Jindal Global Law Review (2021) 12(1):9–27
https://doi.org/10.1007/s41020-021-00140-x

ARTICLE

A walk on the 'rights' side: EU citizenship reform based on international human rights law

Thibault Weigelt[1]

Accepted: 25 March 2021 / Published online: 16 April 2021

Abstract

Citizenship, today, is a concept in crisis. At the international level, migration poses significant questions of justice with regard to citizenship as an exclusionary status; while at the regional and domestic level, citizenship is being challenged by growing nativist politics and arbitrary exercises of naturalisation powers. One site where this crisis can be observed is the citizenship of the European Union (EU). First, Brexit has shown that EU citizenship as an inclusive status beyond nationality is fragile and contingent. Second, arbitrary naturalisation by States according to domestic rules ensures that EU citizenship suffers from the same exclusionary problems as national citizenship. These two problems, I argue, are not the prime vices from which EU citizenship suffers. The biggest flaw in the concept of citizenship is found in the absence of citizenship, namely statelessness. By failing to consider the 'other', i.e., the problem of statelessness, judgments of the European Court of Justice (ECJ) on citizenship and 'third-country nationals' leave this problem unaddressed. Existing academic research has suggested a range of solutions, from harmonising norms on statelessness and acquisition of citizenship (Swider and Den Heijer) to relaxing criteria for naturalisation (Swoboda), decoupling of local, national, and regional citizenship (Bauböck), and establishing EU citizenship as a subsidiary status protecting against statelessness (Kostakopoulou). In this article, I propose to review these solutions and the literature on statelessness in the context of EU citizenship. Choosing EU citizenship as an instance of the broader citizenship crisis, I argue that the framework of international human rights provides a way out by further separating the two facets of citizenship—the political facet of citizenship as identity/nationality and the legal facet of citizenship as a status that enables a person to have rights.

Keywords EU citizenship · Nationality · Human rights · Statelessness

✉ Thibault Weigelt
tweigelt@jgu.edu.in

[1] Jindal Global Law School, O.P. Jindal Global University, Sonipat, India

1 Introduction: Citizenship at a crossroads

Citizenship and nationality in the 21st century are in crisis and face numerous challenges. At the macro level, globalisation, statelessness, and migration challenge citizenship and nationality in their social dimension. At the meso and micro levels, development of 'citizenship constellations'[1] and expansion of rights threaten the established dichotomy of citizens and non-citizens.[2] The challenges and crises that citizenship and nationality face can be seen in the growing body of literature on statelessness and citizenship reform.[3] Arguably an ambiguous and contested concept, I employ 'crisis' not in the context of any specific social-scientific theory of crisis, but to signify a situation where an institution, such as citizenship, fails to meet (some of) its ends. Amongst citizenship's ends, arguably, is the protection of individuals,[4] and the endemic nature of the problem of statelessness, consequently, can be seen as a crisis of citizenship on the international plane.

One site where this crisis can be observed is citizenship of the EU. The ECJ, I contend, has in cases involving EU citizenship under-appreciated statelessness as a human rights issue. Arguing for finding an effective way in which EU citizenship can help in eliminating statelessness, I propose a shift in interpretation towards a more holistic view of the international law on nationality that also includes international human rights law.

Debates about EU citizenship and statelessness must start with a brief discussion on the genesis of nationality and citizenship norms on the international plane and the recognition of statelessness as a human rights issue. Much of the international legal production of citizenship and nationality norms took place in between World Wars I and II or in the after-war period.[5] The sum total of this norm production was a reconfigured relationship between the individual and the State. Rather than a status guaranteeing participation in domestic political life, citizenship and nationality were recognised and protected as statuses that enabled a person to have rights and assured

[1] A term used by Bauböck to designate intertwined citizenship regimes. See Rainer Bauböck, 'Studying Citizenship Constellations' (2010) 36(5) *Journal of Ethnic and Migration Studies* 847, 848.

[2] See generally Yasemin Nuhoğlu Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (University of Chicago Press 1994).

[3] Audrey Macklin, 'Who Is the Citizen's Other? Considering the Heft of Citizenship' (2007) 8(2) *Theoretical Inquiries in Law*. https://www.degruyter.com/view/j/til.2007.8.issue-2/til.2007.8.2.1153/til.2007.8.2.1153.xml. Accessed 20 July 2020; Hélène Lambert, 'Nationality and Statelessness before the European Court of Human Rights: A Landmark Judgment but What about Article 3 ECHR?' (*Strasbourg Observers*, 16 May 2018). https://strasbourgobservers.com/2018/05/16/nationality-and-statelessness-before-the-european-court-of-human-rights-a-landmark-judgment-but-what-about-article-3-echr/. Accessed 22 October 2020; Jessica Parra, 'Stateless Roma in the European Union: Reconciling the Doctrine of Sovereignty concerning Nationality Laws with International Agreements to Reduce and Avoid Statelessness Note' (2011) 34(6) *Fordham International Law Journal* 1666.

[4] See Linda Bosniak, 'Persons and Citizens in Constitutional Thought' (2010) 8(1) *International Journal of Constitutional Law* 9.

[5] The different Minority Treaties of the League of Nations, the 1948 Universal Declaration on Human Rights, and the 1961 Convention on the Reduction of Statelessness are all examples of legal norms evolved during this time period. See generally Peter J Spiro, 'A New International Law of Citizenship' (2011) 105 *American Journal of International Law* 694, 698 ff.

her of protection by a State on the international plane. Citizenship as membership in a political community, after all, has been called by Hannah Arendt as the 'right to have rights'.[6] Gradually, then, citizenship became less about belonging to a national community and more about a set of rights and norms of equality.[7] This conception of citizenship more closely follows earlier liberal templates for citizenship, with the distinction that many of the rights and, indeed, the right to nationality itself are recognised by international law rather than domestic legal instruments.[8] However, at a conceptual level, as Seubert points out, citizenship with its universal promise of equal rights still suffers from the conditions and particularities of its own realisation, namely a closed political community with its potential for exclusion.[9] The recognition of the centrality of citizenship regimes in the aftermath of both World Wars, however, was also accompanied by a perception of statelessness as a 'technical legal problem' whose eradication would require nothing more than the 'harmonization of laws and co-ordination of rules'.[10] This can also be observed in its definition,[11] which states that a stateless person is a person who does not possess the nationality of any State, and thus presents it as a mere absence of documentation. Instead, statelessness as it is understood today also focuses on the social, political, and historical context in which stateless persons live.[12] Only in recent years has statelessness come to the fore and marshalled scholarly attention. The growing recognition that statelessness, indeed, constitutes a core human rights issue is a result of this renewed attention.[13] This growing attention is a result of the persistence of the problem and the co-dependent relationship with globalisation. As Bloom et al. note, statelessness in recent years has been 'seen as endemic in, or even symptomatic of, modernity'.[14]

EU citizenship is an instance of transnationalisation and globalisation of citizenship regimes.[15] While citizenship claims were in the past articulated from within the polis, processes of globalisation and the advent of international human rights law have made it possible to articulate these claims from the outside. Claims for

[6] Hannah Arendt, *The Origins of Totalitarianism* (Harcourt Brace Jovanovich 1973) 296.

[7] Sandra Seubert, 'Antinomies of European Citizenship: On the Conflictual Passage of a Transnational Membership Regime' in Jürgen Mackert and Bryan S Turner (eds), *The Transformation of Citizenship* (Routledge 2017) 139.

[8] Liberal models of citizenship historically were distinguished from republican models of citizenship. While the latter emphasised the political dimension of citizenship, the former placed the emphasis on the legal aspects of citizenship such as rights and duties.

[9] Seubert, 'Antinomies of European Citizenship' (n 7) 140.

[10] Goodwin-Gill as quoted in Michelle Foster and Hélène Lambert, 'Statelessness as a Human Rights Issue: A Concept Whose Time Has Come' (2016) 28(4) *International Journal of Refugee Law* 564, 565.

[11] See the 1954 Convention relating to the Status of Stateless Persons, art 1.

[12] Foster and Lambert, 'Statelessness as a Human Rights Issue' (n 10) section 3.

[13] Indira Goris, Julia Harrington, and Sebastian Koehn, 'Statelessness: What It Is and Why It Matters' (2009) 32 *Forced Migration Review* 4; Foster and Lambert, 'Statelessness as a Human Rights Issue' (n 10).

[14] Tendayi Bloom, Katherine Tonkiss, and Phillip Cole, 'Introduction: Providing a Framework for Understanding Statelessness' in Tendayi Bloom, Katherine Tonkiss, and Phillip Cole (eds), *Understanding Statelessness* (Routledge 2017) 4.

[15] See generally Jürgen Mackert and Bryan S Turner (eds), *The Transformation of Citizenship* (Routledge 2017).

social rights or equal consideration by the polity are now not only reserved to the in-group but instead are frequently made by outsiders. As Seubert notes, these claims 'appear on the public stage as immigration and refugee politics, but underlying are the fundamental dynamics of economic and cultural globalisation'.[16] This challenge posed by globalisation to national citizenship is also evident in the case of European citizenship. Indeed, European citizenship encapsulates many of the claims from without national communities against the exclusionary potential of national citizenship. The guarantees of movement rights and non-discrimination associated with the status of an EU citizen prevent national political communities from continuing with closed-club politics where advantages are given only to members of the in-group. European citizenship has challenged citizenship at the national level also by virtue of the social processes it enables and represents. Having made use of their movement rights associated with EU citizenship, a significant number of people now reside in the territory of other Member States for prolonged periods of time, if not permanently, thus doing away with the idea of the territorial attachment of citizenship. In addition to qualifying the idea of territorial attachment, European citizenship also secures citizens residing in another Member State some degree of political participation at the local level, which has led scholars to debate the idea of urban or multi-level citizenship.[17]

These social processes have produced acerbic reactions in national politics in the Member States. The equality of European citizens predicated by the Treaties is called into question by politicians, for example, leading Shuibhne to note that 'Union citizenship has failed, so far at least, to transcend the fundamental "them" and "us" dichotomy that Member State nationals still feel.'[18] One example of this 'us' versus 'them' dichotomy is the withdrawal of the UK from the EU and the role inter-European migration and citizenship played in the 2016 referendum.[19] Brexit not only means that Britain exits but also that millions of persons will be considered foreign, legally, in communities they call their own, exposing the contingency of European citizenship. Long before Brexit, the EU Ombudsman in 2013 declared that it was plain to see that 'EU citizenship is now in crisis.'[20] The legitimacy and identity crisis is expressed not only by Brexit, but also by the scepticism expressed by the other Member States and the criticism of European citizenship as primarily

[16] Seubert, 'Antinomies of European Citizenship' (n 7) 139.

[17] Both ideas denote conceptions of citizenship with sub-national levels, i.e., urban, regional, and national citizenship. See, e.g., Rainer Bauböck, 'The Three Levels of Citizenship within the European Union' (2014) 15(5) *German Law Journal* 751; Bauböck, 'Studying Citizenship Constellations' (n 1).

[18] Niamh Nic Shuibhne, 'The Developing Legal Dimensions of Union Citizenship' in Anthony Arnull and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 506.

[19] Elizabeth Rigby, 'EU Migrants Moving to UK Balanced by Britons Living Abroad' (*Financial Times*, 10 February 2014). https://www.ft.com/content/5cd640f6-9025-11e3-a776-00144feab7de. Accessed 31 December 2020; James Morrison, 'Re-framing Free Movement in the Countdown to Brexit? Shifting UK Press Portrayals of EU Migrants in the Wake of the Referendum' (2019) 21(3) *British Journal of Politics and International Relations* 594.

[20] European Ombudsman, 'Address by European Ombudsman, Emily O'Reilly'. https://www.ombudsman.europa.eu/en/speech/en/52763. Accessed 02 March 2021.

market-driven. Since the core of the rights conferred by EU citizenship is movement rights for economically active or financially self-sufficient persons,[21] EU citizenship as such benefits only those who possess the capital necessary to make use of the right. But the inequality is not only with regard to the rights conferred by EU citizenship. There is also differential treatment among EU citizens in terms of those who choose to make use of their movement rights, and those who stayed in their birth country. The latter have, by virtue of their participation in national politics, a greater say in European democracy than the former.[22] Underlying the legitimacy and identity crisis is also the apparent inequality in the conditions of access to European citizenship with naturalisation requirements that vary widely from one State to another.[23]

While both Brexit and Member State criticism have spurred new discussions regarding the loss of EU citizenship, the question predates Brexit and has been the object of litigation at the ECJ even before the introduction of EU citizenship in the Treaty of Maastricht. The question of loss of EU citizenship concerns the relation between it and nationality, and acquires particular relevance also with regard to persons who do not possess the nationality of a Member State of the EU. As a result of international migration, there are sizeable populations of 'third-country nationals' in most Member States, i.e., nationals who do not possess the nationality of a Member State. While most of these persons enjoy considerable legal protection under EU law and the European Convention on Human Rights (ECHR), they still are not allowed to participate in national or even local politics for lack of citizenship. This situation calls into question 'the "principle of autonomy" of democracy, which means that those affected by political decisions are supposed to be those who are included in decision-making procedures'.[24] European citizenship also faces questions with regard to statelessness. Despite international and regional instruments protecting against statelessness, the number of stateless persons is estimated to be around 10 million.[25] Scholars such as Kostakopoulou have long underlined that EU citizenship as a legal concept could play an inclusive role and help combat statelessness

[21] 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 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 (Text with EEA relevance) 2004 [32004L0038] arts 6 ff.

[22] Bauböck, 'The Three Levels of Citizenship' (n 17) 758–759.

[23] See in general Thomas Huddleston, 'Naturalisation in Context: How Nationality Laws and Procedures Shape Immigrants' Interest and Ability to Acquire Nationality in Six European Countries' (2020) 8 *Comparative Migration Studies* 18; Jules Lepoutre, 'Citizenship Loss and Deprivation in the European Union (27 + 1)' (EUI Working Paper RSCAS 2020/29) 36; 'MIPEX 2020—Data Analysis Tool'. https://www.mipex.eu/play/. Accessed 03 January 2021.

[24] Seubert, 'Antinomies of European Citizenship' (n 7) 139.

[25] United Nations High Commissioner for Refugees, 'Global Action Plan to End Statelessness 2014–2024' (4 November 2014) 7. https://www.refworld.org/docid/545b47d64.html. Accessed 29 December 2020; United Nations High Commissioner for Refugees, 'Refugee Data Finder' (8 December 2020). https://www.unhcr.org/refugee-statistics/. Accessed 29 December 2020.

and further integrate 'third-country nationals'.[26] On the other hand, many scholars, while sharing some of Kostakopoulou's concerns, do not share her view that EU citizenship can be an inclusive status protecting against the arbitrary withdrawal of membership nationality and statelessness. In their opinion, if one wants to combat these phenomena, reform of Member State citizenship and nationality laws becomes necessary.[27]

At this point, a short sketch of the structure of the article is in order. The purpose of this article is to revisit the scholarly debate surrounding citizenship reforms in the EU and to suggest a modest solution to the question of statelessness and EU citizenship based on international human rights law. In section 2, I will briefly go over the transformation of EU citizenship since its introduction in 1992. Section 3 summarises some of the academic proposals for reform. Sections 4 and 5 then look at human rights law and citizenship and formulate a modest proposal for a shift in interpretation by the ECJ in citizenship matters with immediate import for statelessness, but not limited thereto.

2 Transformations of EU citizenship

Citizenship of the EU was formally introduced by the Treaty of Maastricht, 1992.[28] European citizenship was established as a derivative of nationality. The status of the European citizen was meant to subsume and extend the rights contained in the right to free movement of workers under article 45 of the Treaty on the Functioning of the European Union.[29] Since then, European citizenship has undergone a number of transformations at the hands of the ECJ and the European legislator. The result of these transformations is that today, citizenship is meant to be the 'fundamental status of EU nationals'.[30] The fundamental nature of the status, however, is contested—particularly in the light of the case law of the ECJ on citizenship and its relationship with Member State nationality.

Prior to the introduction of EU citizenship in 1992, the ECJ in *Micheletti*[31] was asked about the competence of Member States to regulate citizenship. While this

[26] Dora Kostakopoulou, 'Scala Civium: Citizenship Templates Post-Brexit and the European Union's Duty to Protect EU Citizens' (2018) 56(4) *JCMS: Journal of Common Market Studies* 854, 865–866; Katja Swider and Maarten den Heijer, 'Why Union Law Can and Should Protect Stateless Persons' (2017) 19(2) *European Journal of Migration and Law* 101.

[27] Hannes Swoboda, 'Don't Start with Europeans First: An Initiative for Extending Voting Rights Should Also Promote Access to Citizenship for Third Country Nationals' in Rainer Bauböck (ed), *Debating European Citizenship* (Springer Nature 2019) 55–56; Rainer Bauböck (ed), *Debating European Citizenship* (Springer Nature 2019).

[28] Treaty on European Union (signed 07 February 1992, entered into force 01 November 1993) (TEU).

[29] Treaty on the Functioning of the European Union (signed 13 December 2007, entered into force 01 December 2009).

[30] *Zhou and Chen v United Kingdom* (2004) European Court of Justice C-200/02 [25].

[31] *Mario Vicente Micheletti and Others v Delegación del Gobierno en Cantabria* (1992) European Court of Justice C-369/90.

case concerned the free movement of persons within the EU before the introduction of European citizenship, the fundamental question was of importance for subsequent debates on European citizenship. At its core, the case concerned the dual Italo-Argentinian citizenship of the applicant and Spain's refusal to accord residency rights under European law based on the habitual residence before the arrival in Spain. Here, the ECJ held that while States were competent to decide freely who their nationals were, they were obliged to give due effect to EU law and the decision of other Member States to grant citizenship.[32] In so deciding the case, the ECJ shone a critical light on and departed from a fundamental principle in international law on nationality: the concept of a genuine link between nationals and their State expressed by the International Court of Justice (ICJ) in *Nottebohm*.[33]

In *Manjit Kaur*, the ECJ was asked about the criteria according to which Member States ought to determine their nationals for the purpose of EU citizenship.[34] Manjit Kaur was, by birth, a British Overseas Citizen and had applied for indefinite leave to remain in the UK. Under British legislation, overseas citizens do not possess the right to entry and residence in the UK. The ECJ reiterated its finding from *Micheletti*, namely that it was for the Member States to determine their nationals, and that the UK had accordingly defined several categories of nationals of which only some were EU citizens as per the UK's declaration in the final act of accession to the EU in 1973. The consequence of this classification was that only those citizens who possessed residence rights as per domestic legislation were to be considered EU citizens.

Subsequent to the rulings in *Micheletti* and *Kaur*, European citizenship was introduced and the free movement and residency rights expanded via Directive 2004/38. In 2008, the case *Janko Rottmann* reached the ECJ and posed significant questions as to the relationship between European citizenship and nationality.[35] Rottmann was an Austrian citizen who had moved to Germany while under criminal investigation in Austria and later acquired German citizenship. His acquisition of German citizenship entailed the automatic withdrawal of Austrian citizenship per the Austrian nationality laws. When Austrian authorities informed Germany of the criminal proceedings, German authorities decided to withdraw his German citizenship retroactively due to false declarations made in his application for citizenship in Germany. As a result, Rottmann became stateless and lost the enjoyment of the substantive free movement rights under EU law. Against this decision of German authorities, Rottmann approached domestic courts in Germany complaining that the withdrawal was against European law and that it would render him stateless. Faced with a similar question to *Micheletti*, the Court was asked whether the loss of European citizenship was contrary to EU law and, if yes, which Member State bore the responsibility to prevent statelessness in this case.[36]

[32] Ibid. [10].

[33] *Nottebohm Case (Liechtenstein v Guatemala) Second Phase* 22 ILR 349 (International Court of Justice).

[34] *The Queen v Secretary of State for the Home Department, ex parte: Manjit Kaur* (2001) European Court of Justice C-192/99.

[35] *Janko Rottmann v Freistaat Bayern* (2010) European Court of Justice C-135/08.

[36] Ibid. [35].

In *Rottmann*, the Court held that the loss of EU citizenship and resultant statelessness was not contrary to EU law as long as the exercise of the power of withdrawal by the Member States was not disproportionate.[37] In sum, while States were free to decide their nationals, this competence had to be exercised, in the language of the ECJ, 'with due regard to EU law'.[38] The decision in *Rottmann* was subsequently criticised for its failure to take into account the human rights imperative to avoid and combat statelessness.[39] Scholars like Kochenov have underscored the perverse use of international law on nationality to justify statelessness: 'Instead of ruling that the legitimate use of EU citizenship cannot trigger statelessness, the Court inconsistently relied on international law, interpreting it in a way that goes against its fundamental principle: the limitation of the cases of statelessness.'[40] The decision in *Rottmann*, according to Kochenov and Shaw, constitutes a departure from the decision in *Micheletti*, where the ECJ assessed international law critically and departed from it.

This trend continues in a recent decision on citizenship by the ECJ in the matter of *MG Tjebbes and Others v Minister van Buitenlandse Zaken*.[41] In this case, the applicants, who possessed dual nationality, lost their nationality *ex lege* while applying for renewal of their passports because they resided outside the Netherlands for a period exceeding ten years. During proceedings before the national courts challenging said loss of nationality, the Court was faced with the question of whether the Dutch law on nationality was compliant with EU law. The European Court, reiterating *Rottmann*, first found that EU law was applicable and that nationality could be predicated on a genuine link between the individual and the State[42] as long as the loss of nationality was preceded by a proportionality assessment. In particular, such an assessment needs to take into account the individual circumstances of the applicant and the consequences of the loss of rights associated with EU citizenship.[43] This finding, according to the ECJ, is supported in principle by international law and, in particular, the 1961 Convention on the Reduction of Statelessness in its article 7(3–6) underlines the legitimacy of the loss of nationality.

Beyond these cases on the relationship between nationality and EU citizenship, the ECJ has interpreted EU citizenship widely in terms of its rights. European Union citizenship has been broadly interpreted and the status of EU citizen may be relied

[37] Ibid. [55].

[38] *Mario Vicente Micheletti and Others v Delegación del Gobierno en Cantabria* (n 31) 10.

[39] Dimitry Kochenov, 'Where Is EU Citizenship Going? The Fraudulent Dr. Rottmann and the State of the Union in Europe' in Leila Simona Talani (ed), *Globalisation, Migration, and the Future of Europe: Insiders and Outsiders* (Routledge 2012) 240; Jo Shaw, 'Setting the Scene: The Rottmann Case Introduced' in Jo Shaw (ed), *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?* (EUI Working Papers RSCAS 2011/62) 1.

[40] Dimitry Kochenov, 'Two Sovereign States vs. a Human Being: CJEU as a Guardian of Arbitrariness in Citizenship Matters' in Shaw, *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?* (n 39) 13.

[41] *MG Tjebbes and Others v Minister van Buitenlandse Zaken* (2019) European Court of Justice C-221/17.

[42] Ibid. [35].

[43] Ibid. [44, 45].

upon even in cases where the individual has not made use of their mobility rights—otherwise a condition for application of EU law. An example is the case of *Ruiz Zambrano*,[44] where the Court held that the EU citizenship of minors may be relied upon by parents who are third-country nationals. The significance of *Ruiz Zambrano* for citizenship matters can hardly be understated and the judgment became the anchor for calls to link human rights with citizenship of the Union explicitly.[45] This approach, however, would further accentuate the division between citizens of the Union and third-country nationals.[46] Outside of its context of countering illiberal movements in the EU, the linking of fundamental rights and citizenship also seems to be of reduced utility and it is better to think of a link between the Union's values in article 2 TEU (Treaty on the European Union) and citizenship of the Union. Several values in article 2—human dignity, equality, and solidarity—have a bearing on citizenship of the Union as individual values,[47] and are joined by abstract, community-oriented values such as democracy and the rule of law. While these values in part refer to the relationships between Member States, they also paint a certain picture of the relationship between individuals, Member States, and the Union. The idea of a democratic, pluralistic Union based on the rule of law necessitates the individual citizen as a starting point and anchor of its goals and values. This point is important for the remainder of the present article and for my argument in the final part, which partly relies on the moral values embedded in international human rights law to argue for an interpretational shift.

3 Contemporary debates on EU citizenship reform

Several recent contributions on European citizenship, and citizenship in general, have shifted the terrain towards normative political theory questions about citizenship.[48] These contributions invariably revolve around the question of institutional innovation and reform of EU citizenship in order to create a more inclusive status which better reflects social realities. These contributions, however, vary radically in their outlook on EU citizenship: while some see the opportunity to make

[44] *Gerardo Ruiz Zambrano v Office National de l'Emploi* (2011) C-34/09 (European Court of Justice).

[45] See Luke Dimitrios Spieker, 'Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis' (2019) 20(8) *German Law Journal* 1182, 1189; Armin von Bogdandy and Luke Dimitrios Spieker, 'Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges' (2019) 15 *European Constitutional Law Review* 391.

[46] A point noted by Joseph HH Weiler, 'Thou Shalt Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals—A Critique' (1992) 3 *European Journal of International Law* 65; and reiterated by Spieker, 'Breathing Life into the Union's Common Values' (n 45).

[47] See generally Marcus Klamert and Dimitry Kochenov, 'Article 2 TEU' in Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds), *Commentary on the EU Treaties and the Charter of Fundamental Rights* (Oxford University Press 2019) 22.

[48] Dora Kostakopoulou, *The Future Governance of Citizenship* (Cambridge University Press 2008); Bauböck, 'Studying Citizenship Constellations' (n 1).

EU citizenship more autonomous, others postulate that reform of EU citizenship needs to acknowledge the multi-level nature of EU citizenship and its bond with nationality.[49]

The first stream of the suggested reforms focuses on citizenship as an inclusive status and seeks to replace or amend the existing provisions of the Treaties. One proposal by Kostakopoulou, for example, was that citizenship status should be replaced by civic registration of residents for immigrants and natives alike.[50] This registration would be made on the basis of two broad criteria: residency and absence of a serious criminal record.[51] Rubio-Marin, on the other hand, has suggested that naturalisation could become automatic after a certain length of residence as liberal democracies have an interest in including as citizens all those who reside on their territory.[52] Residential or civic registration fails to take into account the external dimension of citizenship, according to Bauböck, and does not leave room for individual choice between alternative citizenship statuses.[53] Citizenship is not merely a bundle of rights but also a significant identity. In the wake of Brexit, more urgent attention was paid to the future of EU citizenship and a proposal for an autonomous category of EU citizens was made.[54] Kostakopoulou proposes two ways in which such an autonomy could be brought about: by amending article 20 of the Treaty on the Functioning of the European Union either to add that loss of nationality does not result in loss of EU citizenship, or to add that EU citizenship is independent of nationality.[55] In the latter scenario, citizenship of the EU could be decided based on residency or any other such requirement.

The rationale for both these amendments lies in the *effet utile* (useful effect) of Union citizenship and the bond that it represents. Since EU citizens derive rights directly from the European Treaties, Kostakopoulou argues, the bond is different from the one that nationality represents in that this bond is characterised by these rights, rather than by belonging to a political community.[56] Both proposals have been much debated. Bellamy, for example, replies to Kostakopoulou's proposal by questioning the grounds on which it is based.[57] Far from constituting a unique bond qua the rights it gives citizens, EU citizenship, and the EU as a whole, Bellamy

[49] For two of these contributions, see Kostakopoulou, 'Scala Civium' (n 26); Bauböck, 'The Three Levels of Citizenship' (n 17).

[50] See Dora Kostakopoulou, 'Thick, Thin and Thinner Patriotisms: Is This All There Is?' (2006) 26(1) *Oxford Journal of Legal Studies* 73.

[51] Ibid. 93 ff.

[52] See Ruth Rubio-Marin, *Immigration as a Democratic Challenge: Citizenship and Inclusion in Germany and the United States* (Cambridge University Press 2000).

[53] Bauböck, 'Studying Citizenship Constellations' (n 1) 854 ff.

[54] See Kostakopoulou, 'Scala Civium' (n 26); Theodora Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: Between Past and Future* (Manchester University Press 2009).

[55] Dora Kostakopoulou, 'Who Should Be a Citizen of the Union? Toward an Autonomous European Union Citizenship' (*Verfassungsblog*, 16 January 2019). https://verfassungsblog.de/who-should-be-a-citizen-of-the-union-toward-an-autonomous-european-union-citizenship/. Accessed 03 March 2021.

[56] Ibid.

[57] Richard Bellamy, 'On Mushroom Reasoning and Kostakopoulou's Argument for Eurozenship' (*Verfassungsblog*, 16 January 2019). https://verfassungsblog.de/on-mushroom-reasoning-and-kostakopoulous-argument-for-eurozenship/. Accessed 03 March 2021.

argues, is a 'creature of the contracting States' and the attendant rights are effective only because the Member States make them so.

The second stream of suggested reforms looks at citizenship in a multi-level context and argues that multiple forms of citizenship are embedded in one another. Any solution, thus, needs to account for this special nature of citizenship in the EU and cannot be solely located at the supranational level. Scholars such as Bauböck argue that Union citizenship and national citizenship are not strictly comparable.[58] The EU Treaties clearly spell out that national citizenship is a constitutive element of EU citizenship; hence, the Union provides three distinct levels of individual membership: local, national, and supranational citizenship.[59] Since these levels are embedded within each other, the starting point of resolving the deficiencies of EU citizenship is to accept three interconnected membership regimes: a birth-right-based one at the Member State level, a residential one at the local level, and a derivative regime with residence-based rights at the supranational level.[60] According to Bauböck, some of the problems of EU citizenship can be addressed by weakening the derivative nature of the EU by moving towards fully residential citizenship, not only at the local but also at the supranational level.[61] The solutions outlined by Bauböck broadly fall into two categories: those that rely on disentangling EU citizenship from Member State nationality and those that are based on the abolition of birth-right citizenship at the national level in favour of reintroducing it at the European level. These solutions are quite radical and utopian, as Bauböck admits, resting on the assumption that citizenship in the EU would become fully residential and in the latter case federal in nature.[62] In light of the far-flung and utopian nature of these possible reforms, Bauböck focuses on simpler tweaks to the current citizenship arrangement. The first is to allow voting for all residents in all Member States in local elections based on the principle of inclusion.[63] The second is to ensure that European citizens established in other Member States continue to have a say in the Member State of their origin through absentee ballots and maintaining of voting rights.[64] Free movement should not lead to the loss of voting rights and the global trend towards external rights is evidence of this.[65] The third and most important reform Bauböck proposes is to harmonise the nationality laws of the Member States and conditions for naturalisation, renunciation, and withdrawal. It is in this regard that Bauböck notes the role the ECJ can play.[66]

[58] Bauböck, 'The Three Levels of Citizenship' (n 17) 751.
[59] Ibid.
[60] Ibid. 752–753.
[61] Ibid. 759.
[62] Ibid. 760.
[63] Ibid. 761.
[64] Ibid. 762.
[65] Ibid.
[66] Ibid. 762–763.

4 Human rights law and its relation to citizenship

The importance of nationality and citizenship, as noted above, acquired particular relevance after the failure of international law in the inter-war period and the gross abuse by States before and during World War II and fascism. This recognition then informed the initial human rights catalogue adopted at the UN. Indeed, the Universal Declaration of Human Rights (UDHR) guarantees in its article 15 the right to a nationality and protects against arbitrary deprivation of nationality.[67] Further, the UDHR also recognises and guarantees the right to asylum in article 14. While the International Covenant on Civil and Political Rights (ICCPR) recognises *expressis verbis* the right to a nationality only for children in article 24(3), it nevertheless recognises movement rights, freedom to choose residence, and protection against expulsion for aliens.[68] The vast majority of rights protected by the ICCPR are recognised for all persons, not only citizens by reason of article 2(1).[69] The right to asylum, however, has not been carried forward and the Covenant only has meagre protections against a State which is exiling its own citizens.[70] The omission of a right to nationality and a right to asylum speaks to the wariness of States to allow scrutiny in an area perceived as their core sovereignty. This is also true for movement rights under article 12, which have been controversial not only in the context of the EU but also internationally. This is despite the history and origin of the right in natural law and the French Revolution. The reason for this scepticism, according to Nowak, is that 'this right does not stop at a country's borders and, therefore, interferes more than other rights with *State sovereignty*.'[71]

This scepticism also manifests itself in the Covenant in the structure of the right and takes the form of a requirement of lawful stay which precedes the enunciation of the right.[72] The lawfulness of stay, here, is assessed with regard to the national legal system of the State. While the right is available equally to nationals and aliens (subject to the condition of lawful stay), in practice, as Nowak notes, this creates an opportunity for discrimination against aliens.[73] Once an alien is lawfully within a country, the movement rights and residence rights can only be limited on the grounds of 'national security, public order (*ordre public*), public health or morals or the rights and freedoms of others'.[74] In addition to these grounds, any limitation must be compatible with the other rights contained in the Covenant.[75] According to

[67] Universal Declaration of Human Rights (1948) art 15.

[68] International Covenant on Civil and Political Rights (1976) 999 UNTS 171 arts 12 and 13.

[69] Notwithstanding some political rights under article 25.

[70] See Mercedes Masters and Salvador Santino F Regilme Jr, 'Human Rights and British Citizenship: The Case of Shamima Begum as Citizen to Homo Sacer' (2020) 12(2) *Journal of Human Rights Practice* 341.

[71] Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev edn, Engel 2005) 261; emphasis in original.

[72] International Covenant on Civil and Political Rights (n 68) art 12(1).

[73] Nowak, *U.N. Covenant on Civil and Political Rights* (n 71) 261 para 3 and 263 paras 8, 9.

[74] International Covenant on Civil and Political Rights (n 68) art 12(3).

[75] Ibid.

Nowak, this requirement was introduced because the drafters of the Covenant were concerned that any restriction should not only be rational and non-arbitrary but also just.[76] Restrictions, thus, need to be rational, non-arbitrary, and just, and the standard for evaluation is the principle of necessity and proportionality.

Notwithstanding the thin protection of aliens and movement rights, stay and residence of those who lawfully entered and resided in a State are also protected by the right to enter one's own country.[77] In *Deepan Budlakoti v Canada*,[78] the applicant faced expulsion proceedings from Canada on account of his conviction for criminal offences committed in 2009 and 2010. Prior to his arrest, Deepan Budlakoti was a Canadian citizen. However, his citizenship was revoked at the same time on the ground that 'the passport was issued in error'.[79] Noting his family ties, general attachment to the country, and the adverse consequences the deportation would have for these rights, the Human Rights Committee decided that the 'interference with the author's family life would be disproportionate to the legitimate aim of preventing the commission of further crimes.'[80] The decision in *Deepan Budlakoti* is a notable departure by the Committee from its earlier position in *Stewart v Canada*.[81] In *Stewart*, the Committee had decided that for the right to enter one's own country under article 12(4), two categories of beneficiaries existed: nationals and a narrow selection of non-nationals. The case was about a British citizen who had resided in Canada since his youth and who considered himself to be a Canadian citizen. His communication to the Committee was sent after Canada decided to deport him on the ground of his criminal record. In its decision, the Committee held that the right to enter one's own country was only available to non-nationals 'who are also not "aliens" within the meaning of article 13'.[82] This distinction between non-nationals who are not aliens and aliens within the meaning of article 13 has, understandably, been criticised by many.[83] The decision seems to be at odds with the telos of article 12(4) and article 13 of the ICCPR, which, according to several of the dissenting opinions in *Stewart*, is about the protection of personal and emotional links individuals may develop with their country of residence.

The concern for the private life of individuals also guides the approach of the European Court of Human Rights (ECtHR) to the question of deprivation of citizenship, deportation, and freedom of movement. While the ECHR does not contain a right to freedom of movement, nor does it expressly recognise the right to enter one's own country, the protections offered under article 12 ICCPR are effectively

[76] Nowak, *U.N. Covenant on Civil and Political Rights* (n 71) 273 para 31.

[77] International Covenant on Civil and Political Rights (n 68) art 12(4).

[78] *Deepan Budlakoti v Canada* (2018) Human Rights Committee CCPR/C/122/D/2264/2013.

[79] Deepan Budlakoti, 'Locked-Up and In Limbo: Living Stateless in My Hometown Jail' (2020) 29 *Journal of Prisoners on Prisons* 79.

[80] *Deepan Budlakoti v Canada* (n 78) [9.7].

[81] *Stewart v Canada* (1996) Human Rights Committee CCPR/C/58/D/538/1993.

[82] Ibid. [12.3].

[83] Nowak, *U.N. Covenant on Civil and Political Rights* (n 71) 286; Macklin, 'Who Is the Citizen's Other?' (n 3).

subsumed in the way the ECtHR interprets article 8 ECHR and Additional Protocol No. 4.

Two cases in particular highlight the approach of the ECtHR to citizenship in the context of article 8. In *Ramadan v Malta*, the applicant alleged that a revocation of his Maltese citizenship violated his right to a private and family life.[84] The applicant was of Egyptian origin and acquired Maltese citizenship after marriage. When a domestic court found the marriage to be simulated only to obtain citizenship, the State decided to revoke the citizenship. While the applicant complained that this would render him stateless as he had to relinquish his Egyptian nationality, the ECtHR noted that this was the result of his own fraudulent actions and not a violation of article 8 ECHR.[85] The Court noted in this regard that of relevance here was the impact of the decision on his private life and that he was allowed to remain in Malta and pursue his economic activities. The decision in *Ramadan* has been criticised by many observers for its callous approach to the issue of statelessness and nationality, which is not treated by the Court with the seriousness it deserves and which the Court repeatedly blames on the applicant's conduct.[86]

In *Hoti v Croatia*, the applicant was a stateless person born to Albanian refugees in Kosovo during the Socialist Federal Republic of Yugoslavia.[87] At age 17 he moved to Croatia, where he had been residing for nearly 40 years under different humanitarian residence permits. His attempts to regularise his residence in Croatia had been unsuccessful as Croatian authorities invariably considered him a citizen of Albania or Kosovo and found that he did not satisfy the length of residence requirement. Against this failure of Croatian authorities to provide him with the security of residence, Hoti lodged an application at the ECtHR alleging that Croatia's conduct violated his rights under article 8. The decision of the ECtHR in *Hoti* is important because it recognises the applicant's statelessness as a central feature of the case—something it failed to do in *Ramadan*—and notes the consequences this has for access to the rights guaranteed by the ECHR, in particular the right to private and family life.[88] Commentators have been quick to note that the decision in *Hoti* is based on the ECtHR's social identity approach under article 8.[89] In the Court own words, article 8 protects 'the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity'.[90] The social identity approach has also been deployed by

[84] *Ramadan v Malta* (2016) European Court of Human Rights 76136/12.

[85] Ibid. [57].

[86] See, e.g., Marie-Bénédicte Dembour, 'Ramadan v. Malta: When Will the Strasbourg Court Understand That Nationality Is a Core Human Rights Issue?' (*Strasbourg Observers*, 22 July 2016). https://strasbourgobservers.com/2016/07/22/ramadan-v-malta-when-will-the-strasbourg-court-understand-that-nationality-is-a-core-human-rights-issue/. Accessed 03 March 2021; Lambert, 'Nationality and Statelessness' (n 3).

[87] *Hoti v Croatia* (2018) European Court of Human Rights 63311/14.

[88] Ibid. [128].

[89] See Barbara von Rütte, 'Social Identity and the Right to Belong—The ECtHR's Judgment in *Hoti v. Croatia*' (2019) 24 *Tilburg Law Review* 147.

[90] *Hoti v Croatia* (n 87) para 119.

the Court in other cases where administrative practices resulted in statelessness such as *Mennesson* and *Francis Labassee v France*.[91]

The Inter-American Court of Human Rights (IACtHR) has interpreted the right to a nationality in an expansive manner. In its advisory opinion on the proposed amendments to nationalisation provisions in the Constitution of Cost Rica in 1984, the Court recognised that international human rights law and the American system had departed from the earlier position in international law.[92] Emphasising that nationality and naturalisation are not of the sole competence of States, the Court held that:

> despite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each state to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the states in that area, and that the manners in which states regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction; those powers of the state are also circumscribed by their obligations to ensure the full protection of human rights.[93]

Scholars such as Dembour have noted the distinct nature of the approach of the IACtHR in matters of nationality which involved placing human rights—the right to nationality specifically—at the centre of its reasoning.[94] Contrary to other institutions in the international human rights system at the time, this early advisory opinion shows, according to Dembour, that the IACtHR recognises States' competence in nationality matters, but 'nonetheless [views them] as significantly limited by human rights norms'.[95] This view of nationality as a core human rights issue continues in the case law of the Court and in subsequent decisions the Court has significantly reduced States' discretion in nationality and citizenship matters.[96] For example, in the case of *Expelled Dominicans and Haitians v Dominican Republic*, the Court was confronted with the mass expulsion of documented and undocumented Dominican and Haitian residents.[97] Reiterating the holding of the 1984 advisory opinion, the Court held further on the question of expulsion that States had to give due consideration to the individual and social circumstances of individuals facing expulsion proceedings.[98]

[91] *Mennesson v France* (2014) European Court of Human Rights App No. 65192/11; *Labassee v France* (2014) European Court of Human Rights 65941/11.

[92] *Advisory Opinion on Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica* (1984) Inter-American Court of Human Rights OC-4/84.

[93] Ibid. [32].

[94] Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press 2015) 131.

[95] Ibid. 132.

[96] Ibid. 148.

[97] *Expelled Dominicans and Haitians v Dominican Republic* (2014) (Inter-American Court of Human Rights).

[98] Ibid. [357].

Lastly, a key part of the international system are the twin Conventions on the Reduction of Statelessness of 1954 and 1961. Both Conventions codify the existing customary law rules on the rights of stateless persons and on the prevention of statelessness. They are complemented in Europe by regional norms such as the European Convention on Nationality[99] and the Convention on the Avoidance of Statelessness in Relation to State Succession.[100] The rules on avoidance of statelessness and deprivation of nationality in these Conventions are the starting point for any inquiry into nationality in international law, but, as noted in a recent report of the Centre for Public Interest Law, 'international human rights law has evidently superseded these limits of the Convention by reiterating that any such restrictions must be seen as an exception to the principle of equality.'[101] As has been shown above, the right to private and family life as well as the right to enter one's own country are further principles which constrain States' discretion in nationality, citizenship, and residence matters.

5 A modest proposal

By now, the question of EU citizenship and statelessness has sufficiently occupied us. In the previous sections, I have examined the case law of the ECJ on citizenship, academic proposals for reform, as well as international human rights norms on nationality and citizenship. The overall finding was that the case law of the ECJ has insufficiently dealt with the question of statelessness, which in turn has attracted criticism from scholars and given rise to proposals for reform. In this regard, our examination of international human rights law functions as a counterweight to the ECJ's reading of international law and shows that international human rights law has superseded the doctrinal position that States have absolute competence to decide their nationals. By way of a conclusion to this short essay, a modest proposal is in order. The idea of 'Eurozenship'[102] and the different critiques and alternate solutions offered by scholars all tackle different aspects of EU citizenship and attendant problems. However, their main problem lies in the fact that they require considerable political will at the EU and at the national levels for their realisation. Following Spiro and Soysal, my main argument is that international human rights law has over the 20th century developed in such a way that the difference between non-nationals

[99] European Convention on Nationality (opened for signature 06 November 1997, entered into force 01 March 2000) ETS No. 166.

[100] Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession (opened for signature 19 May 2006, entered into force 01 May 2009) CETS No. 200.

[101] Jindal Global Law School Centre for Public Interest Law, 'Securing Citizenship—India's Legal Obligations towards Precarious Citizens and Stateless Persons' (2020) 67.

[102] A term used by Kostakopoulou in several of her articles on EU citizenship, see e.g., Dora Kostakopoulou, 'Who Should Be a Citizen of the Union? Toward an Autonomous European Union Citizenship' in Liav Orgad and Jules Lepoutre (eds), *Should EU Citizenship Be Disentangled from Member State Nationality?* (2019). https://www.ssrn.com/abstract=3372837. Accessed 16 March 2021.

and nationals, in terms of rights, becomes thin.[103] While I do not share the pessimism of both authors, the point they make—that rights of citizens and non-citizens are almost identical—is well substantiated by international human rights law. International human rights law, as we have seen above, attaches rights to persons—not citizens and nationals—and protects the freedom of movement of aliens in a growing number of situations. Reforming some aspects of EU citizenship and fighting statelessness can thus be achieved through a shift in interpretation by the ECJ and an acknowledgement of the 'different levels of citizenship'.[104] In some way, the problem is too urgent to be solved through the long and winding road of Treaty reform and negotiation.

How could this shift in interpretation come about? The obvious entry point would be to consider the use of international law by the ECJ in justifying its citizenship decisions. This has been rightly criticised by some authors,[105] and the change for the ECJ would consist in taking stock of the full range of international law obligations while deciding citizenship cases. The ECJ in *Rottmann* and *Tjebbes* has so far relied only on general international law—*Nottebohm* and the 1961 Convention—to justify the outcome even when the risk of statelessness was obvious. This approach to incorporating international law has startled observers,[106] especially given the Grand Chamber's approach to international law in *Kadi*.[107] After all, in *Kadi* the Court did not adopt a strict dualist approach, but chose to carefully weigh the implications of applying international law and ultimately rejected the re-examination procedure in question for lack of adequate judicial safeguards. The approach to international law advocated here could be described as 'dualist but ready to compromise'.[108] Even so, my argument here is not dependent on subscribing to either a monist or a dualist position. My contention, on the contrary, is that whatever the position on the incorporation of international law, the ECJ ought to read international law comprehensively, rather than relying solely on *Nottebohm*. Rather than this narrow view, the ECJ could instead take stock of the Treaty obligations that Member States have already subscribed to,[109] the case law of the Human Rights Committee and ECtHR, and treaty obligations and case law from other regional human rights systems, notably the Inter-American system. The sum total of these norms and their interpretation suggests a different outcome than the ECJ has adopted in these decisions. In *Rottmann*, for example, the Court could have taken note of the length of residence

[103] See, e.g., Peter J Spiro, *Citizenship: What Everyone Needs to Know* (Oxford University Press 2020); Peter J Spiro, 'Dual Citizenship as Human Right' (2010) 8(1) *International Journal of Constitutional Law* 111; Soysal, *Limits of Citizenship* (n 2).

[104] Bauböck, 'The Three Levels of Citizenship' (n 17).

[105] See, e.g., Dimitry Kochenov, 'The Tjebbes Fail' (2019) 4(1) *European Papers* 319; Shaw, 'Setting the Scene: The Rottmann Case Introduced' (n 39).

[106] Kochenov, 'The Tjebbes Fail' (n 105); Kochenov, 'Where Is EU Citizenship Going?' (n 39).

[107] *Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* (2008) European Court of Justice C-402/05.

[108] J Kokott and C Sobotta, 'The Kadi Case: Constitutional Core Values and International Law—Finding the Balance?' (2012) 23(4) *European Journal of International Law* 1015, 1017.

[109] Such as the ICCPR, UN Convention Against Torture, and the ECHR (non-exhaustive list).

in Germany, and the nature of the offence allegedly committed in Austria, among other factors to decide that the withdrawal of Member State nationality should not result in the loss of EU citizenship. If we accept that EU citizenship is a social fact by virtue of the freedom of movement many citizens have made use of, then surely it is not too far-fetched to expect the ECJ to recognise that the bond citizens form with the EU is distinct from that with the Member State. International human rights law in this regard provides the ECJ with norms to ground its decision on and persuasive force by virtue of the moral values embedded in them. In advocating this shift in interpretation which would enable EU citizenship to combat statelessness, I follow what Koen Lenaerts has described as a 'stone by stone' approach,[110] and the change would be incremental rather than abrupt and sudden. The benefit of this approach, as noted earlier, is that it avoids the onerous path of Treaty negotiation and reform. Progressively changing and adapting EU citizenship so as to eliminate the possibility of statelessness has another benefit: it enables States to respond and adapt their nationality laws in response to or anticipation of the interpretational shift of the ECJ, thus reducing the need for judicial intervention.

Finally, one problem remains unaddressed: the question of political participation. The problem that citizens who made use of their mobility rights under EU law have a lesser say in EU politics because they cannot participate in national politics, is not easy to solve and international human rights law provides no legal arguments in support. Instead, international human rights as a utopia[111] can supply moral values on which to ground political participation in some settings for all residents of Member States. The values of article 2 TEU, especially democracy, rule of law, and the respect for human rights, mandate that those affected by decisions have a say in them.[112] Recent trends with regard to the notion of public participation in political theory[113] and global administrative law,[114] as well as the administrative and public law of EU Member States,[115] also bolster this principle. This trend of public participation should be extended to all residents and there is scant reason why third-country nationals should be excluded from such processes. The advantage of such a solution would be to take seriously what Bellamy has criticised in the idea

[110] See, e.g., Koen Lenaerts, 'EU Citizenship and the European Court of Justice's "Stone-by-Stone" Approach' (2015) 1(1) *International Comparative Jurisprudence* 1.

[111] Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press 2012).

[112] See generally Carole Pateman, *Participation and Democratic Theory* (Cambridge University Press 1970).

[113] See, e.g., Jeremy Waldron, 'Participation: The Right of Rights' (1998) 98(3) *Proceedings of the Aristotelian Society* 307.

[114] See in general Dipika Jain, 'Law-Making by and for the People: A Case for Pre-legislative Processes in India' (2020) 41(2) *Statute Law Review* 189; Roger C Cramton, 'The Why, Where and How of Broadened Public Participation in the Administrative Process' (1972) 60(3) *Georgetown Law Journal* 27.

[115] See, e.g., Fleur Dargent and Ariane Vidal-Naquet, *La consultation en droit public interne* (2016); Florian Pinel, 'La participation du citoyen à la décision administrative' (Droit, Université Rennes 1 2018). https://tel.archives-ouvertes.fr/tel-02498451. Accessed 03 January 2021; Ulrich Arndt, 'Die Bürgerbeteiligung im Allgemeinen Verwaltungsrecht' (2015) 130(1) *Deutsches Verwaltungsblatt* 6. https://www.degruyter.com/view/j/dvbl.2015.130.issue-1/dvbl-2015-0104/dvbl-2015-0104.xml. Accessed 15 February 2021.

of autonomous European citizenship, namely the idea that 'law and principles are created and identified and subsequently sustained by the agreements of individuals who cooperate socially and politically to uphold them as a people.'[116] Greater participation of EU citizens, but also non-EU citizens, in the decisions that affect them acquires even greater importance against the background of the migration crisis of 2015 and the growing number of non-citizens in the territories of Member States.

Acknowledgements I would like to thank Romit Sarkar, Gangotri Hazarika Nath, Harini Raghupathy, and Moksha Sharma for their help and suggestions. I also would like to thank the anonymous reviewers for their comments and criticism.

[116] Bellamy, 'On Mushroom Reasoning and Kostakopoulou's Argument for Eurozenship' (n 57).