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Citation: Strumia, F. (2017). EU citizenship and transnational rights. Chronicles of a troubled narrative. In: Thym, D. (Ed.), Questioning Union Citizenship. (pp. 149-168). Hart. doi: 10.5040/9781509914678.ch-008

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Link to published version: <https://doi.org/10.5040/9781509914678.ch-008>

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European Citizenship and Transnational Rights. Chronicles of a Troubled Narrative

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I Introduction

Borders, the internal ones among the Member States, have an inconsistent texture in the European Union. They are both open and closed. Guarded and forgotten. What they mark is not clear anymore, except in one sense. They mark the difference between the experience of the third country national migrant, whether the resident foreign worker, the passing tourist, or the asylum seeker, and the experience of the citizen, the European citizen. The former can be stopped and questioned at borders. They have to evidence, respectively, their right to stay, their plans to return home, their claims for international protection. The latter can be stopped. But they cannot be questioned as to their intention to stay, to go, to return.

This is the difference between immigration and free movement of persons. The former is a privilege granted by a State. The latter is a right enjoyed by a citizen. The interpretation of this right, as codified in the Treaties and in secondary EU legislation, has yielded a narrative of transnational rights that characterizes European supranational citizenship as a status of belonging across national borders. This narrative is one of the most revolutionary achievements of European integration. It alters the traditional paradigms of immigration law. It consolidates and constitutionalizes rights that have at best been sketched in international law. It both stretches and constrains national sovereignty, transforming the boundaries of citizenship and altering the roots of jurisdiction.

Yet this narrative of transnational rights has become contested in Europe. Populist political discourse in several corners of the EU advances ideas of closure and rebounded national citizenship that directly contrast with the former narrative.¹ The UK decision to 'brexit' the EU can be seen as a rejection of transnational law and the rights that it implies.² And overall the interests of free movement and transnational solidarity underpinning the narrative of transnational rights are in a phase of retreat.³ The narrative appears thus under threat of implosion. This calls for taking stock of its main tenets as well as its vulnerabilities, and for an assessment of its prospects. This chapter undertakes this exercise. It does so by comparing and contrasting discourses on, respectively, transnational rights and state discretion that transpire from judicial cases, legal texts and policy debates. Whilst comprehensive discourse analysis of

¹ See 'Drawbridges Up – The New Divide in Rich Countries is not between Left and Right but between Open and Closed', *The Economist*, 30th July 2016.

² R Michaels, 'Does Brexit Spell the Death of Transnational Law?' (2016) 17 (Brexit Supplement) *German Law Journal* 52.

³ See e.g. C O'Brien, 'Civis Capitalist Sum: Class As The New Guiding Principle of EU Free Movement Rights' (2016) 53 *CML Rev* 937. But see Standard Eurobarometer 86, Autumn 2016, p. 24 (suggesting that an 80% majority of the respondents has a positive view of free movement of persons).

the relevant sources is beyond the scope and objective of the chapter, its methodological aim is to narrate,⁴ beyond the substance of the legal rules, the principles and preferences that they express.⁵

The first section introduces the narrative of transnational rights and considers the role of the Court of Justice of the European Union (CJEU) in weaving its main threads. The second section traces the recent evolution of this narrative. It analyses a few hybrid sub-narratives that the intersection of different political and judicial discourses has produced; and it weighs the ransom to which threats of secession subject the narrative of rights across borders. The last section focuses on the endogenous and exogenous limits of the rights narrative, laid bare by the evolutions highlighted in the previous section. And it examines the challenges and the questions that these limits pose, in the optic of preserving the narrative from eventual demise.

II The Court of Justice and the Narrative of Transnational Rights

The role of the CJEU in ‘putting flesh on the bones’ of European citizenship has been told in many ways and from several perspectives.⁶ It is in judicial hands that a rather succinct list of citizenship rights has acquired a life of its own. And that a new born concept has been glorified through the promise that it would become the ‘fundamental status’ for nationals of the Member States as well as the harbinger of a ‘minimum degree of financial solidarity’ among the Member States and their nationals.⁷ The Court’s stance on European citizenship has been described, depending on the points of view, as constitutionalizing or federalist,⁸ market-prone,⁹ or overly activist.¹⁰ There is no question that the alchemy of supranational citizenship and free movement of persons has produced its most creative results through the jurisprudence of the Court. In particular, the Court, through its combined interpretation of Union citizenship and right to free movement, has weaved a strong narrative of rights across borders, that challenges some of the main tenets of national sovereignty, as well as immigration law.¹¹

The beneficiaries of this narrative of transnational rights are, first of all, second country nationals, that is, European citizens who exercise their right to move across the borders of the Member States. They enjoy

⁴ On the methodology of legal storytelling see, F Di Donato ‘Constructing Legal Narratives: Client-Lawyers Stories in A Wagner, L Cheng (eds) ‘Exploring Courtroom Discourse – The Language of Power and Control’ (London/New York, Routledge, 2016).

⁵ Also see F Strumia, ‘European Citizenship and EU Immigration: A Demoi-cratic Bridge between the Third Country Nationals’ Right to Belong and the Member States’ Power to Exclude’, (2016) 22(4) *European Law Journal* 417.

⁶ See S O’Leary, ‘Putting Flesh on the Bones of European Union Citizenship’, (1999) 24 *EL Rev* 68.

⁷ See e.g. case C-413/99 *Baumbast and R v Secretary of State for the Home Department*, EU:C:2002:493; case C-184/99 *Rudy Grzelczyk v Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve*, EU:C:2001:458.

⁸ See e.g. F. De Cecco, ‘Fundamental Freedoms, Fundamental Rights and the Scope of Free Movement Law’ (2014) 15 *German Law Journal* 383; M. Dougan, ‘The Constitutional Dimension to the Case Law on Union Citizenship’ (2006) 31(5) *EL Rev* 613.

⁹ See, from different perspectives, M Everson, ‘A Citizenship in Movement’, (2014) 15 *German Law Journal* 965-984, 967; D Kochenov, ‘The Citizenship Paradigm’ (2012-13) 15 *Cambridge Yearbook of European Legal Studies* 196; N Nic Shuibne, ‘The Resilience of EU Market Citizenship’ (2010) 47 *CML Rev* 1597.

¹⁰ See e.g. K Hailbronner, ‘Union Citizenship and the Access to Social Benefits’, (2005) 42 *CML Rev* 1245. But see M Dougan, ‘The Bubble That Burst’, in Adams et al. (eds.), *Judging Europe’s Judges: the Legitimacy of the Case Law of the European Court of Justice* (Oxford, Hart Publishing, 2013).

¹¹ For the development of this argument, see F Strumia, ‘European Citizenship and EU Immigration: A Demoi-cratic Bridge between the Third Country Nationals’ Right to Belong and the Member States’ Power to Exclude’, (2016) 22(4) *European Law Journal* 417.

a right to reside in any other Member State;¹² a right to be treated equally with nationals – through this guarantee of equal treatment, the narrative of rights across borders has come to embrace also non-economically active European citizens – ;¹³ a right to export entitlements, benefits, identities between a Member State of nationality and a Member State of residence.¹⁴

The narrative of rights across borders also embraces third country nationals (TCNs) who have a family relation to a European citizen.¹⁵ TCNs derive from European citizen family members rights to reside in a host Member State together with their sponsor European citizen;¹⁶ rights to return to the sponsor European citizen's Member State of origin;¹⁷ as well as autonomous rights to remain in a host Member State, and continue their lives there, after dissolution of a family relation in qualifying circumstances.¹⁸

Crumbles of the narrative of rights across borders have even overcome the joint venture between citizenship and free movement and come to bear on static European citizens. The Ruiz Zambrano doctrine,¹⁹ revived in a set of recent judgments,²⁰ talks of a substance of European citizenship that cannot be interfered with even in purely internal situations. Protection of the genuine enjoyment of this substance of supranational citizenship may dictate in certain situations rights across borders for TCN parent caretakers of minor European citizens.

In all the above described instances, the narrative that the Court has weaved around European citizenship speaks of rights across borders. Relevant rights limit the discretion that States traditionally retain in the context of immigration and nationality law, and more broadly in respect to decisions on the management of borders and admission and exclusion of aliens within their communities. The Citizenship Directive, in defining the European citizens' 'right of entry', refers to an obligation of the Member States to grant 'leave to enter'.²¹ Beyond the legislative definition, in the Court's case law the rights recognized to second country nationals and TCNs in the penumbra of European citizenship correspond to a limitation to Member States' discretion in admitting and excluding non-nationals.²² Relevant limitations extend also to the power of the Member States with regard to the grant and withdrawal of nationality. Whilst relevant powers remain an exclusive competence of the Member States, the Court has repeatedly found that they

¹² Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of the citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77 (Citizenship Directive), art. 6-7.

¹³ C-184/99, *Grzelczyk*; C-456/02, *Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS)* EU:C:2004:488.

¹⁴ See e.g. case C-499/06 *Halina Nerkowska v Zakład Ubezpieczeń Społecznych Oddział w Koszalinie* EU:C:2008:300; case C-148/02 *Carlos Garcia Avello v Belgian State* EU:C:2003:539.

¹⁵ *Strumia* (n 11), 421-423.

¹⁶ See Citizenship Directive. Also see case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* EU:C:2004:639.

¹⁷ Case C-456/12 *O. v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B.* EU:C:2014:13.

¹⁸ Citizenship Directive, art. 12-13; also see case C-218/14 *Kuldip Singh and Others v Minister for Justice and Equality* EU:C:2015:476.

¹⁹ Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* EU:C:2011:124.

²⁰ See case C-165/14 *Alfredo Rendón Marín v Administración del Estado* EU:C:2016:675; case C-115/15 *Secretary of State for the Home Department v NA* EU:C:2016:487; case C-304/14 *Secretary of State for the Home Department v CS* EU:C:2016:674.

²¹ Citizenship Directive, art. 5.

²² *Strumia* (n 11), 426-428.

have to be exercised ‘having due regard to EU law’.²³ This means that the discretion of the Member States in deciding who should and should not be considered a national is constrained by the need to take into account rights descending from EU law and, particularly, rights of European citizens.²⁴

European citizenship’s narrative thus posits, albeit only in a discrete set of situations, the existence of an individual right to cross national borders. In this sense, on the one hand it lends some support to arguments in favor of the existence of a human right to free movement.²⁵ On the other hand, it contrasts with a competing narrative exalting the discretion of sovereign nation states in matters of immigration and nationality. The latter narrative is well supported in both international law and political philosophy. International law recognizes unfettered discretion to sovereign states to decide on the admission and exclusion of aliens, as well as to manage the borders of their territorial and political communities.²⁶ This sovereign power to include and exclude finds several justifications in political philosophy. Sovereign states are entitled to a measure of closure in order to protect a sustainable system of distributive justice, a communal set of scarce resources, as well as their cultural and political identity.²⁷ This interest in closure, and the narrative of discretion that it underpins, also have a reflection in EU law. The right to free movement of European citizens in fact admits of several limits to make room for the legitimate interests of the Member States: interests in protecting public policy, public health, public security and, crucially for purposes of current debates, the viability of the Member States’ finances.²⁸ These interests are however construed as exceptions to the narrative of rights revolving around European citizenship.

Table 1 Competing Narratives

	Second Country Nationals	TCNs
Rights Narrative	Free movement rights	Derivative rights across borders
Discretion Narrative	Discretionary exceptions to free movement rights (public policy, public security, public health, public finances etc.)	Discretionary admission and exclusion through immigration and nationality regulation

This narrative of transnational rights, to which the CJEU has given the strongest prompt, resonates in part in national courts.²⁹ It also resonates to some extent in political discourse, where it contributes to animate both supporters and detractors from free movement of persons, at a time when the right that was once

²³ See e.g. case C-135/08 *Janko Rottmann v Freistaat Bayern* EU:C:2010:104, par. 32.

²⁴ *Ibid.* par. 56. Also see Strumia (n 11), 426-427.

²⁵ See e.g. J Carens, *The Ethics of Immigration* (Oxford, OUP 2013), 225-254.

²⁶ See e.g. Human Rights Committee, General Comment 15, ‘The Position of Aliens under the Covenant’, HRI/GEN/1/Rev.9 (Vol. I).

²⁷ See e.g. Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York Basic Books 1983); D. Miller, ‘Immigration: the Case for Limits’ in A Cohen, C Wellman (Eds.) ‘Contemporary Debates in Applied Ethics’ (Blackwell 2014); also see Strumia (n 11), 434-435.

²⁸ Citizenship Directive, art 14, art 27.

²⁹ For a Belgian example, see F Strumia, ‘Ruiz Zambrano’s Quiet Revolution: Four Hundred and Sixty-Eight Days that Made the Immigration Case of One Deprived Worker into the Constitutional Case of Two Precarious Citizens’ in B Davies and F Nicola (eds.), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Cambridge, Cambridge University Press 2017).

considered a European ‘dream’ appears to have turned, from many perspectives, into a ‘nightmare’.³⁰ An example emerges in the media diatribe, in the aftermath of the UK EU referendum, between UK foreign secretary Boris Johnson and MEP Guy Verhofstadt. Whilst the former derided the fundamental rights nature of free movement across borders, even in the context of the European project, the latter declared ready to pull out the Treaty of Rome and point Mr. Johnson to the very source of that right in the lines of the Treaty.³¹

Ultimately, the narrative of rights that the cases have developed around supranational citizenship places the substance of this latter citizenship in a status of belonging across national borders.³² This status grounds a complex set of transnational rights. An architecture of obligations of mutual recognition supports these transnational rights. European citizenship grounds the obligation, on the part of the Member States, to recognize the choices of naturalization and grant of nationality of other Member States; as well as the obligation to recognize nationals of those other Member States, who choose to reside within their borders, as part members of their communities and beneficiaries of their obligations as providers of citizenship, on equal terms with their own nationals. European citizenship also grounds obligations of recognition on the part of the citizens themselves: obligations to recognize nationals of other Member States as part members of their ingroup of citizens, and as potential addressees of their duties of communal solidarity.³³

But recent twists and turns unveil the reluctance of the Member States, and their citizens, to take on these obligations of recognition. This reluctance points to the unsteady ground, on which the transnational rights’ narrative ultimately rests.

III A Wavering Narrative

Two evolutions in particular threaten the stability of the narrative of transnational rights. From a first perspective, recent judicial and policy choices at the supranational as well as national level have tended to blur the line between narrative of rights and narrative of discretion, yielding unexpected hybrids. From a second perspective, the withdrawal from the European Union of a Member State, following the UK EU referendum,³⁴ threatens to silence without appeal the transnational rights of several European citizens.

A. Hybrid Narratives

A first hybrid derives from recent turns in the Court’s jurisprudence. In a string of recent cases the Court seems to have revisited some of its holdings on free movement of non-economically active citizens, increasingly yielding to the Member States’ discretion to protect their public finances. Such discretion has always been a feature of EU law: free movement has never been a right for everyone and has always been

³⁰ See Editorial Comments ‘Free Movement of Persons in the European Union: Salvaging the Dream Whilst Explaining the Nightmare’, (2015) 51 *CML Rev* 729.

³¹ For an account, see <http://uk.businessinsider.com/boris-johnson-making-impossible-brexite-promises-article-50-2016-11>.

³² Strumia (n 11), 439; also see F Strumia ‘Supranational Citizenship’ in A Shachar, R Bauböck, M Vink and I Bloemraad (eds.), *Oxford Handbook of Citizenship* (Oxford, Oxford University Press, forthcoming 2017).

³³ Strumia, ‘Supranational Citizenship’.

³⁴ On 23rd June 2016, British nationals expressed a 52% preference for leaving the European Union in a referendum consultation.

conditional.³⁵ However, the Court in its ‘classic’ jurisprudence on citizenship has been the most vocal actor in stretching the right to free movement in both depth and breadth, also against Member States’ signals and preferences.³⁶

The Court’s change of trend begins in 2010 with the *Brey* ruling.³⁷ In *Brey*, the Court ruled that the claim of a German pensioner for a pension supplement paid by the government of Austria – where he resided – could not be automatically denied on the basis that the claimant was not economically sufficient. Denial required a prior assessment of the claimant’s individual circumstances.³⁸ At first sight, the Court maintained a protective approach towards the rights of the not economically active claimant. However, it clarified in a *dictum* that nothing prevents Member States from subjecting the eligibility of not economically active Union citizens for social benefits to a test of legal residence.³⁹ This *dictum*, whilst arguably well supported in EU Treaty and secondary law,⁴⁰ represented a first important concession to the narrative of Member States’ discretion. In subsequent cases, the Court went further in recognizing a margin of discretion to the Member States in excluding not economically active European citizens. In *Dano*, the Court concluded that two Romanian nationals living on benefits in Germany, without ever having worked or studied in the host country, did not meet the legal requirements to reside in a host Member State under Directive 2004/38.⁴¹ A contrary finding – according to the Court – would have denied the legitimate interest of the Member States in protecting themselves against undue burdens on their finances.⁴² The Court lent further credit to the narrative of discretion in *Alimanovic* and *Garcia Nieto*.⁴³ In these two cases, the Court qualified its *Brey* ruling, holding that, respectively, in the case of jobseekers, and in the case of migrant Union citizens in the first three months of residence in a host Member State, a claim for social assistance can be automatically denied without further individual assessments. From a different perspective, but in the same direction of giving room to Member States’ discretion, the Court upheld in June 2016 the UK ordinary residence test for the grant of social benefits to migrant Union citizens.⁴⁴ This line of cases has been hailed as a reversal of the Court’s traditional position protective of rights of free movement and as a betrayal of some of the Court’s main tenets.⁴⁵ Truth to be said the Court is yes partially retreating from its most daring pro-free movement stances, however it is moving within the boundaries of EU Treaty and secondary law. Relevant law, as noted above, has always subjected free movement to limits and conditions. It is undeniable, however, that the Court is watering down its narrative

³⁵ See e.g. Council Directive 90/364/EEC of 28 June 1990 on the right of residence, 1990 OJ L180; Citizenship Directive, art. 7.

³⁶ See e.g. case C-413/99 *Baumbast*; case C-184/99, *Grzelczyk*. Also see S Schmidt’s chapter in this book on the ‘over-constitutionalisation’ of free movement on the part of the Court of Justice.

³⁷ Case C-140/12, *Pensionsversicherungsanstalt v Peter Brey*, EU:C:2013:565.

³⁸ *Ibid.*

³⁹ *Ibid.*, par 44.

⁴⁰ See Treaty on the Functioning of the European Union, art 21; also see Citizenship Directive, art 14.

⁴¹ Case C-333/13, *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* EU:C:2014:2358.

⁴² *Ibid.*, par 74.

⁴³ Case C-67/14, *Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others* EU:C:2015:597; Case C-299/14, *Vestische Arbeit Jobcenter Kreis Recklinghausen v Jovanna García-Nieto and Others* EU:C:2016:114.

⁴⁴ Case C-308/14 *European Commission v. United Kingdom of Great Britain and Northern Ireland* EU:C:2016:436. In this case, the Court clarified that the Member States’ margin of appreciation in assessing the legality of residence before awarding benefits covers not only social assistance, but also social security benefits.

⁴⁵ See D Thym, ‘The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens’ (2015) 52 *CML Rev* 17; C O’Brien, ‘Civis Capitalist Sum: Class As The New Guiding Principle of EU Free Movement Rights’ (2016) 53 *CML Rev* 937.

of transnational rights and blending it with the narrative of Member States' discretion. A strange hybrid is born as a result, that casts European citizenship under a crepuscular light.

This is not the sole hybrid that the blending of competing narratives yields. A second one results, rather than from judicial evolutions, from policy choices at Member States' level. Several Member States have enacted in the last decade 'golden residence' and 'golden passport' programmes. Relevant programmes award, respectively, residence or nationality on a fast track basis to desirable TCNs. In particular, the beneficiaries of these programmes are investors and promising entrepreneurs, who commit to invest capital in the economy of the host country, or to use it as a hub to develop a viable business idea.⁴⁶ Beneficiaries are offered a shortcut to European citizenship, and its corollary transnational rights. The transnational rights that come with European citizenship are in fact one of the core prizes with which Member States lure potential applicants.⁴⁷

This is particularly true for golden passport programmes, under whose terms qualifying applicants are awarded directly nationality, and with it, European citizenship. Malta and Cyprus have been pioneers in the European Union in this respect. Malta introduced its Individual Investor Programme in 2014.⁴⁸ After reforms prompted by a row with the European Commission,⁴⁹ the scheme now provides for the grant of a Maltese passport in exchange for a combined investment of 1,150,000 Euro into the Maltese economy, 70% of which is to be contributed to a National Development and Social Fund.⁵⁰ Applicants are also required to provide proof of their residence in Malta.⁵¹ Cyprus sells its citizenship at a much higher prize, as it requires an investment of at least 5,000,000 Euro in one of a variety of qualifying instruments.⁵² Qualifying investors are not required to reside in Cyprus. The Maltese and Cypriot schemes are not isolated phenomena. Similar schemes have been adopted in several Member States.⁵³ In some cases, relevant schemes rely on mechanisms less transparent than the Maltese and Cypriot ones. Through legal provisions allowing discretionary grants of citizenship, these schemes offer national passports, and European citizenship rights, in exchange for qualifying contributions to the national economy.⁵⁴

⁴⁶ See F Strumia 'New-generation Skilled Migration Policies and the Changing Fabric of Membership: Talent as Output and the Headhunting State', *Investment Migration Working Paper 4/2016*

<http://investmentmigration.org/download/new-generation-skilled-migration-policies-changing-fabric-membership-talent-output-headhunting-state/>.

⁴⁷ See e.g. Brochure for the Malta Individual Investor Programme, available here http://iip.gov.mt/wp-content/uploads/2014/07/IIP-Brochure-v1.2_updated.pdf.

⁴⁸ Individual Investor Programme of the Republic of Malta Regulations, Legal Notice 47 of 2014, <http://iip.gov.mt/wp-content/uploads/2014/02/LN-47-2014.pdf>.

⁴⁹ See Joint Press Statement of the European Commission and the Maltese Authorities on Malta's Individual Investor Programme (IIP), 29 January 2014, http://europa.eu/rapid/press-release_MEMO-14-70_en.htm.

⁵⁰ Individual Investor Programme of the Republic of Malta Regulations, Legal Notice 47 of 2014.

⁵¹ *Ibid* art 4.

⁵² Scheme for Naturalisation of Investors in Cyprus by Exception, <http://www.moi.gov.cy/moi/moi.nsf/All/1562764E412F7B6DC2257B80005235CF>.

⁵³ For an overview, see J Džankić, 'Investment-based citizenship and residence programmes in the EU' *RSCAS/EUDO Working Paper 2015/08* (2015), http://cadmus.eui.eu/bitstream/handle/1814/34484/RSCAS_2015_08.pdf.

⁵⁴ *Ibid*.

It is not a novelty that States use immigration and nationality regulation to reward particularly desirable migrants.⁵⁵ And it is not a novelty that in conjunction with the effort to attract these talented migrants states give away some of their discretion in managing migration.⁵⁶ What is novel is that several Member States, in the very exercise of their discretionary power to include and exclude, have come to appropriate the narrative of transnational rights to serve their own interests. The web of transnational rights weaved through the CJEU’s interpretation of EU law becomes the hook to catch wealthy, or talented migrants. Sovereign discretion is exercised precisely to fast-track relevant migrants into the status of cross-border belonging that European citizenship brings about. In signing up in this way to the narrative of transnational rights, albeit for the purpose of furthering specific sovereign interests, Member States contribute to revitalize the same narrative. And ultimately, narrative of rights and narrative of discretion become intertwined in a further, unexpected hybrid.

Table 2. Hybrid Narratives

	Discretion	Rights
Member States	Narrative of discretion - Exceptions to free movement; Immigration and nationality law	Hybrid narrative of rights – discretionary award of transnational rights
CJEU	Hybrid narrative of discretion - case law yielding to discretionary exceptions	Narrative of rights - Rights to free movement for SCN; derivative rights for TCNs

B. Narratives Held to Ransom

Beyond the hybridization that cross-appropriation of competing narratives has induced, European citizenship’s narrative of transnational rights has come to face a further challenge. On 23rd June 2016, 52% of the voters in the UK EU referendum expressed a preference in favor of the UK leaving the European Union. The results of the popular consultation sparked political conflicts, social unrest and legal quandaries.⁵⁷ At the time of writing, it is expected that the UK government will invoke article 50 of the Treaty on European Union and begin the formal negotiations for withdrawal during the first part of 2017. Beyond the political contingencies, the Brexit saga reveals an Achilles’ heel of the CJEU narrative of rights. This narrative, it seems, is ultimately held to ransom by the decisions of governments at the international level, whether supported or not by popular majorities.⁵⁸ This condition raises questions as to the status of the transnational rights narrative from both a political and a legal perspective.

⁵⁵ For examples from the Kingdom of Italy in the 19th century see S Donati, *A Political History of National Citizenship and Identity in Italy, 1861-1950* (Palo Alto, Stanford University Press, 2013), 87.

⁵⁶ To some extent, this was the case also with the European guest worker programmes of the 1950s and 1960s. For an overview see S Castles et al, ‘The Age of Migration’ (Basingstoke, Palgrave MacMillan, 5th ed. 2014), 103-108.

⁵⁷ For the legal quandaries see *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* [2017] UKSC 5.

⁵⁸ See F Strumia, ‘Brexiting European Citizenship through the Voice of Others’ (2016) 17(Brexit Supplement) *German Law Journal* 109. Article 50 of the Treaty on European Union, prescribing the process for withdrawal of a Member State, refers to the decision to withdraw being made in accordance with the relevant Member State’s constitutional requirements.

From a political perspective, questions arise as to the legitimacy of the silencing of transnational rights through ‘the voice of others’.⁵⁹ This is in effect what happened with the UK EU referendum. The voice of a majority of the voters, but a bare minority of the UK population, sparked the decision to prospectively silence the supranational citizenship, and the transnational rights of the entire UK population.⁶⁰ One can argue, and it has been extensively argued, that this is simply democracy making its course. In democratic consultations, the winner takes all. However, the result is particularly troubling in this case, as what the winner takes is not simply a bunch of seats in Parliament, the leadership of government for a number of years, or even a momentous decision in economic and political terms. What the winner takes is, rather, the right of each British national to have transnational rights through supranational citizenship.⁶¹ The right to have rights through national citizenship could not be collectively taken away just as easily. International law entails protection of the right to a nationality, as well as safeguards against statelessness and collective expulsion.⁶² Supranational citizenship enjoys no comparable protection and can thus be taken away at the diktat of political voice, without any appeal, and without any required individual consent, as a majority is sufficient to strip citizenship from all. As a paradox, its inherent narrative of rights across borders that grew to contrast governmental discretion, is left at the mercy of that very governmental discretion, and of the political process empowering governmental decisions. It is true that a unanimous governmental decision expressed in the Treaties was ultimately at the root of the narrative of transnational rights. However that narrative has bred on the notion that the European Union’s subjects are not only the governments, but also the peoples of the Member States. Hence the democratic paradox.

Relatedly, from a legal perspective, the firmness of the narrative of transnational rights and of the status that it reflects is left hanging. The Court has oft repeated that Union citizenship was ‘destined to be the fundamental status’ for nationals of the EU Member States.⁶³ Renowned Advocate Generals have attached great expectations to that status, arguing that European citizenship was meant to be a vehicle of fundamental rights. It was to transform free movement of persons into the ‘movement of free citizens’.⁶⁴ It was also to entitle each Union citizen to look to his or her supranational status as a guarantee of a modicum of fundamental rights in any part of the Union.⁶⁵ The narrative of transnational rights fulfils in part this promised destiny, as well as the expectations linked to European citizenship. However the exposure of both the status of supranational citizenship, and of its attached narrative of rights, to sudden silencing for entire cohorts of holders, makes them legally unreliable. How can a status that can be stripped off from one day to the next based on political contingencies be legally fundamental? Who would, after a possible bitter divorce between the EU and the UK, possibly resulting in the loss of transnational

⁵⁹ Strumia ‘Brexiting European Citizenship’.

⁶⁰ Votes cast for ‘leave’ were 17,410,742 versus 16,141,241 votes cast for ‘remain’, out of a total electorate of 46,500,001. <http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information>

⁶¹ Ibid.

⁶² For the right to a nationality, see Universal Declaration of Human Rights, art. 15; for the prohibition of collective expulsion see e.g. European Convention of Human Rights, Protocol 4, article 4. On statelessness, see Convention on the Reduction of Cases of Statelessness, Aug. 30, 1961, available at www.unhcr.org/3bbb286d8.html.

⁶³ See e.g. case C-413/99 *Baumbast*.

⁶⁴ Case C-228/07 *Jörn Petersen v Landesgeschäftsstelle des Arbeitsmarktservice Niederösterreich*, Opinion of AG Jarabo Colomer EU:C:2008:281, par 28.

⁶⁵ Case C-168/91 *Christos Konstantinidis v Stadt Altensteig*, Opinion of AG Jacobs EU:C:1992:504.

rights, trust to plan one's own life across borders and believe that he or she could really belong in a supranational citizenship space?

Ultimately, if the blurring of the lines gives a gentle nudge to the coherence of the transnational rights narrative, its being held to ransom by political decisions gives a hard shake to its very premises.

IV The Limits of the Narrative of Rights and the Way Forward

Challenges to the coherence, as well as to the premises of the narrative of transnational rights ultimately yield a glimpse of its limits. These are both exogenous – the narrative, it seems, is not self-standing and relies on a measure of political endorsement; and endogenous – the European citizens' right to belong across borders rests on unsettled legal and philosophical grounds. Exogenous and endogenous limits ultimately point to the challenges facing the narrative of transnational rights and its future prospects.

A. Exogenous Limits and the Rebuilding of Trust

Rights mirror into obligations. In the case of EU transnational rights, these are the obligations of recognition that were considered earlier: recognition, on the part of the Member States, of one another's polities, social contracts, institutions, and citizens.⁶⁶ At the intersection of transnational rights and corresponding obligations of recognition, judicial rationales meet political discourses. The judicial narrative of rights, in other words, relies on a measure of political resonance. Burgeoning hybrid narratives, and the surfacing ransom to which the narrative of rights is held, reveal however denial and conditionality of recognition.

Denial of recognition is most evident with the political ransom to which the narrative of transnational rights has come to be held in the wake of the UK EU referendum. In the aftermath of the UK vote, and in preparation of the formal negotiations for withdrawal of the UK from the EU, political discourses of rejection, rather than recognition, accompany the uncertainty in which transnational rights have been left. Political rejection of the idea that European citizens could automatically hold a right to cross borders was a fundamental component of the campaign preceding the referendum. That 'regaining control of borders' and regulating immigration from EU countries would be a leit-motive of the Brexit agenda was clear ever since then Prime Minister Cameron speech on EU immigration in November 2014.⁶⁷ Denial of recognition has escalated after the referendum, and possibly reached its apex with the British Home Secretary's – later repealed- suggestion, at the Conservative Convention in October 2016, that companies should disclose lists of their foreign employees.⁶⁸ Whilst in the UK rejection of the immigrant other is a historical *deja vu*,⁶⁹ denial of recognition does not stop at the UK border. Beyond the UK, denial of

⁶⁶ K Nicolaïdis, 'The Idea of European Democracy' in *Philosophical Foundations of European Union Law*, J Dickinson, P Eleftheriadis (eds.) (Oxford, Oxford University Press 2012), 248.

⁶⁷ David Cameron, EU Speech, 28 November 2014, <http://www.bbc.com/news/uk-politics-30250299>.

⁶⁸ For an account see 'Amber Rudd Faces Backlash from Businesses over Foreign Workers', *The Guardian*, 5 October 2016, <https://www.theguardian.com/business/2016/oct/05/government-faces-backlash-from-business-leaders-over-foreign-workers>. At the request of a private citizen, this has been registered by the police as a non-crime hate-speech episode.

⁶⁹ For an account of the gradual introduction of restrictions to the immigration of Commonwealth Citizens, see R Karatani, *Defining British Citizenship – Empire, Commonwealth and Modern Britain* (Frank Cass Publishers, 2003), 145-165.

recognition has found expression, for instance, in the Swiss free movement referendum saga;⁷⁰ as well as in the practices of Member States adopting restrictive definitions of what counts as work, and introducing exacting legal residence tests.⁷¹ Whilst not all directly responding to the EU citizenship narrative of rights, these surrounding political discourses re-embolden the narrative of discretion that EU citizenship had countered in the first place.

The hybridization of the narrative of rights emphasizes further its subordinate nature. Not only the latter narrative depends on recognition, but recognition becomes conditional on the attitude and direction of the narrative of rights. In the case of the first hybrid, the Court bows to political discourses and concedes to the narrative of discretion. It impliedly admits that the narrative of rights needs to endorse a measure of denial of recognition as a condition to preserve its legitimacy. As to the second hybrid, where the Member States appropriate the narrative of rights for purposes of attracting desirable migrants, the latter narrative comes to be articulated in this case within the very frame of the narrative of discretion and discourse of recognition. It becomes a tool of the sovereign states' discretion, rather than a constraint on such discretion. A further condition looms, on which the Member States' honoring of their obligations of mutual recognition becomes impliedly dependent: that the narrative of transnational rights may be placed at the service of their sovereign interests when needed.

Conditionality and subordination of the European citizenship narrative ultimately reveal that the equilibrium of transnational rights and obligations of recognition has broken up in the EU. Whilst that equilibrium was arguably wavering already before,⁷² Brexit could be seen as a breaking point. Complete denial of recognition, through the choice of withdrawal from the Union, nullifies the narrative of transnational rights.

Once the debris from this wreckage comes to rest, a question will be left for researchers to address: what are the conditions to restore such equilibrium. Kalypto Nicolaidis has long suggested that mutual recognition, intended as a rule of governance as well as a political and philosophical principle that cuts across political economy, international law and ultimately European integration, rests on a notion of managed trust.⁷³ She refers to a definition of trust as 'the willingness to take risks concerning the behavior of others action in spite of non-trivial probability of betrayal'.⁷⁴ Trust informs, in her vision, the cooperation of regulatory authorities and norm setters. It is a pre-condition, as well as an objective of cooperation. And it comes in two versions: 'blind and binding trust', illustrating the tension respectively

⁷⁰ Prompted by popular initiative, a referendum on immigration was held in Switzerland in February 2014, yielding a slight majority in favor of introducing immigration quotas also for EU nationals. Whilst Switzerland is outside the EU, it has a set of bilateral agreements with the EU encompassing, among others, free movement of persons. A reconciliation between the referendum result and the agreements with the EU was found in December 2016. See 'EU and Switzerland Agree on Free Movement', EU Observer, December 2016, <https://euobserver.com/justice/136398>.

⁷¹ For an overview, see O'Brien, 'Civis Capitalist', (n 45) 957-961.

⁷² The rejection of the Constitutional Treaty in the Dutch and French referendums, and the rejection of the Lisbon Treaty in the Irish referendum being possible signs of such denial, although the questions asked in those referendums were profoundly different in scope and direction from the question asked in the UK referendum.

⁷³ K Nicolaidis, 'Trusting the Poles?: Mark 2—Towards a Regulatory Peace Theory in a World of Mutual Recognition', in I Lianos and I Blanc (eds.), *Regulating Trade in Services in the EU and the WTO: Trust, Distrust and Economic Integration* (Cambridge, Cambridge University Press, 2012), 264-265. Also see M Maduro, 'So Close and Yet so Far: the Paradoxes of Mutual Recognition' in Lianos and Blanc, 241-243.

⁷⁴ Nicolaidis, 'Trusting the Poles?' (n 73), 292.

between ‘deferential and interventionist recognition’.⁷⁵ If blind trust is instinctive and can be based on mutual ignorance, binding trust is based on the combination of a minimal measure of blind trust coupled with monitoring mechanisms that ensure reciprocal knowledge among the involved institutions.⁷⁶

Mutual trust informs several areas of EU regulatory and policy cooperation. It is critical, for instance, to cooperation in the context of criminal law; as well as to the common immigration policy.⁷⁷ In the relevant contexts, trust is at the basis of enforcement cooperation among the authorities of the Member States. In the domain of transnational rights, mutual trust takes on a different connotation. The latter domain implies, on the part of the Member States and their nationals, trust in one another’s systems of values, social contracts, and justice. Trust underpins in this sense the idea of mutual belonging at the basis of transnational rights, and the obligations of mutual recognition that put flesh on the bones of that idea.⁷⁸

Nicolaïdis further hints that ‘paradoxically, only the prospect of reversibility makes recognition sustainable’.⁷⁹ Yet actual reversal also induces to question the foundations of mutual trust: the crisis of recognition in the EU, of which Brexit represents both the symptom and the outburst, calls for some hard thoughts in this sense. Relevant thoughts necessarily address the nature of the compact that joins the Member States. The type of blind trust that such compact requires and the type of binding trust that it allows may shed light on the feasible scope of mutual recognition in the EU. And in turn on the prospects of supranational citizenship and its narrative of transnational rights.

The blind trust that the EU compact requires begins from a measure of understanding. The Committee on a People’s Europe forcefully expressed this already 30 years ago:

‘Continuation of this venture rests on the assumption that future generations will also understand and appreciate one another across borders and will realize the benefits to be derived from closer cooperation and solidarity’.⁸⁰

And a notion of solidarity is needed to legitimate in turn the forms of binding trust that the EU compact envisages. Solidarity requires acknowledgement of the common pursuit of a shared collective good, and willingness to pool the risks that such common pursuit creates.⁸¹

To re-ground both understanding and solidarity, it seems however that a step back has to be taken at this point and that reforms to the EU compact along two sets of lines need to be pondered. On the one hand, philosophical and programmatic reforms. And on the other hand, institutional ones. From the

⁷⁵ Ibid, 265.

⁷⁶ Ibid., 266.

⁷⁷ The tension between mutual trust and protection of human rights in the context of the common immigration policy has been taken into account in a number of judgments of the ECtHR as well as of the CJEU on ‘Dublin transfers’ of asylum applicants. See case C-411/10, *NS and Others*, EU:C: 2011:865; case C-578/16 *C. K. and Others v Republika Slovenija*, EU:C: 2017:127; ECtHR, case *MSS v Belgium and Greece*, application n. 30696/09.

⁷⁸ *Strumia* (n 11), 441-443.

⁷⁹ Ibid, 294.

⁸⁰ P Adonnino, *A People's Europe*. Reports from the ad hoc Committee, Bulletin of the European Communities 7/85, <http://aei.pitt.edu/992/>.

⁸¹ For a possible notion of collective good, see F De Witte, *Justice in the EU—The Emergence of Transnational Solidarity* (Oxford University Press, 2015), 169, 171-172; for an account of the EU as a recipe to enhance the Member States’ problem solving capacities, see A Sangiovanni, ‘Solidarity in the European Union’, (2013) 33/2 *Oxford Journal of Legal Studies* 213.

philosophical and programmatic point of view, common objectives and a shared notion of common good need to be spelled out with further honesty and precision. Andrew Williams has already denounced an integration project that proceeds through principles concerned with order and processes rather than through values driven by ethical needs.⁸² In a Union without a common identity, without a common welfare, without a common language, and with a scant common ethic, a reflection is needed on what is ultimately the kernel of the common project, beyond the completion of a single market. Managing the harms of globalization, mending the inequalities that it has highlighted and re-including the groups that it has displaced could be a possible starting point for a restatement of the integration project.⁸³ The re-articulation of common objectives and notions of collective good needs to go hand in hand, however, with continuous reassurances that identities are not at stake and that sovereignties while pooled are not obliterated.⁸⁴ Relevant objectives and reassurances need to sit at the core of an intergovernmental dialogue leading to treaty revisions where necessary. They also need to form the spine of a clearer and more explicit narrative on the role of the European Union for its citizens, narrative that should form part of civic education and reflection in each Member State.

From the institutional point of view, both peripheral mechanisms of intervention and central mechanisms of accountability need some rethinking. The rebuilding of trust and recognition requires that the social contracts of the Member States be to some extent interchangeable. This requires peripheral mechanisms to equalize the strength of the social protection net of the different Member States, as well as to sustain comparable opportunities for economic inclusion so as to manage incentives for mass free movement.⁸⁵ It also requires reliable, and trusted, central mechanisms of accountability that may monitor and sanction egregious deviations from fundamental shared principles such as the rule of law, democratic guarantees and fundamental rights.⁸⁶ It could easily be objected that several of these mechanisms, both peripheral and central are already there, and that it is precisely their failure that foreshadowed the crises of the EU. The point is however that the perspective of trust and recognition offer a distinctive rationale to inform the process of their rethinking.

B. Endogenous Limits and the Nature of Transnational Rights

Even before getting to recognition at the political level, the lack of coherence that the hybridization of the narrative of transnational rights reveals, and its subjection to the ransom of withdrawal, point to an inner vulnerability. The transnational rights that the judicial narrative has stretched and consolidated lack a clear philosophical and legal rationale that may shore them up in the face of political contingencies.

⁸² A Williams, 'Taking Values Seriously – Towards a Philosophy of EU Law' (2009) 29/3 *Oxford Journal of Legal Studies* 549, 558-559.

⁸³ EU policies already encompass a commitment in this sense. See e.g. Regulation (EU) No 1309/2013 of the European Parliament and of the Council of 17 December 2013 on the European Globalisation Adjustment Fund (2014-2020) and repealing Regulation (EC) No 1927/2006, *OJ L 347*, 20.12.2013, p. 855.

⁸⁴ 'Recognition is about respecting and reconfiguring sovereignty at the same time' Nicolaidis, 'Trusting the Poles?' (n 73), 269.

⁸⁵ European policy on economic, social and territorial cohesion goes in this direction. See TFEU, art. 174-178.

⁸⁶ For an analysis of the shortfalls of EU mechanisms to sanction violations of the rule of law principle, see D Kochenov and L Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015) 11/3 *European Constitutional Law Review* 512.

The UK litigation on the constitutional power to give notice of withdrawal from the EU under article 50 of the Treaty on European Union sheds further light on the uncertainty of the relevant rationale.⁸⁷ The question raised in the *Miller* case is whether the executive can rely on its royal prerogative, traditionally used for managing international relations, to give the notice required under article 50 TEU; or whether Parliament rather holds the relevant power. The answer to the constitutional question turns in relevant part on the nature of the rights that the process envisaged in article 50 TEU is liable to affect. The executive in fact cannot use the royal prerogative to alter domestic law rights.⁸⁸ And the argument of the claimants in the *Miller* case that both the High Court and the Supreme Court have ultimately married in their judgments, is that withdrawal of the UK from the EU will inevitably affect rights that have become UK domestic law.⁸⁹

The question of transnational rights and their nature emerged with peculiar strength in-between the lines of the High Court's judgment. The High Court distinguished three classes of rights grounded in EU law that have become domestic as a result of the UK membership in the EU: rights that are capable of replication in UK domestic law; rights that UK nationals enjoy in other Member States; and rights that are not capable of replication in domestic law.⁹⁰ In all three cases, according to the High Court, relevant rights have become domestic law through the will of the UK Parliament and cannot be repealed by the executive through the exercise of the royal prerogative.⁹¹ The High Court's position with regard to the rights in the second class – rights that UK nationals enjoy in other Member States- is questionable. And indeed the Supreme Court in confirming the High Court's judgment follows a slightly different line of reasoning and effectively disregards the High Court's argument about these latter rights.⁹² In fact, despite the High Court's thoughtful argument, these are hardly domestic law rights: on the one hand they descend from the EU Treaties, so they are EU law rights. On the other hand they are claimed and enforced in the courts of Member States other than the UK. At best, these are the transnational rights that UK nationals enjoy under the European citizenship's narrative of rights.⁹³

The High Court's stance in this respect reaches beyond the UK constitutional question of who has the power to trigger article 50 TEU. It rather points to the question of the necessary safeguards, under EU law, for transnational rights that withdrawal of a Member State puts in jeopardy.⁹⁴ The problem of safeguards in the context of withdrawal links back, in turn, to the nature of those transnational rights. Are these rights

⁸⁷ *Miller* (Supreme Court) (n 57).

⁸⁸ *Ibid*, par 50.

⁸⁹ *Miller* (Supreme Court), par 86; (*R*) *Miller v Secretary of State for Exiting the European Union*, [2016] EWHC 2768 (Admin) (High Court judgment), par 94.

⁹⁰ *Miller* (High Court), par 57-66.

⁹¹ *Ibid*, par 92.

⁹² *Miller* (Supreme Court), par 69-73.

⁹³ The report of the Committee on a People's Europe referred already in 1985 to a set of 'special rights' of Community nationals. P Adonnino, A People's Europe. Reports from the ad hoc Committee, Bulletin of the European Communities 7/85, (n 80).

⁹⁴ Also see F Strumia 'In-Between the Lines of the High Court Brexit Judgment: EU Transnational Rights and their Safeguards', EU Law Analysis, 6 November 2016, <http://eulawanalysis.blogspot.it/2016/11/in-between-lines-of-high-court-brexit.html>; F Strumia 'Brexit and the Safeguard of EU Transnational Rights – Act II: the Supreme Court Position', EU Law Analysis, 28 January 2017, <http://eulawanalysis.blogspot.co.uk/2017/01/brexit-and-safeguard-of-eu.html>.

that were intended to be left at the disposal of the whims of international relations? Or are they part of a more solid and ingrained legal heritage of the European supranational citizens?

The CJEU has spoken of a legal heritage in this sense in some of its seminal judgments. It has suggested that the now European Union represents a 'new legal order under international law'.⁹⁵ The CJEU's doctrine, in this sense, resonates in the holding of the Supreme Court in *Miller*. The majority in *Miller* emphasizes that the EU Treaties are exceptional in character, that they have peculiar legal and constitutional implications, that they are unusual.⁹⁶ In this sense, the UK Supreme Court impliedly confirms the CJEU's theory of a 'new legal order'. According to the CJEU, such legal order is intended to create rights and obligations not only for the Member States, but also for their citizens.⁹⁷ As a result, EU law is intended to confer upon individuals 'rights which become part of their legal heritage'.⁹⁸ The European citizenship narrative of rights is an expression of this very heritage.

The ultimate foundations of that legal heritage remain however underspecified. And the threat that withdrawal of a Member State from the EU suddenly poses to the transnational rights that such heritage encompasses makes the quest for those foundations all the more urgent. What is at stake is not only the European citizenship narrative of rights, but the very destiny of EU law as a 'new legal order' under international law.

The research agenda that relevant challenges call for has three prongs. A first prong entails considering what obligations protection of a heritage of transnational rights poses for the Member States, both the remaining ones and the exiting one, in the context of the process of withdrawal. The Member States are bound by the Treaties to a duty of sincere cooperation with one another and with the Union.⁹⁹ One possible question is what shape this duty takes in the context of withdrawal negotiations, and with peculiar regard to the transnational rights that withdrawal arrangements affect. A second prong needs to be concerned with the philosophical and legal foundations of transnational rights, of which EU law is considered from several sides a concrete example.¹⁰⁰ And a final prong has to scan existing bodies of international and transnational law for possible supplementary sources of protection of the transnational legal heritage that animates the European citizenship narrative, and that contemporary trends have left exposed. In this last sense, it has been observed that supranational citizenship does not enjoy, under international law, the same level of legal protection that national citizenship and nationality attract. Whilst international law codifies the right to a nationality, nobody has a real right to a supranational citizenship.¹⁰¹ The safeguards that the *Rottmann* and *Zambrano* doctrines have built under EU law for supranational citizenship are as vulnerable to be washed away as the narrative that they contribute to bolster.¹⁰² And whilst lack of a nationality triggers international law protections against statelessness, lack

⁹⁵ Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, EU:C:1963:1.

⁹⁶ *Miller* (Supreme Court), par 86, 88, 90.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ See Art 4(3) TEU. Also see Strumia 'In-Between the Lines', n (94).

¹⁰⁰ See K Tuori, 'Transnational Law' in M Maduro, K Tuori and S Sankari (eds), *Transnational Law – Rethinking European Law and Legal Thinking* (Cambridge, Cambridge University Press 2014); also see R Michaels, 'Does Brexit Spell the Death of Transnational Law?' (2016) 17(Brexit Supplement) *German Law Journal* 51.

¹⁰¹ See above text to n (62).

¹⁰² See above text to n (19) and to n (24).

of a supranational citizenship triggers at best indifference. Yet, some of the rights that supranational citizenship entails and that are at the heart of its narrative of transnational rights may warrant further protection under international law. For instance, the International Covenant on Civil and Political Rights recognizes the right of every person to ‘enter their own country’.¹⁰³ In the jurisprudence of the Human Rights Committee the right has traditionally been interpreted as addressed to individuals who were being wrongly excluded from their country through manipulation of their nationality condition.¹⁰⁴ However a recent string of cases has taken to consider a broader range of ties that qualify a country as a person’s own.¹⁰⁵ This may perhaps lead to question whether and to what extent the holding, and the concrete exercise, of transnational rights on the part of European citizens qualifies the Member States in which they exercise those rights as ‘their own country’.¹⁰⁶ And conversely what international law obligations are generated as a result on the part of the host Member States.

V Conclusion

Echoes of populism, protectionism and resurgent nationalism, beyond threatening the European integration project, infiltrate the narrative of transnational rights that integration has yielded. They corrupt some of the narrative threads, and they cloud its prospects. This chapter has traced the hybrids that emerge as a result, and has illustrated the fragility of European citizenship’s narrative of rights in the face of political contingencies.

The vicissitudes of the narrative of transnational rights call, on the one hand, for a reflection on its premises, and for the rescaling of some of the ideas, obligations, and conditions that ultimately sustain the narrative. The chapter has begun an exercise in this sense through a reflection on the changing roles of trust, understanding, and solidarity in the compact among the EU Member State.

On the other hand, those same vicissitudes call perhaps for a closing of the ranks. The narrative of transnational rights is a legal heritage that integration has bestowed upon the Member States and its citizens. This legal heritage is a hefty response to centuries of indulgence to the arbitrary exercise of power and to derivations of nationalism that have ultimately caused historical havoc.

True that the narrative needs a measure of political resonance, true that it cannot stand without democratic endorsement, and true that it should not threaten communal solidarity. Whilst these competing needs may require some compromise, the narrative also deserves a measure of bold firmness in its defense. At least on the part of the CJEU, which has been, after all, its first herald.

¹⁰³ International Covenant on Civil and Political Rights, art 12(4).

¹⁰⁴ See Human Rights Committee, General Comment 27 on Freedom of Movement. Also see Human Rights Committee, Communication 538/1993, *Stewart v Canada*, CCPR/C/58/D/538/1993.

¹⁰⁵ See e.g. Human Rights Committee, Communication 1959/2010, *Warsame v Canada*, CCPR/C/102/D/1959/2010.

¹⁰⁶ A further source of protection for relevant rights under international law could be found in the right to private and family life under article 8 of the European Convention on Human Rights. In this sense, see D. Thym, ‘Respect for Private and Family Life under article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay’ (2008) 57 *ICLQ* 87.