subsequent decision of the UK government to trigger Article 50 TEU and to take the path towards Brexit has produced considerable uncertainty for EU citizens resident within the UK, as well as UK nationals living in the EU. While their future legal position will depend on the outcomes of the negotiations between the UK and the EU, few doubt that Brexit will result in a significant loss of rights on both sides, but especially a significant erosion of the rights of UK citizens (Kochenov, 2017; Schrauwen, 2017; Shaw 2017). The EU citizenship *acquis* will not apply in the UK and UK nationals will lose their EU citizenship altogether; so much seems clear. The treaties have established a clear link between the nationality of a member state and EU citizenship, Article 20 TFEU stipulating that '[e]very person holding the nationality of a Member State shall be a citizen of the Union'. Hence, all UK nationals who are EU citizens¹ and enjoy EU citizenship rights² will lose EU citizenship unless they possess any other EU nationality; a possibility for the population of Northern Ireland, for instance, who can guarantee their rights in the EU through citizenship of the Republic of Ireland.³ Queues in front of the consulates and embassies of EU nations appeared immediately upon the announcement of the referendum result. British applications for Irish citizenship rose almost 20 times; for Swedish

¹ We would like to thank Nina Margrete Havig Bredvold for her invaluable assistance. Not all member state nationals are EU citizens, as has been tacitly confirmed in *Kaur*; in deviation from the academic doctrine of the day (CJEU, 2001). Cf. Plender (1976).

² Not all do, as is clear from the annexes to the Act of Accession of the UK to the Communities, depriving Manxmen and Channel Islanders of EU free movement rights. See Act of Accession (1972), Protocol No. 3. Cf. Simmonds (1969, 1970, 1971).

³ Irish Nationality and Citizenship Act (1956).

citizenship, they more than tripled (*Sunday Times*, 2018; *The Local*, 2017; see also Jessurun d'Oliveira, 2018). Ordinary Britons understood immediately that Brexit means a severe degradation of their rights.

To prevent UK citizens from losing EU citizenship and the rights associated therewith, several commentators have floated the idea of an associate citizenship for UK nationals to safeguard their rights as EU citizens after Brexit. Guy Verhofstadt, the European Parliament (EP) Brexit negotiator, favoured an arrangement that allows for the continuation of EU citizenship rights, such as the possibility of participating in the European elections and free movement 'for those citizens who on an individual basis are requesting it' (*The Guardian*, 2017). A select group of scholars has supported similar ideas. Dora Kostakopoulou, most prominently, has argued in favour of the introduction of 'a special EU protected citizen status' in the pages of this journal, which ensures that 'EU citizenship remains a *special* status for EU citizens living in the UK and UK nationals living in other Member States following Brexit' (Kostakopoulou, 2018, p. 10). EU citizens have also launched a citizens' initiative, which requests the Commission to 'propose means to avoid risk of collective loss of EU citizenship and rights, and assure all EU citizens that, once attained, such status is permanent and their rights acquired' (Citizens Initiative, 2018). Finally, the Court of Justice also seemed to become involved in the debate on associate citizenship for some time, when the Amsterdam District Court expressed its intention to send a preliminary reference asking whether the withdrawal of the UK from the EU will result in the automatic loss of EU citizenship of UK nationals and the rights they derive from that status (Rechtbank Amsterdam, 2018). On appeal, however, the Amsterdam Appellate Court decided that submitting a preliminary reference was premature, not because it disagreed with the District Court that UK nationals may be entitled to retain their EU citizenship status following Brexit but because the claims brought by the applicants were too vague and insufficiently concrete (Gerechtshof Amsterdam 2018). It is possible that the applicants will have more success with a more specific claim.

We offer the case against associate EU citizenship status in this article. We shall argue that besides misrepresenting the core foundations of EU citizenship as it currently stands, the proposals of Verhofstadt and Kostakopoulou, as well as other similar ideas, offer a deeply unattractive prospect of what EU citizenship should become. Expecting too much of the Court of Justice in this context would also be a mistake. Should the Court wish to remain convincing and respect the treaties, including core principles of EU law, such as the EU's promise of respect for the constitutional traditions of member states and the values of democracy and the rule of law, the Court is not left with much room for manoeuvre. The arguments of this article, while targeting the idea of associate EU citizenship, should be of relevance to broader debates on EU citizenship as well, in particular explorations of the possibility of making EU citizenship an autonomous status (Garner 2018; Kostakopoulou 2007, 644). Like the proponents of the introduction of an associate EU citizenship, exponents of autonomous EU citizenship seek to disconnect the EU from national citizenship. Our concerns over associate EU citizenship thus apply to the proposals for autonomous EU citizenship as well.

Having clarified the mechanics of associate EU citizenship as proposed in section I, we reject it in the three sections that follow. We do this based on the law in force, as well as on normative and pragmatic grounds. Section II argues that associate EU citizenship does not logically flow from the present state of EU citizenship, which is additional to the

nationalities of the member states. Section III rejects the idea of associate EU citizenship because it goes against the EU's interests; undermining the EU's own negotiating position and, as a consequence, potentially the rights of EU citizens in the post-Brexit UK. Any future agreement between the EU and the UK on the rights of citizens should be based on reciprocity. Section IV offers a number of democratic reasons for opposing the introduction of associate EU citizenship. Brexit, a free majoritarian decision to secede from the EU taken by one of Europe's oldest democracies in compliance with its internal procedures and conventions, should mean the discontinuation of EU citizenship. Leaving an international integration project and allowing perceived local interests to trump the supranational right of non-discrimination on the basis of nationality is a legitimate choice that must be respected,⁴ however much we dislike it. The arguments offered by proponents of associate EU citizenship reject democratic principles too easily, potentially undermining the very possibility of leaving the Union guaranteed in Article 50 TEU. The EU should allow all states to exercise their democratic right to depart and not colonize the UK constitutional space. The Union has never received such a mandate from the member states and moves into that direction would violate the basic values the EU has promised to uphold. Besides, as we will show, the different accounts of associate EU citizenship are also remarkably silent about the difficulties for processes of democratic decision-making within the EU itself.

To be clear, ours is not an argument against EU citizenship as such. Courts, commentators and individual citizens alike rightly recognize the legal and political significance of this status, granting those who possess it the ability to move to and settle in other member states without all the burdens that usually come with taking up residence in another country, packaged together with the prohibition of discrimination on the basis of nationality and strong political rights at the municipal and EU level. It goes without saying, therefore, that a future UK–EU agreement that offers substantial legal protections to mobile citizens of both entities will be a welcome development. Whatever the EU offers to UK nationals, however, it should not be EU citizenship as such. The 'fundamental status of the nationals of the Member States' ought not to be extended to citizens of a country who have collectively expressed a desire not to take part in – and in fact oppose – the core components of the European project. That desire, however regrettable, is up to a member state to express, even if it is unfortunately antithetical to the ideals of EU citizenship, including the promise of non-discrimination on the basis on nationality which, as Will Kymlicka has recognized, serves as the 'tamer of the nation-state' (Kymlicka, 2006, p. 133). Rather than serving the values the EU holds dear, associate EU citizenship risks undermining them by going against the letter and the spirit of EU law, as well as undermining Union's interests, which informs our objections against the idea.

I. Associate EU Citizenship Templates

A whole array of proposals exists on post-Brexit rights for EU citizens (Schrauwen 2017), so it is necessary to clarify what associate EU citizenship means. The idea of associate EU citizenship is to be distinguished from the extension of certain rights we usually associate

⁴We acknowledge there can be debate on whether the referendum was an exemplary form of democratic decision-making, but do not believe the apparent shortcomings offer reason to disrespect the choices made.

with EU citizenship to third-country nationals, based on an international agreement between the EU and a third party. For example, European Economic Area (EEA), Swiss and Turkish nationals, while enjoying some of the rights enjoyed by EU citizens, are not associate EU citizens (Kochenov and van den Brink, 2015). Associate EU citizenship stands out in two important respects. First, associate EU citizenship is a status under EU constitutional law.⁵ Not rooted in an international agreement between the EU and a third country, it is external to the third country's legal system, whose nationals the EU claims to be its own – albeit 'associate' – citizens. Second, associate citizens enjoy the whole array of EU citizenship rights without, however, possessing a nationality of any member state or necessarily residing in the Union, unlike, for instance EU permanent resident third-country nationals, who, although they have resided in the EU for years and benefited from EU-level rights, are not included in the scope of the new status (Acosta Arcarazo, 2011).

Besides these two key components, different proposals for the introduction of an associate EU citizenship exist. These must be disaggregated in order to understand what exactly has been proposed. The remainder of this section does so, distinguishing among three proposals: the one put forward by the members of the European Parliament (MEPs) Verhofstadt and Goerens, the main contribution in the academic literature by Kostakopoulou, and a shorter contribution to the debate by Dawson and Augenstein. We focus on these three proposals, not just because they all capture the essence of associate EU citizenship well, but also because the different proponents of extending EU citizenship to UK nationals have proposed different avenues for realizing their preferred result.

Following the debate on Guy Verhofstadt's draft report on 'possible evolutions of and adjustments to the current institutional set-up of the European Union' (EP, 2016a), MEP Charles Goerens tabled an amendment that summarizes the idea of associate EU citizenship well. He advocated inserting

in the Treaties a European associate citizenship for those who feel and wish to be part of the European project but are nationals of a former Member State [and offering] these associate citizens the rights of freedom of movement and to reside on its territory as well as being represented in the Parliament through a vote in the European elections on the European lists.⁶

If that proposal were to become reality, associate EU citizens would enjoy the rights of EU citizenship as a matter of Treaty law.

Goerens decided to withdraw his proposed amendments (EP, 2016b) following assurances by Verhofstadt that he would immediately take up these proposals in the negotiations with the UK, saying that they could not await an amendment to the Treaty (EP, 2016c).⁷ Leading legal experts like Jean-Claude Piris immediately rejected the idea that

⁵In a study for Jill Evans (MEP), Roeben *et al.* (2017) propose to ground associate EU citizenship in secondary legislation. Yet they propose grounding such legislation in the Treaty provisions on EU citizenship, while the more appropriate legal basis for the adoption of legislation that extends (part of) EU citizenship rights to UK nationals would be Article 79 TFEU, on the treatment of third-country nationals. Under their proposal for associate EU citizenship, UK nationals would also no longer enjoy EU citizenship status. As we distinguish associate EU citizenship from the legislative framework that exists for third-country nationals, because most of the proponents of associate EU citizenship do so, we will not discuss the proposal of Roeben *et al.* in much detail.

⁶Amendment 882 by Charles Goerens on the proposal of Verhofstadt (2016). For the list of amendments, see EP (2016d).

⁷Guy Verhofstadt made this promise while the MEPs were voting on the motions on his draft report. For the link to this debate see EP (2016c). He made the statement at 01:41:30.

EU citizenship could be extended to UK nationals without an amendment of the treaties (*The Guardian*, 2016), a realization that may have influenced the decision of the EP to adopt a more modest position, taking note

that many citizens in the United Kingdom have expressed strong opposition to losing the rights they currently enjoy pursuant to Article 20 TFEU [and proposing] that the EU-27 examine how to mitigate this within the limits of Union primary law whilst fully respecting the principles of reciprocity, equity, symmetry and non-discrimination (EP, 2017a).

Privately, however, Verhofstadt still appears to support realizing associate EU citizenship, speaking in favour of ‘an arrangement in which [EU citizenship] can continue for those citizens who on an individual basis are requesting it’ (*The Guardian*, 2017).⁸

The idea of associate EU citizenship has also garnered support among academics. Most prominently, Dora Kostakopoulou has defended the introduction of a status that prevents ‘both EU citizens resident in the UK and UK nationals resident in the EU [from] being transformed overnight from rightful subjects to mere objects of political negotiations between the EU and the UK’ (Kostakopoulou, 2018, p. 866). Taking inspiration from British protected persons status, which was granted to individuals from former British protectorates,⁹ she argues that the EU should enact ‘some form of continued EU citizenship status’ and to prevent ‘the unilateral erasure of [UK nationals’] citizenship status by a transient and slim majority in the United Kingdom’ (Kostakopoulou, 2018, pp. 865–6).

An important difference that exists between her proposal and that of Verhofstadt and Goerens, is that Kostakopoulou wants EU citizenship to remain a special status for only UK nationals living in one of the EU member states (Kostakopoulou, 2018, p. 865). The MEPs did not attach a residential condition to their proposal for associate citizenship. A second difference is that the MEPs’ proposal concerns the position of UK citizens only, while Kostakopoulou seeks to protect not just their legal position but also the status of EU citizens resident within the UK. However, as she opposes UK nationals and EU citizens ‘being transformed overnight from rightful subjects to mere objects of political negotiations’ (Kostakopoulou, 2018, p. 866), this aspect of her proposal seems impossible. It both attempts to pre-empt the negotiations and directly depends on their outcome, as there is no way for the EU to secure the rights of its citizens within the UK other than through negotiations with the UK. If individual citizens were not the object of negotiations, she should demand – along the lines proposed by Verhofstadt and Goerens – that the EU safeguard unconditionally the rights of UK nationals living within remaining member states, and hope that the UK is equally generous.

Of course, many of the rights currently enjoyed by EU citizens and UK nationals can be secured through negotiations. In their joint report on the progress during the first phase of the negotiations, the EU and UK stated that they will ‘provide reciprocal protection for Union and UK citizens, to enable the effective exercise of rights derived from Union law and based on past life choices, where those citizens have exercised free movement rights

⁸He certainly isn’t the only MEP still supporting the idea. Jill Evans, an MEP for the Greens, for example, has commissioned a study on the feasibility of associate EU citizenship (Roeben *et al.*, 2017).

⁹For further discussion of this system, as well as its more problematic normative dimensions, see Haas (1952) and Matz (2005). For a wonderful description of the EU’s colonizer moment, see Hansen and Jonsson (2014).

by the specified date' (European Commission, 2017). That was to be expected, as Gareth Davies has explained, because

even fervent Brexiteers had always maintained that [the UK] had no desire to throw out Union citizens already living in the country, and so very quickly the two sides could agree on a guiding principle: a freezing of the status quo (Davies, 2018).

The freezing of rights, and the application of strict reciprocity, however, also implies that UK nationals will be deprived of further rights to free movement (for an analysis of the Draft Withdrawal Agreement, see Guild and Vowden, [2018]). A more extensive agreement, however, could also allow UK citizens to benefit from free movement benefit from free movement under Article 20 TFEU. Former beneficiaries of EU citizenship law could enjoy entitlements similar to, or even more extensive than, those enjoyed by third-country nationals under agreements that the EU has concluded with other states (EEA, 1994; Agreement on the free movement of persons, 2002). If that is the ambition, Kostakopoulou would neither be able to object to UK and EU citizens being turned into the objects of negotiations, nor would need associate EU citizenship to realize her ideals. However, as she seeks to 'maintain the legal effects of Union citizenship and ensure that the existing European Union citizenship space would not contract' (Kostakopoulou, 2018, p. 863), associate EU citizenship status is the only avenue for realizing these ideals.

Dawson and Augenstein's account of associate EU citizenship more closely approximates that of the two MEPs and is more ambitious than that of Kostakopoulou. They wonder why the EU should deprive of EU citizenship UK citizens who wish to retain their status as Union citizens, without making this associate form of citizenship for UK nationals conditional upon their presence within an EU member state on the date the UK withdraws from the EU. They argue that 'the future EU citizenship of UK nationals is not a domestic matter but an issue – perhaps *the* issue – for the Union as a whole to determine' (Dawson and Augenstein, 2016). They believe that EU citizenship needs to be transformed, so that the withdrawal of EU citizenship is made more complicated. That is, 'while the decision to *grant* Union citizenship may still rest with the Member States, via Member State nationality, the decision to *withdraw* it would rest with the individual EU citizen' (Dawson and Augenstein, 2016). It follows, hence, that the associate citizenship status must protect not just those resident within another EU member state, but all UK nationals.

There are thus two key differences between the proposals for associate EU citizenship. The first is whether the status should be open to all nationals of the withdrawing state or only to those who have been resident for a defined period of time within another country that has retained its EU membership. Verhofstadt and Goerens, but also Dawson and Augenstein, favour the former, more extensive conception of associate EU citizenship; Kostakopoulou the latter. A related difference concerns whether the status of associate EU citizenship is meant to disconnect EU from national citizenship in relation to the *loss* or *acquisition* of EU citizenship. On the more extensive understanding, EU citizenship is disconnected from national citizenship when it comes to the loss of the former status. As Dawson and Augenstein state,

the decision to *withdraw* [from EU citizenship] would rest with the individual EU citizen' (Dawson and Augenstein, 2016). Kostakopoulou, on the other hand, proposes a path towards the acquisition of EU citizenship independent of the nationalities of the member states, namely, for those 'who have been residing on a lawful and permanent basis in

the territories of the EU for five years' (Kostakopoulou, 2018). However, while these differences are not irrelevant to our assessment of the desirability of introducing an associate EU citizenship status, the subsequent sections explain why ultimately, it is better to abandon the idea of introducing this status altogether.

II. Black-letter Law Arguments to Oppose Associate EU Citizenship

One immediate question that emerges is whether these accounts of associate EU citizenship are compatible with the present structure of EU citizenship, as defined by the treaties. Kostakopoulou believes it does and Dawson and Augenstein also turn to the Court's interpretation of the treaties in support of their proposal. Before we address various grounds on which to oppose the idea of associate EU citizenship altogether, we want to clarify why the radical restructuring of EU citizenship foreseen by these authors is incompatible with the present state of EU citizenship.

In a number of decisions, the Court of Justice has declared that EU citizenship 'is destined to be the *fundamental status* of nationals of the Member States' (Court of Justice of the European Union [CJEU], 2001b, para. 31; CJEU, 2011, para. 41 [emphasis added]). Scholars who argue that the current reading of the treaties offers support for the realization of an associate EU citizenship status usually argue this on the basis of the Court's understanding of EU citizenship (Kostakopoulou, 2018, p. 12. See also Roeben *et al.*, 2017). While they acknowledge that Treaty change is needed, Dawson and Augenstein also wonder 'how fundamental European citizenship really is' if all UK citizens will be stripped of their EU citizenship following Brexit (Dawson and Augenstein, 2016). Their question is understandable, but we should not read the Court's statements as unquestionable proof that associate EU citizenship can be realized without an amendment of the treaties. EU citizenship has never been fundamental in this sense. The Court's understanding of EU citizenship has always been hard to square with the 'text, teleology and legislative history' of the treaties (Weiler, 2013, p. 284; see also Kochenov and Plender, 2012), which confirms that EU citizenship is contingent on, and, Article 20 TFEU says, 'additional to' member state nationality in terms of its acquisition, continued enjoyment and loss. It is crystal clear that EU citizenship was never supposed to acquire a meaning that allowed for questioning a collective democratic decisions.

Based on the law in force we believe that the CJEU should answer the question whether UK nationals can retain their EU citizenship status following Brexit in the negative, if it were to be confronted with such preliminary references. The Amsterdam District Court expressed its intention to refer such questions to the Court, agreeing with a group of UK nationals currently living in the Netherlands that, on a broad reading of the Treaty provisions on EU citizenship by the Court, the withdrawal of the UK may not entail the automatic loss of EU citizenship by UK nationals (Rechtbank Amsterdam, 2018). The Appellate Court has in the meantime overruled that decision and decided that given that the dispute was too vague and the requested measures insufficiently concrete, no preliminary reference was justified. However, like the District Court, it questioned whether it is correct to read the Treaty provisions as entailing the loss of the status and rights of EU citizenship by nationals of a withdrawing member state (Gerechtshof Amsterdam, 2018). If, however, UK nationals bring a more specific claim, and Dutch courts (or any other court within the EU) decide to submit a preliminary

reference, we believe the CJEU must reject such claims as they rest upon a reading of EU citizenship that is incompatible with the relevant Treaty provisions (see also, McCrea, 2018), as well as with previous interpretations of these provisions.

If anything, the Court's case law that put direct pressure on the member states and triggered the gradual evolution of national citizenship laws confirms that EU citizenship depends on, and has no life independent from, the nationalities of the member states. In cases like *Rottmann* and *Micheletti* (CJEU, 2010, 1992), it stated that 'the Member States must, when exercising their powers in the sphere of nationality, have due regard to European Union law'. The requirement to take EU legal principles into account when making decisions on the loss of nationality or the mutual recognition of each other's citizenship (Szpunar and Blas López, 2017) can be explained only by the fact that EU citizenship requires member state nationality.¹⁰ In *Kaur* (CJEU, 2001a), moreover, it even moved in the opposite direction compared with what the idea of associate EU citizenship implies. Deciding that British Overseas Citizens were not protected by the rights of EU citizenship, it allowed the UK – and by extension Latvia and Estonia (Constitutional Court of Latvia, 2005, para. 17; Järve, 2013)¹¹ – to deprive of the rights and protections of EU citizenship certain categories of persons enjoying (quasi-)nationality of these states. If (quasi-)nationals cannot enjoy the benefits of EU citizenship, individuals who do not possess a member state nationality certainly cannot. Those who perceive that *Kaur* is unjust and rests upon too narrow a reading of Article 20 TFEU may find it desirable if this trend were reversed in the context of Brexit. However, such a move would mean the failure to respect the treaties which offer EU citizenship solely to 'every person *holding a nationality* of a Member State' (emphasis added). If it is not implemented through Treaty change, the idea of associate EU citizenship is thus simply untenable. Currently, the status of EU citizenship is inaccessible to citizens of a third country, like those of post-Brexit UK.

III. Pragmatic Reasons to Oppose Associate EU Citizeships

Proponents of associate EU citizenship may advocate Treaty change to realize the possibility of nationals of withdrawing member states to retain their EU citizenship status. In this and the following section we reject the idea of associate EU citizenship altogether. The first reason for opposing the creation of associate EU citizenship are mostly pragmatic – it runs counter to the EU's own interests. It fails to respect reciprocity in future relations with the UK, potentially undermining the interests of EU citizens. In addition, it makes the prospect of other countries to withdraw more attractive and fails to secure fairness in relation with other third-country nationals.

The EU's primary responsibility is towards its own citizens who will bear the negative consequences of the introduction of associate EU citizenship. As things stand now, UK citizens will be deprived of their EU citizenship status following Brexit, including important rights, such as the right to vote and stand as a candidate in elections to the EP and at municipal level (Article 20(2)(b) TFEU). UK citizens who have not exercised the right to reside in a member state prior to the end of the transition period will also lose the right to

¹⁰On the two types of pressure, see Kochenov (2010b).

¹¹Revocations of the status of non-citizen are strictly monitored due to the 'existence of mutual rights and obligations' between the Latvian State and the non-citizens (Constitutional Court of Latvia, [2005], para. 17. Cf. Järve [2013]).

move around and reside freely in the territory of the EU (European Commission, 2018). The reason is that the EU seeks to safeguard the key principle of international cooperation in its future relations with the UK, namely reciprocity (Allott, 1991): both parties strive to ‘provide reciprocal protection for Union and UK citizens, to enable the effective exercise of rights derived from Union law’. The EU should hold firm on the demand of reciprocity during negotiations in order to incentivise the UK to offer a favourable free movement regime for EU citizens.

Hence the question, posed by Dawson and Augenstein, why the EU should deprive of EU citizenship those UK citizens who wish to retain their status as Union citizens (Dawson and Augenstein, 2016), has a straightforward answer. If all nationals of a former member state could acquire associate EU citizenship and enjoy the full set of rights if they wish, the EU would be deprived of a powerful tool to force the UK to offer a similarly beneficial regime for EU citizens. A reciprocal regime is also what fairness requires, as otherwise the nationals of remaining EU member states could legitimately wonder why UK citizens may be conferred more substantive rights than they enjoy under UK law. Given the importance of reciprocity, the issue of UK nationals’ rights following Brexit should not be removed from the political agenda by judicial means. If the CJEU were to decide that EU citizenship (rights) cannot be withdrawn, the EU would find it more difficult to pressure the UK in accepting a fair free movement regime that is beneficial to both sides.

The counter-argument offered by Kostakopoulou is that UK nationals and EU citizens should not be the object of political negotiations (Kostakopoulou, 2018, p. 866). That, however, is not nearly as self-evident as she would have us believe. If the Trump administration revokes the visa-waiver programme for EU citizens, or excludes certain east European member states from its scope, we think it is desirable that the EP threatens to suspend the programme in order to pressure the US administration to review its decision (EP, 2017b). And if most of the Swiss population in a referendum decide that free movement with the EU should be limited, threatening thereby to violate its agreement with the EU, we also think that the EU can reconsider its position towards Swiss nationals and terminate their rights (EP, 2015). The EU makes these issues of political discussion with the purpose of protecting its own citizens, which should be its primary ambition. In the same way, the EU should primarily be concerned with the rights of its own citizens in Brexit negotiations.

A core difference thus exists between interstate relations within the EU, on the one hand, and between EU member states (and the Union as a whole) and third countries, on the other. Philip Allott treats this as a distinction between ‘democracy’ and ‘diplomacy’ in international relations. Democracy implies that collective actions take, as much as possible, the interests of all affected into account. By contrast, diplomacy, in Allott’s terms, implies acting in the interests of one’s own citizens at the expense of others, if need be (Allott, 1991). The application of reciprocal measures is limited within the EU, as the prohibition of adopting retaliatory measures indicates (Gormley, 2017). However, following Brexit, UK–EU relations move from the realm of democracy to that of diplomacy, where different considerations apply. Therefore, we disagree with the different advocates of associate EU citizenship who use citizenship logic to argue that EU–UK relations should not be affected by Brexit. Instead, the EU should safeguard reciprocity in its future relations with the UK (Shaw 2017, p. 2) in the interests of its own citizens.

Those favouring the retention of EU citizenship rights often invoke the argument of acquired rights. Kostakopoulou, for example, argues that because EU citizenship creates a 'direct bond between the EU legal order and individuals', it would contravene legal principles as well as accepted norms 'if a Union citizen found himself/herself stripped of all his/her rights overnight, totally unprotected in the territory of the host Member State' (Kostakopoulou, 2018, p. 865). Similarly, the Amsterdam District Court reasoned that, because the EU Treaties directly create rights for individuals, the implications of withdrawal must be addressed under EU law, not the Vienna Treaty Convention (Vienna Convention on the Law of Treaties, 1969). Following the CJEU's jurisprudence on acquired rights, according to which rights cannot be withdrawn if citizens had legitimate expectations they would be protected,¹² the Court reasoned that 'it cannot be ruled out that the rights and freedoms that UK citizens living in another EU country derived from Article 20 TFEU should be regarded as acquired rights' (Rechtbank Amsterdam, 2018, section 5.16).

We reject this argument on three different grounds. First, in its most extreme form, it promotes the idea that withdrawal should be altogether impossible. If, as Kostakopoulou argues, rights acquired directly under EU law cannot be altered or withdrawn, member states are basically denied the possibility of withdrawing from the EU's legal regime. Therefore, contrary to her assessment that stripping Union citizens of their rights overnight would contravene the principle of the full effectiveness of EU law (Kostakopoulou, 2018, p. 865), we argue that its effectiveness is realized only if withdrawal under Article 50 TFEU remains possible and EU citizenship and the rights attached thereto are lost, per Article 20 TFEU, by the nationals of the withdrawing state. Second, such expansive definitions of the principle of acquired rights place an undesirable straightjacket on politics. Governing the EU will become a sheer impossibility if political authorities' room for reconsidering past decisions becomes subject to such rigid constraints. Finally, if the principle of acquired rights extends not to EU law as a whole, but only to matters of EU citizenship, withdrawal may actually become a more attractive to other countries in the future. Retaining all the rights of EU citizenship, EU membership can be set aside at a much lower cost. Member state nationals would enjoy the fruits of EU citizenship irrespective of whether they accepted the burdens of EU membership.

This is not to say stripping UK nationals of all their rights would be desirable, but that is unlikely to happen. The policy documents expressing the shared intentions of the UK and EU, to which we referred above, indicate that both parties want to offer substantial safeguards to those who have exercised free movement rights. In addition, bearing in mind the EU's extensive legislation on third-country nationals, it could not deprive UK nationals of all their rights. What we do argue, however, is that there seems little reason to think that UK nationals ought to enjoy better treatment than other third-country nationals who may be longing for EU citizenship, certainly not those UK nationals who are not even resident in the EU. Those with no connection with any of the member states, such as UK citizens resident within the UK, would come to enjoy better rights than the many long-term residents who did not enjoy a member state nationality previously. The long-term exclusion of minorities from national and thus EU citizenship is a violation

¹²The Amsterdam District Court referred, among others, to CJEU (2005), para. 32.

of democratic justice: the same cannot be said necessarily of UK nationals losing their EU citizenship.

IV. Democratic Reasons to Oppose Associate EU Citizenship

In this section we argue there are a number of democratic reasons to oppose offering nationals of withdrawing states associate EU citizenship. Proponents of this status have not thought through the democratic implications of their proposals and occasionally seem extremely hostile towards the idea of democratic decision-making. In addition, they are unwilling to respect the competences of the member states in the EU.

Underlying the proposals for offering UK nationals associate EU citizenship status is a concern about ‘majoritarian tyranny’. The Amsterdam District Court argued that

‘[i]t is part of the existence of a democratic legal state that, at an individual level, those who belong to a social or political minority are entitled in law to a certain degree of protection against the will of the majority’

(Rechtbank Amsterdam, 2018, section 5.8). For Kostakopoulou, ‘it is the duty of the European Union to prevent the unilateral erasure of [EU citizenship] by a transient and slim majority in the United Kingdom’ (Kostakopoulou, 2018, p. 865). Dawson and Augenstein find it unclear why ‘a decision of the UK government should bind those UK nationals who wish to retain their European citizenship’ (Dawson and Augenstein, 2016).

The suggestion that the decision not to be a member of the Union any longer is justifiable only for those citizens who have given their consent to it is rather hostile to principles of majoritarian democratic self-government. As Stephen Coutts has argued convincingly, the idea that the EU

could intervene to ‘protect’ the rights of individuals in the UK that are being dragged from the Union and denied Union citizenship against their will would amount to an argument that the United Kingdom acting under Article 50 TEU is not competent as a democratic political community to bind its own minority. (Coutts, 2016)

Advocates of the introduction of associate EU citizenship would be wise not to push this argument too far, lest their case for associate EU citizenship becomes self-defeating. It would follow that the UK should never have joined the EU (then EEC) in 1973 in the first place, as not all British citizens consented to membership at that time.¹³ Why should a decision of the UK government bind those UK nationals who never wanted EU citizenship or membership?

Of course, there are reasons for concern if democratic decision-making leads to the more or less permanent exclusion of insulated minorities, but the threats posed by majoritarian decision-making are being exaggerated.¹⁴ The UK and EU have both expressed the intention to offer substantial safeguards to those who exercised free movement rights previously, indicating that there is considerable awareness of the position of

¹³In 1975, two years following accession, the UK organized a referendum on continued membership in which 33% of the voters expressed the desire to leave.

¹⁴As so often happens: Tushnet (1999), p. 159; Waldron (2006), p. 1346. See also Van den Brink (2019).

those who (in all likelihood) opposed Brexit. While those falling within the scope of the Draft Agreement will not retain all the rights of EU citizenship (including political rights), the Agreement will offer considerable safeguards of the acquired rights of UK nationals with residence in another EU member state (subject to the condition that the Draft Agreement also enters into force; Guild and Vowden [2018]). No UK national will be rendered stateless by the withdrawal of their EU citizenship status, moreover, which should serve as a reminder that EU citizenship still is not comparable to nationality; the loss of EU citizenship is not as consequential as the loss of national citizenship (if the result is statelessness).

Proponents of associate EU citizenship may favour a substantive version of democracy, which privileges substantive outcomes and a respect for individual rights over procedural concerns and majoritarian decision-making.¹⁵ However, while democracy presupposes a set of civil political rights, if pushed to extremes, the determination to privilege substantive outcomes over procedural issues becomes ‘a flatly antidemocratic justification for guardianship’ (Dahl, 1991, p. 163). This shortcoming certainly affects proposals that seek to extend EU citizenship to UK nationals without a treaty amendment. Either the provisions on EU citizenship, which specify that it is conditional upon the possession of national citizenship, have to be ignored, or the scope of Article 50 and the right of member states to exercise their democratic right to leave the EU must be curtailed. It would be a grave mistake for the CJEU to intervene and curtail the significance of national constitutionalism and the rule of law in the EU’s federal framework without any mandate for doing this (Schütze, 2013). Theresa May’s famous statement ‘Brexit means Brexit’ is debatable in many fields. Does it imply leaving the customs union? What does it mean for the banking, fisheries and other industries? However, a decision of member state nationals to withdraw from the EU cannot amount to anything else but an expression of an unequivocal desire not to be citizens of the Union any more. The desire to leave the Union and not to be EU citizens should be respected rather than undermined, based on a dubious reading of EU citizenship. Associate EU citizenship is to be rejected on that ground.

Those who insist on Treaty change before associate EU citizenship can be realized avoid this substantive democracy fallacy (Dawson and Augenstein, 2016). However, proposals of this kind run into a host of different democratic problems. All proposals for associate citizenship, in fact, are remarkably quiet about processes of democratic decision-making within the EU itself. For a start, if, as Dawson and Augenstein propose, all UK nationals, including those resident within the UK, could acquire associate EU citizenship status, it seems exceptionally difficult to guarantee their right to vote in elections to the EP. Besides, it is unclear why UK citizens not resident within the EU should have a voice in political processes that do not affect or coerce them (or not nearly as much as individuals resident within the EU). This shortcoming merely affects the broader conceptions of associate EU citizenship that do not restrict the right to acquire this status to individuals who are resident within an EU member state (the narrower conception, as proposed by Kostakopoulou). However, all proposals for associate EU citizenship run into two other problems.

¹⁵For criticism of the rights’ discourse in EU citizenship literature, see Van den Brink (2018).

First, associate EU citizens will not enjoy voting rights in national elections of any EU member state, as they do not enjoy the nationality of a member state (Fabbrini, 2017). EU citizens are currently represented directly by the EP and indirectly by national politicians in the Council. If EU citizenship is disconnected from nationality and can be acquired by individuals who are not in the possession of a member state nationality, an ideal pursued not just by advocates of associate EU citizenship, but also by recent accounts defending an autonomous EU citizenship status (Garner 2018), we produce a category of second-class EU citizens who are not included in the EU's indirect channels of political representation.

Finally, the inclusion of EU citizens' in local elections was never uncontroversial, as the decisions by the German Constitutional Court to declare unconstitutional the inclusion of foreigners by Schleswig-Holstein and Hamburg in municipal elections demonstrate (Rulings of the Federal Constitutional Court [BVerfGE], 1990). The German Constitution was amended subsequently so as to comply with the Maastricht Treaty and allow EU citizens to vote and stand in local elections (Grabenwarter, 2009, p. 117). Now, imagine that the CJEU decided that EU citizenship rights could not be withdrawn from individuals who possessed EU citizenship previously. Such a decision is likely to be constitutionally problematic in countries like Germany and demonstrates the risks of thinking too lightly about safeguarding EU citizenship rights for UK nationals without a consideration of the possible democratic implications. There is thus a strong case to be made against associate EU citizenship in the name of the EU's liberal democratic values.

Conclusion

If the Treaty text is followed, and EU citizenship is treated as a contingent status, many UK nationals will be deprived of EU citizenship against their will. The intention of those supporting the introduction of associate EU citizenship to prevent this from happening is easy enough to understand. However, the appropriate response is not to ignore the treaties and offer UK nationals EU citizenship in defiance of Article 20 TFEU. Neither should we exaggerate the implications of Brexit for EU citizens and the concept of EU citizenship and propose solutions that disregard the interests of the EU, as well as its citizens that are difficult to defend on democratic grounds. As we explained, it is important that the EU respects reciprocity in future relations with the UK, to incentivise the UK to offer an arrangement that benefits EU citizens, but also to make the prospect of withdrawal less attractive to other countries. In addition, the desirability of associate EU citizenship can be put into question for a number of democratic reasons. The democratic shortcomings depend on the specific template of associate EU citizenship proposed and the means by which it is to be realized (by judicial means in defiance of the treaties or not), but all the proposals, if implemented, would realize a form of second-class EU citizenship, whereby associate citizens are denied important rights of political representation. Therefore, rather than taking extreme positions, possibly with all sorts of unwanted implications, we believe that a more fruitful starting position accepts that EU citizenship is terminated for the nationals of a withdrawing state. From there, we can start engaging in a debate on what the future position of these people should be. We believe there should be a treaty between the EU and the UK that offers

substantial free movement rights to EU and UK citizens alike. That would accomplish much of what the proponents of associate EU citizenship seek to accomplish, without requiring the adoption of the untenable positions we have tried to dismiss in this article.

Correspondence:

Martijn van den Brink

Ethics, Law and Politics Department, Max Planck Institute for the Study of Religious and Ethnic Diversity

Hermann-Föge-Weg 11

37073 Göttingen

Germany

email: vandenbrink@mmg.mpg.de

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