European Citizenship under Stress: Introduction

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European citizenship is under stress today as it has probably never been before. The European Union has matured to emerge as a powerful constitutional actor and the expectations grew accordingly, from justice, to the Rule of Law and other fundamental issues, all having EU citizenship and European citizens at the centre.¹ Mass demonstrations in favour of the Union and the values it stands for marked the recent years, from the rallies in Britain to Poland and Hungary. As European flags fly above the hopeful crowds, however, the vector of the Union's evolution is not unambiguous: significant achievements are reported alongside the deterioration of the constitutional climate in some parts of the Union² and the perceived weakening of EU citizens' protections.³ The very significance of fundamental rights protection in the EU is in question in the shade of the 'constitutional bargain' among the Member States.⁴ Fundamental rights of EU citizens are said to be 'in decline'.⁵ Add Brexit to this picture, which signifies the loss of the EU citizenship status and all the rights attached to it by dozens of millions of Europeans as well as potential difficulties for EU citizens remaining in the UK, and the picture is more complex still.

- 1 CMLRev. (2015). Editorial comments: The Critical Turn in EU Legal Studies. *Common Market Law Review* 52 (4), pp. 881–888 (and the literature cited therein); de Witte, F. (2015). *Justice in the EU: The Emergence of Transnational Solidarity*. Oxford: Oxford University Press; Kochenov, D., de Búrca, G., and Williams, A., eds. (2015). *Europe's Justice Deficit?* Oxford: Hart Publishing; Williams, A. (2009). *The Ethos of Europe: Values, Law and Justice in the EU*. Cambridge: Cambridge University Press.
- 2 Pech, L., and Scheppele, K.L. (2017). Illiberalism within: Rule of Law Backsliding in the EU. *Cambridge Yearbook of European Legal Studies* 19, pp. 3–47.
- 3 O'Brien, C. (2018). *Unity in Adversity*. Oxford: Hart Publishing.
- 4 Nic Shuibhne, N. (2017). Recasting EU Citizenship as Federal Citizenship: What Are the Implications for the Citizen When the Polity Bargain Is Privileged? In: Kochenov, ed., *EU Citizenship and Federalism*. Cambridge: Cambridge University Press, p. 176 *et seq.*; but see: Spaventa, E. (2017). Earned Citizenship – Understanding Union Citizenship through Its Scope. In: Kochenov, ed., *EU Citizenship and Federalism*, cit., p. 204 *et seq.*
- 5 Yong, A. (2019). *The Rise and Decline of Fundamental Rights of EU Citizenship*. Oxford: Hart Publishing.

This volume brings together a handful of excellent scholars and practitioners⁶ to look at a number of crucial challenges EU citizenship is facing at the moment – and Brexit is, naturally, the constant backdrop of any of the challenges discussed. In some sense, EU citizenship emerges as almost in danger. This context, which is quite new in the history of European integration, all the crises past and present notwithstanding, allows us to see the significance and value of EU citizenship with renewed clarity.

According to settled case law, EU citizenship, which was introduced by the Maastricht Treaty, is intended to be the fundamental status of nationals of the Member States. EU citizenship works on at least two levels. It epitomises the sense of non-discrimination, robust rights for the individuals and also the idea of an ever closer union among the peoples of Europe. As the classical story goes, it builds on the pre-existing free movement of economic actors by adding free movement rights for non-economic actors, as well as, to some extent, the right to equal treatment for all citizens and political rights. While EU citizenship initially had a mostly symbolic value, criticised by Hans Ulrich Jessurun d'Oliveira as a 'pie in the sky' at its inception,⁷ it has developed into a driving force of the European integration project two decades later.⁸

In recent times, however, a number of important challenges emerged as potential obstacles to the process of European integration. It comes as no surprise then, that the concept EU citizenship in particular, as a cornerstone of that integration process, has been questioned, tested and even vilified. The 'migration crisis', the increased popularity of Eurosceptic political movements and a number of contentious constitutional processes all contribute to the current legal-political climate where EU citizenship stands challenged, raising a number of fundamental questions that touch upon the core aspects of personhood and rights in EU law and which can be expected to have a profound impact on the EU citizenship concept.

Amongst the different challenges, Brexit occupies a particularly prominent place. Indeed, ever since the United Kingdom voted, on 29 March 2016, to leave the European Union, Brexit has dominated the legal and political debate. Given

⁶ The usual disclaimer naturally applies: the views expressed in the various contributions of this book only reflect the approach of their respective authors.

⁷ Jessurun d'Oliveira, H.U. (1995). *Union Citizenship: Pie in the Sky?* In: Rosas and Antola, eds., *A Citizen's Europe. In Search for a New Order*. London: Sage, p. 58.

⁸ See, e.g., Jessurun d'Oliveira's contribution to this volume.

its symbolic resonance and its importance for the European integration process, it is only natural that EU citizenship came to play a central role in the negotiations following the UK's decision to leave the European Union. From the outset, the Council and the Commission stated that one of the first priorities for the negotiations would be to agree on guarantees to protect the rights of EU citizens, and their family members, who are affected by Brexit. At the same time, the UK made it clear that it wanted to limit the rights of EU citizens and their family members in the UK, in particular their right to free movement and residence.⁹ It is inevitable, therefore, that, in the context of the Brexit negotiations, the concept of EU citizenship emerged as deeply challenged, leading to a handful of ambitious reform proposals¹⁰ but ultimately resulting in a settlement the outcome of which is a significant downgrade in terms of rights of dozens of millions of those who were EU citizens still on January 31, 2020, as Gillian More explains.¹¹

This volume takes a representative selection of the said challenges, which raise a multitude of highly complex issues, as an invitation critically to reflect on the current state of the EU legal framework surrounding EU citizenship. The contributions are grouped in four parts, dealing with constitutional developments posing challenges to EU citizenship and its nature; the developments related to free movement of persons and the limits of this paradigm in the context of EU citizenship; challenges to EU citizenship beyond free movement; and, lastly, challenges to EU citizenship in the context of the outside world, focusing, besides the problems posed by Brexit, which inform the narrative throughout, also on EU citizenship's relations with the EEA¹² and its implications for building the Eurasian free movement regime.¹³

First of all, EU citizenship has undergone important constitutional developments, while informing the core of EU's constitutionalism, thus growing hand-in-hand with all the EU's legal-political fundamentals and often challenging these in some crucial respects.¹⁴ Notably, it has developed from what

9 See, e.g. the White Paper entitled "The Future Relationship between the United Kingdom and the European Union" (July 2018), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf.

10 Cf. Kostakopoulou, D. (2018). *Scala Civium: Citizenship Templates Post-Brexit and the European Union's Duty to Protect EU Citizens*. *Journal of Common Market Studies* 56 (4), pp. 854–869. But see van der Mei in this volume and van den Brink, M., and Kochenov, D. (2019). Against Associate EU Citizenship. *Journal of Common Market Studies* 57 (6), pp. 1366–1382.

11 See More's chapter in this volume. See also Closa, C. ed. (2017). *Secession from a Member State and Withdrawal from the European Union*. Cambridge: Cambridge University Press.

12 See the chapter by Tobler in this volume.

13 See Pirker and Entin in this volume.

14 For the overview, see the chapter by Kochenov in this volume.

was initially perceived as a mostly symbolic concept into a protective layer, offering the holder a number of rights that must under all circumstances be guaranteed. It is, in particular in situations of hardship, for instance in a context where fundamental rights are coming under threat, where its added value is most crucial.¹⁵ While the principle – first mentioned by the Court in its seminal *Ruiz Zambrano* judgment¹⁶ – according to which EU citizens must not be deprived of the genuine enjoyment of the substance of their EU citizenship rights principle, has become well established in the ECJ's case law, the precise scope of this right remains unclear. Quite how the Court develops this principle, and what (fundamental) rights are covered by it, will determine how important the added value of EU citizenship will be in the years to come.¹⁷ With the lack of clarity on this issue, open questions remain regarding the implications of the functioning of EU citizenship status in the context of the values of the Union, and the role played by the citizenship of the Union in the context of the determination of the precise outlines of the material scope of EU law in concrete cases. As this book demonstrates, many vistas are open for the reassessment of EU citizenship's engagement with EU constitutionalism. A particularly thorny – and also brand new – issue in this context is the impact of the cumulation of EU nationalities on the level of the protection of rights, which Europeans enjoy in EU law today: should being a multiple citizen of Europe be a disqualifier in terms of the full enjoyment of rights in EU law? The ECJ has been masterfully navigating all these issues in the recent years, as David de Groot shows in this volume – but numerous fundamental questions remain.¹⁸

Second, moving to the rights attached to EU citizenship, the right to free movement for EU citizens and their family members is traditionally seen as the most important such right, and with reason. The right to free movement gives an EU citizen the possibility to emancipate himself from the confines of his Member State of origin – which he has not chosen – and to “vote with his feet” by moving to the Member State of his choice. Obviously, as explicitly stated in Article 21 TFEU, this right is subject to certain limitations and conditions, in particular those laid down in the Directive 2004/38¹⁹. The justification

15 See Jessurun d'Oliveira's chapter in this volume.

16 Court of Justice, judgment of 8 March 2011, case C-34/09, *Ruiz Zambrano*. See also Kochenov, D. (2011). A Real European Citizenship; A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe. *Columbia Journal of European Law* 18 (1) pp. 56–109.

17 Cf. the contribution by Kalaitzaki in this volume.

18 See the chapter by de Groot in this volume.

19 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely

for these limitations and conditions, and their precise scope – be this ‘social integration’,²⁰ ‘abuse of law’,²¹ or social benefits and ‘self-sufficiency’, to name just a few – continues to give rise to contention.

On the one hand, a logical consequence of the said emancipating power ensuing from the exercise of the right to free movement is that those who do not or cannot rely on free movement rights are quite literally left behind. The different treatment between “moving” and “static” EU citizens leads to the fundamental question as regards the precise categories of EU citizens that are entitled to benefit from this right and what are the justifications for denying these benefits to other EU citizens. The issue of the (perceived) unequal treatment of different categories of current or former EU citizens is also strongly felt in the context of Brexit. Indeed, one of the most pressing topics in this context are the extent to which UK nationals and their family members will continue to enjoy free movement rights in the EU after Brexit and, conversely, the extent to which citizens from the remaining EU Member States and their family members will have the right to move to the UK.²²

On the other hand, the relation between the free movement of economic actors and that of non-economically EU citizens remains unclear. While EU citizenship was originally conceived as a “market citizenship”, axed on the traditional internal market logic, it has gradually been freed from that logic, as Jesse and Carter, among other contributors, demonstrate with abundant clarity. Unless covered by specific economic free movement regimes, such as the posted-workers framework, for instance,²³ EU citizens have become fully-fledged actors in the European Union in their own right, regardless of their contribution to the internal market. This stands in remarkable contrast with the European Economic Area, which is characterised by the free movement of economically active persons, but which does not share the concept of EU citizenship. Still, the adoption of a special set of EU protective measures for workers and the negotiations in the context of Brexit have acted as a vivid reminder that, at least according to some, the hard core of EU law on citizenship is still to be found in the free movement of economic actors.

within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, *OJ L 158*, 30.4.2004, p. 77–123. See the chapters by Coutts and Muir in this volume.

20 See the chapter by Coutts in this volume.

21 See the chapter by Kroeze in this volume.

22 See the chapters by Cambien and by Jesse and Carter in this volume.

23 See the chapter by Van Nuffel and Afanasjeva in this volume.

Thirdly, EU citizens enjoy significant rights beyond free movement. The right to equal treatment in the different EU Member States, in particular as regard access to social benefits and education, is a classical example of such rights. Specifically in the context of education, the latter right translates into the freedom for students to study in another EU Member State and to enjoy, in that respect, equal access as students coming from that Member State.²⁴ Evidently, this right to equal treatment implies a degree of financial solidarity between the different EU Member States. For that reason, it invites delicate questions as to the scope of the social benefits covered by the principle of equal treatment and the conditions surrounding the right to rely on it, conditions relating to legal residence and integration in the host Member State in particular. These issues are, again, of particular significance in the context of Brexit,²⁵ which calls into question the existing solidarity mechanisms. At the moment of the writing of this introduction, the extent of the solidarity from which, for instance, British pensioners living in Spain or French students studying at a UK university will continue to benefit after Brexit remains an open question, but the legal principles underlying the debate do deserve an in-depth examination.

The sophisticated web of rules on the integration of an area without frontiers for EU citizens remains contingent on politics and is therefore extremely fragile. Crucially therefore, EU citizens enjoy a number of political rights, which enable them to engage with the EU political level. Of utmost importance in this regard is the right to vote and to stand as a candidate in elections to the European Parliament, which acts as the representative of EU citizens at the EU level.²⁶ Also crucial is the EU citizens' initiative, which has the potential to develop into a meaningful form of participatory democracy.²⁷ Such a mechanism is highly desirable in light of the current political context, which has led to growing calls for further political engagement with the process of European integration. While both rights have been bolstered in recent case law, the precise contours of these rights and, hence, their added value for the European integration project still remain unclear for the moment.

All the challenges outlined above notwithstanding, the European legal order and its citizenship remain a significant example of supranational legal-political possibilities put to the service of the citizens themselves, bolstering a constant (re-)negotiation of access. This is the case with EEA nationals, benefiting from

24 See the chapter by Turmo in this volume.

25 See the chapter by Garben in this volume.

26 See the chapter by Platon in this volume.

27 See the chapter by Athanasiadou in this volume.

the majority of EU citizens' rights in the EU²⁸ and also gives rise to imitation, as is evidenced by the free movement framework and the case-law of the Court of the Eurasian Economic Union in Minsk, which clearly finds inspiration in the EU's achievements and legal structures.²⁹ The role of EU citizenship vis-à-vis the outside world equally concerns access to the status for those who do not have it by birth. Indeed, the bolstered status of EU citizenship and its importance for the EU constitutional framework naturally raises fundamental questions regarding the acquisition and loss EU citizenship. New challenges arise here related to the investment naturalizations practiced by a number of the Member States. While the orthodoxy has it – as the ECJ restated in *Tjebbes* to the regret of one of the editors³⁰ – that the Member States' sovereignty in the field of the acquisition and loss of citizenship is not curtailed beyond the *Rottmann* limitations,³¹ the task of ensuring that the new challenges are met effectively could be solved via other fields of EU law, as this book shows, showcasing the importance of observing the freedom of movement of capital, in one example.³²

The most pressing challenges in the context of EU citizenship's interactions with the 'outside world' arise, however, because of Brexit. Where a Member State decides to leave the European Union, it may be wondered whether the automatic loss of EU citizenship for nationals of the Member State is not or should not be subject to certain mitigating principles of EU law.³³ Regrettably, as the Withdrawal Agreement demonstrates, the parties were probably much less inventive that they could have been in a better world, in trying to ensure that as little rights of EU citizens / former EU citizens are lost as a result of the UK's crushing out of the Union following the surprise referendum result.³⁴

It remains to be seen how the concept of EU citizenship and the rights attached to it emerge from the different challenges it faces. The aim of this volume is not to closely monitor current political developments from an academic perspective, but rather to explore the impact that these developments, and the debate they have triggered may have on the said core aspects of the

28 As analysed in the chapter by Tobler in this volume.

29 See the chapter by Pirker and Entin in this volume.

30 Court of Justice, judgment of 12 March 2019, case C-221/17, *Tjebbes*. Cf. Kochenov, D. (2019). The *Tjebbes* Fail. *European Papers* 4 (1), pp. 319–336.

31 See the chapter by Jessurun d'Oliveira in this volume.

32 See the chapter by Kudryashova in this volume. For the general context of investment citizenship, see, Kälén, C. (2019). *Ius Doni in European and International Law*. Boston: Brill-Nijhoff.

33 See the chapter by van der Mei in this volume.

34 See the chapter by More in this volume.

concept of EU citizenship. The current challenges are used as an opportunity to assess the current state of EU law on citizenship and to shed light on emerging trends: How does the EU legal order understand the concept of EU citizenship in the current context? Or, in other words: what lessons can be learnt from the current challenges raised against EU integration to date to steer reflections on EU citizenship in the years to come?