

EU citizens' rights *versus* the Member States' right to withdraw from the Union

- Right to withdraw *versus* fundamental status of EU citizens -

According to the ECJ's consistent case law since the *Rottmann* case (para. 46) questions which concern "the conditions in which a citizen of the Union may, because he loses his nationality, lose his status of citizen of the Union and thereby be deprived of the rights attaching to that status" fall within the Courts jurisdiction.¹

As the Court held in paragraph 42 of the judgment of 8 March 2011, *Ruiz Zambrano* :
„Article 20 TFEU precludes national measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of their status as Union citizens.“²

Although this line of case law has been revised and its scope somewhat limited in *Dereci*, as referring only "to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole,³ it appears to remain relevant in the Brexit context.

The notification of the intent to withdraw under article 50 TEU, though having exactly the effect to deprive British citizens of their status as Union citizens and to deprive Union citizens living in the UK of their Union citizens' rights is, however, covered by the explicitly recognised right of a MS to withdraw.

Thus the right of the MS to withdraw trumps the rights of Union citizens.

This issue will be explored by analysing the nature of the rights involved (1.), the restrictions that already have affected the right to vote in the 2016 referendum (2.) and the potential future impacts of the withdrawal on the Union citizens' rights (3.).

1. The nature of the rights involved

A. Rights of citizens of the Union: acquired rights?

As results from the ECJ's case law since *Rudy Grzelczyk*, "Union citizenship is destined to be the 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, subject to such exceptions as are expressly provided for".

The „substance of the rights conferred by virtue of their status as Union citizens" comprises a variety of different rights like free movement rights, political rights, social rights, fundamental rights, effective judicial protection and many more.

¹ Judgment of the Court (Grand Chamber) of 2 March 2010, *Janko Rottman v Freistaat Bayern*, ECLI:EU:C:2010:104

² C-34/09, ECLI:EU:C:2011:124

³ Judgment of the Court (Grand Chamber) of 15 November 2011, *Murat Dereci and Others v Bundesministerium für Inneres*, ECLI:EU:C:2011:734, para. 66.

The question is, whether these rights might be considered as acquired rights.⁴ Notably the right of « permanent » residence (Dir 2004/38, article 16) rises interesting legal questions in the case of a MS's withdrawal.

But the UK government websites do not leave any doubt with regard to the “permanence “ of this right stating explicitly: “If you already have a permanent residence document it won't be valid after the UK leaves the EU.”⁵

B. The right of withdrawal: a fundamental right?

The right of withdrawal, guaranteed by article 50 TEU, is voluntary, unilateral and unconditional. From the MS's point of view, the right to withdraw is a fundamental guarantee of its sovereignty.

The wording of article 50 makes it a truly fundamental right of MSs within the Union as an IO in a federalising process.

2. The restrictions to the right to vote in the context of the decision to withdraw

A. The restrictions on the right to vote in the referendum June 23, 2016

Inclusion of Commonwealth citizens but exclusion of EU citizens, prisoners and British citizens residing abroad for at least 15 years.

Validated by UK courts decisions of 2016 (High Court and Supreme Court)

B. Assessment in the light of Union law

1. EU citizens

Those who enjoy the right to vote in municipal and EP elections will be deprived of that right by a decision to withdraw adopted through a procedure they had no say in, nor in the referendum nor in the vote of the UK Parliament

2. Expats

What about free movement law (non-discriminatory restrictions) with regard to the 15 years rule?

The Court of Appeal (London) dismissed two UK citizens contesting their incapacity to vote after 15 years of living outside the United Kingdom, in this case, Harry Shindler veteran of the Second World War residing in Italy and Jacquelyn McLennan, a lawyer living in Belgium. They felt that this inability to vote violated the right to freedom of movement within the European Union.

⁴ Regarding the concept of acquired rights, see notably the study of the EP on „acquired rights“: The impact and consequences of Brexit on acquired rights of EU citizens living in the UK and British citizens living in the EU-27 of May 2, 2017.

[http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583135/IPOL_STU\(2017\)583135_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/583135/IPOL_STU(2017)583135_EN.pdf)

⁵ See: <https://www.gov.uk/eea-registration-certificate/permanent-residence>

The right to free elections and the relevant jurisprudence of the ECtHR have been taken into account by the judgment of the High Court of 28 April 2016.

(See *Doyle v UK* (2007) 45 EHHR SE3; *Shindler v United Kingdom* (2013) 58 EHHR 9.)

24 May 2016, R (on the application of Shindler and another) (Appellants) v Chancellor of the Duchy of Lancaster and another (Respondents) - UKSC 2016/0105.

On appeal from the Court of Appeal Civil Division (England and Wales)

The Supreme Court held an oral hearing of the application for permission to appeal, with the appeal to follow immediately if permission to appeal was granted.

The appellants challenged the lawfulness under EU law of section 2 of the EU Referendum Act 2015 in respect of its exclusion from the EU Referendum franchise British citizens who, in exercise of their EU free movement rights, reside outside the UK and have been resident outside the UK for a period of more than 15 years. The appellants claim that their disenfranchisement constitutes a unjustified restriction of their EU law rights to move and reside within the territory of the Member States and separately that the common law affords protection to their right to vote as British citizens and full members of the United Kingdom.

The Supreme Court has refused permission to appeal and the Court of Appeal judgment will therefore stand.

Giving the Court's decision, Lady Hale (Deputy President of the Supreme Court) said:

"We should make it clear that the question is not whether this particular voting exclusion is justifiable as a proportionate means of achieving a legitimate aim.

The question is instead, firstly, whether European Union law applies at all, as only if it does so is there any possibility of attacking an Act of Parliament; and secondly, if so, whether there is any interference with the right of free movement.

Assuming for the sake of argument that European Union law does apply, we have decided that it is not arguable that there is an interference with right of free movement, for the reasons given by the Divisional Court and the Court of Appeal.

We do have considerable sympathy for the situation in which the applicants find themselves and we understand that this is something which concerns them deeply. But we cannot discern a legal basis for challenging this statute.

Accordingly the application for permission to appeal is refused."

But what about the ECJ's case law on restrictive measures that have the effect of dissuading European citizens from using their LC rights?

A preliminary question would have been necessary.

3. Prisoners

CJUE, October 6, 2015, Delvigne, loss of civic rights under the French criminal code, appreciated with regard to CFR rights only!

Para. 52: „It follows from the foregoing that Article 39(2) of the Charter does not preclude legislation of a Member State, such as that at issue in the main proceedings, from excluding, by operation of law, from those entitled to vote in elections to the European Parliament persons who, like the applicant in the main proceedings, were convicted of a serious crime and whose conviction became final before 1 March 1994 (date when the French law changed).“

The British ban goes however much further and is thus probably not consistent with the Charter.

According to recent NEWS: (Sunday Times 29/10) “Prisoners are to be granted the vote in a move that will raise fresh questions about the government’s approach to law and order.

Those sentenced to less than a year behind bars who are let out on day release will be allowed to go home to vote after the justice secretary, David Lidington, decided to tear up the existing ban.

Plans were circulated to other ministers last week, after a 12-year dispute with the European Court of Human Rights, which ruled in 2005 that it was a breach of prisoners’ human rights to deny them the chance to vote. The former prime minister David Cameron once said the thought of prisoners voting made him feel “physically ill”.

3. The potential consequences of the withdrawal for rights arising from European citizenship

A. The (hopefully) moderating effect of the agreements to be concluded

Duty of loyal cooperation applies to the negotiations under article 50 TEU.

1. The parties’ negotiation positions

a) *European Council directives of negotiation (22 May 2017):*

„ III.1 CITIZENS' RIGHTS

5. The Agreement should safeguard the status and rights derived from Union law at the withdrawal date, including those the enjoyment of which will intervene at a later date (e.g. rights related to old age pensions) as well as rights which are in the process of being obtained, including the possibility to acquire them under current conditions after the withdrawal date (e.g. the right of permanent residence after a continuous period of five years of legal residence which started before the withdrawal date). This should cover both EU27 citizens residing (or having resided) and/or working (or having worked) in the United Kingdom and United Kingdom citizens residing (or having resided) and/or working (or having worked) in one of the Member States of the EU27. Guarantees to that effect in the Agreement should be reciprocal and should be based on the principle of equal treatment amongst EU27 citizens and equal treatment of EU27 citizens as compared to United Kingdom citizens, as set out in the relevant Union acquis. **Those rights should be protected as directly enforceable vested rights for the life time of those concerned. Citizens should be able to exercise their rights through smooth and simple administrative procedures.**”
(bold added by me)

b) *The UK position*

As described in seven ‘Future partnership papers’ (August-September 2017) and as resulting from the content of the EU withdrawal (act) bill as far as currently known.

2. The role of the EP representing the EU citizens

Approval of the withdrawal agreement by the European Parliament according to article 50 par. 2 (and to the necessary adaptations of the treaties)

In addition, the ‘future relations agreement’ will most probably also require approval by the EP under article 218 para. 6 a).

a) *A veto right with unpredictable effects*

If the EP vetoes an agreement which does not sufficiently protect citizens’ rights, could the UK Parliament finally come in to decide not to withdraw? If such a veto right was included in the EU withdrawal bill instead of the date of “March 29, 2019, 23:00” as suggested by Theresa May on Friday November 10, 2017.

Lord Kerr (often called the author of article 50) says EU treaty allows UK to change mind up to moment of leaving, and adding date to bill would not change that. (Guardian, 10.11.2017)

b) *The questionable participation of British MPs*

The British people, already consulted directly in the 2016 referendum, is represented twice in the withdrawal process : through the two legitimization chains of the EU: the EP and Westminster.

Could these two groups of representatives take different positions ?

3. The Enforcement dilemma

What we need is appropriate enforcement and dispute settlement mechanisms for both the ‘withdrawal agreement’ and the ‘future partnership agreement’ as well as for any transitional period following the withdrawal date.

Provision should be made for individuals to have the legal means to enforce their continuing rights.

For British citizens in EU-27 states, the agreement concerning existing residents will be part of EU law, which will lead to a role both for the Court of Justice and for domestic courts.

It is more difficult to identify a mechanism to ensure compliance by the United Kingdom, given the Government’s opposition to any continuing role for the Court of Justice. A potential solution would be for the agreement to require that the rights it provides should be legally enforceable at the domestic level in the United Kingdom.

But that is not sufficient!

a) *Why we need an international / European enforcement mechanism*

Because of the peculiarities of the UK legal system. (sovereignty of Parliament, lack of written constitution, dualism with regard to international law,...)

The cardinal principal is Sovereignty of Parliament (*the Queen in Parliament*) meaning that „what a sovereign Parliament can do, a sovereign Parliament can always undo“.

The 1972 EC Act as a ‘constitutional statute’ ensured the rights as well as direct effect, primacy and enforcement.

We have indeed to take into account the emergence of a new category of "constitutional statutes" in British law. In a judgment of 18 February 2002 in the case of *Thoburn v. Sunderland City Council*, Lord Justice Laws considered that there was now in British constitutional law a hierarchy between ordinary laws and constitutional laws and that the parliament could only abrogate the latter explicitly.⁶

The *European Communities Act de 1972* is quoted among these constitutional statutes. (see also High Court and Supreme Court in *Gina Miller*).

The 'EU withdrawal act' will terminate the specific nature of EU in the UK and will also put an end to effective judicial protection, access to ECJ, ...

The UK Government's paper entitled *Enforcement and dispute resolution: a future partnership paper* (23 August 2017) is very clear on this.

b) *The EFTA Court 'solution'*

Suggested by the two presidents Lenaerts and Baudenbacher

The President of the European Court of Justice (ECJ), Koen Lenaerts, has suggested that the UK could use the European Free Trade Association (EFTA) court as a compromise solution to supervising UK-EU relations. The court oversees access to the single market for non-EU states Iceland, Liechtenstein, and Norway. Lenaerts was quoted: "We don't need to reinvent everything, like the wheel, it exists. The question is whether this wheel is adapted to the situation and this is subject to political negotiation." However, he warned that while it would end the ECJ's direct effect in the UK, the EFTA court cannot significantly diverge from the ECJ's rulings, saying, "The treaty stipulates that the EFTA court, which is institutionally independent from the ECJ, must attain a uniform or homogeneous jurisprudence. On paper, they are two independent courts. In practice, the weight of the EU court has more impact. Will the UK accept this?"

Such a solution could meet the Prime Minister's objectives – at least as a transitional measure. The EFTA court is considered to be less meddlesome in states' internal affairs than the ECJ. When both sides are ready to talk compromise, the EFTA court could be a good place to start.

Will the UK still be member of the EEA after Brexit, or does it have to adhere?

Britain is currently a member of the European Economic Area as a member of the European Union. Questions have been raised as to whether a state that withdraws from the EU automatically withdraws from the EEA or whether such a withdrawal requires notice under Article 127 of the EEA Agreement – and, if the courts so decide, whether such notice given by the UK would require an act of parliament.

But, on the other hand, article 126 of the EEA agreement limits the scope of the agreement to „the territories to which the EEC treaty is applied“, thus today the territorial scope of the EU treaty (art. 52 TEU, 355 TFEU)

In August 2016 the Norwegian Government expressed reservations. Norway's European affairs minister, Elisabeth Vik Aspaker, told the *Aftenposten* newspaper: "It's not certain that it would be a good idea to let a big country into this organisation. It would shift the balance, which is not necessarily in Norway's interests"

⁶ High Court of Justice (Queen's Bench Division, Administrative Court), 18 February 2002 *Steve Thoburn v Sunderland City Council*.

Advantages: (promotion by Carl Baudenbacher)

- It exists and functions well
- English language
- Independent court
- Homogenous case law
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c) A 'Swiss solution' with a clause ,guillotine'?

Regarding the relations between the EU and Switzerland, currently renegotiated particularly sensitive is the dispute resolution.

The idea is for a model in which both parties could appeal to the EU Court of Justice (ECJ) in case of dispute. If Switzerland did not implement its decision, the EU could take "adequate countervailing measures" up to the partial or total suspension of the respective agreement (and vice versa). The proportionality of such measures could be decided by an arbitral tribunal.

d) Transitional / permanent dispute resolution scheme

B. In absence of any agreement: the 'no-deal Brexit scenario'

Getting more and more likely to happen.

1. Consequences

a) For UK citizens

In case C-165/14, **Alfredo Rendón Marín**, the ECJ recalled :

„72 On the other hand, the Treaty provisions on citizenship of the Union do not confer any autonomous right on **third-country nationals** (judgments of 8 November 2012, *Iida*, C-40/11, EU:C:2012:691, paragraph 66, and of 8 May 2013, *Ymeraga and Others*, C-87/12, EU:C:2013:291, paragraph 34).“

Thus: UK nationals would keep only derived rights if they are family members of an EU Citizen

Brexit Secretary David Davis said he has spoken to the European Parliament's negotiator Guy Verhofstadt about creating **so-called associate citizenship** that could allow visa-free working rights to British nationals.

Davis was asked in Parliament about what the government could do to offer British workers, particularly younger Britons, the opportunity to work in the European Union without a visa. He said he'd already discussed the idea with EU counterparts.

“We'll listen to anything of this nature,” he told lawmakers on Thursday. “The aim of this exercise is to be good for Europe, good for Britain, and that means good for the citizens of Europe and Britain.”

Verhofstadt said in April he wanted to allow Britons to retain their European citizenship, and the parliament in Strasbourg has put forward a proposal to allow them to opt in to an associate EU citizenship.

It's not clear when such proposals would be formally discussed: talks are currently deadlocked over the contentious issue of the divorce bill. The residency rights of EU citizens in the U.K., and U.K. citizens in Europe need to be sorted before talks can move on to the future relationship.

c) For citizens of EU 27 MS

They will keep the fundamental status but its territorial scope is restricted to EU 27.

2. Remedies

a) In the UK courts

Cf. judgements of High Court and Supreme Court in Gina Miller.

But all depends on the underlying statutes, and the 1972 ECA will be repealed.

b) The ECtHR,

- Art. 8 ECHR, HRA 1998.
- ECHR protocole 1, "Every natural or legal person is entitled to the peaceful enjoyment of his possessions".
- Protocole 4, Article 4 – Prohibition of collective expulsion of aliens „Collective expulsion of aliens is prohibited“. (the UK signed in 1963, but never ratified, Protocol n° 4 to the Convention)

c) UK Parliament

- Amendments of MPs to « EU withdrawal bill » (the great repeal bill)

Some 300 amendments have been tabled, the debate, scheduled during the week of October 16 has been delayed.

What is needed is: An Act of Parliament liable to be judged as ‘constitutional statute’ by the courts

(An Act is a Bill that has been approved by both the House of Commons and the House of Lords and been given Royal Assent by the Monarch. Taken together, Acts of Parliament make up what is known as Statute Law in the UK. Different to delegated legislation in the form of statutory instruments.)

- The UK Parliament could block a no-deal Brexit.

C. In case of the withdrawal notification being withdrawn

1. Is it at all legally possible?

Before the conclusion of an exit agreement and until March 29, 2019, certainly, under both EU and UK law.

2. Are the provisions of the ominous "new settlement for the United Kingdom in the European Union" adopted by the European Council of February 2016 still applicable?

The whole proceedings, starting with the official UK demands formulated in November 2015 until the European Council of 18-19 February and until the Referendum in June, **were a shame for the EU.**

It is an international agreement concluded in simplified form between the 28 MS, which is said ‘fully compatible’ with the founding treaties and **will only enter into force if the UK decides to remain in the EU.**

“the following set of arrangements, which are fully compatible with the Treaties and will become effective on the date the Government of the United Kingdom informs the Secretary-General of the Council that the United Kingdom has decided to remain a member of the European Union, constitute an appropriate response to the concerns of the United Kingdom”

Consists of “The Decision of the Heads of State or Government” (HSG Decision) plus three Commission declarations (Announced changes to primary law by future accession treaties, interpretations of primary law, changes to secondary law).

The decision creates a risk for several fundamental principles of EU Law: EU citizenship, free movement of workers and non-discrimination are put into question without any need.

This kind of ‘cherry picking’ which is also favoured by the Swiss government should not be tolerated.

The adequate new settlement for the UK would rather be the EEA than the EU.

4. Brexit lessons to be learned on the nature of the European Union

Is the Union a Union of States or a Union of citizens, or both?

The picture as resulting from articles 1, 4 (2) and (3), 6, 9, 50 TEU, articles 20, 21 TFEU and the CFR.

During the debates in the European Convention, several members have opposed the new right of withdrawal as being contrary to the nature of the EU and the integration within a Union of values.

In short, European citizenship, as a status guaranteeing a series of rights, starting with free movement and the right of permanent residence in any EU state, is inevitably linked to the state's membership in the Union.

The EU ‘constitution’ is not truly a citizen’s constitution as Loic Azoulay suggested.⁷

As the right to withdraw is: 1st unilateral, 2nd voluntary and 3rd unconditional, the EU remains fundamentally a Union of sovereign Member States based on international treaties. From the MS’s point of view, the right to withdraw is a fundamental guarantee of this sovereignty.

The voluntary, unilateral and unconditional nature of the right of withdrawal testifies to the fact that the Union, while possessing the traits of a federation, is not in the process of becoming a federal state. The (fundamental) rights of its Member States clearly take precedence over the fundamental rights of Union citizens - whether of British nationality or the nationality of another Member State - to whom the exercise of the right of withdrawal will inevitably affect.

The ECJ’s constitutional reading of the treaties and the EU’s legal order as a whole does not resist to the fundamental freedom of each MS to withdraw according to its constitutional requirements.

⁷ Cp. Loic Azoulay, « Constitution économique et citoyenneté de l’Union européenne », *Revue Internationale de Droit économique*, 2011/4.