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NATIONALITY LAW AND EUROPEAN CITIZENSHIP:
THE ROLE OF DUAL NATIONALITY

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the role of dual nationality*

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Abstract

The relationship between the nationality laws of the European Union Member States and European citizenship has long been the subject of academic discussion. The objective of the present paper is to investigate particularly the impact of the dual nationality regimes – for our purposes to be understood as the possession of a Member State and a non-Member State nationality – on access to European citizenship. Based on an analysis of dual nationality in three different historical-constitutional contexts (post-colonialism, post-emigration and post-communism), we argue that the use of dual nationality – in combination with a preferential nationality regime for certain groups residing outside the EU –, results in discrimination against migrants on the basis of their origin. The different dual nationality policies also affect the EU at large as Member State nationals enjoy – as European citizens – the right of free movement and residence in the Union’s territory. At the same time, however, it can be seriously queried whether these ‘external EU citizens’ can demonstrate a real link with the Member States granting their nationality. Finally, the examination of the case law of the European Court of Justice shows that tensions have already arisen between different Member State nationality laws; it is expected that these tensions will arise even more frequently in the future precisely as a result of the privileged route towards the acquisition of a second ‘European’ nationality. As the latter development is negatively perceived by many Member States, the EU may decide to undertake action in the area of nationality. This, in turn, could give rise to the legal autonomy of Union citizenship...

Keywords

European citizenship; dual nationality; colonialism; migration; ethnic minorities

1 Introduction*

In this paper we intend to address the impact of the dual nationality regimes¹ in the Member States of the European Union (EU) on access to European citizenship. It is well known that the latter status is dependent on the possession of the nationality of a Member State. Article 20(1) of the Treaty on the Functioning of the European Union (TFEU) reads that ‘every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship’. Importantly, European citizens enjoy the right to free movement and residence in the EU (Article 21(1) TFEU).² Non-Member State nationals are therefore eager to acquire this status.

In analysing the specific role of dual nationality with regard to access to EU citizenship, we start with an historical outline of the phenomenon of dual nationality. The analysis then proceeds with brief examinations of the approach towards dual nationality in three different historical-constitutional contexts: post-colonialism (UK), post-emigration (Italy) and post-communism (Romania).³ In all these contexts the phenomenon of dual nationality shows the contingency of the legal institution of citizenship and, consequently, that the naturalisation of migrants is linked to the historical experiences of the different European states.

On the basis of this analysis we will argue that the acceptance of dual nationality, in combination with a preferential nationality regime for certain groups residing outside the EU, entails discrimination against migrants on the basis of their origin. What is more, the different dual nationality policies not only have consequences for the Member State conferring the second ‘European’ citizenship, but also for the EU at large. This follows from the fact that Member State nationals enjoy – as European citizens – the right of free movement and residence in the Union’s territory. It thus seems clear that the citizenship policies of individual Member States, by opening up access to citizenship for groups residing outside EU territory on the basis of cultural or ethnic affinity, affects other states inside the EU. One can seriously query, though, whether these ‘external EU citizens’ can demonstrate a real link with the Member State granting its nationality. It appears that they merely attempt to acquire this nationality (and consequently EU citizenship) for instrumental reasons: the possibility to move and reside freely in the European space.

Finally, we discuss the case law of the European Court of Justice (‘ECJ’ or ‘the Court’) on the subject of (dual) nationality and raise the issue of Member State autonomy in nationality matters. This case law can be read in the light of a progressive ‘emancipation’ of the EU legal discipline in a field – nationality law – which is still the reserved domain of the Member States. What is more, the Court’s case law has already demonstrated that tensions between different nationality laws can easily arise, but it is to be expected, in the absence of EU action, that these tensions will arise even more frequently in the future. In this connection it can be hypothesised that it is precisely the privileged route towards the

* The authors would like to thank Sandro Mezzadra, Chiara Favilli and the anonymous reviewer for their detailed comments.

¹ For the purposes of this paper, dual nationality is primarily to be understood as referring to the situation that someone holds both a Member State and a non-Member State nationality. Although we generally adhere to the view that the term nationality best describes the legal link between an individual and a state, we have chosen to use nationality and citizenship interchangeably in this article. We therefore also use the term ‘national citizenship’ when we speak of Member State nationality. In addition, we use the terms ‘dual’ and ‘multiple’ nationality interchangeably. In describing the relation national citizenship-European citizenship, however, citizenship and nationality cannot be used interchangeably. In fact, it will be argued in Section 3 that one of the most important novelties of European citizenship is the impossibility to use the terms nationality and citizenship interchangeably when discussing this phenomenon.

² EU citizens seem to perceive free movement as the most relevant right attached to Union citizenship. Paul Magnette, “How can one be European? Reflections on the Pillars of European Civic Identity”, *European Law Journal* 13, no. 5 (2007): 670.

³ See Section 4 for a justification of this admittedly broad categorization.

acquisition of a second 'European' nationality that will provoke most tensions. After all, the right of external EU citizens to avail themselves of free movement and residence inside the European borders is perceived by many Member States as an 'inconvenience'. This situation, we argue in Section 6, gives rise to the legal autonomy of European citizenship. Suffice it to say for now that by autonomy we do not mean the severance of EU citizenship from national citizenship. Instead, we intend to say that harmonisation of the criteria for the acquisition of the 'second' nationality – which consequently renders the access to EU citizenship more equal – would be the first step in the legal autonomy of the latter.

2 The phenomenon of dual nationality

Dual nationality was generally highly disfavoured in the past.⁴ Today, however, it is approached in a more positive way, and although some still approach it with hostility, no one takes the view any longer that dual nationality is a legal impossibility. The legal literature at the end of the nineteenth and beginning of the twentieth century traditionally thought of multiple nationality as an anomaly, but primarily for emotional and psychological reasons. Legal arguments for the inconceivability of dual nationality were not really brought to the fore, apart from the argument that dual nationality troubled interstate relations.⁵ It is in this hostile context that André Weiss made the oft-quoted statement that 'on ne peut avoir deux patries, comme on ne peut avoir deux mères'.⁶ He did not advance a legal argument for his opposition to multiple nationality, but alleged that the emotional loyalty between individual and state stood in the way of the existence of dual nationality. In other words, he dismissed the possibility that a person may legitimately feel connected to more than one state. Although this view has declined in popularity over time, some still take the position that dual nationality is incompatible with concepts such as national loyalty and identity.⁷

At the opposite side of the spectrum are those taking the view that there are no reasons which prevent a person from having plural nationalities. It seems that most nationality law specialists take this position.⁸ Indeed, if we perceive of nationality primarily as a legal bond between an individual and a state, it is unclear why one should not be able to maintain legal bonds with more than one state; multiple nationality would just be one of the many examples of multiple allegiances.⁹ In this connection it should be noted that people possess many non-state loyalties, for example to the family or ethnic and religious communities. These loyalties can even conflict with loyalty to the state, yet no one would argue that these loyalties are incompatible with being a citizen. Is it thus perhaps not time to accept concurrent attachments and loyalties to different states, just as non-state loyalties to whatever

⁴ See for some historical remarks Paul Lagarde, "La pluralité de nationalités comme moyen d'intégration des résidents étrangers: Développements en France", in *Plural Nationality: Changing attitudes* (Conference at the European University Institute, Florence: 1992), 1.

⁵ Dual nationality is particularly controversial in times of war. Thus, the Great War (1914-1918) triggered a strong French paranoia towards naturalised persons of enemy origin (Germans, Austrians and Ottomans). The principal cause for the French fear was the German Delbrück Law of 22 July 1913. This law incorporated dual nationality in German law by granting the option to request authorization to retain German nationality upon naturalisation abroad on condition, however, of prior authorization by the German government. See Patrick Weil, *How to Be French: Nationality in the Making since 1789*, trans. Catherine Porter (Durham: Duke University Press, 2008), 61.

⁶ Quoted in Gerard-René de Groot and Hildegard Schneider, "Die zunehmende Akzeptanz von Fällen mehrfacher Staatsangehörigkeit in West-Europa", in *Japanischer Brückenbauer zum deutschen Rechtskreis* (Berlin: Duncker & Humblot, 2006), 65.

⁷ Loïc Darras, *La double nationalité*, Thèse pour le doctorat en droit (Paris: Université Paris II, 1986), 956.

⁸ See for example Lagarde, "La pluralité de nationalités comme moyen d'intégration des résidents étrangers: Développements en France", 3.

⁹ Giovanni Kojanec, "Report on Multiple Nationality," (Strasbourg: Council of Europe Proceedings, 2000), 13.

group or organization are accepted?¹⁰ Hailbronner continues along these lines and points to the changing role of the sovereign state, having the effect that states are beginning to recognize the possibility of political membership of more than one state.¹¹ We may say, then, that the concept of nationality is subject to change because the idea to which it is linked – the sovereign state – is changing. The growing toleration of multiple nationality is an illustration of this change.

For several reasons, states are confronted with cases of multiple nationality. Traditionally, the primary cause for the existence of dual nationality concerned the concurrent application of the two ways to acquire a nationality at birth: by birth on the territory of one state (*ius soli*) and by descent from a person who holds the nationality of another state (*ius sanguinis*). Although the nationality laws of most states currently combine these two principles, it is clear that dual nationality particularly arose in the context of migration: receiving states (countries of immigration) often applied the *ius soli* principle whereas sending states (countries of emigration) adhered to that of *ius sanguinis*.

A second and more recent cause for dual nationality concerns the equality of sexes in nationality law, which was introduced in Western Europe from the 1970s onwards.¹² When this equality was not yet secured, women did not have an independent position in nationality law: they lost their nationality upon marrying a foreigner and acquired the nationality of their husband. Consequently, they could not transmit their original nationality to their children.¹³

There is a more recent trend, in a globalizing world characterized by migration, for both sending and receiving states increasingly to allow multiple nationality. The acceptance of dual nationality by receiving as well as sending states corresponds to what Joppke has called a de- and re-ethnicization of nationality law.¹⁴ The de-ethnicization process in *receiving* states is caused by the emergence of universal rights which made it increasingly difficult for states to adhere to an ethnic conception of the nation. Universal human rights and inclusive, liberal norms had a self-limiting effect on the state's leeway in the domain of nationality law, in the sense that an exclusive attitude towards certain groups which seemed self-evident in the past now had to be justified. In addition to this process, a 'territorial' view of the state took root, meaning that membership ought to be dependent on residence instead of descent. This view, which was inspired by the effects of global migration, was part of the cause in many countries for the introduction of *ius soli* elements, the liberalization of naturalisation policies and the acceptance of dual nationality.

In *sending* states, however, nationality law is especially inclusive towards emigrants and their descendants. These states perceive multiple nationality as an important instrument in maintaining links with their emigrant population (see the Italian case in Section 4.2). The same global migration which played a role in triggering the *de-ethnicization* of nationality law in respect of immigrants is thus also the cause for the process of *re-ethnicization* towards emigrants.

Although the previous remarks on sending and receiving states addressed moving *persons*, moving *borders* can also be the cause of multiple nationality.¹⁵ In other words, expatriate populations may not only be produced by 'people moving across international borders' but also by 'international borders

¹⁰ Peter J. Spiro, "Dual nationality and the meaning of citizenship", *Emory Law Journal* 46, no. 4 (1997): 1473-1474.

¹¹ Kay Hailbronner, "Nationality in public international law and European law", in *Acquisition and Loss of Nationality, Policies and Trends in 15 European Countries*, ed. Rainer Bauböck, *et al.* (Amsterdam: Amsterdam University Press, 2006), 36.

¹² See generally Gerard-René de Groot, *Staatsangehörigkeitsrecht im Wandel* (Köln: Heymanns, 1989).

¹³ In 1966 only 3,9 per cent of the marriages concluded in the Netherlands were mixed marriages. In 1997 this had increased to 13 per cent. See Betty de Hart, *Onbezonnen vrouwen. Gemengde relaties in het nationaliteitsrecht en het vreemdelingenrecht*, Dissertatie Katholieke Universiteit Nijmegen (Amsterdam: Aksant, 2003), 241.

¹⁴ Christian Joppke, "Citizenship between De- and Re-ethnicization (1)", *European Journal of Sociology* 44, no. 3 (2003).

¹⁵ Thomas Faist, "Introduction: The Shifting Boundaries of the Political", in *Dual Citizenship in Global Perspective, From Unitary to Multiple Citizenship*, ed. Thomas Faist and Peter Kivisto (New York: Palgrave Macmillan, 2007), 2.

moving across people'.¹⁶ In such a case, states sometimes allow multiple nationality to national minorities that live across the national border but that remain culturally attached to their home country. In this respect, as we will see in Section 4.3, the situation in Central and Eastern Europe is particularly interesting on account of the frequent displacement of national borders in the course of the twentieth century.¹⁷

3 The relation between European citizenship and Member State nationality

The link that was established in the nineteenth and twentieth century between nationality and state sovereignty has been essential for the formation of the modern nation-state in that the state came to play a crucial role in the formation of individual identity. To go beyond this national dimension, as happened with the introduction of EU citizenship, thus constitutes an extraordinary historical rupture. After all, modern citizenship up to 1992 had always been connected to the nation-state, or better, a single nation-state. Throughout the last two centuries, the notion of national citizenship has admittedly acquired different meanings, yet neither citizenship in centralised states nor citizenship in federal states can be compared to the concept of EU citizenship. This is, first, because both forms of national citizenship remain linked to the state. Second, it is because the traditional meaning of citizenship in a centralised state as the link between an individual and a national political community (the state) cannot be transferred to the European Union (a supranational structure). As for citizenship in a federal state, this is difficult to compare to citizenship of the Union in that federal citizenship always overrides state citizenship; Union citizenship, however, has no life of its own but is dependent on national citizenship. From this it follows that no autonomous mechanism exists with regard to its acquisition and loss.

As EU citizenship is dependent on national citizenship, the latter indirectly impacts on the European level. However, EU citizenship itself has also introduced new elements into the exclusive relationship between citizen, state and nation because, by creating a sort of multiple belonging, it has widened the scope of action of European citizens. It has therefore been observed that the introduction of citizenship of the Union 'has established some kind of multiplicity of citizenships whereby some of the political rights traditionally reserved by the respective national constitutions for their own citizens are now extended to fellow European citizens'.¹⁸ EU citizenship, although still derivative from national citizenship, thus constitutes the foundation of a new legal and political space which has created rights and duties independent of the national state.

From a conceptual point of view, the introduction of EU citizenship does not seem to bring about significant changes to the classic concept of citizenship. The distinction of individuals on the basis of their *Volkstum* is still central in the perception of their identity; indeed, very few Europeans perceive themselves primarily as European citizens.

Union citizenship has been criticised because it is still dependant on national citizenship. It should nonetheless be emphasised that this new legal institution did oblige us to rethink the traditional structures of the concept of citizenship. Indeed, one of the novelties of EU citizenship is the impossibility of using the terms nationality and citizenship interchangeably because it does not make sense to refer to European citizens as nationals. After Maastricht, it was therefore necessary to have recourse to other formulas to describe the newly created Union citizenship, such as 'second grade

¹⁶ Rainer Bauböck, "Stakeholder Citizenship and Transnational Political Participation: a Normative Evaluation of External Voting", *Fordham Law Review* 75, no. 5 (2007): 2438.

¹⁷ See generally Enikő Horváth, *Mandating identity: citizenship, kinship laws and plural nationality in the European Union*, Dissertation European University Institute (Alphen aan den Rijn: Kluwer Law International, 2007); André Liebich, "Introduction: the vicissitudes of citizenship in the new EU states", in *Citizenship Policies in the New Europe*, ed. Rainer Bauböck, Bernhard Perchinig, and Wiebke Sievers (Amsterdam: Amsterdam University Press, 2007).

¹⁸ Giovanni Cordini, *Elementi per una teoria giuridica della cittadinanza. Profili di diritto pubblico comparato* (Padova: Cedam, 1998), 304.

citizenship', 'derivative citizenship', 'non-autonomous citizenship', or, in Italian doctrine, '*cittadinanza duale*' (see below).

European citizens enjoy a number of rights irrespective of their Member States of origin. The most characteristic feature of their European status in terms of fundamental rights is the right of free movement and residence in the territory of the Union. This means, to some extent, the dissolution of the traditional citizen-foreigner dichotomy; the right of free movement therefore appears to represent the most important element in the identification of European citizens with the European construct. Importantly, however, the new citizenship at the same time maintained a form of inclusion-exclusion by keeping intact the dichotomy between Union citizens and non-EU foreigners.

3.1 The foregoing has shown us that national and Union citizenship are two interlinked and inseparable statuses. Taking into account the dependency of the latter on the former, however, it seems wrong to speak of the two as a form of dual nationality. Here it is worth pointing to the distinction made by the Italian doctrine¹⁹ between *la cittadinanza doppia* (dual national citizenship) and *la cittadinanza duale* (EU citizenship).²⁰

The additional nature of EU citizenship implies that the concept is not meant to 'absorb' the different national identities. This also implies that EU citizenship is, in a sense, the 'victim' of substantial differences between the Member States' nationality laws. This follows, for example, from the General Declaration of the Conference on the Nationality of Member States attached to the Maastricht Treaty which reads that 'wherever in the Treaty ... reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned'. In this connection, Cordini has also remarked that 'EU citizenship ought not to alter by devious means, i.e. through its automatic extension by the European legal order, the national identity of the Member States'.²¹

Despite state autonomy in matters of nationality, however, we have also observed above that Union citizenship constitutes the basis for a new political space and that it grants rights independently of the Member States. Considering the autonomy of the concept of EU citizenship, it has therefore been noted that 'the conditions for the acquisition and loss of nationality must be compatible with the Community rules and respect the rights of the European citizen'.²² This in fact limits the autonomy of Member States in the field of nationality law. Moreover, in cases of doubt the ECJ can restrict the autonomy of Member States as it has the final word on the compatibility of their nationality legislation with EU law. This already followed from *Micheletti*, where the Court ruled that state competence in nationality law must be exercised with due regard to Community law. Yet in *Micheletti* the Court did not set concrete limits to the competence to autonomously lay down the conditions for acquisition and loss of nationality (see in more detail Sections 5 and 6).

Nevertheless, different authors have hinted at limits imposed by EU law on Member State autonomy in the area of nationality. Thus, AG Maduro has pointed to the fact that rules of primary law as well as general principles of EU law can constrain the legislative power of Member States in the

¹⁹ Vincenzo Lippolis, *La cittadinanza europea* (Bologna: Il Mulino, 1994), 61ff, 75ff.

²⁰ *Cittadinanza doppia* refers to the phenomenon that an individual simultaneously holds more nationalities which all exist independently of each other and which entail rights and duties under different legal jurisdictions. The status of dual national is sometimes dependent on the willingness of the state granting the 'second' nationality to accept the preservation of the other nationality, or vice versa. *Cittadinanza duale*, on the other hand, is characterised by its automatic and instantaneous conferral, i.e. it is automatically acquired upon acquisition of a Member State nationality. It is therefore a status which is simply added to that of Member State national without replacing the latter. According to Lippolis, EU citizenship is only the second example of *cittadinanza duale*. The first historical example was the 'common status' held by all Commonwealth citizens when their respective countries acquired their own national citizenship (this 'common status' was instituted under the 1948 British Nationality Act).

²¹ Cordini, *Elementi per una teoria giuridica della cittadinanza. Profili di diritto pubblico comparato*, 330.

²² Para. 23 of AG Maduro's opinion in Case C-135/08 *Rottmann* [2010] ECR I-0000

sphere of nationality law. Under this view, it could be argued that Article 4(2) TEU – which lays down the principle of loyal cooperation – is violated when a Member State proceeds to the mass naturalisation of non-Member State nationals without prior consultation of the Commission and other Member States.²³ In addition, we argue that Article 4(3) TEU, which guarantees the Union’s respect for the national identities of the Member States, may come to play a role in this field (see Section 6). Here it is worth pointing to d’Oliveira’s claim that nationality law belongs to the hard core of state identity because ‘the people belonging to a State as outlined by the nationality laws of the Member States form an intrinsic component of the identity of the Member States’.²⁴ D’Oliveira’s stance seems to imply that the Union needs to respect the respective nationality laws of the Member States and their particular historical link with non-EU Member States. Here we can think of (1) the post-colonial ties between Portugal and Brazil/African countries, Great Britain and the Commonwealth, and France and its former colonies in Northern Africa; (2) post-migratory ties between Spain/Italy and Latin America; and (3) post-communist ties with ethnic minorities residing in neighbouring countries such as in the case of Romania and Moldova.

4 Dual nationality in three historical-constitutional contexts: UK, Italy and Romania

Taking into account that EU citizens can avail themselves of free movement, we must start from the premise that each Member State’s nationality policy necessarily affects all the others. In this Section we shall therefore analyse the particular relationships and historical bonds between Member States and non-Member States in order to understand the main trends as to the conferral of a second ‘European’ nationality by Member States to non-Member State nationals.

By studying the historical bonds in these three normative contexts we may discover the criteria used to influence migration and integration through the use of naturalisation and dual nationality. In fact, it will be shown that dual nationality plays a crucial role and that the attitude towards this phenomenon is strongly rooted in the histories of specific Member States.

In the following we will focus our attention on three specific contexts:

- Member States with a colonial past (e.g. France, Portugal and the UK);
- Member States that have witnessed large scale emigration in the nineteenth century (in particular Italy, Poland²⁵ and Spain); and
- Member States with substantial ethnic minorities living in neighbouring countries which have not (yet) joined the EU (Central and Eastern Europe).²⁶

²³ Maduro (para. 27) referring to writings by Hall and Kotalakidis.

²⁴ Hans Ulrich Jessurun d’Oliveira, "Nationality and the European Union after Amsterdam", in *Legal issues of the Amsterdam Treaty*, ed. David O’Keeffe and Patrick Twomey (Oxford: Hart Publishing, 1999), 404. See also Opinion of AG Maduro, para. 25.

²⁵ There have been unsuccessful legislative attempts to formally (rather than just tacitly, as is the case now) accept dual nationality for Poland’s large emigrant population. Agata Górný et al., "Selective Tolerance? Regulations, Practice and Discussions Regarding Dual Citizenship in Poland", in *Dual Citizenship in Europe: From Nationhood to Societal Integration*, ed. Thomas Faist (Aldershot: Ashgate, 2007), 163.

²⁶ We acknowledge that this classification can be criticised. After all, the UK history has not only been characterised by colonialism, but also by massive emigration (especially from Ireland and Scotland). Spain on the other hand was a great colonial power before it witnessed large scale emigration. A neat classification is therefore not feasible. We nevertheless feel that this broad classification in three categories serves a purpose as it illustrates how those who suffered the European history (colonialism, emigration and communism) may be able to use dual nationality as an instrument of emancipation.

Take the Portuguese case for example. Piçarra and Gil note that ‘the period of residence required for citizenship acquisition by *ius soli* or naturalisation is shorter (six years) than that required for foreigners who do not come from Lusophone countries (ten years)’. In consequence, citizens of Lusophone countries who were under Portuguese rule

Not only has the dual nationality regime been regulated differently in these three contexts, it has also been subject to change as a result of migratory trends and specific political-ideological objectives.

The colonial experience has played a central role in the nationality laws of some Member States until at least the mid-1970s (and apparently still in Portugal²⁷): the post-colonial dual nationality can be considered as the translation in legal terms of the colonial rhetoric of the *gentle civilizer*.²⁸ This rhetoric has given rise to an integrationist concept of citizenship and these countries have primarily recruited labour migrants from former colonies, based on the presumption that the latter could easily be integrated.

As for Member States which experienced massive emigration during the nineteenth century, these have often tried to retain a link with their emigrants by allowing the unlimited transmission of their nationality to subsequent generations born abroad. Emigration countries are often also strong advocates of dual nationality and facilitate the acquisition of their nationality to people who can prove an ancestral link.

The third context only arose with the accession of Central and Eastern European countries to the EU. Their experience is rather different from that of the Western European Member States in that none of the recently acceded states had their current borders at the beginning of the twentieth century. The moving borders resulted in large groups of ethnic minorities living in neighbouring countries,²⁹ and the liberal attitude towards dual nationality after the collapse of communism has generally been seen as a remedy to right historical wrongs.

These three contexts show the ambivalence of a system of dual nationality which is linked to post-colonialist, post-migratory and post-communist legacies. The conferral of the second 'European' nationality offers a mode of emancipation for those persons who suffered the dramatic history of Europe. The different and subjective situation in each Member State also leads, however, to discrimination and hierarchical differentiation of migrants on the basis of their country of origin and/or his or her belonging to a specific ethnic minority. This division between 'privileged' and 'unprivileged' migrants shows the paradoxes governing mobility in Europe.

The above reflections call for a closer examination of the dual nationality regimes in force in the different Member States. We will therefore briefly analyse one case for each of the three different historical-constitutional contexts outlined above: the UK as the typical post-colonialist country; Italy as the archetypical country of emigration; and Romania as an example of the approach in Central and Eastern Europe towards ethnic minorities living in neighbouring countries.³⁰

4.1 In colonial systems it often happened that the colonial power allowed the retention of its nationality for those who acquired the nationality of the newly independent state. Dual nationality was thus explicitly accepted. When confronted with large scale immigration, states have often accepted dual nationality as an instrument in the integration of immigrants. This, in turn, led to a form of

(Contd.) _____

during colonisation can use Portuguese nationality law (i.e. the general Portuguese acceptance of dual nationality and the preferential regime for Lusophone citizens) as an instrument of emancipation: through their Portuguese nationality they obtain access to the European space. Nuno Piçarra and Ana Rita Gil, "Report on Portugal", *EUDO Citizenship Observatory Country Reports* (2009): 30.

²⁷ Ana Paula Beja Horta and Paul White, "Post-colonial migration and citizenship regimes: a comparison of Portugal and the United Kingdom", *Migrações*, no. 4 (2009).

²⁸ Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2002).

²⁹ It has for example been pointed out that nearly a quarter of all Hungarians live outside Hungary's borders in neighbouring states. Mária M. Kovács, "The Politics of Dual Citizenship in Hungary", in *Dual Citizenship in Global Perspective, From Unitary to Multiple Citizenship*, ed. Peter Kivisto and Thomas Faist (New York: Palgrave Macmillan, 2007), 93.

³⁰ We repeat that we acknowledge that one can take issue with our attempt to categorize the countries into three groups.

institutionalized racial discrimination as the return of colonisers and their descendants was encouraged by granting privileged access to nationality.

The British case is emblematic in this regard. At the time of decolonisation, the acceptance of dual nationality in relation to immigrants from the former colonies was meant to help the integration of labour migrants who, moreover, already knew the language and culture of the former colonising power.

During the colonial era, everyone born within the British empire held a similar nationality status, and, although the civic and political rights of subjects varied substantially from one territory to another, all of them exercised the full rights of British subject if they came to the United Kingdom.³¹ British nationality was thus very inclusive by recognising as British subjects all inhabitants of both the Old and New Commonwealth (e.g. Australia and Canada, and the Caribbean respectively). In the mid-twentieth century, however, when several Commonwealth countries gained independence and instituted their own nationality legislation, a new status was introduced by the new 1948 British Nationality Act which designated British people as ‘Citizens of the United Kingdom and Colonies (‘CUKCs’).³² Under the 1948 Nationality Act those holding the new status had the right to enter and reside in the UK. The result was that from 1948 to 1962 some 500.000 black and Asian British subjects entered the UK.³³ It is not a coincidence that when tensions arose which were imputed to the presence of these migrants, a debate was started on stricter immigration control regarding migrants from the Commonwealth. A distinction between immigrants from the Old and New Commonwealth was brought about with the entry into force of the 1971 Immigration Act, introducing the concept of ‘patriality’.³⁴ The ‘patrial’, defined as someone who was born in the UK or whose parents or grandparents had been born there, was exempt from immigration control. This way the 1971 Immigration Act, despite its formal neutrality vis-à-vis the immigrant’s race or country of origin, favoured white Old Commonwealth immigrants descended from those who had moved to the Dominions, especially from Scotland and Ireland, over ethnic minority immigrants.³⁵

On the first of January 1973, at the same moment the 1971 Act came into force, the UK acceded to the EEC. A declaration was added to the Accession Treaty which stated that only those with a right of abode in the UK were to be regarded as British nationals for the purposes of Community law. In 1981 a new British Nationality Act was drafted³⁶ which distinguished five different statuses: British citizens, British Dependent Territories citizens, British Overseas citizens, British subjects and British protected persons.³⁷ In practice this meant that ‘CUKCs’ who met the condition of patriality became British citizens. ‘CUKCs’ who lived, for example, in Gibraltar and the Falkland Islands became British Dependent Territories citizens. Following the British Overseas Territories Act 2002 this group, which was now referred to as British Overseas Territories Citizens, has full access to British citizenship and consequently EU citizenship. The other categories do not, however, possess European

³¹ Ann Dummett, "United Kingdom", in *Acquisition and Loss of Nationality, Policies and Trends in 15 European Countries*, ed. Rainer Bauböck, et al. (Amsterdam: Amsterdam University Press, 2006), 561.

³² Caroline Sawyer, "Report on the United Kingdom", *EUDO Citizenship Observatory Country Reports* (2009).

³³ Beja Horta and White, "Post-colonial migration and citizenship regimes: a comparison of Portugal and the United Kingdom": 45.

³⁴ Christian Joppke, *Selecting by Origin: Ethnic Migration in the Liberal State* (Cambridge, Massachusetts: Harvard University Press, 2005), 98.

³⁵ Ibid.

³⁶ The amended Nationality Act also made the UK decide to issue a new declaration on who were to be regarded as British nationals for the purposes of Community law. This new declaration of 1982 replaced the one of 1972 but was of the same tenor: those who did not have the right of abode in the UK were not considered British nationals for Community law purposes.

³⁷ Prakash Shah, "British Nationals under Community Law: The Kaur Case", *European Journal of Migration and Law* 3 (2001): 271.

citizenship.³⁸ The British case is further addressed in Section 5 when discussing the ECJ's judgment in *Kaur*.

4.2 The adoption of the current Italian Nationality Act (law 91/92) has been called a delayed measure because Italy, by reinforcing the *ius sanguinis* elements in the 1992 Act, behaved as if it were a country of emigration, whilst in reality it had been a country of immigration since 1973.³⁹

In recent years the number of people who recovered Italian nationality or acquired it through descent from an Italian ancestor has increased considerably. Pastore may have been right in a publication of 2001 that the total number of former nationals and their descendants who recovered Italian nationality was likely to be small as the implementation of the 1992 law 'fortuitously corresponded to a period of strong economic growth and political stability in the main Latin American receiving countries', the current statistics show that this has changed.⁴⁰

The principal cause has been the mode of acquiring Italian nationality under ministerial circular K.28.1 of 8 April 1991, which laid down the procedure for the recognition of Italian nationality with regard to descendants of Italian emigrants. This circular is still in force and was not amended by law 91/1992.⁴¹ Its essence resides in the fact that those who descended from an Italian emigrant and to whom was attributed another nationality *iure soli* but who have never renounced Italian nationality, have transmitted Italian nationality to their descendants.⁴² As Italian nationality was passed on without restrictions, even a person who can prove descent from an Italian who emigrated before the unification of Italy in 1861 is entitled to Italian nationality, provided that the Italian ancestor was alive at the time of the unification.⁴³ In the period 1998-2007 the exceptional number of 786,000 people acquired Italian nationality because they could prove their descent from an Italian national.⁴⁴ The statistics show that the economic and political situation in Latin American countries is of the utmost relevance for the number of people who decide to have their Italian nationality recognized: 60 per cent of those who 'revived' their Italian nationality were nationals of Argentina and Brazil, countries which experienced economic and political difficulties at the time.

Gallo and Tintori, who refer to the assessment by the Italian Ministry of Foreign Affairs that there were 60 million people of Italian descent living around the world in 1994, estimate that at least 30 million of them can prove their Italian descent and thus have an Italian nationality which only needs to be 'revived'.⁴⁵ However, it is doubtful that those who acquire Italian nationality this way will take up residence in Italy. The EU citizenship that is derived from Italian nationality allows them to establish themselves in countries to which they are culturally and linguistically more related such as Spain and Portugal – as for example the *Micheletti* case has shown (see Section 5). Italian nationality also allows

³⁸ Sawyer, "Report on the United Kingdom".

³⁹ Marta Arena, Bruno Nascimbene, and Giovanna Zincone, "Italy", in *Acquisition and Loss of Nationality, Policies and Trends in 15 European Countries*, ed. Rainer Bauböck, *et al.* (Amsterdam: Amsterdam University Press, 2006), 345-347.

⁴⁰ Ferruccio Pastore, "Migration Law and International Migration: The Italian Case", in *Towards a European Nationality. Citizenship, Immigration and Nationality Law in the EU*, ed. Randall Hansen and Patrick Weil (Hampshire: Palgrave Publishers, 2001), 103.

⁴¹ Stefania Bariatti, *La disciplina giuridica della cittadinanza italiana* (Milano: Giuffrè Editore, 1989), 187.

⁴² Marcello Alessio, *La doppia cittadinanza come problema 'quantitativo'*, 2000; available from http://www.umanesimolatino.it/fondazione_cassamarca/05_emigrazione/convegni/con_treviso.html.

⁴³ Guido Menghetti, *Problematiche relative agli immigrati dall'Argentina*, 2002; available from www.interno.it.

⁴⁴ Guido Tintori, *Fardelli d'Italia? Conseguenze nazionali e transnazionali delle politiche di cittadinanza italiane* (Roma: Carocci, 2009), 10.

⁴⁵ Gerardo Gallo and Guido Tintori, "Come si diventa cittadini italiani. Un approfondimento statistico", in *Familismo legale: come (non) diventare italiani*, ed. Giovanna Zincone (Roma-Bari: Editori Laterza, 2006), 133.

them to travel to the United States without an entry visa.⁴⁶ In sum, other states may be much more affected by this Italian practice than Italy itself.

4.3 Another illustrative example of the reacquisition of the nationality of a Member State of the EU by nationals of non-Member States concerns the Romanian case.⁴⁷ Romania has adopted a contested policy which grants former nationals and their descendants living outside the state's borders the right to reacquire its nationality. Romania was established in 1859 through the union of Moldova and Wallachia and was subject to Ottoman rule until 1878. After the First World War, Romania almost doubled in size and population through the incorporation of a number of former Austrian-Hungarian territories as well as Bessarabia. During the Second World War, however, Romania suffered major territorial losses: Northwestern Transylvania had to be ceded to Hungary and Southern Dobrogea to Bulgaria; the provinces of Bessarabia (which would become the Moldovan Soviet Socialist Republic) and Northern Bukovina (which later became part of the Ukraine) were occupied by the Soviets. After the Second World War, Romania would be under Communist rule until 1989.

It is obvious that the frequent change of Romanian borders created substantial groups of co-ethnics living in neighbouring countries. When the communist regime collapsed, Romania was eager to resume ties with the Romanian diaspora and kin-minorities abroad and it adopted a policy aimed at facilitating the reacquisition of Romanian nationality. Under the reacquisition policy of the early 1990s, requests for reacquisition could be sent by post. It was thus possible for descendants of former nationals to 'reacquire' Romanian nationality without ever travelling to the country. What is more, renunciation of the original nationality was not required. The upshot of this policy, which was at least partly inspired by nationalist motivations aimed at symbolically undoing the loss of territory during the Second World War, was the creation of a group of 'non-resident dual citizens living in neighbouring countries'. The main beneficiaries of the Romanian reacquisition regime are the inhabitants of Moldova and some provinces in the Ukraine, and to a lesser extent ethnic Romanians in Hungary and Bulgaria.

The reacquisition policy led to massive (re)naturalisations of Moldovans in the years 1991-2001. Since 2001, the process of restitution considerably slowed down for two reasons. First, there were simply too many applications. Second, the reacquisition policy was criticised by 'several EU agencies' (e.g. the EU representative office to Moldova)⁴⁸ because it could become 'an uncontrollable gate of access to the Schengen Space for non-EU citizens, bypassing restrictive immigration policies'. In this connection it is worthy of note that the European Commission repeatedly stated that the reacquisition policy is an internal matter for Romania.⁴⁹

It should also be noted that the reacquisition policy became much more restrictive in 2003. However, the restrictive amendments were subsequently revoked in 2007 and the restoration of Romanian nationality was again facilitated through a simplified procedure. As Constantin Iordachi has noted: 'The process of restitution of Romanian citizenship to former citizens from Moldova and the Ukraine has been fully resumed'.⁵⁰ He estimates that 30,000 restorations into Romanian nationality will be granted each year.

⁴⁶ Menghetti, *Problematiche relative agli immigrati dall'Argentina*.

⁴⁷ This Section is based on Constantin Iordachi, "Country report: Romania", *EUDO Citizenship Observatory Country Reports* (2009).

⁴⁸ Ibid.: 20.

⁴⁹ Ibid.: 14.

⁵⁰ Ibid.: 18.

5 Case law of the ECJ in the field of nationality law: *Micheletti, Kaur, Chen and Rottmann*⁵¹

For our analysis of the interaction between dual national citizenship and EU citizenship it is essential to have a good overview of the ECJ case law on (dual) nationality law. In what follows we discuss the few cases that directly concerned the Member States' nationality laws (and their interaction with EU citizenship).

Mr Micheletti was born in Argentina to Italian parents. Consequently, he possessed dual nationality: Argentinean nationality by *ius soli*, and Italian nationality as a result of the *ius sanguinis* principle.⁵² He had obtained a dental qualification in Argentina which was recognized by Spain on the basis of an agreement between Spain and Argentina and had been provisionally admitted to Spain for six months because he could show an Italian passport and was thus considered to be a Community national.⁵³ Before expiry of the six month term he requested a permanent residence card because he wanted to establish himself as a dentist in Spain. At that point in time, the Spanish authorities refused to grant this card on the basis of articles 9.9 and 9.10 of the Spanish Civil Code. Those articles provided that confronted with a dual national who did not possess Spanish nationality, the nationality of the country where the person had had his habitual residence before coming to Spain should prevail. As a result, the Spanish authorities saw Mr Micheletti as an Argentinean national, not as an Italian.

The debate in *Micheletti* concerned the question whether these Spanish provisions were incompatible with the Treaty, in particular the freedom of establishment.⁵⁴ The Spanish court asking the preliminary question noted that Italy could autonomously decide who its nationals were, while Spain could at the same time autonomously lay down rules on how to deal with such a dual nationality case. However, this court also acknowledged that the Italian and Spanish rule could clash with each other, leading to a violation of Community law if Spain would not recognise the effectiveness of Mr Micheletti's Italian nationality.⁵⁵

In its answer to the preliminary question, the ECJ stated that it is for each Member State, having due regard to Community law, to lay down the conditions for acquisition and loss of its nationality. The Court also ruled that a Member State cannot restrict the effects of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty. Consequently, Spain could not make recognition of the status of Community national subject to the condition of habitual residence of Mr Micheletti in Italy. If Italy regarded him as an Italian national, even if his habitual residence had been in Argentina, so must Spain.

The Court thus precludes a Member State from restricting the exercise of the freedoms guaranteed by the Treaty by relying on the famous *Nottebohm* case,⁵⁶ which requires a genuine link between a

⁵¹ Cases C-369/90 *Micheletti* [1992] ECR I-4239; C-192/99 *Kaur* [2001] ECR I-1237; C-200/02 *Zhu and Chen* [2004] ECR I-9925; C-135/08 *Rottmann* [2010] ECR I-0000.

⁵² Dual nationality is a frequent phenomenon in the relation Italy-Argentina. Also Spain has a long tradition of allowing dual nationality in respect of the countries in Latin America. See Olivier Vonk, "Latijns-Amerikaanse Spanjaarden en het Europees burgerschap", *Migrantenrecht*, no. 5 (2006).

⁵³ Although the Treaty of Lisbon has abolished the traditional pillar structure in EU law, we have left intact the terminology (i.e. the reference to the Community instead of the Union) as used in the pre-Lisbon literature and case law.

⁵⁴ Hans Ulrich Jessurun d'Oliveira, "Annotation Case C-369/90 *Micheletti* [1992]", *Common Market Law Review* 30 (1993): 624.

⁵⁵ José Luis Iglesias Buhigues, "Doble nacionalidad y Derecho comunitario: A propósito del asunto C-369/90, *Micheletti*, [1992]", in *Hacia un nuevo orden internacional y europeo. Estudios en homenaje al profesor don Manuel Díez de Velasco 1993* (Madrid: Editorial Tecnos 1993), 956.

⁵⁶ *Nottebohm* case (second phase), 6 april 1955, ICJ Reports 4,

person and a state in order for a nationality to be an 'effective nationality'.⁵⁷ Community law therefore imposes clear limits on the power of Member States to regulate situations involving dual nationals: the Member State nationality of a dual national who also possesses a non-Member State nationality will always prevail.⁵⁸ The Court reasons that Member States cannot be permitted to make recognition of the status of Community national subject to a condition such as the habitual residence in the territory of the Member State of which the person holds the nationality. Any other conclusion would mean that 'the class of persons to whom the Community rules on freedom of establishment were applied might vary from one Member State to another'.⁵⁹

Ruzié has criticised the Court's extensive interpretation of the notion of Community national in *Micheletti*. Arguing from a public international law perspective, he maintains that Micheletti could not legitimately claim the Italian nationality as it was not the effective one. It is clear why Ruzié disagreed with the Court's approach as it failed, in his view, to protect the interests of 'real' Community nationals in a time of unemployment in the Community.⁶⁰ Applying the criterion of the effective nationality to decide who is a Community citizen would obviously serve to protect these interests.

5.1 *Kaur*

Kaur addressed the validity of British declarations which defined who was British for Community purposes. Ms Kaur, a person of Asian origin, was born in Kenya in 1948 when Kenya was a British colony. As a result, she acquired the status of 'Citizen of the United Kingdom and Colonies' ('CUKC') under the British Nationality Act 1948.⁶¹ Many Asians who were settled in East African countries retained this status despite these countries becoming independent in the 1960s. They deliberately did not acquire the nationality of the newly independent states, but retained their status of 'CUKC' because they had been assured that they would retain the right of abode in the UK.⁶² When confronted with a strong increase in the number of Asians who moved from East Africa to the UK in the late 1960s, however, it was decided in 1968 to impose an ancestral connection requirement with the UK. The UK effort to keep these persons out had the effect that this particular group of Asians in East Africa is the largest group of British nationals not having the right of abode anywhere in the world.⁶³ Due to these law reforms Ms Kaur had lost her right of abode in the UK because she did not possess 'patriality'.

Ms Kaur, a British Overseas citizen not having a right of abode in the UK, applied for leave to remain in the UK after several temporary periods of residence there. This application was refused but the High Court, to which she turned for judicial review of the decision, asked the ECJ for a preliminary ruling. The questions asked concerned the effect of the British declarations of 1972 and 1982, Declaration no. 2 that was annexed to the Treaty on European Union in 1992⁶⁴, the relevance of

⁵⁷ Kojanec, "Report on Multiple Nationality," 11.

⁵⁸ Iglesias Buhigues, "Doble nacionalidad y Derecho comunitario: *Micheletti*", 966.

⁵⁹ Para. 12 of the judgment.

⁶⁰ David Ruzié, "Nationalité, effectivité et droit communautaire", *Revue générale de droit international public* (1993): 116.

⁶¹ Stephen Hall, "Determining the Scope *ratione personae* of European Citizenship: Customary International Law prevails for Now", *Legal Issues of Economic Integration*, no. 3 (2001): 355.

⁶² Prakash Shah, "British Nationals under Community Law: The *Kaur* Case": 272.

⁶³ *Ibid.*

⁶⁴ Declaration no. 2, which is a confirmation of customary international law, reads: 'The Conference declares that, wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned. Member States may declare, for information, who are to be considered their nationals for Community purposes by way of a declaration lodged with the Presidency and may amend any such declaration when necessary'.

article 3(2) of the Fourth Protocol of the European Convention on Human Rights and the role played by ex Article 18 EC in this context. In its judgment the Court showed its traditional reticence in respect of nationality law, yet its disregard of the human rights at stake has been severely criticised.⁶⁵

Ms Kaur claimed that British law infringed fundamental rights by depriving British nationals in the same situation as she was of the right to enter the territory of which they were nationals, or of rendering them effectively stateless. She referred to *Micheletti* when claiming that a state can only define the concept of national if it has due regard to Community law. This implied, in her view, the observance of fundamental rights which form an integral part of Community law. In addition, she disputed the relevance of the British declarations. The UK and others took the view that under international law, each state alone can determine the categories of persons that it regards as its nationals. The UK stressed the importance of its declarations in the light of its colonial past.

The judgment of the Court is fairly short and disregards many of the points raised by the referring national court. After confirming state autonomy in nationality matters under international law, the Court upheld the validity of the British practice to define, in the light of its colonial past, several categories of British citizens and to confer differing rights to these categories according to the ties to the UK. With regard to the 1972 British declaration – and also the 1982 declaration which the Court regards as substantially designating the same categories of persons – the Court held that this declaration had to be taken into consideration ‘as an instrument relating to the Treaty for the purpose of its interpretation and, more importantly, for determining the scope of the Treaty *ratione personae*’. The adoption of the declaration, the Court continues, did not have the effect of depriving anyone of rights under Community law. Rather, these rights had never arisen in the first place. The national court was thus told to refer to the 1982 declaration in determining whether a person was a British national for the purposes of Community law.

It is interesting to come back to one of Ms Kaur’s arguments, namely the phrase from *Micheletti* which says that the national competence to define conditions for the acquisition and loss of nationality must be exercised with due regard to community law. Although this phrase has the potential to severely curtail state autonomy in nationality law, it is clear that this moment did not yet arrive in *Kaur*. Hall rightly concludes from the judgment that ‘in deciding whether or not to *confer* nationality, the Member States’ wide discretion under customary international law is preserved and recognition must be given to any such (non-)conferral for Community law purposes’ (emphasis in original).⁶⁶ Yet he continues by saying that state discretion may not be equally wide when it comes to *withdrawing* nationality. After all, in *Kaur* the Court ‘avoided holding that all nationality measures fall outside the scope of Community law and do not therefore attract the general principles of Community law of which fundamental rights are a component’.⁶⁷ Hence, the Court’s conclusion that Ms Kaur had never possessed any rights under Community law leaves open the possibility that ‘there may be circumstances in which a person who has already acquired the status of Member State national for Community purposes ... may be protected by Community law when subject to attempts to withdraw that status’.⁶⁸ This was exactly the issue at stake in *Rottmann* (see below).

The reason for discussing *Kaur* at such length is that the case exemplifies the ambivalence surrounding the dual nationality regime in Europe (see in more detail Section 6). After all, some have easy access to a *second* ‘European’ nationality due to the autonomy of the Member States in deciding who their ‘second’ nationals are, while others remain *stateless* as a result of this same autonomy. In

⁶⁵ Prakash Shah, "British Nationals under Community Law: The Kaur Case": 278; Helen Toner, "Annotation Case C-192/99 *Kaur* [2001]", *Common Market Law Review* 39 (2002): 890.

⁶⁶ Hall, "Determining the Scope *ratione personae* of European Citizenship: Customary International Law prevails for Now": 359.

⁶⁷ *Ibid.*: 360.

⁶⁸ *Ibid.*

other words, the case draws attention to the strong discrepancy between Ms Kaur's statelessness (while she had in fact been promised that she could remain a British citizen) and those who acquire a second 'European' nationality for instrumental reasons (while they can often only demonstrate a very weak (if any) link with their 'new' European country).

5.2 *Zhu and Chen*

The facts of *Chen* were very particular. Mrs Chen and her husband both worked for a Chinese undertaking and often travelled to Europe for business – the United Kingdom in particular. The couple had one child and was not allowed to have a second child under Chinese law. They came up with a very original strategy to still have a second child, however. Mrs Chen deliberately entered the UK in May 2000, when she was six months pregnant, with the aim of giving birth in Belfast. Although this city is situated in Northern Ireland, which forms part of the United Kingdom, Irish law at the time provided for the *automatic* acquisition of Irish nationality *iure soli* to children born in Northern Ireland. Not only did Mrs Chen's child (Catherine) therefore acquire Irish nationality, the child also became a European citizen. In that capacity Catherine could make use of her right to reside in another Member State, which she did when mother and child settled in Wales, also in the UK. Although Mrs Chen and Catherine had thus never moved to another Member State, the Court held that this was not a wholly internal situation (as claimed by the Irish and UK governments) due to the fact that Catherine – an Irish national – was resident in the UK. The Court also did not agree with the UK's argument that 'Mrs Chen's move to Northern Ireland with the aim of having her child acquire the nationality of another Member State constitutes an attempt improperly to exploit the provisions of Community law'.⁶⁹ Referring to *Micheletti* and *Kaur*, the Court held that international law allows each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality. The legality of the child's acquisition of Irish nationality was therefore uncontested.⁷⁰ Finally, the ECJ decided that the mother, who was not a European citizen, had a right to reside with the child as her primary carer. Any other decision would deprive the child's right of residence of any useful effect.

Although Mrs Chen was just one of the many non-EU nationals who tried to obtain EU citizenship for their children by giving birth in Northern Ireland, her case seems to have been one of the factors that led to the abolition, by way of a referendum, of the principle of *automatic* acquisition of Irish nationality by birth in Northern Ireland – a very exceptional rule in European nationality law. This case is therefore a good example of voluntary harmonisation of nationality law in Europe.

5.3 *Rottmann*

The most recent ECJ case in the field of nationality is *Rottmann*. The Court's ruling was eagerly awaited for the obvious reason that it was the first case brought before the Court which not only involved the loss of Member State nationality, but (consequently) also the loss of EU citizenship. *Rottmann* was an Austrian national by birth who acquired German nationality through naturalisation in 1999, thereby losing his Austrian nationality. During the naturalisation procedure, however, he had not mentioned that he was the subject of criminal proceedings in Austria. It was only after his naturalisation that the German authorities were informed of *Rottmann* being subject to criminal proceedings, and that already in 1997 Austria had issued a warrant for his arrest. In the light of those circumstances *Rottmann*'s naturalisation was withdrawn with retroactive effect on the ground of deception. As he had lost his Austrian nationality upon naturalisation in Germany, the withdrawal of the naturalisation not only rendered him stateless but also provoked the loss of European citizenship.

⁶⁹ Para. 34.

⁷⁰ See also Jean-Yves Carlier, "Annotation Case C-200/02 *Chen* [2004]", *Common Market Law Review* 42 (2005): 1127-1128.

The preliminary ruling asked for by the highest German federal administrative court consisted of two questions. First, it asked whether it was contrary to Community law that Rottmann lost his European citizenship as a result of the combined effect of the lawful withdrawal of his naturalisation by the German authorities and the non-automatic recovery of his original Austrian nationality. Second, should Germany refrain altogether or temporarily from withdrawing the naturalisation if or so long as that withdrawal would lead to the loss of European citizenship, or should Austria interpret and apply (or even adjust) its national law in such a way as to avoid the loss of European citizenship?

The ECJ started by making a number of predictable observations, repeating that it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality.⁷¹ Yet despite the fact that nationality law falls within the competence of the Member States, the loss of European citizenship and the rights attached to it brings the present situation within the scope of EU law.⁷² In this connection the Court also stresses again that citizenship of the Union is intended to be the fundamental status of nationals of the Member States.⁷³ It is interesting to note for our purposes the section of the judgment where the Court tries to give some substance to the *Micheletti* statement. According to the Court,

‘the proviso that due regard must be had to European Union law does not compromise the principle of international law ... that the Member States have the power to lay down the conditions for the acquisition and loss of nationality, but rather enshrines the principle that, in respect of citizens of the Union, the exercise of that power, in so far as it affects the rights conferred and protected by the legal order of the Union, as is in particular the case of a decision withdrawing naturalisation such as that at issue in the main proceedings, is amenable to judicial review carried out in the light of European Union law’.⁷⁴

The judicial review as carried out by the Court in this case led to the conclusion that the withdrawal of Rottmann’s naturalisation (and consequently the loss of European citizenship) *could* be compatible with European Union law: both the 1961 Convention on the Reduction of Statelessness (Article 8(2)) and the 1997 European Convention on Nationality (Article 7(1) and (3)) allow the deprivation of

⁷¹ D’Oliveira submits that this *obiter dictum*, which by its very nature was not essential to the outcome in *Micheletti*, paved the way for *Rottmann*: ‘[Het obiter] was dus een schot voor de boeg, dat op gezette tijden door het Hof werd herhaald zonder dat er tot nu toe praktische gevolgen aan werden verbonden ... In *Rottmann* is dan nu voor het eerst een praktische uitwerking ontwikkeld aan de herhaalde obiters’. In his very critical annotation he argues for a treaty revision stipulating that nationality law belongs to the ‘reserved domain’ of the Member States. The Court’s evolution of the case law should be brought to a halt as it is in the process of reversing the relationship between nationality and EU citizenship. If the Court insists on strengthening Union citizenship, however, d’Oliveira pleads for the severance of EU citizenship from Member State nationality. Hans Ulrich Jessurun d’Oliveira, “Ontkoppeling van nationaliteit en Unieburgerschap? Opmerkingen over de *Rottmann*-zaak”, *Nederlands Juristenblad*, no. 16 (2010): 1031. See for a positive commentary on *Rottmann* Gareth Davies’s contribution to the EUDO citizenship forum (<http://eudo-citizenship.eu/citizenship-forum>).

⁷² Para. 42. See on the question whether the case fell within the scope of EU law more extensively paras. 8-13 of AG Maduro’s Opinion. The AG’s reasoning is not followed by the Court.

For speculations on the different situations which may fall within the scope of EU law after *Rottmann* see *Ibid.*: 1029; Gerard-René de Groot, “Invloed van het Unierecht op het nationaliteitsrecht van de Lidstaten: Overwegingen over de Janko Rottmann-beslissing van het Europese Hof van Justitie”, (forthcoming): 6, 13. De Groot argues in particular that it remains unclear from *Rottmann* whether a third country national who has been naturalised in one of the Member States but who has never exercised his/her right to free movement will fall within in the scope of EU law if (s)he were to lose this ‘European’ nationality. If (s)he could, this would be a glaring example of judicial activism. After all, the Court would then in the particularly sensitive area of nationality law less easily conclude that a given case is a wholly internal situation. On the other hand, if this situation were not to fall within the scope of EU law then a differentiation would be made in the nationality laws of the Member States between cases falling within the scope of EU law and those that do not. In De Groot’s view, such a differentiation would be completely ‘undeserving of belief’. As the post-*Rottmann* situation is thus not particularly clear, it is expected that the judgment will trigger a number of preliminary questions trying to ascertain its boundaries.

⁷³ First mentioned in Case C-184/99 *Grzelczyk* [2001] ECR I-6193.

⁷⁴ Para. 48.

nationality when that nationality was acquired by means of fraudulent conduct.⁷⁵ Such a deprivation cannot be considered to be an arbitrary act as prohibited by the Universal Declaration of Human Rights (Article 15(2)) and the ECN (Article 4c). Importantly, the Court adds that such withdrawal must observe the principle of proportionality. When examining a decision withdrawing naturalisation, it is necessary for the national court ‘to take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union’.⁷⁶ It will be very interesting to see how this proportionality test⁷⁷ will be interpreted by national courts in the field of nationality law. Does it, for example, imply a closer scrutiny of administrative decisions in light of the European citizenship attached to Member State nationality?⁷⁸ The Court’s introduction of a proportionality test is not the only novelty in *Rottmann*, however. A ‘sensational’ and ‘very far-reaching’⁷⁹ part of the judgment is the following:

‘A Member State whose nationality has been acquired by deception cannot be considered bound, pursuant to Article 17 EC, to refrain from withdrawing naturalisation merely because the person concerned has not recovered the nationality of his Member State of origin. It is, nevertheless, for the national court to determine whether, before such a decision withdrawing naturalisation takes effect, having regard to all the relevant circumstances, observance of the principle of proportionality requires the person *concerned to be afforded a reasonable period of time to try to recover the nationality of his Member State of origin*’ (emphasis added).⁸⁰

As to the German court’s second question, the Court remarked that the German withdrawal of the naturalisation had not yet become definitive and that no decision had yet been taken by Austria concerning Rottmann’s status. As long as no decision is taken, it is not possible for the Court to rule on the question whether this decision is contrary to EU law. Nevertheless, the Court explicitly mentions that also Austria is bound by the principles stemming from the judgment.⁸¹

It is hard to see how the Court could have reached a different substantive outcome in *Rottmann*; the treaties to which the Court referred explicitly allow statelessness which is the result of the withdrawal of a nationality acquired by means of fraudulent conduct. Nevertheless, *Rottmann* is a very interesting addition to the ECJ case law in the field of nationality law. The Court’s introduction of a proportionality test will probably not only have far-reaching consequences, but will also further trigger the debate on the exact scope of judicial review by the ECJ on Member State nationality law.

6 Towards the legal autonomy of Union citizenship?

In this conclusion we wish to comment on the issues thrown up in the foregoing Sections by first of all assessing the impact of the ECJ judgments on the dual nationality policies of the Member States.

⁷⁵ This had also been argued by AG Maduro (para. 29).

⁷⁶ Para. 56.

⁷⁷ On the implications of the proportionality test (first introduced in the EU citizenship case law in Case C-413/99 *Baumbast* [2002] ECR I-7091) see Michael Dougan, "The constitutional dimension to the case law on Union citizenship", *European Law Review* 31 (2006): 613-641.

⁷⁸ See Jo Shaw in her contribution to the EUDO citizenship forum.

⁷⁹ de Groot, "Invloed van het Unierecht op het nationaliteitsrecht van de Lidstaten: Overwegingen over de Janko Rottmann-beslissing van het Europese Hof van Justitie": 12, 14.

⁸⁰ Paras. 57-58

⁸¹ In para. 62 the Court states that ‘it has to be borne in mind ... that the principles stemming from this judgment with regard to the powers of the Member States in the sphere of nationality, and also their duty to exercise those powers having due regard to European Union law, *apply both to the Member State of naturalisation and to the Member State of the original nationality*’ (emphasis added). It is therefore beyond dispute that the principles of EU law apply both to the provisions on the loss and to those on the acquisition of nationality.

Second, it is worth analysing the tensions that arise within the EU due to the lack of harmonisation in the field of nationality law. The attribution of a 'second' nationality in combination with a preferential regime for certain categories of persons from outside the EU can have serious negative effects on the EU at large. After all, the EU citizenship attached to each Member State nationality entails the right to freely move and reside in the EU. Given the fact that external EU citizens residing in third countries are created on a large scale by some Member States, the EU might eventually come to play a stronger role in the field of nationality law.⁸²

Third, the current situation gives rise to discrimination, inequalities, and hierarchies of legal status based on the migrants' different geographic origin. These hierarchies, which are the result of the conferral or non-conferral of a second 'European' citizenship, show the 'non-blindness' of the Member States to the migrants' origins.

Fourth and finally, we will show that the introduction of EU citizenship not only had an impact on Member State nationality law – the *Chen* case is the most illustrative example –, but that especially the attitude towards dual nationality in the different Member States can reinforce the call for minimum standards in the field of European nationality law. Such minimum harmonisation could, we argue, ultimately give rise to the legal autonomy of Union citizenship.

If we leave *Kaur* aside for the present, there are at least two ECJ judgments which had an (indirect) impact on the domestic nationality law of the Member States: *Micheletti* and *Chen* (it is too soon to assess the exact impact of *Rottmann*). In *Micheletti* Spain reluctantly accepted Micheletti's Italian nationality.⁸³ We have seen that it was argued in vain that Micheletti's Argentinean nationality, and not his Italian nationality, was the effective nationality according to Spanish rules of private international law. *Micheletti* also confirmed Member State autonomy in the field of nationality law. As a result, Spain modified its own dual nationality regime by concluding a number of additional protocols to the dual nationality treaties that had been concluded back in the 1950s.⁸⁴ The essential feature of these dual nationality treaties was that a dual Spanish-Latin American national who was not resident in Spain only had a 'dormant', non-active Spanish nationality. Consequently, he/she was in that case also not a European citizen. After the *Micheletti* decision, this system was changed by the additional protocols which allowed both nationalities to be active simultaneously. The additional protocol to the Spanish-Argentinean treaty had an immediate effect in that 25.400 Argentineans acquired a Spanish passport at the Spanish consulate in Buenos Aires in 2001.⁸⁵ As yet, however, the European Commission has expressed no interest in this policy that creates considerable numbers of external EU citizens resident abroad.

The other example of an ECJ judgment having an effect on domestic nationality law concerned *Chen*. Although perhaps less significant for present purposes as the case does not deal with dual nationality, it is nonetheless interesting to see how the introduction of EU citizenship – a status which

⁸² In connection with the Italian and Romanian 'mass' naturalisations we may also point to an interesting observation by Kotalakidis who wonders how the Commission and other Member States would have reacted when Greece, in the event that Cyprus had not been accepted as a Member State, would have granted Greek nationality (and therefore EU citizenship) to all Cypriots of Greek ethnicity. See Kotalakidis in Gerard-René de Groot, *Towards a European Nationality Law – Vers un droit européen de nationalité. Inaugural lecture, delivered on 13 November 2003 on the occasion of the acceptance of the Pierre Harmel chair of professeur invité at the University of Liège*, 2003; available from www.ejcl.org.

⁸³ De Groot refers in this respect to the initial non-compliance by Spanish courts with *Micheletti*. In his view, it is therefore conceivable that Spain will plead for Community competence in the field of nationality law with the aim of preventing Italian-Argentinean nationals from settling in Spain as is currently allowed under EU law. See Gerard-René de Groot, "Zum Verhältnis der Unionsbürgerschaft zu den Staatsangehörigen in der Europäischen Union", in *Europäisches Integrationsrecht im Querschnitt*, ed. P. Müller-Graff (Baden-Baden: Nomos, 2002), 83.

⁸⁴ Vonk, "Latijns-Amerikaanse Spanjaarden en het Europees burgerschap": 187-195.

⁸⁵ Gerard-René de Groot, "Latin-American citizens: Some consequences of the autonomy of the Member States of the European Union in nationality matters", *Maastricht Journal of European and Comparative Law* 9, no. 2 (2002): 120.

was merely meant to complement Member State nationality – had a bearing on the modification of Irish nationality law.⁸⁶

It is to be expected that new cases concerning the relation between dual nationality and European citizenship will be brought before the ECJ that are potentially as important as *Micheletti* has been for the last twenty years.

It is not unlikely that tensions between Spain and Italy, Italy and Romania, but possibly also between Hungary and Romania,⁸⁷ will increase. Italy, for example, has a considerable number of Moldovans living on its territory.⁸⁸ The Italian government has already expressed concerns about becoming one of the most popular destinations of these ‘new’ Romanian nationals,⁸⁹ and has stated that the Romanian (dual) nationality policy in respect of Moldovans may impact both the demographic equilibrium and migration fluxes in Europe.⁹⁰ It has therefore asked the European institutions – emphatically also on behalf of Italian public opinion⁹¹ – to ‘closely watch this situation’.

In the absence of *concrete* EU action,⁹² it is not unthinkable that Italy will at some point refuse to recognise the Romanian nationality of Romanian-Moldovans nationals who have never even resided in Romania by arguing that their Moldovan nationality is in fact their effective nationality. If such a refusal was brought before the Court, however, it would obviously be considered incompatible with the Court’s precedent in *Micheletti*. Nevertheless, it would force the Court to rule on two seemingly irreconcilable rules of EU law. First, the argument (which could be advanced by Italy) that the present ‘mass’ naturalisation by some Member States is incompatible with the principle of loyal cooperation under Article 4(2) TEU. Romania, on the other hand, will rebut that its autonomy in the domain of nationality law follows from the principle that the EU respects the national identities of the Member States as laid down in Article 4(3) TEU.⁹³ As we have seen in Section 4, Romania feels that the

⁸⁶ Interestingly, Macklin notes that female asylum seekers in Ireland became perceived as a threat because they *disrupted the integrity of Irish identity* through reproducing ‘inauthentic’ Irish citizens. Audrey Macklin, "The Securitisation of Dual Citizenship", in *Dual Citizenship in Global Perspective, From Unitary to Multiple Citizenship*, ed. Peter Kivisto and Thomas Faist (New York: Palgrave Macmillan, 2007), 51.

⁸⁷ Mária M. Kovács, "The Politics of Dual Citizenship in Hungary", *Ibid.*, 94-95. See also the debate on the EUDO citizenship forum concerning the Hungarian and Slovakian dual nationality policies (<http://eudo-citizenship.eu/>).

⁸⁸ Romanians and Bulgarian nationals (who became EU citizens in 2007) are subject to the so-called 2+3+2 arrangement, meaning that Member States may restrict access to their labour markets for a maximum of seven years. Romanian and Bulgarian EU citizens will therefore only enjoy full free movement in the EU from 2014 onwards. They can enter Italy without an entry visa for three months, however, but subsequently often overstay their permitted residence. Hence the great number of illegal Romanian and Romanian-Moldovan nationals in Italy.

⁸⁹ People from Romania represent 67 per cent of the total of EU nationals living in Italy. Giovanna Zincone and Marzia Basili, "Report on Italy", *EUDO Citizenship Observatory Country Reports* (2009).

⁹⁰ This remark was made by the Italian minister for European Affairs, Andrea Ronchi, on 23 April 2009. See <http://www.politichecomunitarie.it/comunicazione/16576/moldova-ronchi-preoccupazione-su-cittadinanza-romena-a-moldavi>

⁹¹ See on Italian public opinion in respect of Romanians Cara Margaret Uccellini, "'Outsiders' After Accession. The case of Romanian migrants in Italy, 1989-2009", in *Insiders and Outsiders: Globalisation, citizenship and the future of the EU* (Inaugural Conference Jean Monnet Centre of Excellence, King's College London 14 June 2010).

⁹² On 17 April 2009 the European Commission stated that it was ‘closely monitoring the situation’. See <http://temi.repubblica.it/metropoli-online/romania-presto-cittadinanza-piu-facile-per-i-moldavi/>

⁹³ Article 4(2) TEU reads: ‘The Union shall respect the equality of Member States before the Treaties as well as their national identities ...’. Article 4(3) TEU provides: ‘Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives’. The Treaty is available from <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0001:01:EN:HTML>

reacquisition policy for former nationals and their descendants living outside the state's borders is an element in the reconstruction of Romanian identity. Confusingly, Italy uses a similar line of reasoning to justify its own preferential regime for co-ethnics living in Latin America.

The Court would thus have to balance 'loyal cooperation' against 'national identity'. This would, paradoxically, come down to balancing two different national identities, as the Member State which invokes the principle of loyal cooperation will also do so in the name of national identity. After all, the state which claims to suffer negative effects to its demographic equilibrium as a result of the nationality policies of other Member States will, by invoking the principle of loyal cooperation, claim that these policies 'ought not change its own national identity by devious means'.⁹⁴

It is therefore essential that the Court be more explicit (at least more explicit than it was in *Rottmann*) as to the exact meaning of the statement that the definition of the conditions of acquisition and loss of nationality must be exercised with due regard to EU law. In other words, what exactly are the rules and principles of EU law that can limit Member State autonomy in nationality law?

Ultimately, the question boils down to whose national identity will have the upper hand in a conflict as we have tried to sketch above. Is the national identity of the Member State creating large groups of external EU citizens paramount to the national identity of the Member State which sees its own national identity affected by the large scale immigration of the external EU citizens created by other Member States?

As each Member State is under an obligation to recognise nationalities granted by the others, the dual nationality policy as illustrated by the Italian and Romanian cases has an obvious and significant effect on the EU at large. It has been shown that this policy, by creating large numbers of external EU citizens, grants access to the European territory to nationals of states that have not (yet) acceded to the EU. This paper has hopefully made clear that this development is increasingly perceived in a negative way. After all, the external EU citizens mainly seem to acquire a Member State's nationality for the EU citizenship attached to it, which reinforces the ambivalence surrounding the different dual nationality regimes. Compared to the many 'unprivileged' migrants who have to meet stringent conditions to acquire a Member State's nationality, the dual nationality regime as described in this paper represents an extremely privileged access to the 'right to stay' in the European space. On the other hand, those who have suffered the European history (colonisation, permanent emigration and communism) can now – through the use of 'legal trickery' – employ European citizenship as an instrument of emancipation.

It is possible that the combined effect of this 'trickery' and the increasing number of conflicts that consequently arise between the dual nationality regimes of the EU member states will lead to the legal

⁹⁴ See footnote 19 (Cordini). The question of national identity and demographics had already arisen in Case C-473/93 *Commission v Grand Duchy of Luxembourg* [1996] ECR I-3207. Luxembourg had imposed a nationality requirement in a number of public sectors such as education, arguing that 'teachers must be Luxembourg nationals in order to transmit traditional values and that, in view of the size of the country and its specific demographic situation, the nationality requirement is therefore an essential condition for preserving Luxembourg's national identity'. Although the Court recognised that the preservation of the national identities of the Member States was a legitimate aim respected by the Community legal order (under ex article F(1) Treaty on European Union), Luxembourg's argument failed. The Court held that 'the interest pleaded by the Grand Duchy can, even in such particularly sensitive areas as education, still be effectively safeguarded otherwise than by a general exclusion of nationals from other Member States' (paras. 32-35).

In this connection it is perhaps also worth pointing at the (in d'Oliveira's view disputable) assumption that EU citizens cannot be subjected to integration measures when permanently residing in other Member States than their own. As d'Oliveira argues, this situation shows that ex Article 6(3) EC (now Article 4(2) TEU) expresses a preference for the EU citizen's bond with his or her *home* state, not with the *host* state. This view of ex Article 6(3) EC seems to reinforce Italy's argument: not only can Romanian-Moldavians not be refused access to Italian territory, they can also not be subjected to integration measures which could potentially overcome the problems raised by the massive influx of this group. See Hans Ulrich Jessurun d'Oliveira, "Europees burgerschap: dubbele nationaliteit?", in *Asser Colloquium Europees Recht*, 33e zitting, 2003 (2004), 121.

autonomy of EU citizenship. By autonomy we do not mean the severance of EU citizenship from national citizenship, however. Rather, we intend to say that a harmonisation of the criteria for the acquisition of the ‘second’ nationality – which consequently renders the access to EU citizenship more equal – would be the first step in the legal autonomy of the latter.

As for the question of harmonisation, we can imagine that the Commission will increasingly question the almost absolute autonomy of the Member States in the field of nationality law, in particular where the issue of the second ‘European’ citizenship is concerned. However, as legislative harmonisation does not seem feasible at the moment, we may possibly witness how the Court uses its constituent power in this area, just like it has done, for example, in the fields of fundamental rights and European citizenship.⁹⁵

In conclusion, we shall therefore try to imagine what will be the role of the ECJ in establishing the boundaries of EU citizenship and what position it will take towards the national justifications for adopting a given dual nationality policy. The many tensions that arise in relation to the national identities of the Member States due to conflicting dual nationality regimes will force the Court to lay down criteria that guarantee the respect for these identities. These criteria, which will give preference to either the demographic national identity or the cultural-ethnic national identity, will become an integral part of EU law. This may, in turn, be the first step in a process whereby the Court will more closely scrutinise the nationality laws of the Member States. It can therefore be hypothesised that the Court’s imposition of criteria for the acquisition of a second ‘European’ citizenship will result in a further harmonisation of nationality law and, consequently, in the legal autonomy of EU citizenship.

⁹⁵ The dynamic role of the Court is well known. See for example Francis Jacobs, "Citizenship of the European Union - A Legal Analysis", *European Law Journal* 13, no. 5 (2008); Miguel Poiares Maduro and Loïc Azoulay, eds., *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford: Hart Publishing, 2010).

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