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ROUNDING UP THE CIRCLE:  
THE MUTATION OF MEMBER STATES' NATIONALITIES  
UNDER PRESSURE FROM EU CITIZENSHIP

Dimitry Kochenov



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**EUROPEAN UNION DEMOCRACY OBSERVATORY ON CITIZENSHIP**

***Rounding up the Circle:***  
***The Mutation of Member States' Nationalities under Pressure from EU Citizenship***

**DIMITRY KOCHENOV**

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## **Abstract**

The European integration project has shaped a legal reality where the importance of particular Member State nationalities is dwarfed in relation to that of EU citizenship. Currently the Member States' nationalities, short of being abolished in the legal sense, mostly serve as access points to the status of EU citizenship, which has also come to influence the rules for the acquisition of the Member State's nationalities. Six Member States already provide for different naturalisation procedures for the acquisition of nationality for those already in possession of the EU citizenship status. The majority of the assumptions regarding Member State nationalities stand to be profoundly questioned today. EU citizenship is no longer a merely derivative status, leading to the need for re-conceptualisation of its relationship with the nationalities of the Member States, if not opening a new chapter in the process of European integration.

## **Keywords**

EU, citizenship, nationality, naturalization, EU legal order, division of competences, citizenship rights, non-discrimination





‘– Passport! – tjavknul kot i protianul pukhluju lapu’.

*Mikhail Bulgakov*<sup>1</sup>

‘J’aime beaucoup l’ethnographie; c’est une science d’un rare intérêt; mais, comme je la veux libre, je la veux sans application politique’

*Ernst Renan*<sup>2</sup>

## Introduction \*

The days of a one-way relationship between EU citizenship and the nationalities of the Member States are over. The link between the two is now much more complex than a simple dependency relationship of one status on another.

The nationalities of the Member States are essentially affected by two lines of development: the adherence of the Member States to liberalism and human rights ideals – which deprived them of any possibility of resorting to the ‘thick’ sense of nationalities, eventually leading to the parting of ways of state and nation-building and the proceduralisation of citizenship – and through the development of the European integration project, which has by now largely succeeded in removing all the essential differences in terms of rights that particular Member States’ nationalities are connected with. The success of the paired instruments of the internal market and EU citizenship – a bond underlined by AG Poiares Maduro<sup>3</sup> – shaped a reality where Member States’ nationalities are absolutely not what any national political élite would claim that they are. The task of this paper is to outline the recent developments that affected the legal essence of Member States’ nationalities in the Union and to provide a sober outline of the relationship between the Member States’ nationalities and the citizenship of the EU.<sup>4</sup> Member State nationalities and the citizenship of the Union seem to be increasingly affecting each other in ways much more profound than what was initially envisaged by the drafters of the Treaties and the *acquis académiques*.

Clearly, European citizens residing in a Member State other than their Member State of nationality are not simply ‘foreigners’. The powers of the Member State of residence to discriminate against such people or deport them have been diminishing at an increasing pace over the last few decades:<sup>5</sup> the Court of Justice (ECJ) acting together with other Institutions of the Union has shaped a legal reality where the citizenship of the EU acquired clear and identifiable scope.<sup>6</sup> This status is usable in practice,

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<sup>1</sup> Bulgakov, Mikhail, *Master i Margarita*, Moskva: Azbuka-Klassika, 2008, 212 [‘Passport!’ barked the cat, holding out a plump paw].

<sup>2</sup> Renan, Ernst, *Qu’est-ce qu’une nation? et autres essais politiques*, Paris: Agora, 1992 (1st ed. 1882), 49.

<sup>3</sup> E.g. AG’s Opinion in Case C-446/03 *Marks & Spenser plc v. Halsley (Her Majesty’s Inspector of Taxes)* [2005] ECR I-10837, para. 37: ‘to reconcile the principle of respect for state competences and the safeguarding of the objective of establishing an internal market in which the rights of citizens are protected’.

<sup>4</sup> It is surprising that this important topic has never enjoyed sufficient scholarly attention. For one of the best contributions to date see Evans, Andrew, ‘Nationality Law and European Integration’, 16 *Eur. L. Rev.*, 1991, 190.

<sup>5</sup> Kochenov, Dimity, ‘*Ius Tractum* of Many Faces: European Citizenship and a Difficult Relationship between Status and Rights’, 15 *Colum. J. Eur. L.*, 2009, 169, 193 (and the literature cited therein).

<sup>6</sup> For a very informative analysis of this process see Spaventa, Eleanor, ‘Seeing the Wood despite the Trees? On the Scope of Union Citizenship and Its Constitutional Effects’, 45 *Common Mrkt. L. Rev.*, 2008, 13; Kostakopoulou, Dora, ‘Ideas, Norms and European Citizenship: Explaining Institutional Change’, 68 *Modern L. Rev.*, 2005, 233, 244–261. See also

changing the legal position of the individuals in possession of it. In such a context, treating a European citizen like any other ‘foreigner’ is not only unfair, but also goes against common sense.

Consequently, although branded as purely derivative, EU citizenship has already started altering the essence of the Member State nationalities it is derived from,<sup>7</sup> including the rules of loss and acquisition of such nationalities. Simply put, although the acquisition and the loss of nationality are not among the issues which the Union is empowered to regulate,<sup>8</sup> the very existence of the internal market<sup>9</sup> amplified by the notion of EU citizenship makes the retention of the pre-existing modes of regulation of such *de jure extra-acquis*<sup>10</sup> issues by the Member States clearly unsustainable. Internal market and EU citizenship work together to transform the nationality policies of the Member States not by empowering the Union to act in the field of the conferral of nationalities by the Member States, but simply by bringing a profound change to the whole meaning of the Member States’ nationalities in contemporary Europe.<sup>11</sup> This evolution is the key to the understanding of the dynamic development of the legal essence of EU citizenship of the near future, as it affects access to supranational status. The line which could be drawn between the legal concepts of Member State nationality and EU citizenship is thus becoming ever more flexible and contested.

Already today, six Member States – including Austria, Germany, Hungary, Italy, Romania and, to a lesser extent, Slovenia – differentiate between EU citizens and third-country nationals in their naturalization procedures (two more, Lithuania and Spain, are discussing the possibilities of introducing such changes).<sup>12</sup> These differences are not minor at all. In Italy, for example, the length of minimal legal residence in order to qualify for naturalization is drastically different for the two categories in question: while EU citizens naturalize in four years, third-country nationals have to wait six years longer.<sup>13</sup> In the near future, the number of Member States to introduce such differences as well as the reach of the differences themselves is likely to proliferate, amplifying the importance of

(Contd.)

Groussot, Xavier, “‘Principled Citizenship’ and the Process of European Constitutionalisation – from a Pie in the Sky to a Sky with Diamonds”, in Bernitz, Ulf *et al.* (eds.), *General Principles of EC Law in a Process of Development*, The Hague: Kluwer Law International, 2008, 315; Elsmore, Matthew J., and Starup, Peter, ‘Union Citizenship – Background, Jurisprudence, and Perspective: The Past, Present, and Future of Law and Policy’, 26 *Ybk. Eur. L.*, 2007, 57; Jacobs, Francis G., ‘Citizenship of the European Union – A Legal Analysis’, 13 *Eur. L.J.*, 2007, 591; Maas, Willem, *Creating European Citizens*, Lanham *et al.*: Rowman and Littlefield, 2007; Schönberger, Christoph, *Unionsbürger. Europas föderales Bürgerrecht in vergleichender Sicht*, Tübingen: Mohr Siebeck, 2006; Kadelbach, Stefan, ‘Union Citizenship’, in von Bogdandy, Armin and Bast, Jürgen (eds.), *Principles of European Constitutional Law*, Oxford: Hart, 2006, 453.

<sup>7</sup> Art. 9 of the Treaty on the EU (TEU); Art. 20 of the Treaty on the Functioning of the EU (TFEU), *OJ* C115/1, 2009.

<sup>8</sup> *E.g.* Opinion of Pío S. Cruz Villalón, AG in Case C-135/08 *Janko Rottmann* [2010] ECR 0000, para. 17: ‘la détermination des conditions d’acquisition et de perte de la nationalité, – et donc de la citoyenneté de l’Union –, relève de la compétence exclusive des États membres’ (also see the references cited therein). This notwithstanding the famous *obiter dictum* in *Micheletti* that decision on nationality should be taken by the Member States with ‘due regard of Community law’: Case C-369/90 *Mario Vicente Micheletti et al. v. Delegación del Gobierno en Cantabria* [1992] ECR I-4239, para. 10. In practice, the Union took part in the framing of state nationality laws on several occasions, all during the pre-accession process, when dealing with the Member States-to-be. For analysis see Kochenov, Dimitry, ‘Pre-accession, Naturalization, and “Due Regard to Community Law”: The European Union’s ‘Steering’ of Citizenship Policies in Candidate Countries during the Fifth Enlargement’, 4 *Romanian J. Pol. Sci.*, 2004, 71.

<sup>9</sup> Art. 26(2) TFEU [14(2) EC].

<sup>10</sup> On the concept of the *acquis* see Delcourt, Christine, ‘The *Acquis Communautaire*: Has the Concept had its Day?’, 38 *Common Mrkt. L. Rev.*, 2001, 829.

<sup>11</sup> This change is also reflected in the preliminary questions submitted by the Member States’ courts to the ECJ. See *e.g.* the questions submitted in Case C-135/08 *Janko Rottmann* [2010] ECR 0000, concerning the legality under EU law of a situation where a person becomes stateless and is thus deprived of EU citizenship following a fraudulent naturalisation in one of the Member States. The EU legal dimension is discovered in issues which only ten years ago would have been regarded as pertaining exclusively to the field of competences of the Member States.

<sup>12</sup> Section III(b) *infra*.

<sup>13</sup> Legge N. 91/1992; Zincone, Giovanna and Basili, Marzia, ‘Country Report: Italy’, *EUDO Citizenship Observatory RSC Paper*, EUI, 2009, 13.

EU citizenship, which is now capable of providing the holder with easy access to the nationalities of other EU Member States even at the formal level of the naturalization procedure, not only by providing a virtually unlimited access to residence,<sup>14</sup> and thus infinitely simplifying the meeting of any standard naturalization requirements as well.<sup>15</sup> Ultimately, the establishment of diverging naturalization requirements for EU citizens and third-country nationals means that a distinction is made between the acquisition of EU citizenship (necessarily coupled with a Member State's nationality) and the mere acquisition of another Member State nationality. This is a fundamental development, bound to have far-reaching consequences for the legal essence of both legal statuses in question.

The situation of EU citizens and third-country nationals in any Member State is categorically different,<sup>16</sup> allowing talk of an 'unfulfilled promise of European citizenship'.<sup>17</sup> Naturalization in the Member State of residence is already less important by far for EU citizens than for the third-country nationals.<sup>18</sup> This is true because a number of key rights formerly associated with state nationality are granted to EU citizens directly by the EU legal order. Among these are virtually unconditional rights of entry, residence, taking up employment and, crucially, non-discrimination on the basis of nationality.<sup>19</sup> In this context it is evident that little is left of the Member States' nationalities in the EU. An oft-cited phrase coined by Davies attributes to Article 18 of the Treaty on the Functioning of the European Union [TFEU]<sup>20</sup> [12 EC] the abolition of the nationalities of the Member States.<sup>21</sup> Currently it is not Member State nationality, but EU citizenship, which provides Europeans with the most considerable array of rights, so long as, by virtue of this status, rights in twenty-seven states instead of only one are extended and any discrimination on the basis of nationality is prohibited.

Successful development of the internal market is bound to diminish the legal effects of particular Member States' nationalities even further, eventually annihilating such effect virtually entirely. These developments, which are supported by the ECJ case-law on citizenship, are bound to have two main consequences. The first is the widening of the gap between EU citizens and third-country nationals in the EU even further. The second is the obvious need to adapt the Member States' nationalities to the new reality, constructing legal statuses more aware of their limitations. The diminution in importance

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<sup>14</sup> To say nothing of the access to the majority of rights which were previously associated with nationality.

<sup>15</sup> Consequently, those Member States' nationals who naturalise in their new Member State of residence automatically fall within the scope of EU law even when they lost their previous Member State's nationality, since EU law permitted them to meet the necessary residence requirements: Opinion of Póitíneas, AG in Case C-135/08 *Janko Rottmann* [2010] ECR 0000, paras 10, 11.

<sup>16</sup> The EU and the Member States announced on a number of occasions that this difference is bound to be reduced, the third-country nationals gradually coming to be treated as EU citizens. However, as Directive 2003/109/EC overwhelmingly demonstrates the differences are there to stay. For the assessment of the legal position of the third-country nationals in the EU see e.g. Kochenov (2009) '*Ius Tractum*', 225–229; Hedemann-Robinson, Martin, 'An Overview of Recent Legal Developments at Community Level in Relation to Third country Nationals Resident within the European Union, with Particular Reference to the Case-law of the European Court of Justice', 38 *Common Mrkt. L. Rev.*, 2001, 525; Staples, Helen, *The Legal Status of Third-country Nationals Resident in the European Union*, The Hague: Kluwer Law International, 1999; Ward, Ian, 'Law and the Other Europeans', 35 *J. Common Mrkt. Stud.* 1, 1997, 79; Peers, Steve, 'Towards Equality: Actual and Potential Rights of Third-Country Nationals in the European Union', *Common Mrkt. L. Rev.*, 1996, 8.

<sup>17</sup> Maas, Willem, 'Migrants, States, and EU Citizenship's Unfulfilled Promise', 12 *Citizenship Stud.*, 2008, 583.

<sup>18</sup> Section III(a) *infra*.

<sup>19</sup> For a critical analysis see Kochenov (2009) '*Ius Tractum*', 206 (and the literature cited therein).

<sup>20</sup> Treaty on the Functioning of the European Union, OJ C115/1, 2009.

<sup>21</sup> Davies, Gareth, "'Any Place I Hang My Hat?' or: Residence is the New Nationality", 11 *Eur. L.J.* 1, 2005, 43, 55. Evans (1991) put it slightly differently: 'possession of the nationality of one Member State rather than that of another loses all real significance' (at. 195).

of the nationalities of the Member States as legally meaningful statuses naturally reaffirms the rise of EU citizenship to the most prominent position in regulating the rights of EU citizens.

It has taken the Member States a long time to awaken to the realization of this state of affairs. Once realized and harkened,<sup>22</sup> it is bound to have direct influence on their nationality policy, as well as on the very essence of interaction between Member State nationalities and EU citizenship in the EU. To pretend that EU citizens are not, potentially at least, quasi-nationals of any of the Member States where they choose to reside, would be to close one's eyes to the current level of evolution of EU law.

The consequences of all these developments and, particularly, of differentiating between EU citizens and third-country nationals for the purposes of naturalization, are far-reaching indeed. Once EU citizenship – a *ius tractum* status rooted in the possession of a nationality of one of the Member States<sup>23</sup> – starts to also affect the rules of access to nationality, in addition to the rights formerly exclusively associated with this very nationality, the circle is rounded up: the formerly 'parasitic'<sup>24</sup> and 'cynical'<sup>25</sup> nature of EU citizenship comes to be contested. The proverbial pie<sup>26</sup> lands from the sky on the table, leaving no place for other foods.

## Structure of the argument

This paper is structured as follows. The first part focuses on the processes that shaped the evolution of the concept of nationality during the 20<sup>th</sup> century, including, on the one hand, the influence of liberalism and human rights resulting in the replacement of the 'thick' conceptions of nationality with their liberal-minimalist counterparts,<sup>27</sup> and the decoupling of nationality and social rights – the creation of *citoyenneté sociale* – on the other.<sup>28</sup> As a result, nationality could no longer be legally connected with substantive notions of culture and identity (I).

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<sup>22</sup> Weiler, Joseph H.H., *The Constitution of Europe: Do the Clothes Have an Emperor?*, Cambridge: Cambridge University Press, 1999, 3.

<sup>23</sup> Art. 20 TFEU. Kochenov (2009) '*Ius Tractum*', 181. The fact that access to the status of EU citizenship is always provided via the nationality of a Member State does not diminish the importance of the former status. Analysis of some distinguished commentators claiming the non-existence of European citizenship based on the fact that access to it is derivative is logically unsound: if *ius soli* citizenship is not better or worse than *ius sanguinis* citizenship, there is no reason to claim that the same should not be valid for *ius tractum* citizenship: certain rules of access to the status have nothing to do with the existence of the status as such. Among the commentators making this mistake see Giuseppe Tesaurò, whose analysis is far from convincing: 'non esiste, né potrebbe allo stato ipotizzarsi, una nozione comunitaria di cittadinanza, sì che le norme che ne prescrivono il possesso come presupposto soggettivo per la loro applicazione in realtà rinviano alla legge nazionale dello Stato la cui cittadinanza viene posta a fondamento del diritto invocato': Tesaurò, Giuseppe, *Diritto comunitario* (5<sup>th</sup> ed.), CEDAM (Wolters Kluwer Italia), 2008, 480. It is impermissible to ignore the fact that 'la citoyenneté de l'Union suppose la nationalité d'un État member mais c'est aussi un concept juridique et politique autonome par rapport à celui de nationalité' (emphasis added): Opinion of Poiares Maduro, AG in Case C-135/08 *Janko Rottmann* [2010] ECR 0000, para. 23.

<sup>24</sup> Rostek, Karolina and Davies, Gareth, 'The Impact of Union Citizenship on National Citizenship Policies', 10 *EIoP* 5, 2006, 1 (also reprinted in 22 *Tul. Euro. Civ. LF*, 2007, 89).

<sup>25</sup> Weiler, Joseph H.H., 'European Citizenship and Human Rights', in Winter, Jan A. et al. (eds.), *Reforming the Treaty on European Union – The Legal Debate*, The Hague: Kluwer, 1996, 65, 68, speaking of a 'cynical exercise in public relations on the part of the High Contracting Parties'.

<sup>26</sup> Jessurun d'Oliveira, Hans U., 'Union Citizenship: Pie in the Sky?', in Rosas, A. and Antola E. (eds.), *A Citizens' Europe: In Search for a New Order*, London: Sage, 1995, 58.

<sup>27</sup> Joppke, Christian, 'Immigration and the Identity of Citizenship: The Paradox of Universalism', 12 *Citizenship Stud.*, 2008, 533.

<sup>28</sup> For analysis in EU context see Maillard, Sandrine, *L'émergence de la citoyenneté sociale européenne*, Aix-en-Provence : Presses universitaires d'Aix-Marseille, 2008; van der Mei, Anne Pieter, 'Union Citizenship and the "De-Nationalisation" of the Territorial Welfare State', 7 *Eur. J. Migration & L.*, 2005, 210.

The paper proceeds by looking at the general processes outlined in the first part through the lens of European integration, exploring the normative gray zone where Member States' nationalities end and EU citizenship begins. A perfect example of amplified globalisation, the European integration project has successfully created all the conditions for a significant intensification of world trends leading to the marginalization of Member State nationalities in the context of the borderless internal market, and has moved beyond affecting the substance of nationality, having important implications also for the extent of rights associated with particular nationalities. The adoption of the liberal ideals as the guiding stars of integration by the ECJ and the EU Treaty<sup>29</sup> and the successful shaping of European citizenship contributed to this process. Unlike the mere proceduralisation of nationality and its decoupling from the substance of culture and identity which could be observed world-wide, the EU, via the prohibition of discrimination on the basis of nationality and the gradual phasing away of reverse discrimination,<sup>30</sup> established the need to also rethink the array of rights any nationality is expected to bring. Consequently, the issue of primary importance is the analysis of the legal balance between EU citizenship and the Member States' nationalities as legal statuses associated with enforceable rights (II.).

The part that follows moves towards the analysis of the practical examples of EU citizenship's influence on the nationality policies of the Member States. Although not formally covered by the *acquis*, nationality acquisition rules are deeply affected by the realities of the internal market and EU citizenship, which has already resulted in the adaptation of national regulations on naturalization in six Member States. This part uses the data collected within the auspices of the EUDO citizenship project,<sup>31</sup> drawing on the updated citizenship legislation of all the EU Member States, EEA countries and EU candidate countries. The fact that six Member States have already formalised the differentiation of access to their nationality by those in possession of EU citizenship as opposed to third-country nationals has important implications for the future development of the interplay between EU citizenship and Member State nationalities (III.).

The final part contains an outline of the likely future dynamics in the relationship between Member State nationality and European citizenship, as well as an informed speculation on the likely evolution of the nature of the latter. The borderless context of the internal market amplifying world-wide trends is likely to lead to an overwhelming diminution in the legal importance of the nationalities of the Member States as meaningful legal statuses. However, given the universality of the trends negatively affecting nationalities, it is clear that EU citizenship, while *de jure* gaining in importance, should not be expected to become anything more than a thin procedure-driven concept, in line with the liberal credo espoused by the EU.<sup>32</sup> To borrow from Palombella, 'European citizenship must remain a status without inevitable ties to suffocating bonds'.<sup>33</sup> Consequently, to expect *dēmos*-creation<sup>34</sup> or a rise in the feeling of belonging to the new status would not only be unwise – given the world-wide trend towards the natural phasing out of 'thick' citizenship in liberal jurisdictions – but also most

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<sup>29</sup> Esp. Arts. 6 and 7 of the European Union Treaty, *OJ C* 115/1, 2009 [6 and 7 EU]. Hereinafter the pre-Lisbon numbering of Treaty provisions is put in square brackets.

<sup>30</sup> Tryfonidou, Alina, *Reverse Discrimination in EC Law*, The Hague: Kluwer Law International, 2009.

<sup>31</sup> Available at <<http://eudo-citizenship.eu/>>.

<sup>32</sup> Kostakopoulou, Dora, 'Why Naturalisation?', 4 *Perspectives on Eur. Politics & Soc'y*, 2003, 85; Carens, Joseph H., 'Citizenship and Civil Society: What Rights for Residents?', in Hansen, Randall and Weil, Patrick (eds.), *Dual Nationality, Social Rights and Federal Citizenship in the U.S. and Europe*, New York/Oxford: Randall Books, 2002, 100, 109–113. See also Zilbershats, Yaffa, 'Reconsidering the Concept of Citizenship', 36 *Tex. Int'l L.J.*, 2001, 689, 714 (in the potential duty to grant citizenship to a resident of a state).

<sup>33</sup> Palombella, Gianluigi, 'Whose Europe? After the Constitution: A Goal-Based Citizenship', 3 *Int'l J. Const. L.*, 2005, 357, 382.

<sup>34</sup> For a critical assessment see Weiler, Joseph H.H., 'The State "über alles": *Demos*, *Telos* and the German Maastricht Decision', in Due, Ole, Lutter, Marcus and Schwarze, Jürgen (eds.), *Festschrift für Ulrich Everling*, Baden-Baden: Nomos Verlagsgesellschaft, Vol. 2, 1995.

undesirable.<sup>35</sup> Indeed, while the nationalities of the Member States are likely to end up stripped of any legal substance, this does not mean that the notion of the ‘peoples of the Member States’ is thereby undermined, nor should it be abandoned. Consequently, the feeling of belonging to Member State nationalities should remain, reinforcing one of the fundamentals of EU integration, its unique ‘constitutional federalism’,<sup>36</sup> the basis of the *costituzione senza popolo*<sup>37</sup> (IV.).

The conclusion insists, once again, that it is time to start thinking about the balance between EU citizenship and Member State nationalities differently, rebutting old assumptions. The formerly purely derivative status of EU citizenship will not go away and the battle for legal relevance is already being lost by the nationalities of the Member States, even though the majority of nationals remain blissfully unaware.

## I. Liberalism and the Erosion of the Former Meaning of Nationality

### a. Taking a legal fiction seriously

A hundred years ago, the prevailing views among lawyers and politicians all over the world ascribed greater danger to possessing two nationalities than to possessing two wives. In the words of Bancroft one should ‘as soon tolerate a man with two wives as a man with two countries: as soon bear with polygamy as that state of double allegiance which common sense so repudiates that it has not even coined a word to express it’.<sup>38</sup> Ties with a state were seen as absolutely exclusive, and international law reflected this belief.<sup>39</sup> Dual citizens or those who changed their nationality were regarded with suspicion as potential traitors<sup>40</sup> and saw their rights limited compared with ‘natural born’ citizens.<sup>41</sup>

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<sup>35</sup> For a brilliant and utterly unflattering analysis of the essence of the *dēmos* and the role it plays see Allott, Philip, ‘The European Community is not the True European Community’, 100 *Yale L.J.*, 1991, 2485, 2497–2498.

<sup>36</sup> Weiler convincingly argues that ‘European constitutional federalism’, *i.e.* the lack of the presumption of the supreme authority and sovereignty of the federal *demos*, ‘represents not only its most original political asset but also its deepest set of values’: Weiler, Joseph H.H., ‘In Defence of the *Status Quo*: Europe’s Constitutional *Sonderweg*’, in Weiler, Joseph H.H. and Wind, Marlene (eds.), *European Constitutionalism beyond the State*, Cambridge: CUP, 2003, 7, 13 and 9 respectively. For a totally different (and much more orthodox) perspective on the feeling of belonging and European citizenship see, among many others, Bellamy, Richard, ‘Evaluating Union Citizenship: Belonging, Rights and Participation within the EU’, 12 *Citizenship Stud.*, 2008, 597.

<sup>37</sup> Scoditti, Entico, *Costituzione senza popolo: Unione europea e nazioni*, Bari: Edizioni Dedalo, 2001.

<sup>38</sup> Bancroft, George, ‘Letter to Lord Palmerson, Jan. 26, 1849’, reprinted in *Sen. Ex. Docs.* 38, 36<sup>th</sup> Congress, 1<sup>st</sup> Session, 1950, as cited in Howard (2005), 700.

<sup>39</sup> For analysis see Bar-Yaacov, Nissim, *Dual Nationality*, London: Stevens and Sons, 1961. Bar-Yaacov opined that ‘dual nationality is an undesirable phenomenon detrimental both to the friendly relations between nations and the well-being of individuals concerned’ (at 4). Nothing could be less true today.

<sup>40</sup> As happened in *Korematsu v. U.S.* 323 U.S. 214 (1944). The case concerned the internment of all persons of Japanese ethnicity residing in the West Coast of the US in the ‘Relocation Centres’ on military order during the Second World War. It did not matter whether these persons held US citizenship or not.

<sup>41</sup> The remnants of this rule are still the law in a number of countries where citizenship by naturalisation brings with it fewer rights than citizenship by birth. Thus naturalised US citizens cannot run for the office of the President (US Constitution, Art. II) and naturalised Spaniards cannot act in the capacity of King’s tutor (Spanish Constitution, Art. 60.1.). For an analysis of the US situation see *e.g.* Herlihy, Sarah P., ‘Amending the Natural Born Citizen Requirement: Globalization as the Impetus and the Obstacle’, 81 *Chi.-Kent L. Rev.*, 2006, 275. In the context of European citizenship, such distinctions are illegal. In *Auer* the ECJ found that ‘there is no provision of the Treaty which, within the field of application of the Treaty, makes possible to treat nationals of a Member State differently according to the time at which or the manner in which they acquired the nationality of that State’: Case 136/78 *Ministère Public v. Auer* [1979] ECR 437, para. 28.

International law generally left it up to the states to decide on the issues of nationality<sup>42</sup> and concentrated on combating dual nationality.<sup>43</sup> This amplified the romantic vision of a state as the cradle of a nation to which individuals belonged due to 'blood ties',<sup>44</sup> thus taking a legal fiction very seriously.<sup>45</sup> The world came to be divided into mutually-exclusive territorial units, containing each its own society, separated by clear well-guarded borders.<sup>46</sup>

Modern states<sup>47</sup> took to confining their activities to homogenising, linguistically,<sup>48</sup> culturally<sup>49</sup> and otherwise, their imagined communities,<sup>50</sup> and to selling them to their citizens as an omnipresent unquestionable given in the *société de spectacle*.<sup>51</sup> As a result, in the words of Allott,

Social life as a whole tends to take the character of a collective fantasy. And the collective fantasy tends to become the only reality that the citizen knows because of its spectacularly energetic efforts: the thrilling set-pieces of public affairs (including elections and wars), the godlike achievements of technology, and mind-filling charisma of entertainers.<sup>52</sup>

Patriotic ideals prescribed the willingness to sacrifice everything for this fiction, equalling with heroism the loss of dignity and reasoned judgement (found in being willing to hate, and, if needed, to kill, those belonging to another nation).<sup>53</sup> In a setting where 'war made the state and the state made

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<sup>42</sup> The 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (L.N. Doc. C 24 M. 13.1931.V.), is unequivocally clear on this issue: 'it is for each state to determine under its own law who are its nationals' (Art. 1). Art. 2 stipulates that 'Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State'. See also Kochenov (2009) '*Ius Tractum*', 175 *et seq.*

<sup>43</sup> E.g. CoE Convention on Reduction of Cases of Multiple Nationality, (1963) ETS no. 43, entered into force in 1968; Protocol to this Convention (1977) ETS no. 96. Combating double nationality distracted attention from solving the problem of statelessness, which is still acute. Among the instruments addressing this issue see Protocol Relating to a Certain Case of Statelessness (1937-1938) 179 L.N.T.S. 115 (No. 4138); Special Protocol Concerning Statelessness, League of Nations Document C. 227.M.114.1930.V; 1961 Convention on the Reduction of Statelessness, (1975) 989 U.N.T.S. 175 (No. 14458). The document is only ratified by a handful of states. For analysis see Chan, Johannes M. M., 'The Right to a Nationality as a Human Right: The Current Trend towards Recognition', 12 *Hum. Rts. L.J.*, 1991, 1, 2 *et seq.*, who is critical of the international legal developments in this area.

<sup>44</sup> In 1900 there was no *ius soli* in Europe – only *ius sanguinis*. *Ius soli* was reintroduced in order to draft more inhabitants, previously considered as foreigners, to the army: Joppke, Christian, 'Citizenship between De- and Re-Ethnicization (I)', 44 *Archive européen de sociologie*, 2003, 436.

<sup>45</sup> Weil has compellingly demonstrated that nationality laws have nothing to do with the reflection of a concept of a nation: Weil, Patrick, *Qu'est-ce qu'un Français?*, Paris: Grasset, 2002, 13.

<sup>46</sup> For an account see Bauböck, Rainer, 'Citizenship and National Identities in the European Union', *Jean Monnet Working Paper* (Harvard, now NYU), 1997, 1.

<sup>47</sup> Hereafter 'modern' is used in its historical sense, not to be confused with 'contemporary'. On the difficulties connected with the use of the term see Williams, Raymond, 'When Was Modernism', *New Left Review* I/175, 1989, 48.

<sup>48</sup> Linguistic homogeneity of the majority of states regarded by many as natural is a very recent product of state-building efforts. E.g. Eco, Umberto, *La ricerca della lingua perfetta nella cultura europea*, Roma: Laterza, 1993, 9.

<sup>49</sup> Tully, James, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, Cambridge: CUP, 1995, 87: 'Most of the modern theorists did not believe that cultural diversity would disappear solely by the unintended consequences of progress. They also held that it is the duty of a modern constitutional government to assist the process with an unhidden hand and ensure in practice the consequences they predicted in theory'.

<sup>50</sup> Anderson, Benedict, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (2<sup>nd</sup> ed.), London: Verso, 1991. See also Smith, Anthony D., *The Ethnic Origin of Nations*, Oxford: OUP, 1986.

<sup>51</sup> Debord, Guy, *La société de spectacle*, Paris: Gallimard, 1996.

<sup>52</sup> Allott (1991), 2497–2498.

<sup>53</sup> 'In August 1914, Australians and Germans, Frenchmen and Englishmen, flooded the enlistment offices, but we would not want to explain their military enthusiasm by reference to the quality of their citizenship [but rather] as a sign of the poverty of their lives and their lack of moral independence': Walzer, Michael, 'Civility and Civic Virtue in Contemporary America', 41 *Social Research* 4, 1974, 593, 596.

war,<sup>54</sup> being ready to hate to order, as well as to die and to murder, was a necessary component of being a good citizen.<sup>55</sup>

### ***b. Proceduralisation of nationality and the death of the ‘ideal citizen’***

The flourishing of the modern states that led to numerous disasters in the 20<sup>th</sup> century has been attributed to the poverty of the civil society that ‘lack[ed] the capacity to resist [the state’s] plans’.<sup>56</sup> The disasters of totalitarianism demonstrated with overwhelming clarity how dangerous states are,<sup>57</sup> and that they should not be given *carte blanche* to multiply human misery for the sake of the pursuit of highly abstract goals rooted in quasi-religious<sup>58</sup> and very egoistic conceptions of good, which stop at national boundaries ‘that specify, with dogmatic clarity, the distinction between the political community that is inside and the international anarchy that is outside’.<sup>59</sup>

Post WW II, developments leading to the rise of international migration – as well as international marriages producing children directly disproving the dogma of unitary identities and exclusive nationhood<sup>60</sup> – coupled with the global rise of human rights and liberalism<sup>61</sup> rendered it impossible for states to remain as they were. The states’ very authority over the nations came to be undermined, as state and nation-building parted ways.<sup>62</sup> Liberal ideology made it impossible for the states to continue embracing a clear idea of who their nationals should be, undermining any ‘thick’ conception of nationality.<sup>63</sup> In fact, democratic states effectively lost any legal possibility of imagining themselves as rooted in homogeneous monocultural societies, unable to ask of their own nationals and of the growing numbers of new-comers anything more than mere respect for the liberal ideology.

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<sup>54</sup> Tilly, Charles, *Coercion, Capital, and European States AD 990 – 1990*, Cambridge: Basil Blackwell, 1990, 114–117.

<sup>55</sup> With the diminution of the relevance of war in the life of contemporary liberal states the picture has changed considerably. For a profound analysis see Triadafilopoulos, Triadafilos, ‘Dual Citizenship and Security Norms in Historical Perspective’, in Faist, Thomas and Kivisto, Peter (eds.), *Dual Citizenship in Global Perspective: From Unitary to Multiple Membership*, Basingstoke: Palgrave Macmillan, 2007, 27.

<sup>56</sup> Scott, James, *Seeing Like a State*, New Heaven: Yale University Press, 1998, 89 (quoted in Joppke (2003), 437).

<sup>57</sup> This realisation is not new, as it is omnipresent in the Federalist papers. See also Sajó, András, *Limiting Government: An Introduction to Constitutionalism*, Budapest: Central European University Press, 1999.

<sup>58</sup> As admitted in his diary by Justice Frankfurter: ‘perhaps the feelings that underlie religious forms for me run into intensification of my feelings about American citizenship’: Levinson, Sanford, ‘Constituting Communities through Words that Bind: Reflections on Loyalty Oaths’, 84 *Mich. L. Rev.*, 1986, 1440, 1441. See in this context Bellah, Robert N. and Hammond, Phillip E., *Varieties of Civil Religion*, San Francisco: Harper and Row, 1980.

<sup>59</sup> Falk, Richard, ‘The Decline of Citizenship in an Era of Globalization’, 4 *Citizenship Stud.*, 2000, 5, 6.

<sup>60</sup> The proliferation of liberal ideology also caused similar developments in other spheres. Just as the dogmatic construct of ‘nation’, the notions of ‘race’ and ‘family’ undergo mutation. Acceptance of dual nationality and multiple identities can thus be compared with the acceptance of interracial marriage, as well as sexual minorities. On the latter two see Ball, Carlos A., ‘The Blurring of the Lines: Children and Bans on Interracial Unions and Same-Sex Marriages’, 76 *Fordham L. Rev.*, 2008, 2733. Ball writes: ‘one of the reasons why same-sex marriage is so threatening to so many is that the raising of children by same-sex couples blurs the boundaries of seemingly preexisting and static sex/gender categories in the same way that the progeny of interracial unions blur seemingly preexisting and static racial categories’ (at 2735). Just in the same vein, the existence of dual nationals undermines the ‘natural’ division of the world into nations and states.

<sup>61</sup> Rawls, John, *Political liberalism*, New York: Columbia University Press, 1993; Sandel, M., ‘Review of Political Liberalism’, 107 *Harv. L. Rev.*, 1994, 1765; Dworkin, Ronald, ‘Foundations of Liberal Equality’, in Darwall, Stephen (ed.), *Equal Freedom. Selected Tanner Lectures on Human Values*, Ann Arbor: The University of Michigan Press, 1995, 190. Joppke (2008) provides an excellent summary of the idea applying it to the context of nationality (at 534–536).

<sup>62</sup> See Falk (2000), 5.

<sup>63</sup> Joppke (2008), 534; Joppke (2003), 437.



Relying on Habermas<sup>64</sup> and Rawls,<sup>65</sup> Joppke sketches the essence of this transformation in the following way: 'in a liberal society the ties that bind can only be thin and procedural, not thick and substantive. Otherwise individuals could not be free'.<sup>66</sup> Nationality as such came to be stripped of any substantive elements, 'good' or 'bad'.

This is great news, since states no longer view themselves as being in a position to decide how their citizens are supposed to look, to behave, and to think. It is true that 'societies that lack or suppress [...] other affiliations, allowing only allegiance to the nation-state, are rightly condemned as totalitarian'.<sup>67</sup> The previously state-espoused views that a citizen should be a hard-working member of the 'Socialist community',<sup>68</sup> or a person 'of German or kindred blood',<sup>69</sup> or someone who 'by virtue of conscription [...] attain[s] and enjoy[s] the fruits of full citizenship',<sup>70</sup> or must genuinely believe in the liberal Constitution,<sup>71</sup> have become impossible. Nationality itself no longer has an ethno-cultural component, at least not legally speaking. It has been reinvented in a procedural vein, becoming merely a 'Kopplungsbegriff'<sup>72</sup> connecting a state and a person. Although not entirely gone,<sup>73</sup> the old quasi-religious and potentially chauvinistic meaning of nationality has been severely undermined.<sup>74</sup>

Proceduralisation of the idea of nationality means that lacking certain mythical characteristics of a 'good citizen' cannot cause either deprivation of nationality nor block access to naturalization, as "'abstract character" of state membership [...] is decoupled from rights and identity'.<sup>75</sup> At present,

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<sup>64</sup> Habermas, Jürgen, 'Geschichtsbewusstsein und posttraditionale Identität', in Habermas, Jürgen, *Eine Art Schadensabwicklung*, Frankfurt am Main: Suhrkamp, 1987.

<sup>65</sup> Rawls (1993); Rawls, John, 'The Idea of an Overlapping Consensus', 7 *Oxford J. Legal Stud.*, 1987, 1.

<sup>66</sup> Joppke (2008), 535.

<sup>67</sup> Martin, David, 'New Rules for Dual Nationality', in Hansen, Randall and Weil, Patrick (eds.), *Dual Nationality, Social Rights and Federal Citizenship in the U.S. and Europe*, New York/Oxford: Randall Books, 2002, 34, 39.

<sup>68</sup> Communist dictatorships remained faithful to a 'thick' substantive idea of citizenship until the last days of their existence. The Constitution of the USSR of 1977 listed 'vospitanie cheloveka kommunisticheskogo obshchestva' [molding the men of Communist society] as its main fundamental goal (Preamble). See also e.g. Eley, Geoff and Palmowski, Jan, *Citizenship and National Identity in Twentieth-Century Germany*, Stanford: Stanford University Press, 2008, 89. Interestingly, leaving your work-place early or littering in the park could be regarded as acts of dissent, as they contradicted the citizenship ideal espoused by the regime.

<sup>69</sup> Art. 2(1), The Reich Citizenship Law of September 15, 1935, available at <<http://frank.mtsu.edu/~baustin/nurmlaw2.html>>.

<sup>70</sup> Murray, Melissa, 'When War Is Work: The B.I. Bill, Citizenship, and the Civic Generation', 96 *Cal. L. Rev.*, 2008, 967, 996.

<sup>71</sup> The German Federal Constitutional Court ruled that citizens are 'legally not required to personally share the values of the Constitution': Joppke (2008), 542. To find otherwise would be in contradiction with the very rationale of a contemporary liberal state.

<sup>72</sup> de Groot, Gérard-René, *Staatsangehörigkeitsrecht im Wandel*, Cologne: Carl Heymanns Verlag, 1989, 5 (as quoted in Joppke (2003), 433). See also Makarov, Aleksander, *Allgemeine Lehren des Staatsangehörigkeitsrechts*, Stuttgart: Kohlhammer, 1947.

<sup>73</sup> According to Fukuyama, '[N]ational identities in Europe, compared with those in the Americas, remain far more blood and soil based, accessible only to those ethnic groups who initially populated the country': Fukuyama, Francis, 'Identity, Immigration, and Liberal Democracy', 17 *J. Democracy*, 2006, 5, 14.

<sup>74</sup> There is a huge literature on the negative impacts of globalization on citizenship and the nation state: Bosniak, Linda, 'Citizenship Denationalized', 7 *Ind. J. Global Legal Stud.*, 2000, 447. See also Kuisma, Mikko, 'Rights or Privileges? The Challenge of Globalization to the Values of Citizenship', 12 *Citizenship Stud.*, 2008, 613; Wolf, Martin, 'Will the Nation-State Survive Globalization?', 81 *Foreign Aff.*, 2001, 178; Falk (2000); Rubinstein, Kim, and Adler, Daniel, 'International Citizenship: The Future of Nationality in a Globalised World', 7 *Ind. J. Global Legal Stud.*, 2000, 519; Lipschutz, Ronnie D., 'Members Only? Citizenship and Civic Virtue in a Time of Globalization', 36 *Int'l Politics*, 1999, 203.

<sup>75</sup> Joppke (2003), 433.

‘there seems to be a general consensus that everyone is entitled to change his nationality’,<sup>76</sup> as well as possess dual or multiple nationality. Equally connected with the abstract character of contemporary state membership is the idea of fairness of the potential comparisons between citizens by birth and to-be-citizens by naturalization: asking the latter to be smarter, richer or better looking (as far as the state can judge) while simply embracing the former would not be entirely correct it seems.<sup>77</sup>

States are bound to accept social realities, which necessarily entails acknowledging the differences between citizens, as well as welcoming as citizens the residents who do not think, act or look like the majority: the reasoning lying at the core of the liberal-democratic ideal espoused, at least in theory, by the majority of non-totalitarian states. In the words of Carens,

At the heart of the liberal democratic conception of politics is the notion that the state exists for the sake of the members of society, and that the fundamental interests of some members should not be sacrificed even if a majority would find that to their advantage. What makes a person a member of society with these kinds of claims against the state cannot depend on the state’s own categories and practices. It depends instead on the social facts.<sup>78</sup>

As a consequence, when liberal democracies refer to ‘being one of us’, their ‘particularism’ is necessarily bound to stop at the restatement of liberal values: there is no more such a thing, legally speaking, as differences between ‘Britishness’, ‘Frenchness’, ‘Danishness’ etc.,<sup>79</sup> as ‘the national particularisms which immigrants and ethnic minorities are asked to accept across European states, are but local versions of the universalistic idiom of liberal democracy’,<sup>80</sup> making the logic of ‘naturalisation’ for new-comers somewhat outdated if not totally misplaced.<sup>81</sup> This does not mean, however, that the states have stopped using the quasi-messianic rhetoric of national ‘specificity’.<sup>82</sup> Interestingly, as Weiler has compellingly demonstrated, the same applies, too, to the very idea of national *constitutional* specificity, which the Member States often embark on ‘protecting’ (rhetorically at least).<sup>83</sup>

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<sup>76</sup> Chan (1991), 8. For the accounts of this transformation see e.g. Brøndsted Sejersen, Tanja, ‘“I Vow to Thee My Countries” – The Expansion of Dual Citizenship in the 21<sup>st</sup> Century’, 42 *Int’l Migration Rev.*, 2008, 523; Sassen, Saskia, ‘The Repositioning of Citizenship and Alienage: Emergent Subjects and Spaces for Politics’, in Bodeman, Michal Y. and Yurdakul. Gökçe (eds.), *Migration, Citizenship, Ethnos*, Basingstoke: Palgrave Macmillan, 2006, 13; s Howard (2005), 700 *et seq.*; Hansen, Randall and Weil, Patrick, ‘Dual Citizenship in the Changed World: Immigration, Gender and Social Rights’, in Hansen, Randall and Weil, Patrick (eds.), *Dual Nationality, Social Rights and Federal Citizenship in the U.S. and Europe*, New York/ Oxford, Berghahn Books, 2002, 1; Zolberg, Aristide R., ‘The Dawn of Cosmopolitan Denizenship’, 7 *Ind. J. Global Legal Stud.*, 2000, 511; Rubinstein, Kim, ‘Citizenship in a Borderless World’, in Angie, Antony and Sturgess, Garry (eds.), *Legal Visions of the 21<sup>st</sup> Century: Essays in Honour of Judge Christopher Weeramantry*, The Hague: Kluwer Law International, 1998, 183.

<sup>77</sup> Joppke (2003), 433, citing Makarov (1947), 32 and de Groot (1989), 258.

<sup>78</sup> Carens (2002), 100, 110.

<sup>79</sup> Joppke (2008), 536–542.

<sup>80</sup> *Id.*, 541.

<sup>81</sup> For an outstanding account see Kostakopoulou (2003); Kostakopoulou, Theodora, ‘Thick, Thin and Thinner Patriotisms: In This all There Is?’, 26 *Oxford J. Legal Stud.*, 2006, 73, 88–95. Also see her remarkable book Kostakopoulou, Theodora, *The Future Governance of Citizenship*, Cambridge: CUP, 2008.

<sup>82</sup> Where liberal states choose to pretend that there *are* fundamental cultural differences between them and go beyond language testing in their integration policies for the ‘new-comers’, they usually end up embarrassing themselves, as the tests they set which are sold as examining specific cultural features of a particular nation focus on the rules for filling-in forms and polite communication with the neighbours. For a sample Dutch culture test with which the author was confronted see <<http://docs.google.com/fileview?id=0B-z6p7DEIfUvNmZjNWQwMzgtNzM2OC00ZTIwLTgxNzltODAxNzVjMjRjNWRI&hl=en>>. For the description of the complexity of the Dutch ‘integration’ policy see van Oers, Ricky, de Hart, Betty and Groenendijk, Kees, ‘Country Report: The Netherlands’ *EUDO Citizenship Observatory RSC Paper*, EUI, 2009.

<sup>83</sup> Weiler (2005), 16, 17. Although ‘protecting national identity by insisting on constitutional specificity is *à la mode*’ (at 16), ‘constitutional texts in our different policies, especially when it comes to human rights, are remarkably similar’ (at

Anyway, 'a sense of belonging to community develops with inclusion in society and politics, rather than as a result of citizenship ceremonies and language proficiency tests'.<sup>84</sup> Once the dream of monocultural national unity faded, it became impossible to deny the possibility of different coexisting levels of identity in the populace, if not in one person,<sup>85</sup> which brought about the critical reassessment of constitutionalism, an idea building – whether we want it or not – on the assumptions of monocultural nationalism.<sup>86</sup>

### ***c. Erosion of the 'container theory of society'***

As a result of the proliferation of international migration and liberal human rights-oriented states, nationality, besides becoming merely a procedural connection, is being detached both from the idea of territory and from the idea of culturally and ethnically homogeneous national community – both being necessary components of 'what a state essentially is'.<sup>87</sup> The mutation of nationality is thus rooted in the binary nature of states: both territorial and *Volk*-based units.<sup>88</sup>

Joppke describes the recent dynamics in terms of the simultaneous de and re-ethnicization of nationality.<sup>89</sup> The former refers to the acceptance of naturalization and immigration, which are not based on the idea of assimilation,<sup>90</sup> resulting in the proliferation of diverse ethnic and cultural communities within states – a situation impossible in the modern world of homogeneous nations.<sup>91</sup> The latter refers to the increasing willingness of states to confer citizenship on the offspring of nationals who left the territory. In recent decades the majority of European states have moved in both opposing directions described, which has resulted in a process of 'de-territorialization of politics',<sup>92</sup> and, naturally, of states.<sup>93</sup>

With the growth of international migration in the liberal context, where states are bound to exercise self-restraint in nation-building, it became apparent that 'the paradigm of societies organised within the framework of the nation-state inevitably loses contact with reality'.<sup>94</sup> With the rise of human rights ideology and the proceduralisation of nationality, the array of exclusive entitlements which nationality would bring weakens, as the deprivation of rights on the ground of not being a citizen becomes more difficult to explain and justify.<sup>95</sup> Consequently, a number of key social and some political rights

(Contd.) \_\_\_\_\_

17). Consequently, 'defending the constitutional identity of the state and its core values turns out in many cases to be a defence of some hermeneutic foible adopted by five judges voting against four' (*Id.*).

<sup>84</sup> Kostakopoulou (2006), 73.

<sup>85</sup> Kymlicka, Will, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Oxford: Clarendon Press, 1995.

<sup>86</sup> Tully (1995). See especially Chapter 3: 'The historical formation of modern constitutionalism: An empire of uniformity', at 59–98.

<sup>87</sup> Joppke (2003), 431.

<sup>88</sup> *Id.*, 443, 454.

<sup>89</sup> *Id.*, 430.

<sup>90</sup> France is the only Western democracy preserving a reference to assimilation on its books: Joppke (2003), 440. See also Lagarde, Paul, *La nationalité française*, Paris: Dalloz, 1997, 131.

<sup>91</sup> In Europe, even Turkey and Germany are leaning towards being less archaic in this regard.

<sup>92</sup> Council of Europe, 'Links between Europeans Living abroad and Their Countries of Origin', Doc. 8339, 1999, 30.

<sup>93</sup> Non-resident citizens acquired political rights in the context of this transformation. For analysis within the context of the EU see Kochenov, Dimitry, 'Free Movement and Participation in the Parliamentary Elections in the Member State of Nationality: An Ignored Link?', 16 *Maastricht J. Eur. & Comp. L.*, 2009, 197 (and the literature cited therein).

<sup>94</sup> Beck (2000), 80.

<sup>95</sup> See in this respect *inter alia* ECt.HR *Gaygusuz v. Austria* [1996] Appl. No. 17371/90.

previously associated with the idea of ‘belonging to a nation’, came to be connected with residence only,<sup>96</sup> watering down citizen-foreigner dichotomies.<sup>97</sup>

Today, national borders are genuinely irrelevant for increasing numbers of people in planning their lives. This makes it difficult, if not impossible, wholeheartedly to embrace the fictions taught to our great-grand fathers by the public school systems of the day in the expression of a reality masterfully exposed by Renan: ‘l’oubli, et [...] l’erreur historique, sont un facteur essentiel de la création d’une nation’.<sup>98</sup> School curricular research in the Western world demonstrates that the idea of national glory – the cornerstone of the school programs of the past – is being supplanted.<sup>99</sup>

It is possible to envisage a future where ‘container theory of society’<sup>100</sup> is totally undermined and the insider/outsider dichotomy fails.<sup>101</sup> The de-territorialisation of states and societies and the failing links between nationality on the one hand and particular culture and identity on the other call into question the whole construct of the world as we know it, leading to the ‘second age of modernity’<sup>102</sup> marked by society and law beyond states.<sup>103</sup> Through the growing importance of EU citizenship, which does not know any *dēmos* and is not based on any particular identity or any bias of national ‘specificity’, European integration exemplifies how near such future can be.

## II. Nationality in EU Context: Diminishing in Importance Amplified

### a. European citizenship taking over?

The normative foreigner-citizen dichotomy questioned at the world scale<sup>104</sup> is just short of being eliminated in the EU with regard to the nationals of the Member States. Even before the formal introduction of the concept of European citizenship by the Treaty of Maastricht, the likely depth of influence of the European integration project on the nationalities of the Member States was

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<sup>96</sup> Maillard (2008); Davies (2005).

<sup>97</sup> Schuck, Peter H., *Citizens, Strangers, and In-betweens: Essays on Immigration and Citizenship*, New York: Westview Press, 2000.

<sup>98</sup> Renan, 1992, 41.

<sup>99</sup> Joppke (2008), 537 (and literature cited therein).

<sup>100</sup> For an excellent explanation of the differences in internal and external functioning of States leading to the separation between ‘societies’ see Allott (1991), 2491: ‘[There was] an internal life of society which, put in ideal theoretical terms, could be labelled a rationalist-progressive pursuit of ever-increasing well-being for all the people in accordance with a given society’s highest values. And there also was an external life of society, seeking the well-being of the state by any means and at anyone’s expense. And the reality of the relation of the European states over recent centuries reflected the theoretical structure: intrinsically unstable and conflicting, occasionally life-threatening on a very grand scale’. See also Blank, Yishai, ‘Why Citizenship?’ 8 *Theoretical Inquiries in Law*, 2007, 411, 414.

<sup>101</sup> For the analysis of relevant literature see Calavita, Kitty, ‘Law, Citizenship, and the Construction of (Some) Immigrant “Others”’, 30 *Law & Soc. Inquiry*, 2005, 401, 405–409.

<sup>102</sup> Beck, Ulrich, ‘The Cosmopolitan Perspective: Sociology of the Second Age of Modernity’, 51 *British Journal of Sociology*, 2000, 79.

<sup>103</sup> See Allott, Philip, *The Health of Nations: Society and Law beyond the State*, Cambridge: Cambridge University Press, 2002. It is reasonable to agree with Bosniak in this context, who cautions against interpreting the proliferation of multiple nationality as ‘postnationality’: the states, however reinvented and stripped of their former exclusivity, are here to stay: Bosniak, Linda, ‘Multiple Nationality and the Postnational Transformation of Citizenship’, 42 *Va. J. Int’l L.*, 2002, 979.

<sup>104</sup> Brøndsted Sejersen (2008), 524. The signs to this erosion are not only seen in the equality of legally resident foreigners with citizens in the majority of spheres ranging from non-discrimination to social security. Recent decisions of international tribunals also demonstrated that the international human rights protection regime can stand on the way of the use by states of the previously unconditional right to deport an alien. See e.g. ECt.HR *Beldjoudi v. France* [1992] Appl. No. 12083/86. *Stewart v. Canada*, U.N. Doc. CCPR/C/58D/538/1993. See also Kochenov (2009) ‘*Ius Tractum*’, 175–181.

apparent.<sup>105</sup> It is now being constantly amplified, empowering EU citizens and articulating the position of third-country nationals as the losers in integration.

At present, European citizenship grants individuals in possession of this status a constantly growing number of rights, the majority of which were previously associated with state nationalities alone. These rights touch upon the core of the understanding of citizenship, moving a number of areas of regulation previously considered to belong to the vital core of national sovereignty away from the jurisdiction of the Member States, handing them over to the EU. These rights include, first of all, the right to enter a state territory and the right to remain, accompanied by the right to work, open a business and be accompanied by your family of any nationality.<sup>106</sup> A classical understanding of nationality would reserve this block of rights to nationals alone.<sup>107</sup> Another, equally important right concerns non-discrimination on the basis of nationality within the material scope of the application of EU law established by *lex generalis* Article 18 TFEU and a number of *lex specialis* instruments.<sup>108</sup> Just as in the case of the previous example, a classical understanding of nationality would make these rights available uniquely to home nationals.<sup>109</sup>

Article 22 TFEU [19 EC] extends the application of the logic of non-discrimination on the basis of nationality to the sphere of political participation rights, providing for rights to vote and run for office for all EU citizens legally resident in Member States other than their own on an equal basis with

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<sup>105</sup> Cansacchi, G., 'La cittadinanza comunitaria e i diritti fondamentali dell'uomo', in *Studi in onore di G. Sperduti*, Milano: Gioffrè, 1984, 435; Evans, Andrew C., 'European Citizenship', 45 *Mod. L. Rev.* 5, 1982, 497; van den Berghe, Guido and Huber, Christian H., 'European Citizenship', in Bieber, Roland and Nickel, Dietmar (eds.), *Das Europa der zweiten Generation: Gedächtnisschrift für Christoph Sasse*, Vol. II, Kehl am Rhein: N.P. Engel Verlag, 1981, 755; Sica, Mario, *Verso la cittadinanza europea*, Florence: Le Monnier, 1979; Lord Mackenzie Stuart, 'Recent Trends in the Decisions of the European Court: Towards the Creation of a Community Citizenship', 21 *J.L. Soc. Scotland*, 1976, 40.

<sup>106</sup> Case C-127/08 *Metock v. Minister for Justice, Equality and Law Reform* [2008] ECR I-6241. For a very concise overview see Kochenov (2009) '*Ius Tractum*', 194–197 (and the literature cited therein). See also Hammamoun Saïd and Neuwahl, Nannette, 'Le droit de séjour du conjoint non communautaire d'un citoyen de l'Union dans le cadre de la directive 2004/38', 45 *Revue trimestrielle de droit européen*, 2009, 99; Kochenov, Dimitry, 'On Options of Citizens and Moral Choices of States: Gays and European Federalism', 33 *Fordham. J. Int'l L.*, 2009, 156.

<sup>107</sup> Sometimes even the nationals do not enjoy such right: Lester, Anthony (Lord Lester of Herne Hill QC), 'East African Asians Versus the United Kingdom: The Inside Story', lecture of 23 October 2003, available at <[http://www.blackstonechambers.com/pdfFiles/Blackstone\\_APL\\_East%20African%20Asians.pdf](http://www.blackstonechambers.com/pdfFiles/Blackstone_APL_East%20African%20Asians.pdf)>.

<sup>108</sup> E.g. Art. 45 TFEU [39 EC]; Art. 49 TFEU [43 EC]. For assessment see Davies, Gareth, *Nationality Discrimination in the European Internal Market*, The Hague: Kluwer Law International, 2003.

<sup>109</sup> In line with the traditionalist reading of the scope of EU law entitlements the ECJ refuses to apply Art. 18 TFEU to third-country nationals, notwithstanding the non-restrictive wording of the provision. For criticism see Kochenov (2009) '*Ius Tractum*', 206–209; Boeles, Peter, 'Europese burgers en derdelanders: Wat betekent het verbod van discriminatie naar nationaliteit sinds Amsterdam?', *Sociaal-economische wetgeving*, no. 12, 2005, 502; Epiney, Astrid, 'The Scope of Article 12 EC: Some Remarks on the Influence of European Citizenship', 13 *Eur. L.J.*, 2007, 611, esp. fn 4 at page 612, listing the recent case-law of the ECJ most relevant for the interpretation of Art. 18 TFEU. See also Hublet, Chloé, 'The Scope of Article 12 of the Treaty of the European Communities *vis-à-vis* Third-Country Nationals: Evolution at Last?', 15 *Eur. L.J.*, 2009, 757.

locals.<sup>110</sup> Two levels of political representation are covered: local elections<sup>111</sup> and EP elections.<sup>112</sup> The national, most important, level of political representation is a glaring omission in this context.<sup>113</sup>

Providing access to ‘rights ... provided for in the Treaties’,<sup>114</sup> EU citizenship effectively takes over the vital substance of rights and entitlements popularly associated with nationality. Viewed in this context, Closa’s claim that ‘citizenship of the Union adds new rights to those enjoyed by nationals from Member States without this implying currently any meaningful derogation of nationality’<sup>115</sup> no longer appears to reflect reality. While nationalities remain present, the addition of EU citizenship has simply dwarfed them in importance.

The possible limitations of EU citizenship rights are interpreted by the ECJ very strictly.<sup>116</sup> Practically speaking, the Member States are not given any possibility to abuse the grounds for derogations provided for in the Treaty.<sup>117</sup> Moreover, even in situations where the Member States do not rely on derogations, their ability to undermine the rights of EU citizens is minimised by the ECJ. The Court has made it clear that Article 21 TFEU [18 EC], granting EU citizens a general free movement right, although allowing for derogations,<sup>118</sup> cannot give rise to secondary legislation which would, if applied strictly, undermine the provision itself.<sup>119</sup> In practice, it means that the Court is bound to interpret the relevant secondary law<sup>120</sup> in constant adherence to the principles established by Part II TFEU [II EC] dealing with European citizenship. This approach has resulted in the substantial growth in importance of the status of EU citizenship<sup>121</sup> and has limited the Member States’ ability to

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<sup>110</sup> Shaw, Jo, *The Transformation of Citizenship in the European Union*, Cambridge: CUP, 2007. See also Kochenov (2009) ‘*Ius Tractum*’, 197–205; Day, Stephen and Shaw, Jo, ‘Implementing Union Citizenship: The Case of Alien Suffrage and the European Union’, undated conference paper, available at <<http://www.arena.uio.no/events/papers/Shaw.pdf>>; Zincone, Giovanna and Ardo vino, Simona, ‘I diritti elettorali dei migranti nello spazio politico e giuridico europeo’, 5 *Le istituzioni del federalismo*, 2004, 741; Shaw, Jo, ‘Alien Suffrage in the European Union’, 12 *The Good Society* 2, 2003, 29; Day, Stephen and Shaw, Jo, ‘European Union Electoral Rights and the Political Participation of Migrants in Host Policies’, 8 *Int. J. Popul. Geogr.*, 2002, 183.

<sup>111</sup> Art. 22(1) TFEU [19(1) EC], Directive 94/80/EC, *OJ* L368/38, 1994, as amended. Analyzed by Shaw (2007), 142–153.

<sup>112</sup> Directive 93/109/EC, *OJ* L329/34, 1993.

<sup>113</sup> For analysis see Kochenov (2009) ‘Free Movement’. Evans (1991) has rightly underlined that this state of affairs is not entirely logical, as the national level elections are the most consequential also for the EU legal order, affecting the formation of the Council (at 194).

<sup>114</sup> Art. 20(2) TFEU [17(1) EC].

<sup>115</sup> Closa, Carlos, ‘Citizenship of the Union and Nationality of Member States’, 32 *Common Mrkt. L. Rev.*, 1995, 487.

<sup>116</sup> E.g. Joined cases C-482 and 493/01 *Georgios Orfanopoulos et al. and Raffaele Oliveri v. Land Baden-Württemberg* [2004] ECR I-5257; Case 149/79 *Commission v. Belgium* [1981] ECR 3881.

<sup>117</sup> Arts. 45(3) and (4) TFEU [39(3) and (4)]; 52(1) TFEU [46(1) EC]; 62 TFEU [55 EC], and the relevant Secondary law. Among the grounds are public policy, security, health and employment in the public sphere.

<sup>118</sup> Art. 20(1) TFEU [18(1) EC]. For the assessment of the clause of Art. 20 TFEU which allows for limitations of the right see Davies (2003), 188.

<sup>119</sup> E.g. Case C-456/02 *Michel Trojani v. Centre publique de l’aide sociale de Bruxelles (CPAS)* [2004] ECR I-7573; Case C-209/03 *R. (on the application of Danny Bidar) v. London Borough of Ealing, Secretary of State for Education and Skills* [2005] ECR I-2119; Case C-184/99 *Rudy Grzelczyk v. le Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve* [2001] ECR I-6193. See also Spaventa (2008); Gastaldi, Silvia, ‘L’égali té de traitement au service de la citoyenneté européenne’, in Chappuis, Christine, Foëx, Bénédict and Kadner Graziano, Thomas (eds.), *L’harmonisation internationale du droit*, Zürich: Schulthess, 2007, 326, 342–344; de Waele, H., ‘Europees burgerschap en studiefinanciering: Nieuwe rechten, nieuwe beperkingen na het arrest Bidar’, *Nederlands tijdschrift voor Europees recht* no. 6, 2005, 122.

<sup>120</sup> Esp. Directive 2004/38/EC, *OJ* L58/77, 2004.

<sup>121</sup> Jacobs, Francis G., ‘Citizenship of the European Union – A Legal Analysis’, 13 *Eur. L.J.*, 2007, 591; Elsmore and Starup (2007), 77–89; Kokott, Juliane, ‘EU Citizenship – *citoyens sans frontières?*’, Durham European Law Lecture, 2005, available at <[http://www.dur.ac.uk/resources/deli/annuallecture/2005\\_DELI\\_Lecture.pdf](http://www.dur.ac.uk/resources/deli/annuallecture/2005_DELI_Lecture.pdf)>.

act in the cases when they seemingly 'enforce the law'.<sup>122</sup> Consequently, EU citizens cannot be automatically deported from their new Member State of residence upon failing to demonstrate compliance with the provisions of secondary law,<sup>123</sup> as the requirement to have sufficient resources is interpreted in such a way that the Member States are not permitted to actually check how much money EU citizens have.<sup>124</sup> Permanent banishment of an EU citizen from a particular Member State is prohibited.<sup>125</sup> Even more importantly, once residence in a new Member State is established,<sup>126</sup> non-discrimination on the basis of nationality applies to EU citizens even in the cases where they objectively fail to meet the minimal requirements of secondary law necessary to establish residence at the moment of the dispute.<sup>127</sup>

The pro-citizenship position embraced by the Court ensured that the Member States are not legally able<sup>128</sup> to deprive EU citizens of their rights using either Treaty derogations or the 'strict application' of secondary EU law as a pretext. EU citizenship status can also be used against one's own Member State of nationality,<sup>129</sup> as the introduction of obstacles to free movement of persons, even non-discriminatory ones, is prohibited in EU law.<sup>130</sup> The goal-oriented reading of the relevant EU law instruments prevails. In practice, this means that the free movement right is effectively nearly absolute – to depart from it, the Member States need to be able to demonstrate compelling reasons.

All this has deprived the Member States of the ability to decide who will reside and work in their territory, who should be sent away, and – which is probably more painful for some – has placed Member States in a position where privileging their own nationals *vis-à-vis* other EU citizens is illegal.

Moreover, as far as citizenship 'duties' are concerned,<sup>131</sup> Member States are powerless before the EU, as any duties they might wish to attach to their nationalities are by definition unable to undermine

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<sup>122</sup> As what occurred in *Bidar* for instance: Case C-209/03 *Bidar* [2005] ECR I-2119. This consideration holds also when no discrimination on the basis of nationality can be observed: e.g. Case C-353/06 *Stefan Grunkin and Dorothee Regina Paul* [2008] ECR I-7639.

<sup>123</sup> Case C-408/03 *Commission v. Belgium* [2006] ECR I-2647, para. 72.

<sup>124</sup> Art. 8(4) Directive 2004/38; Case C-408/03 *Commission v. Belgium* [2006] ECR I-2647.

<sup>125</sup> Case C-348/96 *Criminal proceedings against Donatella Calfa* [1999] ECR I-11. Obviously, it would have been a clear violation of Art. 18 TFEU to allow the banishment, as the Member States are not free to banish their own citizens from their territory.

<sup>126</sup> To which end a residence permit is issued, which is not strictly necessary, as the right emerges from the Treaties directly: Case 157/79 *R. v. Stanislaus Pieck* [1980] ECR 2171; Joined Cases 389 and 390/87 *G.B.C. Echernach and A. Moritz v. Minister van Onderwijs en Wetenschappen* [1990] ECR 723.

<sup>127</sup> E.g. Case C-456/02 *Trojani v. CPAS* [2004] ECR I-7573. The Court underlined that to rely on Art. 12 EC [18 TFEU] a residence permit is enough (para. 43).

<sup>128</sup> Member States sometimes deviate from the norms of the law. See e.g. See European Roma Rights Centre, *Security a la Italiana: Fingerprinting, Extreme Violence and Harassment of Roma in Italy, Budapest*: ERRC 2008, available at <<http://www.errc.org/db/03/4D/m0000034D.pdf>>.

<sup>129</sup> This is possible also in the territories lying outside the scope *ratione loci* of EU law: Case C-300/04 *M.G. Eman and O.B. Sevinger v. College van Burgemeester en Wethouders van Den Haag* [2006] ECR I-8055. For analysis see Kochenov, Dimitry, 'The Impact of European Citizenship on the Association of the Overseas Countries and Territories with the European Community', 36 *Legal Issues of Economic Integration*, 2009, 239; Kochenov, Dimitry, 'Regional Citizenships and EU Law: The Cases of the Åland Islands and New Caledonia', *Eur. L.Rev.*, 2010 (forthcoming).

<sup>130</sup> Case C-192/05 *K. Tas-Hagen en R.A. Tas v. Raadskamer WUBO van de Pensioen- en Uitkeringsraad* [2006] ECR I-10451. Besides, turning EU citizenship against your Member State of nationality is also possible by EU citizens falling within the scope of EU law: Case C-224/98 *Marie-Nathalie D'Hoop v. Office national d'emploi* [2002] ECR I-1691; Case C-353/06 *Stefan Grunkin and Dorothee Regina Paul* [2008] ECR I-7639.

<sup>131</sup> To claim, as Condinazzi *et al.* do, that 'the absence of any list of duties means that ... Union citizenship is an imperfect ... and ... unsatisfactory concept' seems to misunderstand the essence of citizenship as a libertarian and empowering concept completely: Condinazzi, Massimo, Lang, Alessandra, and Nascimbene, Bruno, *Citizenship of the Union and Free Movement of Persons*, Leiden/ Boston: Martinus Nijhoff, 2008, 19.

EU citizens' ability to make use of the fundamental freedoms of the Treaties. This is so because the two legal orders in question find themselves related by simple subordination (legalistically speaking at least).<sup>132</sup> In cases of conflict between the national law of the Member States and EU law, EU law prevails.<sup>133</sup> Since states cannot attach duties to their nationalities by way of applying EU law, whatever citizenship duties they invent, the application of such duties is no longer absolute, diminishing their grip on the nationals even further. Practically speaking, this means that any Greek unwilling to serve in the army (which is one of the duties of male Greek nationals) should simply move to a different Member State, using EU citizenship rights.<sup>134</sup> The same applies to a Belgian not willing to vote (voting is a citizenship duty in that Kingdom). Consequently, EU citizens falling within the scope of EU law are protected by the EU from the irrational demands of their Member States, sold by official propaganda as sacred attributes of nationality.<sup>135</sup> Consequently, an answer to the question 'what will happen if the allegiance to the Union comes into conflict with the allegiance to our country?', once raised in the House of Lords,<sup>136</sup> is clear.

### **b. What is left of the Member States' nationalities?**

Given the current state of development of European integration, the question that naturally arises is what is actually left of the nationalities of the Member States? Davies' answer is clear: 'abolished'.<sup>137</sup> While it is difficult to disagree with this position in general, it is necessary to take into account the diverse range of legal situations where the possession of a particular Member State's nationality plays a role.

#### **b.1. Possession of a particular Member State's nationality: positive effects**

Possession of a particular Member State's nationality has positive legal consequences for European citizens primarily in three cases. Firstly, and most importantly, it carries with it an entitlement to vote and stand for election at the national level of political representation. Secondly, it qualifies the possessor for work in public service<sup>138</sup> in derogation from the non-discrimination principle of Article 45 TFEU [39 EC].<sup>139</sup> The ECJ interprets this derogation narrowly, meaning that the majority of jobs within the state administration at different levels are not reserved to EU citizens possessing particular nationalities.<sup>140</sup> Thirdly, the nationality of a particular Member State theoretically provides the owner of this status with unconditional access to the territory of the Member State in question.<sup>141</sup> The latter is

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<sup>132</sup> Bruno de Witte, 'Direct Effect, Supremacy, and the Nature of the Legal Order', in Craig, Pail and de Búrca, Gráinne (eds.) *The Evolution of EU Law*, 1999, 177.

<sup>133</sup> This is confirmed by an infinite amount of case-law, starting with Case 6/64 *Flaminio Costa v. E.N.E.L.* [1964] ECR 585. For the whole story see e.g. de Witte (1999), *passim*.

<sup>134</sup> For an indirect confirmation see Case C-376/89 *Panagiotis Giagounidis v. Stadt Reutlingen* [1991] ECR I-1069.

<sup>135</sup> Kochenov (2009) '*Ius Tractum*', 215.

<sup>136</sup> Maas (2007), 58.

<sup>137</sup> Davies (2005), 55.

<sup>138</sup> Art. 45(4) TFEU [39(4) EC].

<sup>139</sup> Art. 45(2) TFEU [39(2) EC].

<sup>140</sup> See e.g. Case 149/79 *Commission v. Belgium* [1980] ECR 3881 (interim judgement) and [1982] ECR 1845; Case C-473/93 *Commission v. Luxembourg* [1996] ECR I-3207; Case C-173/94 *Commission v. Belgium* [1996] ECR I-3265; Case C-290/94 *Commission v. Greece* [1996] ECR I-3285; Case 307/84 *Commission v. France* [1986] ECR 1725; Case 225/85 *Commission v. Italy* [1987] ECR 2625. For analysis see Beenen, Nanda, *Citizenship, Nationality and Access to Public Service Employment*, Groningen: Europa Law, 2001.

<sup>141</sup> This is so since the Member States cannot apply TFEU derogations referring to public health, security and policy to their own citizens exercising free movement rights. When they do apply these derogations to EU citizens, they are bound by Chapter IV of Directive 2004/38, which severely limits the possible use of such derogations. The strictness of



an almost fictitious right at present, as the borders between the Member States do not exist for EU citizens and, in the majority of cases, are not physically present either.<sup>142</sup> Adding to the fictitious character of this right, there are the obligations assumed by the Member States under the law of what was, until recently, the Third Pillar of the EU. Unconditional access to the territory does not mean, for instance, that a territory of a Member State can become a safe haven for a national who has committed a serious crime elsewhere in the Union. Neither does it mean that the Member State of nationality can protect its nationals from extradition to other EU Member States. The European Arrest Warrant<sup>143</sup> is thus yet another sign of the general trend towards erosion of nationality in the EU.<sup>144</sup>

Political inclusion at the national level, civil service employment and the unconditional right to cross a non-existent border are positive rights attached to each Member State's nationality. They potentially empower individuals possessing a particular nationality notwithstanding (and obviously in a legalised breach of) the equality rationale of Article 18 TFEU and the spirit of the Treaties.

#### b.2. Possession of a particular Member State's nationality: negative effects

There is also a possible negative side to possessing a particular Member State's nationality. Member States' nationalities have the potential to undermine the rights of their owners. This paradoxical situation is a direct consequence of one of the main functions of Member States' nationality in EU law: Member State nationality has the potential to activate reverse discrimination.<sup>145</sup> Only those in possession of the nationality of the Member State of residence can legally be discriminated against in the EU, as the possession of the status of EU citizen alone is not enough, according to the ECJ, in order to fall within the scope *ratione materiae* of EU law.<sup>146</sup> Consequently, while discrimination on the basis of nationality is outlawed in the situations covered by the Treaty,<sup>147</sup> it is legal outside the Treaty's scope even when EU citizens suffer from it.<sup>148</sup>

The Court has done a lot in order to remedy this drawback inherent in the law in force.<sup>149</sup> At present it is no longer necessary to cross borders, for instance, in order to fall within the scope of EU

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interpretation of the grounds for derogations listed in Art. 27 of Directive 2004/38, they are sometimes abused. Consider for instance the banning of Geert Wilders, a Dutch MP, from entering the UK to attend a screening of his propaganda film at the House of Lords: <[http://topics.nytimes.com/top/reference/timestopics/people/w/geert\\_wilders/index.html](http://topics.nytimes.com/top/reference/timestopics/people/w/geert_wilders/index.html)>. Given that Geert Wilders sued, it is obvious that the UK will lose the case in front of the ECJ in this regard.

<sup>142</sup> Even where the border is present, the officers are not even entitled to ask EU citizens any question with regard to the purpose and anticipated length of their stay: Case C-68/89 *Commission v. The Netherlands* [1991] ECR I-2637, para. 16.

<sup>143</sup> Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member, OJ L190/1, 2002.

<sup>144</sup> This was clearly sensed by a number of the Constitutional courts of the Member States. On the Arrest Warrant saga see e.g. Pollicino, Oreste, 'European Arrest Warrant and Constitutional Principles of the Member States: A Case Law-Based Outline in the Attempt to Strike the Right Balance between Interacting Legal Systems', 9 *German L.J.*, 2008, 1313; Siegel, Scott, Courts and Compliance in the European Union: The European Arrest Warrant in National Constitutional Courts, *Jean Monnet Working Paper* No. 05/08, 2008.

<sup>145</sup> See also Nic Shuibhne, Niamh, 'The European Union and Fundamental Rights: Well in Spirit but Considerably Rumpled in Body?', in Beaumont, Paul, Lyons, Carole, and Walker, Neil (eds.), *Convergence and Divergence in European Public Law*, Oxford: Hart, 2002, 177, 188.

<sup>146</sup> Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] ECR I-3171, para. 23; Case C-148/02 *Garcia Avello* [2003] ECR I-11613: 'citizenship of the Union, established by Article 17 EC [20 TFEU], is not intended to extend the material scope of the Treaty to internal situations which have no link with Community law' (para. 26).

<sup>147</sup> Art. 18 TFEU.

<sup>148</sup> E.g. Joined cases C-35/82 *Elestina Esselina Christina Morson v. State of the Netherlands and Head of the Plaatselijke Politie within the meaning of the Vreemdelingenwet* and C-36/82 *Sweradje Jhanjan v. The Netherlands* [1982] ECR 3723.

<sup>149</sup> For analysis see Tryfonidou (2009), 63–126; Dautricourt, Camille, 'Reverse Discrimination and Free Movement of Persons under Community Law: All for Ulysses, Nothing for Penelope?', 34 *Eur. L.Rev.*, 2009, 433; Van Elsuwege,

law and thus benefit from the non-discrimination principle.<sup>150</sup> Possession of a second Member State's nationality helps.<sup>151</sup> Indeed, as Spaventa has masterfully demonstrated, 'any Union citizen now falls within the scope of the Treaty, without having to establish cross-border credentials'.<sup>152</sup>

Geelhoed and other eminent lawyers, including Lord Slynn, argued that little can be done to outlaw reverse discrimination in the wholly internal situations under the present Treaty regime:<sup>153</sup> even in the future, those in possession of the nationality of the Member State of residence are very much likely to be treated worse than other EU citizens residing in the same Member State. In fact, it seems that the very logic of market integration in the EU contradicts the ideal of equality inherent in the notion of citizenship,<sup>154</sup> as the non-discrimination principle of Article 18 TFEU does not have a self-standing value in connection with the status of EU citizenship, and has to be 'activated' separately from it.<sup>155</sup> Davies made a compelling demonstration of the clash between equality and market freedoms using the Services Directive<sup>156</sup> as a case study.<sup>157</sup> Regrettably, this clash covers a wide array of other issues too.<sup>158</sup>

Unlike Geelhoed, who simply takes the future legal acceptability of the wholly internal situations for granted,<sup>159</sup> subscribing to a purely dogmatic nature of reverse discrimination,<sup>160</sup> a number of scholars moved towards systemic criticism of the current state of affairs in the nationality non-

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Peter, and Adam, Stanislas, 'Situations purement internes, discriminations à rebours et collectivités autonomes après l'arrêt sur l'*Assurances Soins Flamande*', *Cahiers de droit européen*, 2008, 655, 662–678; van der Steen, I., 'Zuiver interne situaties: geen omwenteling, wel inperking', *Nederlands tijdschrift voor europees recht*, 2008, 301.

<sup>150</sup> E.g. *Case C-212/06 Government of the French Community and the Walloon Government v. Flemish Government* [2008] ECR I-1683, para 39; *Case C-403/03 Egon Schempp v. Finanzamt München V* [2005] ECR I-6421, para. 22: 'the situation of a national of a Member State who ... has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation'.

<sup>151</sup> E.g. *Case C-148/02 Carlos Garcia Avello v. Belgium* [2003] ECR I-11613.

<sup>152</sup> Spaventa (2008), 13 (emphasis in the original).

<sup>153</sup> Geelhoed, L.A., 'De vrijheid van personenverkeer en de interne situatie: maatschappelijke dynamiek en juridische rafels', in Manunza, Elisabetta and Senden, Linda (eds.), *De EU: De interstatelijkheid voorbij?*, Nijmegen: Wolf Legal Publishers, 2006, 31. Slynn, Gordon, *Introducing a European Legal Order*, London: Stevens and Sons and Maxwell, 1992, 99. This position has also been accepted by the ECJ on numerous occasions, e.g. *Case C-132/93 Volker Steen* [1994] ECR I-2715.

<sup>154</sup> See Kochenov, Dimitry, 'The Transformative Potential of the Tandem of EU Citizenship and Equality', *Jean Monnet Working Paper*, NYU Law School, 2010 (forthcoming). In general on equality see Chemerinsky, Erwin, 'In Defence of Equality: A Reply to Professor Westen', 81 *Mich. L. Rev.*, 1983, 575 (and the literature cited therein). For a US perspective: Karst, Kenneth L., 'The Supreme Court 1976 Term Foreword: Equal Citizenship under the Fourteenth Amendment', 91 *Harv. L. Rev.*, 1977, 1.

<sup>155</sup> Kochenov (2009) '*Ius Tractum*', 234.

<sup>156</sup> Directive 2006/123/EC, OJ L376/36, 2006. For analysis see Barnard, Catherine, 'Unravelling the Services Directive', 45 *Common Mrkt. L. Rev.*, 2008, 323.

<sup>157</sup> Davies (2007): 'an individual who is present in the jurisdiction but not subject to its regulation, and operating under a more beneficial regime, is a direct challenge to the content of citizenship – national or European – and its associated guarantees of equality and privilege' (at 7).

<sup>158</sup> Kochenov (2009) '*Ius Tractum*', 234.

<sup>159</sup> Geelhoed (2006): 'nee, het ziet er niet naar uit dat de "zuiver interne situatie" in het vrije verkeer van personen haar relevantie zal verliezen' (p. 47). ""

<sup>160</sup> As submitted by Tagaras: 'C'est à dire qu'il n'existe pas d'argument en faveur de la non-applicabilité des règles communautaires aux situations internes? Si, un argument essentiellement dogmatique, celui qui exclut l'application des règles de libre circulation aux situations internes par la simple considération que ces situations ne sont pas "envisagées" par le droit communautaire, en ce sens qu'elles sont en dehors de sa portée normative': Tagaras, Haris, 'Règles communautaires de libre circulation, discriminations à rebours et situations dites "purement internes"', in Dony, Marianne (ed.), *Mélanges en hommage à Michel Waelbroeck* (Vol. II), Brussels: Bruylant, 1999, 1499, 1538.

discrimination law in the EU.<sup>161</sup> The analysis provided by Tryfonidou<sup>162</sup> makes a simple but powerful point echoing Davies' plea for equality among EU citizens and the optimistic Opinions written by the Advocates General at the dawn of the citizenship era in Community law.<sup>163</sup> Agreeing with Tryfonidou, it is indeed the case that the reverse discrimination concept, pre-citizenship in nature, simply does not take EU citizenship status into account as a legally meaningful construct.<sup>164</sup> Therefore, while serving well in the context of pure economic integration, in the Union of citizens it is entirely out of place. In fact, the application of the concept effectively comes down to punishing those who do not contribute to the internal market – as they and they alone are worse off as a result of its application.<sup>165</sup> Once a *Marktbürger* is replaced by a *citoyen* (if not a human being<sup>166</sup>) the same logic is no longer applicable.<sup>167</sup> Equality is bound to come to the fore, should we use the term 'citizenship' in earnest.<sup>168</sup>

Another way to argue against reverse discrimination concerns the concept of the 'properly functioning internal market'.<sup>169</sup> If the borders between the Member States no longer exist within such a market, how can it logically be argued that some situations within it are 'internal' while others are not?<sup>170</sup> The ECJ has accepted this argument in a number of cases,<sup>171</sup> making Tryfonidou argue that 'one thing is certain: reverse discrimination is, indeed, a problem that falls within the scope of EC law'.<sup>172</sup>

Comparing the number of EU citizens who fall within the scope *ratione materiae* of EU law with the number of those who do not, the main function of the Member State nationalities in EU law connected with the activation of reverse discrimination becomes clear (statistically at least). More EU citizens stay in their own Member States, caught by reverse discrimination by virtue of possessing the

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<sup>161</sup> Tryfonidou (2009); Tryfonidou, Alina, *Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe*, 35 *Legal Issues of Econ. Integration*, 2008, 43; Nic Shuibhne, Niamh, 'Free Movement of Persons and the Wholly Internal Rule: Time to Move on?', 39 *Common Mkt. L. Rev.*, 2002, 731; Gaja, Giorgio, 'Les discriminations à rebours: un revirement souhaitable', in Dony, Marianne (ed.), *Mélanges en hommage à Michel Waelbroeck* (Vol. II), Brussels: Bruylant, 1999, 993; White, Robin C.A., 'A Fresh Look at Reverse Discrimination?', 18 *Eur. L.Rev.*, 1993, 527.

<sup>162</sup> Tryfonidou (2008), *passim*.

<sup>163</sup> See e.g. Opinion of AG Jacobs in Case C-168/91 *Christos Konstantinidis*, [1993] ECR I-1191, para. 46; Opinion of AG Léger in Case C-214/94 *Boukhalfa v. Bundesrepublik Deutschland* [1996] ECR I-2253, para. 63; Opinion of AG Ruiz-Jarabo Colomer in Joined Cases C-65&111/95 *The Queen v. Secretary for the Home Department ex parte Shingara and Radiom* [1997] ECR I-3343, para. 34. See also Kochenov, Dimitry, 'European Citizenship Concept and Enlargement of the Union', 3 *Romanian J. Pol. Sci.*, 2003, 71, 84–85.

<sup>164</sup> Tryfonidou (2009), 129–166.

<sup>165</sup> Tryfonidou (2008), 54.

<sup>166</sup> Groussot (2008), 318.

<sup>167</sup> On the rights of non-economically active EU citizens see e.g. van Nuffelen, P. and Cambien, N., 'De vrijheid van economisch niet-actieve EU-burgers om binnen de EU te reizen, te verblijven en te studeren', 62 *Sociaal economische wetgeving* 2009, 144.

<sup>168</sup> Kochenov (2009) '*Ius Tractum*', 173; Kochenov (2010) 'Transformative Potential'.

<sup>169</sup> Tryfonidou (2009), 199.

<sup>170</sup> *Id.*, 178. Tryfonidou's argument echoes that of Mortelmans, Kamiel, 'The Common Market, the Internal Market and the Single Market, What's in a Market?', 35, *Common Market L.Rev.*, 1998, 101, 136. Also see, in this regard, Opinion of Sharpston, AG in Case C-212/06 *Government of the French Community and the Walloon Government v. Flemish Government* [2008] ECR I-1683, paras. 143–144.

<sup>171</sup> See e.g. Case C-293/02 *Jersey Potatoes Marketing Organisation Ltd. v. States of Jersey and Jersey Potato Export Marketing Board* [2005] ECR I-9543; Joined cases C-363/93, C-407/93, C-409/93 and C-411/93 *Lancry SA v. Direction générale des douanes* [1994] ECR I-3957. For a thought-provoking analysis of the new approach to reverse discrimination in the recent case law of the Court see Tryfonidou (2009), 64–126.

<sup>172</sup> Tryfonidou (2009), 232.

nationality of that, not some other Member State. This is a high price to pay for the exclusive access to the ballot at the national level.

### *c. Ius tractum and the illusion of control*

In the context of the legal assessment of the Member States' nationalities in the light of EU law, it should not be forgotten that EU citizenship draws on the nationalities of the Member States, as its separate acquisition is impossible.<sup>173</sup> Precisely because EU citizenship is ultimately a secondary status, the power of the Member States is severely weakened, since while each one of them taken separately can have an illusion that it controls access to EU citizenship, taken together they do not, as long as the naturalisation regimes are not harmonised, at least to some extent. Huge disparities between the citizenship laws of all the Member States<sup>174</sup> all lead to the multiplication of the routes to acquisition of the same status of European citizenship which, as has been demonstrated above, has effectively overtaken the majority of the main attributes of nationality from the national level. In failing to regulate the issue of access to EU citizenship effectively, the Member States opted for the illusion of control rather than the resolution of outstanding problems, which include, most importantly, the need to design an effective immigration policy for the Union, while ensuring that the rights of EU citizens and third-country nationals are protected.

In a borderless Union the current approach means that more than twenty-seven ways of acquiring the same status applicable in all the Member States are in existence.<sup>175</sup> In the light of federalism's potential to enhance human rights,<sup>176</sup> the discrepancy between nationality legislation in different Member States is highly beneficial for those willing to acquire a Member State nationality and, consequently, EU citizenship.<sup>177</sup> Informed third-country nationals are free to choose the Member State where the access to nationality is framed in the most permissive terms,<sup>178</sup> in order to move to their 'dream Member State' later, in their capacity as EU citizens.<sup>179</sup> Obviously, when comparing the

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<sup>173</sup> Art. 20 TFEU.

<sup>174</sup> For overviews see e.g. de Groot and Vink (2008); Liebich (2000); Bauböck, Rainer, Ersböll, Eva, Groenendijk, Kees and Waldrauch, Harald (eds.), *Acquisition and Loss of Nationality: Policies and Trends in 15 European States: Comparative Analyses* (Vol. I), Amsterdam: Amsterdam University Press, 2006. For detailed country-by-country information see the documents available on the web-page of the EUDO project: <<http://eudo-citizenship.eu/>>.

<sup>175</sup> Kochenov (2009) 'Ius Tractum', 182–186.

<sup>176</sup> E.g. Kreimer, Seith F., 'Lines in the Sand: The Importance of Borders in American Federalism', 150 *U. Penn. L.Rev.*, 2002, 973, 980–984; Kreimer, Seith F., 'Federalism and Freedom', *Annals AAPSS* No. 574, 2001, 66; McDonnell, Michael, 'Review: Federalism: Evaluating the Founders' Design', 54 *U. Chi. L. Rev.*, 1987, 1484, 1494. Applied to the context of the EU, see Kochenov (2009) 'On Options of Citizens'.

<sup>177</sup> For a brilliant argument for the federal nature of the EU, clarifying the fallacies of numerous approaches to the nature of the European integration project in the *acquis académiques* see Schütze, Robert, 'On "Federal" Ground: The European Union as an (Inter)National Phenomenon', 46 *CMLRev.*, 2009, 1069. See also Oeter, Stefan, 'Federalism and Democracy', in von Bogdandy, Armin and Bast, Jürgen (eds.), *Principles of European Constitutional Law*, Oxford: Hart, 2006, 53.

<sup>178</sup> This is exactly what happened in the *Chen* case, where a Chinese mother came to Belfast in order to give birth to little Catherine in defiance of the Chinese one-child policy. The girl acquired Irish nationality by birth and immediately fell within the scope of EU law as an EU citizen falling within the scope *ratione materiae* of EU law, since the birth actually took place in the UK, creating a cross-border situation: Case C-200/02 *Kunqian Catherine Zhu & Man Lavette Chen v. Secretary of State for the Home Department* [2004] ECR I-9925. As one can guess, '[t]he choice of Ireland as Catherine's place of birth had not been accidental but rather influenced by the peculiarities of Irish Nationality laws in force at that time, which had been brought to the Chens' attention by their lawyers': Hofstötter, Bernhard, 'A Cascade of Rights, or Who Shall Care for Little Catherine? Some Reflections on the *Chen* Case', 30 *Eur. L. Rev.* 2005, 548.

<sup>179</sup> This point seems controversial to some of the scholars, including Prof. Rainer Bauböck, which is surprising. It seems obvious that the majority of third-country nationals willing to settle in the EU do not choose their Member State of residence by chance, but have a number of considerations in mind, including the possibilities of naturalisation. Not only the *Chen* family has good lawyers.

number of rights associated with EU citizenship with that associated with the nationality of a particular Member State, it becomes clear that at present 'for third-country nationals residing in the EU it is becoming increasingly irrelevant in which Member State to naturalize'.<sup>180</sup> The main status they are likely to benefit from, in any event, will be EU citizenship, not the particular Member State's nationality *per se*.

Consequently, the Member States are unable to make a coherent claim to be able to control the access of non-nationals to their territories.<sup>181</sup> No matter how they frame their citizenship laws, the mere existence of the internal market has already destroyed any direct logical connection between the territory of a particular Member State and the 'people' of that Member State. The conceptual contradiction between the nationality policies of the Member States and the main EU citizenship rights is clear. While the Member States grant nationality to those connected with their territory or populace, assuming that the nationals would keep such connections, EU citizenship follows an opposing rationale, aiming at encouraging people to move, to benefit from the opportunities that the internal market has to offer and to think beyond their Member States. Consequently, third-country nationals naturalising in a particular Member State can do this for two reasons: either to stay in the Member State or to leave immediately, benefiting from the main right of EU citizenship. Currently, the Member States seem to pretend that the latter choice is not an option, since all the naturalisation policies are built on the assumption that a new citizen will *stay* in the Member State, which provides justification for the linguistic, cultural and other tests the new comers are asked to pass before EU citizenship is conferred on them. Once the EU dimension is taken into account, however, the illusory world in which the Member States are still living crumbles in a second: why would you ask of an applicant for naturalisation to be proficient in Estonian, a language which virtually no-one speaks in the EU (and the world), if it is known that the main right that naturalisation confers is to *leave* Estonia and to benefit from EU citizenship rights in a greater Europe where hardly anything 'Estonian' will help? In the words of AG Poiares Maduro,

Tel est le miracle de la citoyenneté de l'Union: elle renforce les liens qui nous unissent à nos États (dans la mesure où nous sommes à présent des citoyens européens précisément parce que nous sommes des nationaux de nos États) et, en même temps, elle nous en émancipe (dans la mesure où nous sommes à présent des citoyens au-delà de nos États).<sup>182</sup>

Interestingly, naturalisation statistics coming from different countries proves that, unlike states, ordinary people are less prone to living in dream worlds and understand the current *status quo* pretty well. In one example, the number of applications for recognition of Polish citizenship increased almost five-fold upon Poland's accession to the EU,<sup>183</sup> indicating that 'Polish accession to the EU had an effect on the interest in the Polish citizenship among diaspora members',<sup>184</sup> or, to put it differently, the interest of the diaspora members in EU citizenship status – since this is the only fundamental addition to Polish nationality to have made it so overwhelmingly attractive on May 1, 2004. Similarly in Italy, the number of marriages involving Romanian citizens decreased substantially after Romania's accession to the EU, demonstrating that it was not Italian nationality as such, but the status of EU citizenship that Romanians were seeking.<sup>185</sup> Speaking of marriages is particularly relevant in this context, since this is the main mode of acquisition of Italian nationality. Naturalisation by residence in the country only accounts for 1 percent of naturalisations.<sup>186</sup>

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<sup>180</sup> Kochenov (2009) *Ius Tractum*, 183.

<sup>181</sup> See also Maas (2007), 8.

<sup>182</sup> Opinion of Poiares Maduro, AG in Case C-135/08 *Janko Rottmann* [2010] ECR 0000, para. 23.

<sup>183</sup> Górný, Agata and Pudzianowska, Dorota, 'Country Report: Poland', *EUDO Citizenship Observatory RSC Paper*, EUI, 2009, 8: the number of applications for Polish nationality in 2000 was 765. In 2004 it reached 3,805.

<sup>184</sup> *Id.*

<sup>185</sup> Zincone and Basili (2009), 13.

<sup>186</sup> *Id.*

The legal disorder in EU citizenship law at the moment, which is caused by the lack of EU powers to permit it to decide for itself who its citizens are, is beneficial, in the short term at least, for both the main stake-holders affected. The Member States are happy to pretend that they regulate the issues of access to EU citizenship and state territory while they do not,<sup>187</sup> and the candidates for inclusion benefit from the differences in regulation of the issue of access to EU citizenship status existing between the Member States. Besides the notion of common sense, almost nothing seems to suffer from this arrangement, with the exception of the third-country nationals who frequently change their Member State of residence, or those who have ended up living in a Member State where naturalisation possibilities are restricted. Consequently, it seems that the proposals for harmonisation of EU citizenship law<sup>188</sup> that would lead to the effective loss by the Member States of the capacity to regulate access to their nationalities alone seem to be misplaced, as they are likely to lead to stricter regulation on average in the EU-27 compared to that in place in the most liberal Member States.<sup>189</sup> Full harmonisation in such issues should be avoided, giving way to mid-way solutions incorporating access to EU citizenship via Member State nationalities, in tandem with direct conferral of EU citizenship by the Union. The fact that the latter does not seem feasible at the moment is a very bad example of national politics affecting common sense, because plenty of acute problems are bound to remain unsolved while we wait for the Member States to finally cope with their distorted self-visions, which severely lag behind reality.

#### ***d. Third-country nationals between EU citizenship and Member States' nationalities***

Besides the inability of the Union to deliver on the promise of equality among its citizens, as inherent in any citizenship status, there is another problem plaguing the development of EU citizenship at the moment. This problem is directly related to its uniquely *ius tractum* nature. A great number of third-country nationals permanently residing in the EU are excluded from this status, creating a situation where the division between those in possession of EU citizenship and third-country nationals is more important by far than that between different Member States' nationalities.<sup>190</sup> Third-country nationals are largely left within the realm of the national law of the Member States. For them, the borderless internal market is only a mirage which, albeit omnipresent, does not shape their situation directly. This is what Balibar called '*apartheid européen*'.<sup>191</sup> Although limited free movement rights are now granted to this category of residents,<sup>192</sup> all in all, the gap between the rights of third-country nationals and EU citizens is enormous. They live in the same Union as EU citizens and equally contribute to its flourishing, yet the legal protections applicable to them in EU law are minimal indeed. Clearly, 'where the borders between the Member States are non-existent, preserving them on paper exclusively for

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<sup>187</sup> It is evident that even if the EU does not step in, certain co-ordination among the Member States will arise. As early as in 1983 Evans acknowledged that 'harmonisation of the nationality laws of the Member States may ultimately prove necessary': Evans, A.C., 'Nationality Law and the Free Movement of Persons in the EEC: With Special Reference to the British Nationality Act 1981', 2 *Ybk Eur. L.*, 1982, 173, 189; similarly see Blumann, Claude, 'La citoyenneté de l'Union européenne (bientôt dix ans): Espoir et désillusion', in Epping, Volker, Fischer, Horst and Heintschel von Heinegg, Wolff (eds.), *Brücken Bauen und Begehen: Festschrift für Knut Ipsen zum 65 Geburtstag*, München: Verlag C.H. Beck, 2000, 3, 16. Becker suggested 'harmonisation – or even standardization of national citizenship across the European Union': Becker (2004), 159. See also European Parliament's view on this issue: *OJ C260/100*, 1981.

<sup>188</sup> Becker is one of those who recently suggested 'harmonisation – or even standardization of national citizenship across the European Union': Becker, Michael A., 'Managing Diversity in the European Union: Inclusive European Citizenship and Third-Country Nationals', 7 *Yale Hum. Rts. and Dev. L.J.*, 2004, 132, 159.

<sup>189</sup> In one example, it is unlikely that being appointed a full professor at an institution of higher education would be enough to become a European citizen (exemplifying the Austrian case) once the laws of the twenty-seven Member States are harmonised: Art. 25(1) of the Austrian Nationality Act, *FLG No. 311/1985*.

<sup>190</sup> E.g. Becker (2004) (and literature cited therein).

<sup>191</sup> Balibar, Étienne, *Nous, citoyens d'Europe? Les frontières l'Etat, le peuple*, Paris : La Découverte, 2001, 190, 191.

<sup>192</sup> Art. 14(1), Directive 2003/109/EC, *OJ L16/44*, 2004. For critique see e.g. Kochenov (2009) '*Ius Tractum*', 225–229.

third-country nationals seems not only impractical but also unjust'.<sup>193</sup> The next challenge of EU citizenship law should be the incorporation of this group.

In the context of the Union the situation of the third-country nationals is significantly different from that of the non-citizens of the states which are not part of the internal market. While in the latter case connecting naturalisation with the duration of legal residence in the state makes sense, in the context of the Union it deprives all those third-country nationals who frequently change their Member State of residence of any possibility to naturalise, making EU citizenship unattainable.

As has been mentioned above, granting the EU some (non-exclusive) powers in the sphere of direct conferral of EU citizenship might be of great assistance to solve at least some of the logical contradictions created by the fact that naturalisation in the Union is conditioned on a wrong requirement: that of residence in a Member State, not in the EU.

Almost twenty years ago, Evans compellingly argued for 'desirable relaxation of the link between possession of the nationality of a Member State and enjoyment of citizenship rights in that Member State'.<sup>194</sup> While it is difficult to disagree with this suggestion, it seems that the Member States will need to proceed in this direction very carefully, as full harmonisation would, like Janus, have double-faced consequences – negative ones. Firstly, the easier ways to naturalisation present in the law of some Member States will most likely be eliminated: virtually any harmonisation means application of stricter requirements, as all the Member States come with their own fears and concerns.<sup>195</sup> Secondly, harmonisation would result in nothing short of the *de jure* abolition of Member States' nationalities. Although *de facto* they are already not legally meaningful – besides granting access to the EU citizenship status – selling such an arrangement to the Member State populations would be difficult. As often, a mid-way solution could be an option. Imagine an EU citizenship which can be acquired by third-country nationals meeting certain EU requirements and, equally, by way of possessing the nationality of one of the Member States.

#### ***e. EU citizenship and Member State nationalities: The current balance***

The core challenges which European citizenship law is facing at the moment lie mainly in two fields. The first is the ensuring of equal treatment of EU citizens no matter which nationality they possess: those who never used EU rights and thus do not fall within the scope of EU law according to the present-day interpretation of the Treaty should not be treated less favourably than those who live in the same Member State and possess a different nationality. The second challenge consists of trying to bridge the divide existing between EU citizens on the one hand and third-country nationals residing in the Union on the other.

The success of the integration project to-date and, particularly, the centre-stage position which the legal status of EU citizenship has come to occupy in the EU's legal landscape has resulted in the amplification of the world-wide trends of market-related and cultural globalisation, and has undermined the holy cow of nationality much more severely than the results of similar processes taking place outside of the EU legal framework. In this context the nationalities of the Member States have come to be *de facto* abolished and only remain legally consequential in several cases, of which three are the most important ones and include two positive and one negative. The positive ones are confined to political representation at the national level and access to the pool of jobs reserved for those possessing the local nationality. The negative one consists in the activation of reverse discrimination.

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<sup>193</sup> Kochenov (2009) *Ius Tractum*, 236.

<sup>194</sup> Evans (1991), 190.

<sup>195</sup> The Schengen visa list can serve an illustration of this point: the list is longer than the participating countries' individual visa lists in force before their accession to the Schengen system.

### III. EU Citizenship Shaping the Nationalities of the Member States: First Steps

#### a. *The absence of a 'better nationality' in the EU*

The recent developments in the international and European legal climate described in sections I and II *supra* have resulted in the reinvention of the legal essence of nationality in terms of a merely procedural connection between the individual in possession of this status and a state. At this point it would be entirely incorrect to interpret nationality as a legal status which is in direct connection to the idea of a 'nation' in socio-cultural terms, as liberal democracies have effectively forfeited their ability to promote any 'thick' understandings of nationality among both their own citizenry and the newcomers willing naturalise.

Indeed, asking for anything more than several years of legal residence and the awareness of the liberal-democratic ideals on which all the Member States of the Union are officially based would be in blunt violation of the liberal essence of contemporary democracies. The same clearly applies to the knowledge of the state language: 'a person who functioned in a society for several years successfully without knowing its official language should be presumed to be capable of participating in the political process without knowing the language',<sup>196</sup> *i.e.* being a citizen as good as any other. Unlike a century ago, all the conditions are potentially being created to accommodate diversity among the citizenry, rather than to punish those unable to share the majoritarian ideas, skin colour or religious tastes. The 'integration' policies designed by the Member States for the facilitation of the newcomers' entry into the body of nationals expectedly came to be stripped of the majority of nation-specific features. The accounts of integration policies provided by the Member States themselves make this point quite clear: there are no differences between 'Danishness', 'Britishness', 'Frenchness' etc. Moreover, for the reasons explained above, there cannot possibly be.

While the similarities between the substance of all the Member States' nationalities in the EU are thus overwhelming, the differences, if at all decipherable, are negligible. This state of affairs is also reflected in EU law, where Article 6 EU [6 EU] provides a clear reference to the whole array of legal principles which are ultimately responsible for the erosion of the modern meaning of nationality, as explained in Part I *supra*.<sup>197</sup> Any departure from the liberal principles which are currently shared by the Member States and the Union is also likely to be punished by the application of Article 7 EU [7 EU], which contains a special procedure to deal with 'a clear risk of a serious breach by a Member State of principles mentioned in Article 6(1) [EU]'.<sup>198</sup> In other words, the EU as such is also able to contribute to the preservation of nationality as a purely procedural connection,<sup>199</sup> since an introduction of far-reaching requirements substantively shaping the citizenry, akin to those employed by the *inter-bellum* autocracies or Communist regimes would be in immediate violation of the core principles the Union is built on, as reflected in Article 6(1) EU. Clearly, the Member States are unable to reverse this trend.

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<sup>196</sup> Carens (2002), 100, 111. Besides, being politically active is obviously not an obligation but a right of citizens, notwithstanding the existence of a number of systems adopting a different point of view, like Belgium, or Turkey, which are in a minority.

<sup>197</sup> The EU also projects these principles onto the Member States-to-be and countries in its neighbourhood, constantly underlining the importance of the values underlying them (including liberalism). Such exercise is very telling, even if not always successful: Kochenov, Dimitry, 'The Eastern Partnership, the Union for the Mediterranean and the Remaining Need to Do Something with the ENP', *CRCEES Working Papers* (Glasgow) No.1, 2009,1, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1459560](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1459560) (addressing the ENP); Kochenov, Dimitry, *EU Enlargement and the Failure of Conditionality*, The Hague: Kluwer Law International, 2008 (addressing the pre-accession).

<sup>198</sup> Art. 7 EU. For the story behind this provision see Sadurski, Wojciech, 'Adding a Bite to a Bark? A Story of Article 7, the EU Enlargement, and Jörg Haider', *Sydney Legal Studies Research Paper* No. 10/01, 2010, 1.

<sup>199</sup> This is true even though 'culture tests' are becoming more popular in Europe. For analysis see Joppke, Christian, 'Beyond national models: civic integration policies for immigrants in Western Europe', 30 *W. Eur. Pol.* 2007, 1.



The scope of the rights associated with it is another important factor to be taken into account. Once the effects of the European citizenship on the Member States' nationalities are analysed, the differences between particular Member States' nationalities become even tinier. In the world outside the EU – at least as far as liberal democratic states are concerned – the thick meaning of nationality has faded away as well. Being Canadian is not different from being American or Mexican in this respect. Yet the scope of the actual rights the enjoyment of which the possession of the status of each particular nationality brings varies to a great extent. In this respect Canadian and Mexican nationalities are certainly very different. The same degree of differences cannot be observed in the EU, where the principle of non-discrimination on the basis of nationality is the core element of the EU legal order. As has been demonstrated in Part II *supra*, the actual rights specific to any particular Member State's nationality are not numerous at all. In this context, the status of EU citizenship – not the nationality of one of the Member States – comes to the fore as the main generator of rights in the Union. Notwithstanding the fact that EU citizenship is directly rooted in the possession of a Member State's nationality for EU law purposes, it is not the nationality itself, but the *ius tractum* legal status at the EU level that is responsible for a huge share of the rights enjoyed by the nationals of the Member States in the EU at the moment.

Since all the nationalities of the Member States provide access to the same single status of EU citizenship from which the rights are then derived, the possibility for one Member State to have a 'better nationality' as far as the scope of rights enjoyed in connection with it is concerned, is non-existent, legally speaking at least. This is especially evident once one takes into account the importance of residence, to which the majority of practically usable rights are connected in any Member State, as well as the fact that such residence can be established with the use of EU citizenship status. Consequently, it is evidently true that a national of any Member State is automatically a quasi-national of any other Member State, should she choose to move there.

Unable to claim any differences in terms of the 'essence' of their nationalities, the Member States also lost a possibility for claiming differences in the terms of rights their nationalities confer.<sup>200</sup> Treating a Union citizen not in possession of the local nationality worse than the locals is prohibited by EU law.

#### ***b. Rounding up the circle: special naturalisation procedures for EU citizens***

In a situation where a 'better nationality' in the EU is non-existent and possessing any of the Member States' nationalities confers on you the status of EU citizenship – which *de facto* means being a *quasi*-national of any Member State of residence – the lack of any coordination between the Member States in terms of access to their nationality was bound to result in the mutation of the nationality laws of the Member States, without any formal intervention of the EU. Such developments have occurred at two different levels. At the informal level, the change occurred without any amendments of the Member State's nationality laws in order to accommodate the special position of EU citizens; while at the formal level, the nationality laws were changed in order to reflect the reality of European integration.

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<sup>200</sup> This statement should be qualified with regard to the legal effects of possession of particular Member State's nationalities outside the EU, EEA and Switzerland. When EU citizens travel in third countries, their Member State nationality, not EU citizenship, is the main status affecting the extent of rights they enjoy. Consequently, differences exist between the attractiveness of different Member States' nationalities, as different visa regimes apply to different EU passports: travelling with an Estonian passport to the US is much easier, for instance, than with a Greek one. The Commission is doing a lot, however, in order to ensure that the same visa regimes apply to all EU citizens: *e.g.* Kubosova, Lucia, 'Brussels to press for US visa free entry to EU newcomers', *EU Observer*, 24 February 2006, available at <<http://euobserver.com/?aid=20982>>.

### b.1. Changes on the informal level

Even when there are no formal provisions to facilitate EU citizens' naturalisation on the books, it is clear that *de facto* EU citizens have an overwhelming advantage compared with third-country nationals willing to naturalise. As explained by Evans,

The potential for Community nationals to acquire the nationality of a second Member State is already considerable. National authorities tend to rely on immigration control in order to limit access to naturalisation. Since beneficiaries of freedom of movement are not subject to such control, many Community nationals must now be in a position to satisfy the residence condition for naturalisation.<sup>201</sup>

Written twenty years ago, this reasoning is truer today than ever, especially after the introduction of EU citizenship status, which resulted in enabling citizenship claims for those persons who would not formally have qualified under the pre-citizenship regime, which favoured economically active citizens even more than the current one.<sup>202</sup> Given that getting access to legal residence in a territory of a Member State is the first fundamental step towards naturalisation, and that EU citizens are virtually automatically entitled to claim residence rights anywhere in the Union as one of their EU citizenship entitlements, naturalisation of EU citizens is on average overwhelmingly simplified in EU Member States, compared with naturalisation of those not in possession of this status.

The fact that the residence of EU citizens in a Member State other than the Member State of their nationality is virtually always legal (some minor exceptions only underline the importance of the rule), has important implications not only on the nationality of the EU citizens themselves should they decide to naturalise, but also on the nationality of their children. This is particularly acute in the UK and Ireland, where a child born to a long-term resident parent of any nationality can acquire the nationality of the country of birth.<sup>203</sup> Given that EU citizens derive their residence rights from EU law, rather than the law of any particular Member State, illegality is barely possible for them,<sup>204</sup> unlike in the case of third-country nationals. Consequently, the children of all long-term resident EU citizens obtain a right to acquire UK or Irish nationality if they are born in one of those countries.<sup>205</sup>

The virtually complete transfer of the regulation of residence of EU citizens from the level of the Member States to EU level shaped a reality where naturalisation of EU citizens in the Member State of residence has become overwhelmingly simplified. The main hurdle that third-country nationals face and which is connected with acquiring the right of entry and the right of residence, as well as prolonging the former, does not exist for EU citizens. Consequently, the naturalisation rules for EU citizens and for third-country nationals parted ways.

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<sup>201</sup> Evans (1991), 193.

<sup>202</sup> Workers, able to travel around the EU and stay in any Member State as long as it pleases them, enjoy much better protection than the European citizens experiencing health problems and economic hardship, since all persons not falling within the EU definition of a worker should, according to the general rule, be covered by sickness insurance and have sufficient resources in order to benefit from the right 'of residence on the territory of another MS for a period of longer than three months': Art. 7(1), Directive 2004/38/EC. However, the Member States are not entitled to conduct strict checks of sufficiency of resources: Case C-408/03 *Commission v. Belgium* [2006] ECR I-2647.

<sup>203</sup> Sawyer, Caroline, 'Country Report: United Kingdom' *EUDO Citizenship Observatory RSC Paper*, EUI, 2009, 22; Handoll, John, 'Country Report: Ireland' *EUDO Citizenship Observatory RSC Paper*, EUI, 2009, 11.

<sup>204</sup> Especially given that in Ireland, for instance, residence is proven by a declaration made by an EU citizen: Handoll (2009), 11.

<sup>205</sup> This right will also depend on the law of the Member State of nationality of the parents, although conflicts are unlikely to arise, given that the majority of the Member States allow the retention of the nationality of the state where one is born.

## b.2. Changes on the formal level

This fact is so obvious that it was bound to find direct reflection in the law of the Member States, even without any EU-level obligation to treat EU citizens differently from third-country nationals for the purposes of nationality law – which itself would stem from the Union – as the latter is not empowered to act in this domain. Building on the realisation of the deep differences existing between EU citizens and third-country nationals in the Union, even in situations where persons belonging to both categories are branded as foreigners, six Member States introduced formal differences into their legislation on the acquisition and loss of nationality, in order to reflect this gap.

The formal difference between EU citizens and third-country nationals for the purposes of naturalisation is made in two respects. The first concerns providing EU citizens with a possibility to naturalise more quickly by applying a shorter naturalisation term to them. The second consists of applying different renunciation requirements to EU citizens, thus facilitating their naturalisation. The first approach is adopted in Austria, Hungary, Italy and Romania, the second – in Germany and, to a lesser extent, in Slovenia.

Germany is among ten Member States of the EU where the renunciation requirement is enforced.<sup>206</sup> It means that naturalisation in these countries is subject to the renunciation of one's previous citizenship. Germany does not require EU citizens to meet this requirement,<sup>207</sup> which leads to their easier naturalisation. Slovenia, applying similar law, is more restrictive. 'The condition of a release from current citizenship is waived for citizens of those EU Member States where reciprocity exists'.<sup>208</sup> This means that the condition is lifted for the majority of Member States' nationalities, given that only ten Member States (including Germany and Slovenia) enforce the renunciation requirement. The fact that only one third of Member States have such a requirement in the first place is easily explainable by the requirement's nonsensical nature. However, it is interesting that two of them allow EU citizens to keep their previous Member State nationality upon naturalising. In the countries where no exceptions from this requirement for EU citizens are made, naturalisation rates of EU citizens are extremely low.<sup>209</sup> Since there is no 'better nationality' in the EU, renouncing one to acquire another predictably makes no sense.

The approach to the naturalisation of EU citizens adopted in Austria, Hungary, Italy and Romania is potentially more important for the purposes of this paper than the one found in Germany and Slovenia. While the very existence of differences in naturalisation procedures applicable to EU citizens and third-country nationals is already extremely significant, the approach adopted in these four countries stands out since it really simplifies access to the nationality of these Member States for all the EU citizens residing there. Accordingly, to become Austrians through the discretionary naturalisation procedure, EU citizens and EEA nationals need to reside in Austria for two years less

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<sup>206</sup> The ten include the Czech Republic, Denmark, Estonia, Hungary, Latvia, Lithuania, the Netherlands, Poland, Slovakia, Slovenia (numerous exceptions apply). See de Groot, Gerard-René, and Vink, Maarten, *Meervoudige nationaliteit in Europees perspectief: Een landenvergelijkend overzicht*, The Hague: Adviescommissie voor Vreemdelingenzaken, 2008; Vink, Maarten and de Groot, Gerard-René, 'Citizenship Attribution in Western Europe: International Framework and Domestic Trends', forthcoming in *J. Ethnic & Migration Stud.*, 2010. In virtually all the countries listed certain exceptions apply, providing fractions of newly-naturalized citizens with a possibility to retain their previous nationality. (for an overview of citizenship laws in Western European states); Liebich, André, 'Plural Citizenship in Post-Communist States', *12 Int'l J. Refugee L.*, 2000, 97 (for an overview of the situation in Eastern Europe). On the general context of dual nationality in the EU see Howard, Marc Morjé, 'Variation in Dual Citizenship Policies in the Countries of the EU', *39 Int'l Migration Rev.*, 2005, 697, esp. Table 4, at 713.

<sup>207</sup> de Groot and Vink (2008), 73–75.

<sup>208</sup> Medved, Felicita, 'Country Report: Slovenia' *EUDO Citizenship Observatory RSC Paper*, EUI, 2009, 12.

<sup>209</sup> For the example of the Netherlands see e.g. Maas, Willem, *National Citizenship and Europeanisation*, paper presented at 2009 EUSA Conference, Los Angeles, April 2009.

than third-country nationals.<sup>210</sup> Moreover, unlike third-country nationals, EU citizens and EEA nationals enjoy ‘a legal entitlement to naturalisation’.<sup>211</sup> Preference in naturalisation extended to EU citizens can also be observed in Hungary, where they naturalise more quickly.<sup>212</sup> To become Italians, EU citizens need to reside in Italy for six (!) years less than third-country nationals.<sup>213</sup> In Romania the difference between the naturalisation requirements for EU citizens as opposed to third-country nationals is equally considerable. EU citizens naturalise after ‘half the period of regular naturalisation’,<sup>214</sup> *i.e.* in less than four years.<sup>215</sup>

The law in force in the four countries described makes it much easier for EU citizens to acquire the nationality of these Member States. All the requirements specific to EU citizens are relatively new: Italy was the first EU Member State to give priority to EU citizens in naturalisation. The relevant legislation entered into force in 1992,<sup>216</sup> in Austria in 1998,<sup>217</sup> in Hungary in 2003<sup>218</sup> and in Romania in 2008.<sup>219</sup> The passing of the relevant legislation overlaps with a period of maturation for the internal market, during which the notion of EU citizenship started to take shape. Without any doubt, more countries will follow the six examples provided in differentiating between EU citizens and third-country nationals for the purposes of nationality regulation, reflecting the change in the *status quo* between EU citizenship and Member State nationality.<sup>220</sup> Relevant proposals are being discussed in Lithuania<sup>221</sup> and Spain.<sup>222</sup>

### ***c. Special procedures for the acquisition of EU citizenship?***

Differentiating between EU citizens and third-country nationals in the nationality legislation of the Member States clearly comes down to the establishment of a separate procedure for the acquisition of EU citizenship. Those not in possession of this status are asked to meet more severe conditions in order to acquire it compared with EU citizens merely wishing to naturalise in the Member State where they reside.

This state of affairs reflects a reality that is absolutely different from the promise of a merely derivative EU citizenship status in the Treaty of Maastricht. Such developments were to be anticipated, however, given the processes described in Parts I and II *supra*, which diminished the importance of Member State nationalities in a number of key respects and removed virtually all the differences between them.

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<sup>210</sup> Çinar, Dilek, ‘Country Report: Austria’ *EUDO Citizenship Observatory RSC Paper*, EUI, 2009, 8.

<sup>211</sup> *Id.*, 15.

<sup>212</sup> Kovács, Mária and Tóth, Judith, ‘Country Report: Hungary’ *EUDO Citizenship Observatory RSC Paper*, EUI, 2009, 1, 3.

<sup>213</sup> Zincone and Basili (2009), 1.

<sup>214</sup> Iordachi, Constantin, ‘Country Report: Hungary’ *EUDO Citizenship Observatory RSC Paper*, EUI, 2009, 8.

<sup>215</sup> The regular residence period for naturalisation in Romania amounts to seven years: Iordachi (2009), 8.

<sup>216</sup> Zincone and Basili (2009), 1, 2.

<sup>217</sup> Çinar (2009), 8.

<sup>218</sup> Kovács and Tóth (2009), 1.

<sup>219</sup> Iordachi (2009), 8.

<sup>220</sup> In the Member States where the law is silent on this matter, scholars argue for amending the law. See *e.g.* Sawyer (2009), 28.

<sup>221</sup> Kūris, Egidijus, ‘Country Report: Lithuania’ *EUDO Citizenship Observatory RSC Paper*, EUI, 2009, 40, 41 (the law was vetoed by the President).

<sup>222</sup> Rubio Marín, Ruth and Sobrino, Irene, ‘Country Report: Spain’ *EUDO Citizenship Observatory RSC Paper*, EUI, 2009, 17.

Application of different naturalisation procedures to EU citizens and third-country nationals at the national level is a sign of the maturity of EU citizenship. A person's prospects of acquiring the nationality of a specific Member State directly depend on the possession or not of this EU law status. Even in the Member States where this connection is not formally adopted as part of nationality regulation, EU citizenship provides easier access to the nationalities of such states in practice through the lifting of residence and immigration controls for EU citizens.

Initially designed as a derivative concept, EU citizenship started influencing the access to the nationalities of the Member States, which mostly happened at the cost of the third-country nationals, as their position is as different from EU citizens, as ever. This now also concerns issues of access to Member State nationalities, which do not fall within the scope of the *acquis*. In addition to third-country nationals, Member State nationalities are also worse off as a result, as the rise in importance of EU citizenship as a new leading status for each Member State national in the EU undoubtedly undermines the former prominence which nationalities used to enjoy in the legal systems of the Member States.

This loss is not necessarily one to lament, as, ultimately, EU citizens are not worse off as a result – on the contrary. However, the legal climate in the EU is certainly changing following this transformation, making the sovereignty claims of the Member States even more misplaced than ever and amplifying the acuteness of the need to change the current state of affairs in the regulation of nationality and citizenship statuses in Europe, including the vertical division of powers between the EU and the Member States in this sphere. Notwithstanding the fact that the need to update how the personal scope of application of EU law is delimited is of overwhelming importance for the success of the European integration project as well as all the Member States, the latter are not all too willing to amend the current derivative logic behind EU citizenship, as the key bastion of their sovereignty<sup>223</sup> is perceived to be at stake.

#### **IV. What Future for Member States' Nationalities?**

EU citizens enjoy preference compared with third-country nationals when they naturalise in their Member State of residence. The question that arises is what would be the need for such naturalisation, given that increasingly many rights formerly rooted exclusively in Member State nationalities are now associated with the legal status of EU citizenship? Travelling around with a collection of different passports can be regarded by some as fancy; however, if all the passports you own ultimately provide you with the same EU citizenship status and the same rights stemming from it, procuring yet another nationality clearly hardly makes you better off.

Leaving the activation of reverse discrimination and unconditional access to the territory aside,<sup>224</sup> possession of the nationality of a particular Member State carries with it two meaningful rights in the EU: political representation at the national level and access to civil service employment.<sup>225</sup> Being a national of a particular Member State, one can also be coerced into join the military, which is easily avoidable through the use of EU citizenship rights and is thus of little interest for us here. Consequently, all other things remaining equal, EU citizens' naturalisation in the Member State of residence should be regarded in the context of access to two rights. EU citizens not holding the nationalities of the Member States where they reside are excluded from the franchise at the national level and cannot occupy high-standing positions in public service. This hardly contributes to building an ever closer Union between the peoples of the Member States.

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<sup>223</sup> This bastion fell many decades ago in fact: see esp. II(c) *supra*.

<sup>224</sup> See II(b)(2) *supra*.

<sup>225</sup> See II(b)(1) *supra*.

In fact, it actually seems to contradict the principles of Article 6 EU, especially with regard to democracy. By definition ‘in order to make representative government function properly, it must be truly representative of all its constituent groups’.<sup>226</sup> EU citizens enter on the basis of EU law and are treated equally with the locals, thus forming part of the society of their Member State of residence: the Member State itself can only accept and is unable to change this reality. EU citizens’ rights in the new Member State of residence are virtually identical to those enjoyed by local nationals. All EU citizens possess nationalities which are not marked by any substantive differences, as liberalism, human rights and globalisation exacted the same changes from all the Member States of the Union – just as from any other Western-style democracies that had to set aside any thoughts of moulding the ‘right’ citizen as a necessary component in their modern development paths.

Ironically, it is precisely because little is left of the nationalities of the Member States – either substantively or otherwise – that the arguments not to treat all EU citizens having a stable residence in a Member State other than their Member State of nationality like local nationals *in all respects* seems to be so difficult to justify logically, especially given that, as Lardy has compellingly demonstrated, the arguments for disenfranchising those residents who are not in possession of the nationality of the state where they reside do not exist.<sup>227</sup> Largely similar observations apply to the right of access to civil service employment. While to presume that non-nationals cannot cope with such jobs since nationality provides one with some new insight is silly, to assume that a Belgian national judge in Luxembourg would abuse her position in the interests of the country of nationality is not smart either. Given that all the Member States embrace the same ideology and are joined in the EU to achieve the same objectives,<sup>228</sup> such a possibility could never arise.

If things are as they are, what, at the level of common sense, prevents the Member States from automatically granting either naturalisation or *full* equality to those EU citizens who move in? Either choice leads to the complete disappearance of nationality as a meaningful legal status in the Member States, which does not mean that nationalities are necessarily bound to cease carrying out other important functions, such as serving as reference points for the feeling of emotional attachment to particular Member States *i.e.* reflecting the *dēmoi* of Europe. Indeed, granting EU citizens equal rights does not mean the disappearance of the peoples of the Member States.

#### ***a. Full equality***

Since naturalisation in the Member State of residence ultimately means access to civil service employment and political participation at the national level in that Member State, amending the Treaties with a view to including these rights among EU citizenship rights is actually the most logical way to solve the problems of those EU citizens who are not nationals of their Member State of residence. Half-way-house solutions are also possible. The rights which are currently specific to Member States’ nationalities can be granted upon meeting a certain residency requirement for instance, introducing a different approach compared with the virtually unconditional non-discrimination right of Article 22 TFEU.

Should this equality option be chosen – and the European Commission has been discussing it since the seventies<sup>229</sup> – there will remain no possible need for EU citizens to naturalise in their new Member State of residence as such naturalisations will not be according them any rights besides those which they already enjoy in their capacity as EU citizens. A direct parallel with the possession of a residence

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<sup>226</sup> Hammar (1985), 439.

<sup>227</sup> Lardy, Heather, ‘Citizenship and the Right to Vote’, 17 *Oxford J. Legal Stud.*, 1997, 75.

<sup>228</sup> Art. 3 EU [2 EC; 2 EU].

<sup>229</sup> European Commission, ‘Towards European Citizenship’, Brussels, 1975, 28.

permit in a Member State other than your own can be made:<sup>230</sup> while it is probably nice to have it, it does not grant you any rights *per se*.<sup>231</sup> Such development, should EU law move in this direction, can only be welcomed. While there are no apparent 'losers' as a result of such change, since EU citizenship and EU non-discrimination has already successfully challenged any meaningful content in Member State nationalities, all EU citizens exercising their free movement rights are likely to be better off as a result of the move described. The same applies to the soundness of the Member States democracies. By including more residents in the electorate, Member States will provide for better political representation of their populations by accepting social facts.

Should this option prevail, the nationalities of the Member States will end up playing a foundational non-legalistic role, delimiting the boundaries of the multiple *dēmoi* of the peoples of Europe. Reinvented in this vein, the preservation of the Member States' nationalities as such serves an important role to legitimise the European project in the vein of Weiler's European constitutional federalism idea,<sup>232</sup> which regards the creation of a federal mono-sovereign, *i.e.* a 'European people' as highly undesirable and potentially harmful for the success of the European project, since, agreeing with Palombella, 'Europe does not need to abandon *dēmoi* in order to make in *e pluribus unum*'.<sup>233</sup>

### ***b. Automatic naturalisations***

A somewhat more 'extreme' (from the national-sovereign perspective) option is directly connected with *de iure* death of nationalities in the EU. Once political participation at the national level and access to civil service employment both become EU citizenship rights attached to residence – 'the new nationality'<sup>234</sup> of the persons concerned – what would be the reason to refer to EU citizens by underlining their connection with their initial Member State of nationality? Once this is supplanted by residence as a requirement initiating access to full rights in the new Member State of residence, the use of nationality even in the formal legal sense can be presented as legally questionable, as it would no longer possess any added juridical value, at least in terms of providing for specific rights, and thus following the approach to citizenship and nationality adopted in the majority of the world's federations.<sup>235</sup> Born as a citizen of Kentucky, a US citizen moving to California effectively becomes a citizen of California, as the legal connection with Kentucky, meaningful as long as the citizen resides there, evaporates with the change of residence.<sup>236</sup>

However unlikely, such an option does not seem unthinkable anymore, since in the EU, just as in any other federated entity, 'the only true form of nationality is that of dual nationality',<sup>237</sup> characterised, one should add, by the precedence of the federal level status. The Commission actually considered this option thirty-five years ago, only to discard it as 'less promising than the idea of

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<sup>230</sup> Evans (1991), 194.

<sup>231</sup> Case 48/75 *Jean Noël Royer* [1976] ECR 497, para. 31.

<sup>232</sup> Weiler (2005).

<sup>233</sup> Palombella (2005), 365.

<sup>234</sup> Davies (2005), 43.

<sup>235</sup> See on this issue: Beaud, Olivier, 'The Question of Nationality within a Federation: A Neglected Issue in Nationality Law', in Hansen, Randall and Weil, Patrick (eds.), *Dual Nationality, Social Rights and Federal Citizenship in the U.S. and Europe*, New York/Oxford: Randall Books, 2002, 314.

<sup>236</sup> On parallels between EU and US citizenships see Strumia, Francesca, 'Citizenship and Free Movement: European and American Features of a Judicial Formula of Increased Comity', 12 *Columbia J. Eur. L.*, 2006, 714; van der Mei, Anne Pieter, 'Freedom of Movement for Indigents: A Comparative Analysis of American Constitutional Law and European Community Law', 19 *Ariz. J. Int'l & Comp. L.*, 2002, 803. For a US example see Varat, Jonathan D., 'State "Citizenship" and Interstate Equality', 48 *Chi. L.Rev.*, 1981, 487 (demonstrating that while discrimination on the basis of state residence in the majority of cases is illegal, individuals derive a number of rights from their status of residents).

<sup>237</sup> Beaud (2002), 314, 317.

equality with the nationals of the host Member State', as Maas has demonstrated.<sup>238</sup> Unlike classical federations, however, the structure of the legitimation of power in the EU is rooted in the Member States, not in the 'European people'.

In such a context it becomes clear that, should Weiler's stance on the 'Constitutional federalism'<sup>239</sup> of the EU as one of the main values of the integration project be embraced, the formal elimination of Member States' nationalities is likely to have harmful consequences, undermining the coherence of the federal legal system of the EU. Since the EU is the only federated entity in the world that does not claim sovereignty from the united federal 'people', its very essence lies with the pluralist approach to the sources of legitimation. Erasing Member States' nationalities in a formal sense can undermine the fundamental notion of the 'peoples of the Member States' and is thus entirely counterproductive, depriving the EU of one of the main sources of legitimation. Consequently, although it might seem that granting nationality of a particular Member State to all the incoming EU citizens wishing to reside in that Member State, or, those EU citizens who have resided in that Member State for a certain period of time is not so different from granting equal treatment in the sphere of political participation at the national level and access to all occupations, the difference is in fact considerable.

### *c. Deterritorialisation of nationality scenario*

The third possible scenario is probably the one which is most likely to occur, as neither the Member States nor the Union have to do anything in order to implement it. By maintaining the status quo and reserving the national-level franchise and high offices for the holders of a particular Member State nationalities alone, the continuous success of the internal market is likely to amplify the de-territorialisation of the national politics of the Member States. It is not for nothing that a convincing trend can be observed in the EU to include citizens residing abroad in politics.<sup>240</sup> In order to use one's exclusive nationality-related rights it is no longer necessary to be a resident. Consequently, the number of nationals residing in one Member State and participating in politics in another will be on the rise. This is an interesting situation which provides us merely with an imitation of democracy, since basic social facts – such as the link between the people and a particular jurisdiction where they reside – are ignored. While not presenting any danger at present, while the number of EU citizens residing in Member States other than their Member State of nationality is relatively low, the situation will change, assuming that more EU citizens come to benefit from the rights offered at the EU level in the future. Should this transpire – and it is likely – the acuteness of the two scenarios listed above becomes particularly clear.

### *d. Justice and facts*

How will the nationalities and nationality-related rights of the Member States actually be changed? At issue in this context is not whose competence it is to make the law on nationality, but whether the law is just. Justice in this context presumes at least one thing: taking reality into account. If the Member States are empowered and the EU is not empowered to decide who is to be considered a national of a particular Member State and which rights are to be exclusively associated with Member State nationalities, the sovereignty argument should not be misused. Being able to decide does not mean that bad decisions need to be taken.<sup>241</sup> The EU, apparently powerless in the area concerned, is bound to criticise any unjust decisions of the Member States taken within their sphere of competences.

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<sup>238</sup> Maas (2007), 32.

<sup>239</sup> Weiler (2005). See also Palombella (2005).

<sup>240</sup> Kochenov (2009) 'Free Movement and Participation'.

<sup>241</sup> Carens (2002), 100, 115.



The methods of shaping the legal-political realities described in each of the scenarios vary. While the first can be implemented either at the level of the Member States alone or at the EU level through amending the Treaty, the second will without any doubt require Treaty amendment and an overwhelming reshuffling of the national law of all the Member States, as well as all the assumptions underlying the legitimation of power both in the EU and in the Member States. The likely extent of the reforms required to implement any of the scenarios discussed should not discourage scholars from trying to escape the sin of inability to make mid to long-term predictions of the likely dynamics in EU legal developments.

## Conclusion

The integration process, once having gained momentum, has a profound ability to affect the Member States in seemingly unexpected ways, even in the areas which the national politicians do their best to shelter from European influence. Allott's argument for the change in the paradigm from diplomacy to democracy in the relations between the Member States exemplifies the unique nature of the EU.<sup>242</sup> Once classical diplomacy is discarded, once war is no longer an option, a formerly conventional understanding of a (Member) State, with its sovereignty concerns and its *own* society separate from other societies, comes to be questioned. The era of diplomacy is over in Europe.<sup>243</sup> Along with it, the age of great states with politicians able to direct or control the European integration project is equally gone. Slowly but surely, the integration project is shaping the Member States in ever more profound ways. The paradigmatic change in the interaction between EU citizenship and Member State nationality is thus likely to affect the very essence of both the Union and its Members.

There is no reason to believe that the process of the legal marginalisation of the nationalities of the Member States as providers of rights in the EU will stop or be reversed. The contrary seems more likely – its dynamics will only intensify in the near future, as it will be clearer for the Member States' authorities and for the EU citizens alike that the status provided by the EU is potentially and also practically more important for all the individuals in possession of it than any Member State nationality as such. Whether or not the Member State nationalities will survive as legal statuses connecting individuals and the EU, they will certainly mutate to a considerable extent under the international pressures of human rights and liberalism, and the EU pressures of the internal market and non-discrimination on the basis of nationality, to say nothing of EU citizenship. The result of this mutation will necessarily be a legal status which is substantially different from the nationalities of the Member States today, as it is bound to become more aware of its own limitations. It will move away from providing its bearers with practical rights, remaining merely the main legal reference for the emotional connection existing between the nationals and their Member States, thus reinforcing EU's legitimation through the multiplicity of the people – *dēmoi* – of Europe. This reinvention of nationality will necessarily result in critical scrutiny of all its attributes, which are taken for granted in the law of the Member States today. Irrelevant and antiquated requirements of naturalisation, for instance, or the nationality-related duties peculiar to some Member States, will be under pressure to go no matter which scenario of future development of nationalities in the Union is to become operational.

The most imminent development to come is the parting of ways between access to Member State nationality and EU citizenship. Those in possession of EU citizenship are already likely to be included among nationals much more easily than third-country nationals, who, once again, risk being excluded. The parting of ways of naturalisation depending on which status is acquired – EU citizenship (along with a Member State's nationality) or only the nationality of a Member State, will intensify the binary dynamics of citizenship development outlined by Joppke. The nationalities of the Member States are likely to be de-ethnicised more quickly upon the introduction of simpler naturalisation requirements

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<sup>242</sup> Allott (1991), 2490–2492.

<sup>243</sup> *Id.*, 2494.

for EU citizens in the growing number of Member States. Re-ethnicisation will soon follow in compensation, contributing to the further deterritorialisation of the Member States. With the increase in the intensity of de and re-ethnicisation, the ultimate legal meaning of the Member States' nationalities as providers of enforceable rights will fade compared with the status of EU citizenship. In this context the wholly internal situations will have to be dealt with, depriving the Member State nationalities of one of their most important functions and increasing the rights of EU citizens.

As a result of the acute articulation of the differences between Member State nationalities and EU citizenship, third-country nationals who are long-term residents in the EU seem to be the only group who are likely to gain little. Should different naturalisation regimes persist for them, the absurd state where access to the main status of interest for them – *i.e.* that of EU citizenship – via more than twenty-seven different routes is here to stay. Harmonisation of access to the status of EU citizenship is unlikely to result in the improvement of their situation, however, as it will necessarily undermine the possibility for some of them to rely on the discrepancies in the national rules of the Member States. The middle solution proposed in this paper offers a way to solve this dilemma.

In a situation when nationalities are likely to play a merely symbolic role, the likelihood of the proliferation of petty nationalism and silly political games at the national level will be increasing as the discovery that something the majorities in each Member State believe in means virtually nothing and is bound to go is certainly a loss, even if an ephemeral one. The EU will moan together with its citizens and move on.<sup>244</sup>

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<sup>244</sup> Davies, Gareth, *A Time to Moan: How I Learned to Stop Worrying and Quite Like the European Union*, Amsterdam: De Vrije Universiteit, 2008, 15: 'If the EU wishes to make itself accepted by the people, it needs to show that it feels their pain. It must recognize their loss'.

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