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MEVROUW DE JONG GAAT ETEN:  
EU CITIZENSHIP AND THE CULTURE OF PREJUDICE

Dimitry Kochenov



**EUROPEAN UNIVERSITY INSTITUTE, FLORENCE**  
**ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES**  
**EUROPEAN UNION DEMOCRACY OBSERVATORY ON CITIZENSHIP**

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**DIMITRY KOCHENOV**

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## **Abstract**

This essay discusses the dubious premises of ‘repressive liberalism’ underlying the policies of cultural ‘integration’ that have been adopted by a number of otherwise liberal democracies around the world. The author uses his own first-hand experience of naturalisation in the Kingdom of the Netherlands, the pioneering jurisdiction with regards to the introduction of ‘cultural integration’, in order to expose the counterproductive nature of the ‘integration’ approach to the absorption of non-citizens. The essay claims that there is no such thing as a ‘nation-specific’ culture to be tested and that the creation and consolidation of EU citizenship changed the whole framework of reference within which any Member State nationality operates and should be discussed. The argument is that, particularly in the EU context, culture and language testing before naturalisation is built on false assumptions and does not serve any identifiable goal that would go beyond the perpetuation of prejudice. Since testing stigmatises a large number of Europeans and potentially undermines social cohesion in the Member States, it should be abolished.

## **Keywords**

EU Law, Citizenship, European Citizenship, nationality, naturalisation, culture, integration, social cohesion, prejudice, testing





## Mevrouw de Jong Gaat Eten:<sup>†</sup> EU Citizenship and the Culture of Prejudice

*It has always been easier, it will always be easier, to think of someone as a non-citizen than to decide that he is a non-person (Alexander Bickel<sup>1</sup>)*

*Vsiak kulik svojo boloto khvalit (A Russian proverb<sup>2</sup>)*

### Introduction and the structure of the argument<sup>\*</sup>

This essay discusses the dubious premises of ‘repressive liberalism’<sup>3</sup> underlying the policy of cultural ‘integration’ adopted by a number of otherwise liberal democracies around the world.<sup>4</sup> The focus is on the situation in the European Union (EU). I am using my own first-hand experience of naturalisation in the Kingdom of the Netherlands, the pioneering jurisdiction with regards to the introduction of ‘cultural integration’, marked by ‘politics divided from society’.<sup>5</sup> This will hopefully provide a useful perspective for those readers who have never changed nationalities themselves.

In what follows the counterproductive nature of the mistaken ‘integration’ approach to the absorption of non-citizens embraced by a growing number of Member States of the Union is exposed.<sup>6</sup> It is claimed that there is no such thing as a ‘nation specific’ culture to be tested and that the creation and consolidation of EU citizenship changed the whole framework of reference within which any Member State nationality operates and should be discussed. The argument is very simple: culture and language testing before naturalisation is built on false assumptions and does not serve any identifiable goal that would go beyond the perpetuation of prejudice, particularly in the EU context. As such, since testing stigmatises a large number of Europeans and potentially undermines social cohesion in the Member States, it should be abolished.

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<sup>†</sup> Mrs. de Jong Goes to Eat.

<sup>\*</sup> Senior Lecturer in European Law, University of Groningen. I am grateful to the colleagues at the Jean Monnet Centre for International and Regional Economic Law and Justice, NYU Law School, where the first draft of this paper was produced in the Spring semester of 2010, especially, to Miriam Aziz, who encouraged the writing of this paper and also to Maria Fletcher (Glasgow Law School) and Dora Kostakopoulou (Manchester Law School), Daan Beltman (Groningen), an anonymous reviewer and numerous others for their most helpful comments. The first sketch was presented at the UACES ‘Communicating European Citizenship’ conference, Foreign and Commonwealth Office, London, April 2010. Assistance of Harry Panagopoulos is kindly acknowledged.

<sup>1</sup> Bickel, Alexander, *The Morality of Consent*, New Haven: Yale University Press, 1975, 53. For an illuminating analysis of this statement see Bosniak, Linda, ‘Persons and Citizens in Constitutional Thought’, 8 *Int’l J. Cont’l L.*, 2010, 9, 10.

<sup>2</sup> Each bird praises its own swamp.

<sup>3</sup> Joppke, Christian, ‘Beyond National Models: Civic Integration Policies for Immigrants in Western Europe’, 30 *WEP*, 2007, 1.

<sup>4</sup> For an overview and analysis see Bauböck, Rainer, and Joppke, Christian (eds.), ‘How Liberal Are Citizenship Tests?’, EUI RSCAS Working Paper 2010/41, 2010.

<sup>5</sup> Oosterwaal, Annemarije, and Torenvlied, René, ‘Politics Divided from Society? Three Explanations for Trends in Societal and Political Polarisation in the Netherlands’, 33 *WEP*, 2010, 258. Oosterwaal and Torenvlied demonstrate that the national policy with regards to immigration and minorities which changed the Netherlands after the death of Pim Fortuyn is detached from the opinions held by the majority of the Dutch.

<sup>6</sup> The majority of EU Member States, including Austria, Denmark, France, Germany, the Netherlands and the UK now require ‘culture’ and language testing. For overviews see e.g. Carrera, Sergio, *A Typology of Different Integration Programmes in the EU*, Briefing Paper IP/C/LIBE/FWC/2005-22, 2006; van Oers, Ricky, Ersbøll, Eva, and Kostakopoulou, Dora, ‘Mapping the Redefinition of Belonging in Europe’, in van Oers, Ricky, Ersbøll, Eva and Kostakopoulou, Dora (eds.), *A Re-definition of Belonging?*, The Hague: Koninklijke Brill, 2010, 307. For up-to-date naturalisation regulations in all the Member States please consult the EUDO CITIZENSHIP database, available at <[www.eudo-citizenship.eu](http://www.eudo-citizenship.eu)>.

The structure is as follows. After a brief outline of the main problematic aspects of the shift towards the policy of ‘cultural testing’ in Europe and of its apparent clash with the rationale of EU integration, including the continuing articulation of the concept of EU citizenship (1), the essay turns to a concise account of the author’s naturalisation experience (2). Building on the first two sections, the myth of the necessary ‘integration’ of the ‘new-comers’<sup>7</sup> into the majority society propagated by a number of (still) liberal democracies is exposed and analysed. This myth is commonly employed by states to justify the exclusion of citizenship applicants perceived in the popular culture as the ‘other’. A special emphasis is put on the problematic nature of the recent developments, when seen in the context of the continuing proceduralisation of the notion of nationality in the liberal democratic states during the last half a century. Having lost its substantive cultural essence, the contemporary legal vision of nationality disallows states from developing profoundly illiberal monocultures by punishing difference. The universality of modern culture reinforced by the ideal of liberal tolerance ensures that states introducing cultural tests, even with the best intentions, simply have nothing to test – my first thesis (3). The essay continues by focusing on the clash between the essence of EU citizenship, on the one hand, and that of Member States’ nationalities on the other, firmly placing the debate within the legal-political context of European integration and demonstrating that within that context, any culture and language test by the Member States is *per se* far more dubious than in any other country in the world – my second thesis (4).

The mentioned developments damage the harmonious development of the societies of the EU Member States in a number of important ways, including the propagation of mythical national exceptionalism through the state-mandated exclusive idea of culture and, probably more importantly, by making it clear to the applicants for naturalisation that no matter where they might come from, their own ‘non-culture’ is not good enough for the states where they reside.<sup>8</sup> Once the layer of EU citizenship is added, the urgency to deal with the problems outlined becomes even more acute.<sup>9</sup>

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<sup>7</sup> In the majority of cases, ironically, the ‘new-comers’ are permanent residents who have successfully functioned in their country of residence for many years. The most minimal measure of ‘success’ is required in this context, *i.e.* not going beyond legality of stay and being clean of serious crimes (terrorism, murders etc.).

<sup>8</sup> See also Kostakopoulou, Dora, ‘Introduction’, in van Oers, Ricky, Ersbøll, Eva and Kostakopoulou, Dora (eds.), *A Re-definition of Belonging?*, The Hague: Koninklijke Brill, 2010, 1, 1, 7.

<sup>9</sup> I am not concerned here with the issue of bullying people to give up other nationalities (see, for a short overview of the problem, Jessurun d’Oliveira, Hans Ulrich, ‘Multiple Nationality and International Law by Alfred Boll’, 101 *Am. J. Int’l L.*, 2007, 922), still accepted in a number of countries as a necessary prerequisite for naturalisation. In the EU, such countries include: Austria, Bulgaria, the Czech Republic, Denmark, Estonia, Germany, Latvia, Lithuania, the Netherlands, Poland, Slovenia and Spain (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. See also the relevant database of the EUDO citizenship project: <[www.eudo-citizenship.eu](http://www.eudo-citizenship.eu)>. For analysis see Kochenov, Dimitry, ‘Dual Nationality in the EU: An Argument for Tolerance’, 17 *ELJ*, 2011. Such bullying always comes at the price of closing one’s eyes to the obvious inconsistencies of such policy, based solely on prejudices and empty claims (see on this issue *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; Howard, Marc Morjé, ‘Variation in Dual Citizenship Policies in the Countries of the EU’, 39 *Int’l Migration Rev.*, 2005, 697, 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). A good example is provided by my own country, the Netherlands, where 10% of the population are double or triple nationals (de Groot and Vink (2008)), including Her Majesty the Queen (Jessurun d’Oliveira (2007), 923), while the official policy consists in the prohibition of dual nationality, against modern trends in international law (Spiro, Peter J., ‘Dual Citizenship as Human Right’, 8 *Int’l J. Const. L.*, 2010, 111).

These problems not only make the lives of a huge number of people more miserable than they would otherwise be. They also threaten to affect the social cohesion of our societies, where a general shift to the purely doctrinal vision of what a society is seems to have taken a toll on common sense, simplifying reality to a dangerous degree.

## 1 Outline of the problem

The articulation of the status of EU citizenship<sup>10</sup> deeply affected the very essence of the Member States' nationalities in a number of important ways.<sup>11</sup> While EU citizenship provides all Member State nationals with a number of Union-wide rights which no Member State alone could grant, the status of EU citizenship, although of *ius tractum* nature<sup>12</sup> (being derived from the nationalities of the Member States),<sup>13</sup> often finds itself in a contrarian relationship with such nationalities. The main logic behind the nationalities of the Member States – as numerous naturalisation practices aimed at incorporating 'newcomers' clearly demonstrate – is that of *settling* the nationals within the confines of the states.<sup>14</sup> The main logic of EU citizenship, on the contrary, consists in liberating citizens from the negative effects of the 'container theory of society'<sup>15</sup> that states (and sometimes regions) impose,<sup>16</sup> since the main EU citizenship right is *to leave* one's Member State of nationality<sup>17</sup> and to settle elsewhere in the Union. EU citizenship thus reinforces the democratic nature of the Union reflected in the EU Treaty

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<sup>10</sup> For analysis of the EU citizenship concept see, *inter alia*, Davies, Gareth, 'EU Citizenship', in Chalmers, Damian, Davies, Gareth, and Monti, Giorgio, *European Union Law: Text and Materials* (2<sup>nd</sup> ed.), Cambridge: CUP, 2010, 439; Kochenov, Dimitry, '*Ius Tractum* of Many Faces: European Citizenship and a Difficult Relationship between Status and Rights', 15 *Colum. J. Eur. L.*, 2009, 169; Spaventa, Eleanor, 'Seeing the Wood despite the Trees? On the Scope of Union Citizenship and Its Constitutional Effects', 45 *CMLRev.*, 2008, 13; Kostakopoulou, Dora, 'Ideas, Norms and European Citizenship: Explaining Institutional Change', 68 *MLR*, 2005, 233; Jacobs, Francis G., 'Citizenship of the European Union – A Legal Analysis', 13 *ELJ*, 2007, 591; Maas, Willem, *Creating European Citizens*, Lanham: Rowman and Littlefield, 2007.

<sup>11</sup> Rostek, Karolina and Davies, Gareth, 'The Impact of Union Citizenship on National Citizenship Policies', 10 *EIoP* 5, 2006, 1 (and the literature cited therein); Kochenov, Dimitry, 'Rounding up the Circle: The Mutation of Member States' Nationalities under Pressure from EU Citizenship', EUI RSCAS Working Paper No 2010/23, 2010.

<sup>12</sup> Kochenov (2009) '*Ius Tractum*', 181. For an analysis of the legal possibility to decouple the two statuses on certain occasions see Kostakopoulou, Dora, 'The European Court of Justice, Member State Autonomy and European Union Citizenship: Conjunctions and Disjunctions', in de Witte, Bruno and Miklitz, Hans (eds.), *European Court of Justice, Member State Autonomy and European Union Citizenship: Conjunctions and Disjunctions?*, Florence: EUI, 2010; Kochenov (2010) 'Rounding up the Circle', 29–33; Jessurun d'Oliveira, Hans U., 'Ontkoppeling van nationaliteit en Unieburgerschap?', *NJb*, 2010, 785.

<sup>13</sup> Art. 20(1) TFEU.

<sup>14</sup> This explains dubious linguistic and 'cultural' testing in place in all the Member States. For an up-to-date analysis of national naturalisation laws of all the European states please visit EUDO CITIZENSHIP observatory web-page: <<http://eudo-citizenship.eu/>>.

<sup>15</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>16</sup> On the regional dimension see Kochenov, Dimitry, 'Regional Citizenships in the EU', 35 *ELRev.*, 2010, 307.

<sup>17</sup> Art. 21(1) TFEU.

by providing for voting with one's feet:<sup>18</sup> EU citizens can always move away and choose a Member State which would suit best their ideals of liberty and the good life.<sup>19</sup>

This obvious clash between the logical vectors of 'to stay' and 'to go' might be downplayed, but it will have to be addressed seriously in the immediate future. Given the positive potential of the legal status of EU citizenship to broaden citizens' horizon of opportunities<sup>20</sup> and the recent citizenship case law reaffirming the importance of this status,<sup>21</sup> the reconciliation of the two vectors can only occur through a rethinking and reframing of the Member States' nationalities, unless the whole construct of the internal market and EU citizenship is to be scrapped, with all the disastrous consequences that makes this highly unlikely.

The situation of newly naturalised Member State nationals is a perfect illustration of the logical disharmony between the two legal orders in the EU, affecting the same individuals simultaneously. This duality of statuses which governs the life of every single EU citizen exemplifies the archaic logic behind naturalisation, which is never questioned by politicians and is only rarely seriously criticised by scholars.<sup>22</sup> The illuminating critical accounts provided by Kostakopoulou<sup>23</sup> and Carens<sup>24</sup> are particularly useful in employing simple facts to challenge the counterproductive views entrenched within the political mainstream, which in essence focus on the quasi-totalitarian embrace of a mythical monoculture, corresponding to each bounded community, to each nation.

Such an idea of the world shapes a duality, which consists in the tension between a presumed order 'inside' and anarchy 'outside',<sup>25</sup> automatically dismissing any 'outside' culture as inferior to that of the majority culture 'inside' the state, mistakenly embracing the presumption of monocultural citizenship,<sup>26</sup> which never existed in reality,<sup>27</sup> however hard the states tried to impose it from within

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<sup>18</sup> Such right is a characteristic of the majority of other federated entities around the world and goes to the core of the concept of federalism as one of the ways to promote freedom: 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; Tiebout, Charles M., 'A Pure Theory of Local Expenditures', 64 *Journal of Political Economy*, 1956, 416. For a compelling explanation why the EU is a federation within a classical sense of the word see Schütze, Robert, 'On "Federal" Ground: The European Union as an (Inter)National Phenomenon', 46 *CMLRev.*, 2009, 1069; Schütze, Robert, *From Dual to Cooperative Federalism: The Changing Structure of European Law*, Oxford: OUP, 2009.

<sup>19</sup> See Kochenov, Dimitry, 'On Options of Citizens and Moral Choices of States: Gays and European Federalism', 33 *Fordham. J. Int'l L.*, 2009, 156.

<sup>20</sup> See, for a brief outline, Kochenov (2010) 'Rounding up the Circle'.

<sup>21</sup> For a recent example see e.g. Case C-135/08 *Janko Rottmann v. Freistaat Bayern*, judgment of 2 March 2010, ECR I-0000 annotated by Kochenov, Dimitry in 47 *CMLRev.*, 2010, 1831.

<sup>22</sup> For accounts of exceptional clarity see 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>23</sup> Kostakopoulou, Theodora, *The Future Governance of Citizenship*, Cambridge: CUP, 2008.

<sup>24</sup> Carens, Joseph H., *Culture, Citizenship, and Community*, Oxford: OUP, 2000.

<sup>25</sup> Allott, Philip, *Eunomia: New Order for a New World*, Oxford: OUP, 1991. See also Allott, Philip, 'The European Community is not the True European Community', 100 *Yale L.J.*, 1991, 2485, 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>26</sup> For an argument for multiculturalism see Kymlicka, Will, *Multicultural Citizenship*, Oxford: OUP, 1995.

<sup>27</sup> This is so because citizenship can be presented as the evolution/struggle for recognition both of formerly ignored groups (women, gays, racial minorities, the poor) and of new forms of rights. See also Sypnowich, Christine, 'The Culture of

the confines of their ‘imagined communities’.<sup>28</sup> Viewed from this perspective, the European ‘*Costituzione senza popolo*’<sup>29</sup> is not an exception in representing a polity without a nation, but a reflection of the state of affairs where the state-imposed homogenisation is absent.<sup>30</sup> Indeed, ‘nowhere is a common identity sufficient to give rise to new forms of governance. Identities overlap and compete with one another’.<sup>31</sup> Moreover, to take the state-related official identity as the most important one *per se* would be verging on the absurd.

While Member States present language and ‘integration’ tests preceding naturalisation as necessary and useful, this article takes exception with such a view, demonstrating that the contrary is true. First of all, the liberal ideology of tolerance coupled with common sense permits argument against such practices. Indeed, those who are willing to naturalise are in the absolute majority of cases long-term residents of a polity. It would appear to be exceptionally arrogant of any ‘container society’ – of any state – to assume that the culture and language(s) of these people are inherently inferior to those the state happens to sponsor. So much inferior, in fact, as to lead to a ‘legitimate’ denial of their very membership of society.

Asking those who functioned in a society for years to pass any form of naturalisation test simply underlines their ‘otherness’ and exposes a presumption against the acceptance of such people as equals, unless they pass through the state-sponsored ‘purification’ process. In short, it comes down to the denial of social facts:<sup>32</sup> those who never bother to naturalise may stay, but will always be looked down upon by a state that presumes their cultural inferiority. The latter will mandate their exclusion from the majority society composed of ‘correct’ citizens,<sup>33</sup> whose representatives in the legislature would preach faithfulness to the ‘real’ (*i.e.* state-sponsored) culture, usually viewed as a frozen set of conventions, rather than a set of dynamic interactions of different, mutually enriching influences.<sup>34</sup>

In fact, when speaking of culture in such a context, it is impossible but to focus on the idea of control, since, as pointed out by Adorno, ‘whoever speaks of culture speaks of administration as well, whether this is his intention or not’.<sup>35</sup> Once the state intervenes, the very essence of what one commonly understands as culture is instantly transformed: ‘the law can play an instrumental role in “organizing culture”’,<sup>36</sup> leading to the formation and promotion of *Leitkultur* – the version of ‘culture’ which is officially endorsed and promoted by the state.

The path of the liberal democratic state during the last half a century is, broadly-speaking, also a path *away* from such interventions and *towards* tolerance and pluralism, as exemplified by the degree to which states have embraced human rights and non-discrimination commitments. However, as the

(Contd.)

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Citizenship’, 28 *Politics & Society*, 2000, 531 (disagreeing with Kymlicka on the point of promoting minority cultures, but arguing for a general state obligation to ensure that all ‘live well’, including a guarantee of cultural tolerance).

<sup>28</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>29</sup> Scoditti, Enrico, *Costituzione senza popolo: Unione europea e nazioni*, Bari: Edizioni Dedalo, 2001. One might also characterise European integration, following J.H.H. Weiler, through the notion of ‘European constitutional federalism’: 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.

<sup>30</sup> For a brilliant account see Scott, James, *Seeing Like a State*, New Haven: Yale University Press, 1998. See also Sissenich, Beate, *Building States without Society*, Lanham, MD: Lexington Books, 2007.

<sup>31</sup> Sissenich, Beate, ‘Justification and Identity in European Integration’, 14 *Constellations*, 2007, 347, 349.

<sup>32</sup> Carens (2002), 110.

<sup>33</sup> The constitutional theory of a number of countries is built around solely the inclusion of citizens among the *Volk*, which amounts to persistent refusal to see the social reality. For examples see *e.g.* Lansbergen, Anja and Shaw, Jo, ‘National Membership Models in a Multilevel Europe’, 8 *Int’l J. Const. L.*, 2010, 50, 58.

<sup>34</sup> See also Chaney, David, ‘Cosmopolitan Art and Cultural Citizenship’, 19 *Theory, Culture & Society*, 2002, 157.

<sup>35</sup> Adorno, Theodor, *The Culture Industry*, London: Routledge, 1991, 107.

<sup>36</sup> Aziz, Miriam, *The Impact of European Rights on National Legal Cultures*, Oxford: Hart, 2004, 83.

recent rise in the adoption of naturalisation ‘culture tests’ reveals, this does not prevent majorities from halting the exceptionalism of local ‘cultures’, thereby employing narratives (as well as laws, of course) against those who ‘do not belong’.

An acceptance by the majority should not deter scholars from criticising this state of affairs. However, the understanding that majorities are more often wrong than right predates Publius<sup>37</sup> and democracy is only a success in that it ‘does not demand much of people and [...] can function with a minimal human being’.<sup>38</sup> Moreover, democracy is just the means, as Weiler reminded us, not a value in itself.<sup>39</sup> Consequently, ‘a democracy of vile persons will be vile’.<sup>40</sup> One can sigh with relief: at least there is nothing wrong with democracy in Europe.

In the context of the EU all the aforementioned considerations are amplified by the functioning of the concept of EU citizenship. This status is conferred on any individual who acquires the nationality of a Member State and is essentially antithetical to the narrow-minded nationalist concerns which drive naturalisation politics. EU citizenship, by its mere existence, thus renders dubious all the illiberal ‘integration’ efforts put in place by national legislatures. These national policies cannot escape from being assessed in the context of the Union as a whole. Once the level of magnitude has changed – especially once viewed from the wider perspective of the EU – all state-mandated cultures become ‘minority cultures’<sup>41</sup> in some sense, which results in the instant taming of their mythical claims.<sup>42</sup> According to Kymlicka, ‘the world-historical task of the EU is to tame and diffuse liberal nationhood’,<sup>43</sup> which corresponds to the consolidation of democracy.<sup>44</sup> Non-recognition of this important contribution of the EU would clearly amount to ‘moral blindness’.<sup>45</sup>

## 2 On a personal note: becoming Dutch

When going through the process of naturalisation in the Netherlands, like any other citizenship applicant, I was asked to prove that I had legally resided in the Kingdom for a number of years,<sup>46</sup> that my income was sufficient and also that I was well enough versed in the local language and culture.<sup>47</sup> The elaborate testing system in place in the Netherlands<sup>48</sup> is tuned to ensure the ‘integration’ of newly

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<sup>37</sup> See e.g. Madison, James, ‘Federalist 51’ [1799].

<sup>38</sup> Mueller, John, ‘Democracy and Ralph’s Pretty Good Grocery: Elections, Equality, and the Minimal Human Being’, 36 *Am. J. Pol. Sci.*, 1992, 983.

<sup>39</sup> Weiler (2003), 18.

<sup>40</sup> *Id.* For an account of the death of democracy see Allott, Philip, ‘The Emerging International Aristocracy’, 35 *NY U. J. Int’l L. & Pol.*, 2003, 309.

<sup>41</sup> de Witte, Bruno, ‘Politics versus Law in the EU’s Approach to Ethnic Minorities’, in Zielonka, Jan (ed.), *Europe Unbound*, London: Routledge, 2002, 137, 148. See also von Toggenburg, Gabriel, ‘Minorities (...) The EU: Is the Missing Link an “of” or a “within”?’’, 25 *Eur. Integration*, 2003, 273, 275–276.

<sup>42</sup> This is not to say that myths and cannot efficiently coexist with rationality, in fact, the contrary seems to be true: Della Sala, Vincent, ‘Political Myth, Mythology and the European Union’, 48 *JCMS*, 2010, 1, 16.

<sup>43</sup> Kymlicka, Will, ‘Liberal Nationalism and Cosmopolitan Justice’, in Benhabib, Seyla, *Another Cosmopolitanism*, Oxford: OUP, 2006, 134. See also Davies, Gareth, ‘Humiliation of the State as a Constitutional Tactic’, in Amtenbrink, Fabian and van den Bergh, Peter (eds.), *The Constitutional Integrity of the European Union*, The Hague: T.M.C. Asser Press, 2010.

<sup>44</sup> Weiler (2003), 18. See also Davies (2010) ‘Humiliation’.

<sup>45</sup> Kymlicka (2006), 135.

<sup>46</sup> The exact number of years depends on the personal circumstances of the applicant, her family situation and her legal status in the country.

<sup>47</sup> Chapter 4, Rijkswet op het Nederlanderschap.

<sup>48</sup> 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.

naturalised citizens into the society. The law demands that an ‘official’ test of (official) culture be passed.<sup>49</sup> Thus numerous years spent in the country teaching law at an (Imperial) University – in my case – were not viewed as a proof of successful ‘integration’.

The consequences of such an approach are truly paradoxical. ‘Integration’ becomes a bureaucratic exercise entirely ignoring the reality of life, as my actual functioning in society did not count. Having spent five or more years in the country, anyone necessarily has a network of friends and daily routines, be it a law professor, a prostitute, or a pro-bono fitness instructor. Passing an integration test in such a context merely means getting a seal of state approval for your *life*, which the state randomly distributes among taxpayers: today a professor of Dutch law is more successful than a catholic priest preaching to Latin Americans – tomorrow a porn-actor starring with Dutch divas is preferred by the Kingdom to a poet writing in Tagalog with the majority of friends coming from Luzon. The assumption that a state, when dealing with law-abiding, financially self-sufficient taxpayers, can officially brand some lives as deficient is certainly worrisome. Once such an assumption is questioned, no possible justification for any such tests can be found, no matter how such tests are managed, what kind of questions they ask and what their stated goals are.

The Dutch *inburgeringstoets* sends a message which is clear: possessing humanity is not sufficient to be embraced by the Dutch state even after years spent in the Kingdom. Like a great number of other European countries, the Dutch state views the society it is in charge of as highly specific and different from any other on the planet. This starting assumption justifies the need to test the ‘knowledge’ of this specificity amongst those willing to naturalise or acquire permanent residence, *i.e.* those who have been part of this very society for many years. Listening to the municipal employee, I began to wonder how I had been able to survive so many years in a society so unique. Do they really see Godard’s films differently? Do they read Dostoyevsky differently? Clearly, they do not. Consequently – and coupled with the analysis contained in the following two parts of this essay – any culture test is inherently a hypocritical bureaucratic exercise based on an unjust presumption that in being ‘foreign’ some residents are not quite good enough to be recognised as full members of *their* community. This presumption not only stigmatises those deemed not good enough, it also ignores a simple and overwhelmingly important fact: those willing to naturalise *are* already part of the community, whether the state is willing to recognise this or not. Simply put, culture and language testing is used by states to ignore a reality they are for some reason uncomfortable with.

The Dutch state is not better nor worse than any other in this respect. To prove my worthiness to vote against the likes of Wilders and, most importantly, not to be looked down upon as someone who is ‘not good enough’ in a country where I have been paying taxes for my entire working life, I registered for the test. The content of it was (quite expectedly) *truly* strange, to say the least. It included questions such as ‘your neighbour died. What should you do?’ with the following suggested answers: ‘1. Nothing; 2. I send a condolences card; 3. I go help the widow’.<sup>50</sup> As any specialist in Dutch culture knows, only *one* of these answers is correct. Consider another example: ‘Mrs. de Jong says “I will go and eat now”’ (*Ik ga nu eten*). Suggested reactions: ‘1. You are invited to join Mrs. de Jong; 2. Mrs. de Jong does not feel like speaking with you any more and wishes to go home; 3. Mrs. de Jong will probably invite you to eat with her later’.<sup>51</sup> And lastly: ‘Fines above a certain amount disqualify you from the possibility of becoming Dutch’ with the following suggested reactions: ‘1.

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<sup>49</sup> For the Dutch culture test with which I was confronted see <<http://docs.google.com/fileview?id=0B-z6p7DEIfUvNmZjNWQwMzgtNzM2OC00ZTIwLTgxNzItODAxNzVjMjRjNWRI&hl=en>> (the formulations are not identical to the ones in the test, as I had to reconstruct them relying on memory (taking notes during the test is prohibited)).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

Thank God I only have a parking fine; 2. I did not know about this rule; 3. I never drink when I am driving'.<sup>52</sup>

Upon completing the test – for which, incidentally, example copies are not available anywhere on the basis that preparation is considered impossible since ‘the proper attitude ... cannot be learnt by heart’,<sup>53</sup> – the feeling of optimism which should normally accompany the decision to become a fully-fledged member of the society where one has been living for a very long time, was entirely gone.<sup>54</sup> I clearly remember how puzzled I was. *Is this Dutch culture?* For me Dutch culture included references to the Union of Utrecht, to the ‘Golden Age’<sup>55</sup> with its tulipmania,<sup>56</sup> to the art of Rembrandt van Rijn and Vincent van Gogh, to Piet Mondriaan, to groundbreaking architecture and design, the *Amsterdamse School*,<sup>57</sup> *De Stijl*<sup>58</sup> etc. Above all though, it included references to the famed liberalism and tolerance entrenched in Dutch society, and yet, as the very existence of this absurd test abundantly testified, an aspect of Dutch culture that is nowhere in evidence. The language which I learnt to read ‘Rituelen’,<sup>59</sup> seemed desecrated. However, I was very happy the questions were not related to geography or historical facts – a position generally in line with the liberal ideology: citizens themselves are to decide whether to quit smoking, read books or love the motherland. Moreover, although it is abundantly clear that knowing the distance between Utrecht and Leeuwarden is unlikely to make you a better member of the community in which you have already spent many years, the test I faced was by far more absurd than any fact-based test would have been, since, unlike a test based on facts, it simply made no sense.

By introducing the test, the Kingdom killed two strange birds with one stone. It made it clear that besides being in contempt of my own culture and humanity, all that I considered important about Dutch culture and all that made me apply for naturalisation – that I was tired of being a ‘foreigner’ – actually did not count. Necessarily so, since it is your actual membership of the national community, your life with the other Dutch people in the same cities and villages, buying the same German bread, Iranian hummus and Flemish fries at the market, which creates the connection between a person and all the others around her, not your librarian skills or reading speed. Stranger things were important for the Dutch state, however. What counted was a handful of irritating clichés like ‘our trains are yellow’ and ‘our land is flat’, as well as an ability to fill in forms correctly (to which several questions in the culture test were dedicated). It takes passing this ‘secret’ test to realise that, in fact, the *imburgeringstoets* does not test any knowledge of anything and is not related to any culture whatsoever, however widely construed. Quite clearly, the test’s real purpose is the self-justification of the myth of the exceptionalism of the local ‘culture’ of the Kingdom. The account of mythologies provided by Barthes is instrumental in this regard: myths are not important for the story they tell, but for what they *do*, since ‘in a mythical system causality is artificial, false; but it creeps, so to speak,

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<sup>52</sup> *Id.*

<sup>53</sup> Groenendijk, Kees, ‘Integratie en uitsluiting in het nederlandse vreemdelingenrecht’, in Boeles, P. and Lodde, G., *Integratie en uitsluiting*, The Hague: Sdu uitgevers, 2005, 9, 30, as quoted in van Oers, Ricky, de Hart, Betty and Groenendijk, Kees, ‘Country Report: The Netherlands’ EUDO Citizenship Observatory RSCAS Paper, EUI, 2009, 26.

<sup>54</sup> The Dutch approach is opposed to the one in a number of other nations asking naturalisation applicants to pass tests. US test, for instance, which does not contain absurd value judgements, unlike the Dutch: Park, Julian Wonjung, ‘A More Meaningful Citizenship Test? Unmasking the Construction of a Universalist, Principle-Based Citizenship Ideology’, 96 *California L. Rev.*, 2008, 999, 1032 *et seq.* (reproducing the standard questions of the US citizenship test).

<sup>55</sup> See Israel, Jonathan, *The Dutch Republic: Its Rise, Greatness, and Fall: 1477–1806*, Oxford: OUP, 1998.

<sup>56</sup> See Goldgar, Anne, *Tulipmania: Money, Honor, and Knowledge in the Dutch Golden Age*, Chicago: University of Chicago Press, 2007.

<sup>57</sup> See Casciato, Maristella, *The Amsterdam School*, 010 Publishers, 1996.

<sup>58</sup> See Overy, Paul, *De Stijl*, Thames & Hudson, 1991.

<sup>59</sup> Nooteboom, Cees, *Rituelen*, Amsterdam: De Bezige Bij 2009 (1980).



through the back door of Nature'.<sup>60</sup> Thus what counts in the context of the culture tests is not the rubbish content of these exercises, but the line they draw between 'us' and 'them', which is, however, entirely arbitrary.

My personal story is not exceptional. Neither is it all too country-specific. Increasingly many liberal democracies in the world are introducing tests to check how accustomed citizens-to-be are with their 'culture' and society.<sup>61</sup> This worrisome practice of attempting the annihilation of the 'other' by imposing on her the status of 'one of us', which Weiler abhorred<sup>62</sup> and Kymlicka found suspicious,<sup>63</sup> now seems to be accepted as a norm of daily life, generating a wave of scholarly criticism, a body of literature to which this essay aspires to contribute.<sup>64</sup> Indeed, 'integration' is a very interesting way of dealing with the 'other'. In the words of Weiler such 'come be one of us' strategy functions in the following way.

'It is noble since it involves, of course, elimination of prejudice, of the notion that there are boundaries that cannot be eradicated. But the 'be one of us', however well intentioned, is often an invitation to the alien to be one of us by being us. Vis-à-vis the alien it risks robbing him of his identity. Vis-à-vis oneself, it may be a simple manifestation of both arrogance and the belief in my superiority as well as my tolerance. If I cannot tolerate the alien, one way of resolving the dilemma is to make him like me, no longer an alien. [...] *It is a form of dangerous internal and external intolerance.*'<sup>65</sup>

Luckily, the tests promoted by a number of states are not and cannot possibly be 'effective'. No matter what the stated goals of such tests are, they cannot possibly be reached, since the underlying assumption behind the tests is that of the cultural exceptionalism of the local society coupled with a belief that the state is entitled to brand some non-criminal lives as deficient and unworthy of official inclusion based on the local mythologies and prejudices. Despite the frequent complacency on the part of those passing the test (having no other choice), states simply cannot impose any 'nation-specific culture' on the new citizens, neither can they invent it. Furthermore, requiring knowledge of a local language does not make one forget the other five, let alone the lullabies,<sup>66</sup> since the private realm, our biological existence, is bound to be separated from the sphere of the political, to which citizenship is confined and where the tests take place: we are not in '1984'.<sup>67</sup>

The strongest point of culture is its universality, its appeal to the whole of humanity, which unavoidably plays against any messianic feelings in the legislatures introducing 'culture' tests. Indeed, the content of the tests exemplifies the impoverished character of the myths of national

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<sup>60</sup> Barthes, Roland, *Mythologies*, (trans. Annette Lavers) New York: Farrar, Starus & Giroux, 1972, 131.

<sup>61</sup> For an overwhelmingly informative analysis see also the discussion between Christian Joppke, Ines Michalowski, Kees Groenindijk, Ricky van Oers, Amanda Klekowski von Koppenfels, Dora Kostakopoulou, Joseph Carens, Liav Orgad, Randall Hansen, Sergio Carrera, Elspeth Guild and Sara Wallace Goodman: Bauböck and Joppke (2010).

<sup>62</sup> Weiler (2003), 7.

<sup>63</sup> Kymlicka (1995).

<sup>64</sup> See e.g. Kostakopoulou, Dora, 'Matters of Control: Integration Tests, Naturalisation Reform and Probationary Citizenship in the United Kingdom', *J. Ethnic & Migration Stud.*, 2010; Kostakopoulou (2010) 'Introduction', 1; Joppke, Christian, 'Beyond National Models: Civic Integration Policies for Immigrants in Western Europe', 30 *WEP* 2007, 1. See also Vink, Maarten and de Groot, Gerard-René, 'Citizenship Attribution in Western Europe: International Framework and Domestic Trends', *J. Ethnic & Migration Stud.*, 2010. For detailed country by country analysis of the integration testing policy in the EU see van Oers, Ricky, Ersbøll, Eva and Kostakopoulou, Dora (eds.), *A Re-definition of Belonging?*, The Hague: Koninklijke Brill, 2010.

<sup>65</sup> Weiler (2003), 19 (emphasis added).

<sup>66</sup> For an informative account of the Soviet language policy in the Baltic States see Bychkov Green, Sonia, 'Language of Lullabies: The Russification and De-Russification of the Baltic States', 19 *Mich. J. Int'l L.*, 1997, 219. Liberal democracies in their illiberal phase cannot possibly be more effective in culture moulding than totalitarian empires.

<sup>67</sup> Agamben, Giorgio, *Homo Sacer: Sovereign Power and Bare Life* (trans. Daniel Heller-Roazen) Stanford, CA: Stanford University Press, 1998.

exceptionalism. The duo of globalisation and liberalism has done its job. While classical myths are rich, colourful and intriguing, the myths of cultural exceptionalism adopted by the liberal democracies can only be dull and deeply embarrassing. If the Dutch example I provided does not seem convincing enough, any other citizenship test would do the job.<sup>68</sup>

### 3 State-mandated *étalons* of culture

My first thesis is that liberal democracies have simply lost the luxury being able to invent themselves as nations in a substantive vein.

Post Second World War 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>69</sup> – coupled with the global rise of human rights and liberalism,<sup>70</sup> have rendered it impossible for states to continue shaping their nations.<sup>71</sup> States effectively lost any legal possibility to imagine 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: ‘societies that lack or suppress [...] other affiliations, allowing only allegiance to the nation-state, are rightly condemned as totalitarian’.<sup>72</sup>

Nationality as such has been reinvented in a procedural vein, becoming merely a ‘*Kopplungsbegriff*’<sup>73</sup> connecting a state and a person. Proceduralisation of the idea of nationality means that lacking certain mythical characteristics of a ‘worthy citizen’ cannot cause either deprivation of nationality nor block access to naturalisation, as “‘abstract character’” of state membership [...] is decoupled from rights and identity’.<sup>74</sup> The citizenship test I had to pass was so

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<sup>68</sup> Consider a standard question from the US naturalisation test: ‘what colour are the stars on our flag?’: Park (2008), 1032. Answering this question, among others, serves the purpose of convincing the US authorities that the applicant is ‘attached to the principles of the US Constitution’ (INA para. 316(a)).

<sup>69</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 pre-existing and static sex/gender categories in the same way that the progeny of interracial unions blur seemingly pre-existing 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>70</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 provides an excellent summary of the idea applying it to the context of nationality: Joppke, Christian, ‘Immigration and the Identity of Citizenship: The Paradox of Universalism’, 12 *Citizenship Stud.*, 2008, 533, 534–536.

<sup>71</sup> See Falk, Richard, ‘The Decline of Citizenship in an Era of Globalization’, 4 *Citizenship Stud.*, 2000, 5.

<sup>72</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>73</sup> de Groot, Gérard-René, *Staatsangehörigkeitsrecht im Wandel*, Cologne: Carl Heymanns Verlag, 1989, 5 (as quoted in Joppke, Christian, ‘Citizenship between De- and Re-Ethnicization (I)’, 44 *Archive européen de sociologie*, 2003, 433). See also Makarov, Aleksander, *Allgemeine Lehren des Staatsangehörigkeitsrechts*, Stuttgart: Kohlhammer, 1947. There is a huge literature on the negative impacts of globalisation 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>74</sup> Joppke (2003), 433.

embarrassing not only because its patriotic drafters were unwise.<sup>75</sup> Quite on the contrary in fact, they knew the limits of what they could legally do all too well. Once state membership has become abstract and there is an obligation to introduce a nation-specific ‘culture’ test for those willing to naturalise, the test is bound to be at least as abstract as the belonging itself, *i.e.* a waste of time – unless one is blinded by madness, of course.

Contemporary liberal democracies 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. As a consequence, when they 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>76</sup> Today, ‘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>77</sup> This makes it exceedingly difficult for liberal democracies to justify the outdated logic of ‘naturalisation’ to which they historically expose the ‘new-comers’.

Faithful to the inertia of the modern times of nation-formation and in spite of the general shift away from assuming the responsibility for nation-forming, states have not stopped using the quasi-messianic rhetoric of national ‘specificity’, of which ‘culture’ and language testing are clear illustrations. Interestingly, as Weiler has compellingly demonstrated, the same also applies to the very idea of national *constitutional* specificity, which the Member States of the EU often embark on ‘protecting’ (rhetorically at least).<sup>78</sup> In the current context there is a need for critical reassessment of constitutionalism, an idea building – whether we want it or not – on the assumptions of monocultural nationalism.<sup>79</sup>

Whatever the mythical cultural exceptionalism of liberal democracies today might mean, in addition to the questions about a *mevrouw de Jong*, it is clear that it is powerless before the task of the generation and preservation of social cohesion. Actually, it is actively destroying such cohesion. Neither the embarrassing questionnaires about local ‘culture’, nor the tests of proficiency in the local language are able either to replace, or to provide added value to the simple socialisation of the ‘new’ members of a society. Indeed, instead of promoting socialisation, they merely play a role of ‘mobilisation bias’<sup>80</sup> – a well-known conclusion of social scientists which is hardly new. Agreeing with Kostakopoulou, ‘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>81</sup> There is nothing scary about a natural evolution in society, where people eat what they want, pray when they want and choose a language suitable, as far as they can judge, for the occasion.

Given that states are bound to exercise self-restraint in nation-building, it becomes apparent that ‘the paradigm of societies organised within the framework of the nation-state inevitably loses contact

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<sup>75</sup> Kostakopoulou, Theodora, ‘Thick, Thin and Thinner Patriotisms: In This all There Is?’, 26 *Oxford J. Legal Stud.*, 2006, 73.

<sup>76</sup> Joppke (2008), 536–542.

<sup>77</sup> *Id.*, 541.

<sup>78</sup> Weiler (2003), 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 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>79</sup> Tully, James, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, Cambridge: CUP, 1995. See especially Chapter 3: ‘The historical formation of modern constitutionalism: An empire of uniformity’, at 59–98.

<sup>80</sup> Lukes, Steven, ‘Political Ritual and Social Integration’, 9 *Sociology*, 1975, 289.

<sup>81</sup> Kostakopoulou (2006), 73; Kostakopoulou (2010) ‘Matters of Control’.

with reality'.<sup>82</sup> With the rise of human rights ideology and the proceduralisation of nationality, the array of exclusive entitlements which nationality could bring weakens, as the deprivation of rights on the grounds of not being a citizen becomes more difficult to explain and justify.<sup>83</sup> Consequently, a number of key social and some political rights previously associated with the idea of 'belonging to a nation', came to be connected with residence only,<sup>84</sup> watering down the citizen-foreigner dichotomies.<sup>85</sup>

As a result of the developments described, national borders are genuinely irrelevant for increasing numbers of people in planning their lives. This makes it 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>86</sup> School curricular research in the liberal democracies in Europe demonstrates that the idea of national glory – the cornerstone of the school programs of the past – is being supplanted.<sup>87</sup> 'British national pride', like any other similar institution, is in decline.<sup>88</sup> States are trying hard to come up with their 'own' culture<sup>89</sup> but there is no such thing, beyond tolerance – and tolerance can be embraced, but not owned.

#### 4 EU citizenship/Member State nationalities: Diverging vectors

My second thesis is that, when viewed through the lens of EU integration, language and 'culture' tests seem even less justified, running counter the very idea of European integration, let alone that of EU citizenship.

The EU adds to the transformative potential of liberalism, human rights, and migration in general. Precisely because EU citizenship is a contingent and complementary status, the power of the Member States, who remain in charge of nationalities,<sup>90</sup> is severely weakened. This is because 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 nationality acquisition regimes are not harmonised, at least to some extent. Huge disparities between the citizenship laws of all the Member States<sup>91</sup> lead to the multiplication of the routes to the acquisition of the same status of European citizenship. In failing to regulate the issue of access to EU citizenship effectively, the Member States opted for the illusion of control rather than

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<sup>82</sup> Beck, Ulrich, 'The Cosmopolitan Perspective: Sociology of the Second Age of Modernity', 51 *British Journal of Sociology*, 2000, 79, 80.

<sup>83</sup> See in this respect *inter alia* ECt.HR *Gaygusuz v. Austria* [1996] Appl. No. 17371/90.

<sup>84</sup> 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; Davies, Gareth, "'Any Place I Hang My Hat?" or: Residence is the New Nationality', 11 *ELJ* 1, 2005, 43.

<sup>85</sup> Schuck, Peter H., *Citizens, Strangers, and In-betweens: Essays on Immigration and Citizenship*, New York: Westview Press, 2000.

<sup>86</sup> Renan, Ernst, *Qu'est-ce qu'une nation? et autres essais politiques*, Paris: Agora, 1992 (1st ed. 1882), 41.

<sup>87</sup> Joppke (2008), 537 (and literature cited therein).

<sup>88</sup> Tilley, J. and Heath, A., 'The Decline of British National Pride', 58 *British J. Sociology*, 2007, 661.

<sup>89</sup> And sometimes language: the invention of Montenegrin, which, although identical to Serbo-Croat is defined as 'ethnically and culturally separate language' by the Montenegrin Association of America is the latest example of this fascinating process (<<http://www.montenegro.org/language.html>>).

<sup>90</sup> Case 135/08 *Janko Rottmann v. Freistaat Bayern* [2010] ECR I-0000 (judgement of March 2, 2010), para 39.

<sup>91</sup> For overviews see e.g. de Groot and Vink (2008); Bauböck, Rainer, Ersbøll, 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 CITIZENSHIP project: <<http://eudo-citizenship.eu/>>.

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>92</sup> Informed third-country nationals are free to choose the Member State where access to nationality is framed in the most permissive terms,<sup>93</sup> in order to move to their ‘dream Member State’ later in their capacity as EU citizens. Obviously, when comparing the 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 naturalise’.<sup>94</sup> The main status they are likely to benefit from, in any event, will be EU citizenship, ‘a fundamental status of nationals of the Member States’,<sup>95</sup> not the particular Member State’s nationality *per se*.<sup>96</sup>

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>97</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 very different, if not opposing reasons – both of them perfectly legitimate: either to stay in the Member State or to leave (immediately), benefiting from the main right of EU citizenship.<sup>98</sup>

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<sup>92</sup> Kochenov (2009) ‘*Ius Tractum*’, 182–186.

<sup>93</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’: Hofstotter, Bernhard, ‘A Cascade of Rights, or Who Shall Care for Little Catherine? Some Reflections on the *Chen* Case’, 30 *ELRev.* 2005, 548.

<sup>94</sup> Kochenov (2009) ‘*Ius Tractum*’, 183.

<sup>95</sup> E.g. Case C-184/99 *Grzelczyk v. Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, para 31; Case C-413/99 *Baumbast and R* [2002] ECR I-7091, para 82; Case C-403/03 *Schempp* [2005] ECR I-6421, para 15. Among the most recent case law using the formula see e.g. Case C-135/08 *Janko Rottmann* [2010] ECR I-0000, para 43; Case C-103/08 *Arthur Gottwald v. Bezirkshauptmannschaft Bregenz* [2009] ECR 0000, para 23. Note that similar wording is contained in recital 3 of the Preamble to the Directive 2004/38 (*OJ L 158/77*, 2004): ‘Union citizenship should be the fundamental status of nationals of the Member States *when they exercise their right of free movement and residence*’ (emphasis added). This wording is significantly narrower than the ECJ’s formula, but, helpful in interpreting the Directive, which is confined to regulating ‘the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States’ (as the title itself stipulates), such wording obviously cannot limit the scope of the relevant Treaty provisions.

<sup>96</sup> For a detailed analysis of this point see Kochenov (2010) ‘Rounding up’, on which the core of this and the previous section is based.

<sup>97</sup> See also Maas (2007), 8.

<sup>98</sup> Moreover, refusing naturalisation on the basis of a suspicion that a newly-naturalised citizen is likely to use the main EU citizenship right obviously cannot be a valid option.

Currently, the Member States seem to assume 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 newcomers 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 Latvian, 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* Latvia and to benefit from EU citizenship rights in a wider Europe where hardly anything ‘Latvian’ will help? This is so obvious and, at the same time, so stubbornly ignored by the Member States that the situation can hardly be characterised in optimistic terms. However, given the lasting impact of European integration on the nationalities of the Member States, it is unavoidable that change will come. Pronounced in a slightly different context, these words of AG Poiares Maduro certainly apply to the awkward situation of those persons who, when naturalising in the EU, are exposed to ‘culture’ and language tests:

Citizenship of the Union *must* encourage Member States to no longer conceive of the legitimate link of integration only within the narrow bonds of the national community, but also within the wider context of the *society of peoples of the Union*.<sup>99</sup>

Viewed from the other side, any Latvian policy of language and ‘culture’ promotion targeting uniquely third-country nationals is by definition futile, since Latvia is just a tiny spot on the map of the EU, where borders do not exist for EU citizens. The latter can rely on EU law to come to Latvia and settle there. Given that any discrimination on the basis of nationality, either direct or indirect, is squarely prohibited by Article 18 TFEU,<sup>100</sup> the application to EU citizens of any kind of tests in any circumstances is legally impossible.<sup>101</sup> And if a Belizean naturalised on the island of Curaçao by virtue of passing an exam of the knowledge of Papiamentu,<sup>102</sup> or an Inuit from Greenland can settle in Latvia without any tests, how can the preservation of cultural specificity be used as an argument for asking a Moldovan to pass them? Is Papiamentu less ‘dangerous’ for the survival of Latvian culture than Romanian written in Cyrillic script? Obviously, the same observations apply to any of the Member States of the Union in a situation where, as Somek put it, ‘the [EU] does no longer yield’.<sup>103</sup>

Even though European citizenship does not directly question the dubious nature of the claims of the nation-specific cultures, it clearly flushes out the inconsistency of the policy of ‘culture’ and language testing by the Member States. Even if a specific testable culture existed – which is not the case, as the previous two sections of this essay have demonstrated – and even if the knowledge of particular state-selected languages were indispensable for successful functioning in a society – which is equally untrue – the claim for pre-naturalisation tests still makes no sense, as it ignores all those who do not intend to

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<sup>99</sup> Opinion of AG Poiares Maduro in Case C-499/06 *Halina Nerkowska v. Zakład Ubezpieczeń Społecznych Oddział w Koszalinie* [2008] ECR 3993, para 23 (emphasis added).

<sup>100</sup> For assessment see Davies, Gareth, *Nationality Discrimination in the European Internal Market*, The Hague: Kluwer Law International, 2003.

<sup>101</sup> See e.g. Case C-544/07 *Uwe Rüffler v. Dyrektor Izby Skarbowej we Wrocławiu Ośrodek Zamiejscowy w Walbrzychu* [2009] ECR 0000, judgement of 23 April 2009, para 64; Joined cases C-396/05, C-419/05 and C-450/05 *Doris Habelt, Martha Möser and Peter Wachter v. Deutsche Rentenversicherung Bund* [2007] ECR I-11895, para 2.

<sup>102</sup> For the application of EU citizenship in the overseas possessions of the Member States see Kochenov, Dimitry, ‘The Impact of European Citizenship on the Association of the Overseas Countries and Territories with the European Community’, 36 *LIEI*, 2009, 239; Kochenov, Dimitry, ‘EU Citizenship in the Overseas’, in Kochenov, Dimitry (ed.), *EU Law of the Overseas*, The Hague: Kluwer Law International, 2011.

<sup>103</sup> Somek, Alexander, ‘Solidarity Decomposed: Being and Time in European Citizenship’, 32 *ELRev.*, 2007, 787, 789 (Somek does not quite appreciate such developments).

naturalise and simply live in a territory of the given Member State,<sup>104</sup> especially all those EU citizens coming from other Member States who are given virtually *all* the rights associated with the nationality anyway, no naturalisation required.<sup>105</sup>

Should one be alarmed by this state of affairs? Most certainly not: the examples provided simply point to the fact, once again, that the assertions of messianic cultural exceptionalism by the Member States are routed in prejudice, rather any legitimate concerns. On the issue of language, one can spend days in Luxembourg without hearing Luxembourgian. We are likely to hear less of it in the near future, just as we will hear less Dutch in the streets of Amsterdam, or less Latvian in the streets of Riga. Is this a valid reason to make a handful of third country nationals naturalising in the Grand Duchy to pass a language exam? Of course not, since, firstly, knowing a language does not necessarily mean using it. Secondly, should the new Luxembourgians opt to benefit from their free movement right and leave the country, they will not have anyone to speak to (too bad they were pushed to learn the language they will never need). Lastly, given that language requirements do not apply to non-naturalising third country nationals and EU citizens already settled in Luxembourg, their imposition clearly cannot have anything to do with Luxembourgian society, of which the latter two groups form an all too important part. Rather, it is about the distorted self-image of the state, which opts to intrude into the lives of the most vulnerable among the populace with its unjust demands. How else can this be characterised if not as *'apartheid européen'*?<sup>106</sup>

Putting 'culture' and language testing into EU context demonstrates with clarity how arbitrary, random and nonsensical these policies are. All in all, the picture of inclusion and exclusion as applied to different entitlements in the EU is such that, agreeing with Aziz, it 'fails to adequately account for the *status quo* in the Union and the spheres of belonging which, to some extent, make a mockery of vertically defined hierarchical interpretations of citizenship'.<sup>107</sup> Much needs to be changed.

## Conclusion

Whatever liberal democracies think about the stand-off between a culture of humanity and their 'own culture', when connecting the state-approved possession of the latter with the newly-reinvented notion of citizenship, to which the 'culture' and 'integration' tests testify, it is inevitable that the obvious is bound to prevail. The return to the logic of modern states actively shaping their nations and annihilating the 'other' within their borders is highly unlikely. Moreover, in their present form, the tests do not actually test anything even closely related to culture, despite trying to reassert citizenship against the personhood of those taking them. This is wrong and can lead to increasing tensions in the societies making this mistake, just as any other arbitrary divide unjustifiable on its face would. Bosniak is right when she submits that 'the very idea of personhood in liberal-egalitarian thought is ethically expansive ... [this idea] contains the normative and rhetorical resources to challenge every context in which it is situated – including the national constitutional context itself'.<sup>108</sup> The battle for

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<sup>104</sup> A number of Member States have recently moved towards introducing 'culture' and language testing of some categories of migrants before admitting them to the territory, which is nothing but a most disappointing creation of obstacles in people's lives for no positive reason (besides racism and xenophobia, of course, which linger behind the scenes). For the analysis of the list of the countries as well as the analysis of the policy using the UK as an example see Kostakopoulou (2010) 'Matters of Control'.

<sup>105</sup> For details see Kochenov (2010) 'Rounding up', 31.

<sup>106</sup> Balibar, Étienne, *Nous, citoyens d'Europe? Les frontières l'Etat, le peuple*, Paris : La Découverte, 2001, 190, 191.

<sup>107</sup> Aziz (2004), 79–80.

<sup>108</sup> Bosniak (2010), 29.

self-serving myths fought by all the ‘integrationist’ states against those of their inhabitants who remain willing to be accepted is thus lost, just as it started.<sup>109</sup>

Invention of cultural exceptionalism through ‘culture’ testing of permanent residents should stop as soon as possible. The idea that every liberal democracy in the EU is in possession of its own unique culture which must be imposed on a random sample of the new-comers is the first problem I promised to outline. The second problem concerns the chronic blindness of the Member States unwilling to see the effects of European citizenship and the successful functioning of the internal market on their societies. In reframing naturalisation policies, attention should be paid to the fact that the Member States no longer represent closed container societies and that the vectors of EU citizenship and of their nationalities are diametrically opposed. Asking someone to learn Slovenian to become an EU citizen can thus be counterproductive, a mistake. This is a *fact* that the Member States need to have the courage to admit. Lastly, it is greatly troubling that the Member States – in a somewhat old-fashioned quasi-totalitarian drive – do not feel the need to respect the private realm of those willing to naturalise: language and culture should be left to every individual human being to choose and to practice. By demonising those who have not yet answered the questionnaire about *mevrouw de Jong*’s preferences, social cohesion is undermined and numerous lives derailed. While pointing all this out is to restate the obvious, it is most unfortunate that these issues are not seriously discussed in the Union today. It is easy to predict, however, that in the medium term future naturalisation procedures in the EU will be radically different from what we now have – taking reality into account in framing the policy is bound to happen sooner or later. That the naturalisation procedures are to become more open and less restrictive seems to be an inevitable consequence of the creation of the Union, where borders are non-existent and the federal-level status<sup>110</sup> has already taken the lead.<sup>111</sup>

Returning to my personal story, all the nuisances of the process notwithstanding, I am very happy to have become an EU citizen. Although the literature seems to be unanimous on the fact that the EU cannot generate any emotional appeal,<sup>112</sup> I am one of the few for whom the contrary is true: it is EU citizenship, not the Dutch nationality that matters most to me. That I was bound to receive EU citizenship via the Dutch Kingdom is just a minor element of my story – other Member States happen to be just as short-sighted in putting widely-held prejudices into their naturalisation laws. Having dedicated several years of my academic enquiries to the analysis of the regulation of the accession of states to the EU,<sup>113</sup> I am particularly happy to have acceded to the Union personally. I thus wholeheartedly thank my Queen, a British subject<sup>114</sup> in whose name I became an EU citizen.

In the practice of day-to-day life, however, tests change little – it is still a great pleasure to hear ‘welkom thuis’ in the plane landing from New York or Singapore – the same feeling as the one I experienced every time before the Dutch state set me the test which gave me my first serious doubts about my homeland – the Netherlands.

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<sup>109</sup> This does not prevent the current policies to intrude into the lives of hundreds of thousands of people throughout the EU, derailing their lives for no reason, driven by sheer prejudice and a lack of common sense.

<sup>110</sup> For a convincing analysis of the EU through the federal lens see Schütze (2009) ‘From Dual to Cooperative Federalism’.

<sup>111</sup> For a detailed analysis of the first signs of the anticipated transformation see Kochenov (2010) ‘Rounding up the Circle’.

<sup>112</sup> See e.g. Della Sala (2010), 1. For a particularly balanced and illuminating account see Aziz (2004), 82–84.

<sup>113</sup> Kochenov, Dimitry, *EU Enlargement and the Failure of Conditionality*, The Hague: Kluwer Law International, 2008.

<sup>114</sup> Jessurun d’Oliveira (2007), 922.



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