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OF POLITICAL  
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SCIENCES

# ‘Citizens-Minus’ and ‘Citizens-Plus’

## A Normative Attempt to Defend Citizenship Acquisition as an Entitlement Based on Residence

Andrei Stavilă

Thesis submitted for assessment with a view to  
obtaining the degree of Doctor of Political and Social Sciences  
of the European University Institute

Florence, December 2013



European University Institute  
**Department of Political and Social Sciences**

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## Abstract

*In this thesis I try to defend the concept of residence-based citizenship. My point of departure is the puzzling observation that, in the 19<sup>th</sup> and the beginning of the 20<sup>th</sup> centuries, a quite large number of countries practiced *ius domicilii* and unconditional *ius soli* as the most important principles of citizenship acquisition, against a growing number of states following the 1804 French Civil Code which reinvented *ius sanguinis*. In less than one hundred years however, *ius sanguinis* became the most important principle of citizenship acquisition all over the world, *ius soli* was largely restricted, and *ius domicilii* almost disappeared.*

*My intention is not to investigate this historical process, but to explore the ways in which normative theories and academic research in immigration studies may reveal the need to re-evaluate a residence-based citizenship theory based on *ius domicilii*. In this sense I am analysing four test cases which have in common the essential fact underlined by Joseph Carens that in time immigrants become members of society, irrespective of political authorities' decisions. This is enough to substantiate a claim to citizenship.*

*The test cases are irregular migrants, temporary workers, dual citizens and 'external quasi-citizens.' I argue that the 'undocumented' have a moral claim to regularisation after one year of illegal residence, and further that the first two categories of migrants have a moral claim to citizenship acquisition after three years of legal residence, which is the threshold supported today by a few liberal states. But if residence supports a claim to citizenship, then lack of it for an extended period sanctions loss of this status. Thus I argue against dual citizenship, trying to explain that its advantages are either rather imagined than real, or they can be achieved through more convenient means. However, in order to acknowledge the fact that many people have real and strong ties to more than one country I suggest the status of 'external quasi-citizenship' which may be accessed by non-residents and may provide numerous entitlements, possibly all citizenship rights except the right to vote and the right to stand for elections.*

*I also analyse legal provisions in fifty states and try to make a normative plea for residence-based citizenship. In a final step, I discuss four alternative theories of citizenship which do not easily come to terms with the idea of residence-based membership and try to make a case for the latter.*



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*I dedicate this dissertation to my grandparents Elena and Constantin Stavilă who, in the darkest days of Ceaușescu’s communist regime, taught me about freedom. By trying to do their best, they made everything possible.*



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## Chapter 1. Introduction: Towards a Residence-Based Conception of Citizenship

*'Home is where one lives, and where one lives is the crucial variable for interests and for identity, both empirically and normatively' (Carens 2014, forthcoming: chapter two)*

*'There is certainly a need for democratic states to reform their own conceptions of citizenship. Those that receive immigrants ought to adopt some form of *ius soli* and should turn naturalization into an entitlement after several years of residence' (Bauböck 2003: 150)*

*'the migrant perhaps produces the maximum anxieties around whom discourses of crisis in citizenship are woven' (Roy 2010: 36)*

### 1.1. Introduction

Political theorists generally consider that in a liberal democracy, long-term immigrants must be set on the path to full citizenship. Otherwise, they would become ‘second-class’ citizens, being subjected to the coercion of a democratic decision-making process in which they are not represented. Moreover, it seems that all substantive conceptions of social justice define societies as communities of equal citizens (Bauböck 2010b). Citizenship – more exactly, *equal* citizenship, understood as a unitary concept which confers equal rights for all those present within borders – seems to be the only solution unless we want to transform a liberal democracy into a ‘caste-like society’ (Bosniak 2006).

Historically, in *many* political communities citizens were considered to be those individuals resident within that community’s borders (the caveat is important here, since many historical political communities did not have any status equivalent to what we call citizenship today and most of those that did, had other inhabitants who had some different, usually subordinate, legal status).<sup>1</sup> *Residence-based citizenship* had been the norm of citizenship acquisition in the civilised world until France reinvented<sup>2</sup> the idea of *ius sanguinis* in the 1804 Civil Code (Bertossi and Hajjat 2012: 2) and disseminated it throughout Europe as the most important basis for assigning social and political membership. It is true that the creation of *ius sanguinis* had been considered at that moment a liberal movement, as long as *ius soli* ‘connote[d] feudal allegiance’ (Bertossi and Hajjat 2012: 3). But it is also true that, in fewer than two hundred years, the perception of emancipation has been turned on its head: for many theorists today, *ius soli* and *ius domicilii* provisions seem to be a very liberal device, while exclusive *ius sanguinis* may

<sup>1</sup> I would like to thank Joseph Carens for drawing my attention on this caveat (personal communication on file with the author, November 2013).

<sup>2</sup> This idea is ‘re-invented’, since *ius sanguinis* is an old principle, and it determined citizenship in the ancient republics.

appear to some of us as an intolerant expression of a narrow-minded, nationalistic view of a political community. It is true that this prejudiced view is supported by almost every government today: indeed, nowadays, some states do everything in their power to keep the link with emigrants and kin minorities abroad on the one hand, and also to prevent accession of immigrants (allegedly seen as ‘different from us’) to full membership status, on the other hand. This research does not intend to investigate how such a move has been historically, politically or morally possible: it merely seeks to defend and support the idea of residence-based citizenship.

In consequence, this study starts with a puzzle: on the one hand, 150 years ago many countries applied the principles of *ius domicilii*, *ius soli* and *residence* for citizenship acquisition. Today the situation is reversed: the ‘modern’ principle of *ius sanguinis* and strong requirements regarding proof of *integration before naturalisation* are applied. On the other hand, according to an author in 2008 there were over 200 million inter-state migrants worldwide, which amount to over 3% of the world’s population (Abizadeh 2010: 358). Regarding the situation relative to each country, in general the number of non-citizen permanent or temporary residents is around the same. If we take into account the total population with some ‘migrant background’ (citizens included)<sup>3</sup> the percentage was, for example, 16.6% of the total population in Germany in 2006 (Cyrus 2009).<sup>4</sup> The difference between the relatively small number of immigrants worldwide and the relatively high standards for citizenship acquisition in the countries they reside in has been the subject of fierce debates in normative political theory. I want to sidestep this discussion and take a step forward, by asking whether the *principle of residence* (together with its subordinate principles of *ius soli* and *ius domicilii*) has any chance to be revived and used again in the 21<sup>st</sup> century. *To make the case for a residence-based citizenship* is the main task of this study.

I intend to make this case in seven steps. The first step is taken in the second chapter, which tries to offer a historical view of citizenship understood as residence as it was practiced in Europe in the 19<sup>th</sup> and 20<sup>th</sup> centuries. The following two steps are classified under the label ‘citizens-minus’. They take into account actual cases where long-term residents are nowadays denied access to full citizenship status: the first instance is that of irregular migrants<sup>5</sup> (chapter three) and the second is that of temporary

<sup>3</sup> One ought to keep in mind the fact that incompatible statistics should not be mixed, since there are different categories of persons: migrants, foreign-born, non-citizens, etc. However, Cyrus uses the term ‘migrant background’ in order to include the total population connected in some way or another with the migration phenomenon.

<sup>4</sup> For figures of migration in other European countries see Annex, Table 1: ‘Irregular migrants – numbers and percentages out of total population in twelve European Countries, European Union and the USA’.

<sup>5</sup> For the purposes of this study I am considering the terms ‘irregular immigrants,’ ‘illegal migrants,’ ‘undocumented migrants’ and ‘clandestine migrants’ as synonyms, setting aside various problems raised by using each term. However, I will generally use the term ‘irregular’ when referring to persons and the term ‘illegal’ when referring to status or actions (for

workers (chapter four). The subsequent two steps are labelled ‘citizens-plus’. I discuss here situations where either long-term emigrants or ‘ethnic kins’ living within the borders of another state are offered more than one full citizenship status: the first instance is that of multiple citizens (chapter five) and the second is that of ‘external quasi-citizens’ (chapter six). Finally, chapter seven attempts a straightforward defence of the concept of residence-based citizenship by normatively discussing the current citizenship laws of fifty states. My conclusions (chapter eight) will admit honestly what my residence-based theory cannot explain, will try to defend citizenship as residence against four alternative normative theories, and will finally offer some avenues for further research.

Before proceeding, it is important to make some conceptual and methodological clarifications. Firstly, both notions of citizenship and nationality are subject to a conceptual confusion both in current laws and normative discussions. Starting with chapter five on multiple citizens the difference between the two concepts will become extremely important, so section four of that chapter will clearly define (and also defend) the two concepts according to the way I am using them in this research. For the moment, it is important to submit at the very beginning that for the purposes of this study *citizenship* is defined as a legal bond between the individual and the state, while *nationality* is seen as ‘belonging’ to a particular ethnicity or to a particular cultural nation. This is surely not the way these notions are defined in many western states, where citizenship defines a political space of rights in internal affairs, while nationality is seen as an external dimension used in international law (Handoll 2012: 2).

However, the distinction I have made is commonly used in many countries (although in common understanding rather than in legal documents) and will better support my own arguments. The distinction between citizenship as legal bond and nationality as ethnicity<sup>6</sup> is commonly used in the following 22 (both Western and Eastern European) countries: Belarus (Ulasiuk 2011: 1), Bosnia and Herzegovina (Sarajlić 2010: 1), Bulgaria (Smilov and Jileva 2010: 11), Croatia (Ragazzi, Štiks et al. 2010: 2), Czech Republic (Baršová 2010: 1-2), Estonia (Järve and Poleshchuk 2010: 1), Georgia (Gugushvili 2012: 2), Hungary (Kovács and Tóth 2010: 16), Iceland (Jóhannesson, Pétursson et al. 2010: 2), Italy (Zincone and Basili 2010: 1), Kosovo (Krasniqi 2012b: 2), Lithuania (Kūris 2010: 1), Macedonia (Spaskovska 2012: 4), Malta (Buttigieg 2010: 1), Moldova (Gasca 2012: 2), Montenegro (Džankic 2012: 1), Norway (Brochmann 2010: 1-2), Poland (Górny and Pudzianowska 2010: 1), Portugal (Piçarra and Gil 2012: 1), Russia (Salenko 2012: 1-2), Slovakia (Kusá 2010: 1), and Sweden (Bernitz 2012: 1).

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example: ‘irregular migrant’, but ‘illegal crossing’, ‘illegal status’, ‘illegal employment’, ‘illegal work’). I would like to thank Anna Triandafyllidou for this suggestion (personal communication on file with the author, November 2013).

<sup>6</sup> For example, ‘a Romanian citizen of Hungarian nationality’.

Secondly, I will largely use in this study the following concepts of nationality law: *ius sanguinis*, *jus soli*, and *ius domicilii*. According to *ius sanguinis* (which means in Latin ‘right of blood’), citizenship is determined by having one or both parents who are (or were) citizens of the specific state. Some variations also exist, for example when citizenship is determined by *ius sanguinis* in relation to a grandparent or any other relative or ancestor. This method of passing on citizenship is now the most common one in European countries. According to *ius soli* (which means in Latin ‘right of the soil’), anyone born in the territory of a state has a right to obtain that state’s citizenship. There are different types of this provision, since it may be unconditional (the person born in the territory gets citizenship irrespective of other considerations), conditional (usually, on parents’ residence in the territory for a number of years) or it may be in the form of double *ius soli* (as in France, where a child born in the territory of a foreign parent also born in France gets automatic French citizenship).

Today, unconditional *ius soli* is the most common method of passing on citizenship on the American continents, the United States of America and Canada being the most economically developed countries applying it. In Europe no country grants unconditional birthright citizenship since 2004, the last country that dropped it being Ireland. According to *ius domicilii* (in Latin ‘right of residence’) anyone present in the territory of a state has the right to citizenship after a residence threshold is met, irrespective of other considerations. This principle has been applied by some countries in the 19<sup>th</sup> and the beginning of the 20<sup>th</sup> centuries, but it is not applied anymore in its unconditional form by any state. It is important to note that *ius soli* (birth in the territory) is conceptual distinct from *ius domicilii* (residence). However, as I explain in chapter two, for the purposes of this study I am going to stretch the meaning of *ius soli* and treat it as a principle ‘subordinated’ to *ius domicilii*, in the sense that a state offers citizenship based on *ius soli* because is expecting the child to live (hence, to have permanent residence) for a long enough period of time in the home country. Finally, I will also use other (usually outdated) types of determining citizenship like *ius conubii* (spousal transfer of citizenship without any other requirement). I am defining these forms in the places I am using them.

Thirdly, it is crucial to keep in mind the important distinction between ‘residence’ and ‘domicile’: while the former is a sociological concept and it strictly refers to presence in the territory, the latter is a legal category and refers to ‘a legal relationship between a person and a country governed by a particular system of law’ (Hammar 1990: 193-194), (Rubio-Marín 2000: 22). When talking about residence-based citizenship, my focus is on the *simple presence in the territory* which makes an individual a societal member over time – and not on the legal notion of ‘domicile’. However, if not otherwise stated, I will treat the concepts of permanent residence and domicile as synonymous.

Fourthly, it is essential to underline that I will consider as ‘liberal’ those countries which are implementing today a form of residence-based citizenship which is closest to my theoretical model. I use the term ‘liberal’ primarily in the sense of ‘generous’ and ‘strengthening individual rights’. This is important, since most sufficiently comprehensive liberal views would balance individual rights claims against the condition for maintaining an institutionalised regime of individual rights. For example, a ‘touch the territory and you’re in’ view may fail to qualify as liberal in this sense.

Fifthly, methodological clarifications are needed to strictly define the subject of this study. My case studies refer to irregular migrants, temporary workers, multiple citizens and ‘external quasi-citizens’. I have chosen these groups since their situation calls attention to the fact that the category of migrants most commonly refers to *settlers* – to those who tend to stay and make a new life in the host state. In consequence, I have set aside for the purposes of this work other categories of migrants, such as sojourners and daily commuters. This is not to say, of course, that such cases are not interesting in other respects – but I believe they are not central for a case that supports residence-based citizenship. Again, I have set aside the situation of refugees since the problem is, in my opinion, their lack of access to most basic human, economic and social rights; otherwise, according to the residence-based theory, they must be set on the road to citizenship as any other migrant after a time threshold requirement is met. Finally, I do not take into account the type of citizenship that has emerged in the supra-national and regional integration project of the European Union: EU citizenship, otherwise extremely interesting, is perfectly compatible with the project of residence-based citizenship since both apply to different levels: the basic level is that of state membership, and the level of supra-national or regional citizenship is secondary, and dependent on the basic one.

Sixthly, an introductory clarification must be made on the methods used by this study. My approach is normative, and it is based on political theory and on moral philosophy applied to citizenship and immigration issues. In consequence, the methods used are philosophical and, where necessary (as in the second chapter) historical. However, the main basis of this study is particularly empirical: as I explain later in this chapter, eight projects in political science and sociology constitute its main core. However, this research situates itself mainly in political theory: all empirical cases referred to are intended as examples, not as (a) results of different methods used in *political science* such as trend analysis, systematic comparative data (longitudinal data), or descriptive quantitative analysis, or (b) results of a systematic *legal* interpretation devised on the model of legal studies. Especially in chapter seven below, the plea for residence-based citizenship is made using examples of current

citizenship laws *by way of illustration*, and eventual patterns are rather suggested than claimed to be discovered using political science methods.

Finally, regarding the level the normative theorising engaged in the study is intended to operate at, it is important to note that I am arguing at a mid-level of abstraction where I assume as given the international system of territorial states and raise the question what equality and inclusiveness of citizenship require in contexts of migration. This cuts out from view ideal theories that might argue for a radical transformation of the state system itself. However, I largely leave aside questions of feasibility, which would be at the fully applied and realist end of the spectrum. The principle of residential citizenship I am defending is obviously not a “highest order principle” (such as freedom or equal dignity), but a practical mechanism for determining membership that is by itself normatively neutral. It can also be used in illiberal ways, for example by an authoritarian regime that would turn every resident into a subject. At the end of the day, birthright, residence and consent are all membership mechanisms that are in themselves normatively neutral, but normative commitments to liberalism and democracy make certain interpretations and combinations of these principles required or permissible while ruling out others as impermissible. My argument is that, in the context of international migration, liberal states ought to commit to residence-based membership as the most important basis of their citizenship and migration policies for the sake of maintaining sufficiently inclusive and egalitarian citizenship regimes.

## **1.2. Alternative normative theories to residence-based citizenship**

Up to the present day no political theorist has tried to defend a residence-based theory of citizenship. From ethnic nationalism to liberal democracy, numerous theories offered an answer to the question of ‘who should be a citizen of a specific political community’. This study challenges six main, more or less complete answers to this question that have been advanced to the present day in political and migration theories. The proposed criteria for political membership that I want to dispute are the ‘all affected interests’ principle, the ‘all subject to political coercion’ criterion, the ‘stakeholdership’ principle, and the liberal inclusion principle. To these I am adding two other proposals that do not offer a full criterion of membership in general but only one related to migrants: a principle of automatic naturalisation based on a social membership principle, and a principle proposing either a negotiated or a forced political exclusion of migrant workers. Let me take these in turn.

The first two criteria are not considered well-founded today because they fail to meet serious critiques. The ‘all affected interests’ principle basically state that democratic decisions must be justified towards all individuals affected by them (Dahl 1989). Rainer Bauböck nicely summarises four main problems such a principle faces: (a) it falsely derives a criterion for participation from a duty of justification ; (b) this criterion implies an unstable demos, since the scope of the inclusion is different for each decision; moreover, it is impossible to guess who will be affected by a decision before the decision is taken; (c) not all decisions affect citizens equally, and some decisions also affect people living in other states; (d) as Robert Goodin puts it, at the end of the day the principle requires an ‘all-inclusive global demos’ (Bauböck 2009a: 17-18).

The ‘all subject to political coercion’ criterion accepts the existing political authority and its democratic institutions in a given territory but asks that all those present in that territory and subject to the coercive power of those institutions should be considered members of that democratic polity (Walzer 1983). But as in the case of ‘all affected interests’, Bauböck lists four main problems it has to face: (a) indeterminacy: claiming that ‘all subject’ must be included into the demos does not offer an answer to the prior problem of who can be *legitimately* subject; (b) it supports the right to citizenship for long-term residents but not for long-term emigrants and their children (however, we will see that this is not necessarily a problem, since a residence-based theory of citizenship would also support such a view); (c) membership must have a ‘sticky quality’, since tourists and migrants leave and enter states and becomes subject to their laws without acquiring these polities’ citizenships; (d) it is too narrow as a criterion for membership inclusion since it ‘fails to accommodate the interests of migrants in being able to choose their memberships’ (Bauböck 2009a: 18-20).

Bauböck thus proposes another principle of political membership and puts forward the ‘stakeholdership criterion’: according to it, only a ‘stakeholder’ has a claim of membership in a particular polity. And one person is a stakeholder ‘if the polity is collectively responsible for securing the political conditions for [her] well-being and enjoyment of basic rights and liberties’ (Bauböck 2009a: 15). Basically, according to this proposal only those individuals have a claim to citizenship in a polity who satisfy (a) the ‘dependency criterion’ (i.e., they depend on the polity for long-term protection of their basic rights) and (b) the ‘biographical subjection criterion’ – i.e., they ‘are or have been subjected to that community’s political authorities for a significant period over the course of their lives’ (Bauböck 2009c: 479). Thus he supports not only the status of ‘external’ citizenship (for emigrants and first generation born abroad), but also the right long-term immigrants have to access citizenship after they meet the time threshold. Since a residence-based citizenship accepts the latter

claim, I will further concentrate only on the former (which supports a claim to citizenship for long-term emigrants).

Besides the characteristics underlined in its definition, the ‘stakeholder’ status also have other features: probably the most important one is that this standing must have a ‘sticky’ quality in order to guarantee the correct functionality and stability of a democratic state over the generations. To avoid boundary indeterminacy, a polity should make the citizenship status permanent: once a citizen, the person should keep her status even when she is taking permanent residency or even a second citizenship in another state. Moreover, under some conditions (usually, residency for a specific period of time) even the second generation migrants should be able to keep their citizenship status. However, Bauböck limits the transmission of citizenship to the first generation born abroad: all the other subsequent generations may have a right to retain citizenship status if and only if they prove a genuine link with their ancestors’ origin state.

Besides this legal provision of a guaranteed lifelong citizenship for the individuals who acquire citizenship status through *ius sanguinis*, *ius soli*, or other type of regularisation, Bauböck adds a psychological condition for a polity’s continuity and stability over the generations: citizens should ‘see each other as belonging to [a] particular intergenerational political’ community (Bauböck 2009a: 2). Thus, even if migrants and the first generation born abroad do not have a permanent residence in the home state anymore, they should be entitled to keep their citizenship status in the home state not only because of the ‘sticky’ quality of citizenship, but also because they are simply connected with it in various ways. In consequence, Bauböck claims that migrants who ‘retain strong economic, social, cultural and family ties with a sending country have a plausible claim to citizenship’ in both origin and host states (Bauböck 2007a: 72). The reasons for this is not only that that they are ‘stakeholders in both their country of origin and settlement’ (Bauböck 2009a: 17), but also that they are members of several self-governing polities that have to be experienced as ‘communities of fate’, ‘in which citizens will share a common future that they shape through their present political actions’ (Bauböck 2007b: 2417).

But what rights does the ‘stakeholdership’ status offer to long-term emigrants? Bauböck thinks that the most important rights in this case that must be ‘unconditionally attached’ to this status are the right to diplomatic protection and the right to return, which are established by the dependency criterion. Bu this principle cannot also establish who among the persons originating in the home country enjoys these rights. This problem is solved by the ‘biographical subjection’ criterion, which points to the first-generation emigrants. Under some conditions that are usually but not obligatory related to the residence principle, this category can be extended, as we have already seen, to second generations (Bauböck

2009c: 482). However, in contrast to these unconditional rights, an ‘external franchise’ should be seen only as ‘permissible’, but not as ‘a fundamental individual right’ (Bauböck 2009c: 487).

A second, liberal theory of citizenship has been proposed by David Owen. He puts forward a concept of ‘transnational citizenship’ based on the principle of ‘all subjected persons’ (Owen 2010) and argues that both immigrants and emigrants should be included in a liberal democratic polity (Owen 2011a). Since a residence-based theory readily accepts and even requires citizenship status for immigrants, I want to concentrate here directly on Owen’s discussion of long-term emigrants’ inclusion. In order to make his case, he discusses López-Guerra’s reading of the inclusion principle proposed by Dahl, according to which ‘all subjected to the laws’ of a political community should have a say in making those laws (Dahl 1989). However, since long-term emigrants are no longer subject to the origin country’s laws, it follows according to López-Guerra (2005) that they should not have a say in the making of those laws – in other words, they should lose full citizenship status.

Owen discusses three claims that López-Guerra takes to follow from Dahl: (a) the justified exclusion of expatriates; (b) the choice to sever or to maintain the link between citizenship and political rights; and (c) the relationship between dual citizenship and democracy is politically meaningless. Owen critiques all three points. Regarding the later, according to him the claim should be dismissed because even if expatriate voting is banned because long-term emigrants are not subjected to their home state laws, citizens still have under the international law a basket of rights (like diplomatic protection and the right to return) to any state of which they are citizens. As such the relationship between dual citizenship and democracy is not political meaningless. Regarding the second claim, it also has to be dismissed since the ‘either/or’ solution is false: there is a third alternative to either severing or maintaining the link between citizenship and political rights, and this is called ‘dormant citizenship’. According to it, political rights are ‘active’ only when a citizen has a permanent residence in the country of citizenship; when he changes his permanent residency to another country of citizenship his full membership status is not lost, but political rights become ‘inactive’. Regarding to the first claim, it also fails since being a habitual resident is a sufficient, but not a necessary condition of being subject to the rule of a state (Owen 2011c). Thus, if a state decides to have a constitutional referendum or a referendum to abolish expatriate voting or to denaturalise long-term emigrant citizens, then the latter do have a say since they are indeed affected by these decisions.

What about the proposal of implementing a system of ‘dormant citizenship’ which consigns political rights to residence? Owen accepts that this is the case for local or municipal citizenship, and possibly (though not desirable) the case for national elections (Owen 2011b), (Owen 2011c). However,

he claims that this model cannot be employed in cases of constitutional referendum, which directly takes into account the nature of citizenship in a specific state, hence engage ‘the fundamental interest of all citizens *as citizens*’ (Owen 2010). In this latter case, political rights of ‘external’ citizens cannot be suspended.

Finally, Owen believes that the only way to avoid the status of ‘external citizenship’ and the voting rights attached to it is to accept López-Guerra’s residence-based citizenship but to also match the category of residents and citizens through mandatory naturalisation of residents and compulsory denaturalisation of non-residents. However, according to Owen this is not feasible, since such a proposal cannot meet ‘certain basic standards of sociological and psychological realism’ (Owen 2010). And it cannot meet such standards since one’s sense of belonging to a polity is not simply a function of residence combined with automatic full inclusion. In the same vein, non-residence plus automatic full exclusion are not enough to eliminate one’s identification with one’s origin state. In consequence, according to Owen, a ‘purely territorialist conception of political community fails to acknowledge the salience of sources of belonging that are not based on residence’ (Owen 2010).

The last two proposals I am taking into account do not intend to offer a general theory of citizenship that discusses the critical question of who has the right to be a member of a polity. They simply approach the question of membership in the context of migration and discuss the membership claims of different categories of migrants. The first account is proposed by Ruth Rubio-Marín and is known as the ‘social membership principle’ (Owen 2011c): she accepts a claim made by Joseph Carens according to which living in a society makes one a member of that society; moreover, because living in a specific society one is subject to its laws, according to Rubio-Marín people have a right to be citizens of the states they are living in. The interesting thing is that in this author’s point of view no issue regarding individual option should be considered here: after a period of 10 years of residence in a specific polity, any (regular or irregular) migrant should be automatically transformed into an official member of that society irrespective of her own preference.

This is not a perspective shared by the previous two theorists: according to Bauböck, migrants’ agency should always be taken into account: they should always have the right to decide whether they apply for host state’s citizenship or not. He builds his case on a Rawlsian argument based on the worth of liberty to persons: immigrants have a larger structure of social ties than native-born citizens, so they should have the right to choose their citizenship in an international system where dual citizenship is not allowed. However, Bauböck agrees that in a different international system where dual citizenship is largely accepted his argument loses its force: as long as a strict choice is not required, the immigrant

can keep multiple citizenship, so a state may have the right to impose its citizenship on a long-term resident (Bauböck 1994a: 91). Owen also answers to the proposal of automatic naturalisation by trying to strike a balance between Rubio-Marín's and Bauböck's views. He is defining the debate as 'an antinomy of incorporation', where the immigrant should be either 'automatic entitled' or 'automatically required' to become a national citizen. Owen proposes to dissolve this antinomy by making a 'distinction between *political membership* and *national citizenship*' (Owen 2011c): political membership implies having full political rights (thus, acquiring full political membership) and this should be mandatory after the residence threshold is met. However, national citizenship – which includes 'the "external rights" of diplomatic protection and automatic right of re-entry to the state as well as the automatic entitlement to pass nationality on to their children via the *jus sanguinis* provisions' (Owen 2011c) – should be based on migrants' will and thus must be seen as a voluntary acquisition.

The second interesting thing in Rubio-Marín's account is that, in what regards long-term emigrants, she considers that their exclusion as members *can* be justified as long as they are not directly and systematically affected by the origin state's decisions. However (and she agrees here with Owen) such exclusion is neither morally nor democratically required: on the contrary, an inclusion of long-term emigrants is a recommended policy, since this may prove to be a clear way of acknowledging their personal or subjective attachment to their origin polities.

The second account also comes from within migration theory and is proposed by several authors who do not want to provide a membership criterion in general, but only for a specific category of migrants – that is, temporary workers (although, as we will see later, we could also include here irregular migrants to a more or less extent). The first author is Daniel A. Bell, who contrasts the situation of migrant workers in Western states like Canada to their condition in Asian states (Bell 2005). He observes different practices regarding migrants' access to rights: if today Western states receive few temporary workers but also set them on the path to full citizenship, some Asian states receive large numbers but severely restrict their rights and do not offer them the possibility of becoming full citizens (irrespective of the time they spent in the host state). Interestingly, Bell prefers not to adopt a theoretical point of view: he accepts that the best thing to do in theory is to offer temporary migrants all possible rights and finally, after a residence threshold is met a chance to apply for citizenship status. But given the real-world conditions (where some countries refuse to offer such path to citizenship for migrants), he claims that it is better for a state to accept large numbers of immigrants (while restricting their rights) than to accept few numbers who would enjoy extended

rights. He makes his argument in four steps. Firstly, he underlines that migrant workers are more interested in economic and work-related problems than in having equal rights with native workers; secondly, lack of democracy benefit temporary workers because decision-makers are not obliged to support their citizens' opinions (which may go against migrants' interests); thirdly, as we will see in chapter eight, Bell accepts that ideally migrant workers should be given equal rights, but nevertheless he claims that some counter-arguments have their own merit; and finally, he argues that cultural characteristics must be taken into account: unlike in the Western states migrant workers are considered in Asia as part of an 'extended family', which also explains for example the lack of demand for day-care centers in the region.

A second point of view is offered by Ottonelli and Torresi, who draw attention to an unresolved dilemma in the standard liberal approach to migration. Their main claim is that temporary migrants' self-assumed vulnerability undermines liberal egalitarian ideals (Ottonelli and Torresi 2012). This happens because, even in cases where temporary migrants enjoy equal rights, they are still ready to trade them off in order to secure employment and financial security. The problem is that liberal democracies presuppose an identity between the political space of rights and the social space of self-respect: equal political rights are indispensable for their citizens to pursue their own happiness and life plans. However this is not true for temporary migrants. Their bases of self-respect are situated in the origin country (they want to work in a wealthy state as temporary workers in order to improve their condition in the home state); but the political space of rights is situated in the host state. The trade-off becomes possible because the disentanglement of these two spaces: migrant workers are ready to trade their rights in order to improve their future condition at home. This raises a problem for liberal democracies because they value individual equality; but in this case the choice of a liberal democracy is between letting migrants pursue their plans (thereby abdicating the liberal democratic principle of equal standing) and upholding this principle, disregarding migrants' life plans.

### **1.3. A normative motivation for a residence-based citizenship theory**

The theories and points of view expressed above have their own merits, so what is the point of designing (or enlivening) another theory of citizenship? A new, residence-based theory must be normatively motivated. But in order to do this, we have to clearly define from the outset what citizenship means and what it implies. In my view, two dimensions of citizenship must be taken into account here. The first dimension is a psychological one: being a citizen means being a part of

collective endeavour, with a common territory, history, language, and fate/destiny; and having such a status also implies a responsibility regarding this polity's stability, a duty concerning its present and future. The second dimension is a practical one: citizenship is a legal status which confers to its bearer a set of rights. My claim here is that today being a citizen strictly and *exclusively* means, in this second dimension, being a bearer of *political* rights (more specifically, the right to vote and the right to stand for elections) in a particular polity's territory. In the international state system today human, social and economic rights are not linked to citizenship status anymore: one migrant can access them because she is simply a human being, because she is resident in a particular territory, or because she simply contributed to a social scheme. Even some political rights like the right to demonstrate or to campaign for a political party can be accessed by someone without being a citizen of a specific country.

Moreover, as I will try to show in chapter six, today even the right to return is not attached to citizenship status anymore. Different countries design an 'external quasi-citizenship' which offers a large varieties of rights (including the right to return) to citizens of other states, even if they are not considered 'full citizens' by the state that offers such a status. However, 'external quasi-citizens' do not enjoy voting rights because they are not citizens. In consequence we may confidently support the view that citizenship today, in its practical (that is, formal, or legal) dimension means being a bearer of *only political* rights – that is, having the right and responsibility to decide on how one's state must be ruled.

If this is correct, then a normative defence of a residence-based citizenship must take into account three different perspectives: immigrants, emigrants and polity's own points of views. Regarding legal immigrants, almost every political theorist accepts today that after a period of residence (which may be longer or shorter depending on each scholar's view) an immigrant should be offered the chance to be set on the path to full citizenship status. Otherwise the host state may lose its liberal democratic character, since in such a case it would become a 'caste-like society' (Bosiak 2006), where some individuals are 'subjects of a band of citizen tyrants, governed without consent' (Walzer 1983).

The situation is more complicated in the case of irregular migrants because they are living in the territory without host state's consent. However, even in such a case most scholars argue that time matters morally: after some time of residence irregular migrants become full social members of their state of residence, and keeping them in an illegal status would again transform the host state in a caste-like society. This is accepted even by some immigration countries today where, as we will see, after a long period of residence at least a legal status of permanent residence, if not even citizenship, *can* be offered to irregular migrants (though usually this is not seen as an individual right, but as a kind of

absolution at the government's discretion). The basic point here is that after a specific period of residence (which may be a longer or a shorter one, depending on the liberal degree of a particular state's view) immigrants must be put on the path to full citizenship status. It is important to underline that the period of residence is the most important factor today regarding migrants' access to citizenship.

However, it is not the only one. Most countries today have other requirements for successful citizenship application. Thus, according to the legislation in various countries the candidate must have a good knowledge of the official language, must have accommodation and a permanent source of subsistence means, she must prove that she has not been sentenced to prison in her home state and has not been a subject to criminal proceedings, that she doesn't pose a threat to the security and defence of the host country, and finally according to other national laws sometimes she must sign a loyalty oath, must know the national anthem, be familiar with local habits, customs, and tradition, must prove that she has contacts with local citizens, and must show an interest in social coexistence in her municipality.

However, I will try to prove in chapter seven that all of these requirements beyond residence should not be connected with citizenship. Indeed, in practice migrants can live and socially function for all of their lives in the host state without meeting any of these requirements. Moreover, some countries abandoned in the past some requirements that seem absurd to many of us today, like mental sanity or even proof of being able to economically support oneself. So why isn't possible to think about knowing the language or the national anthem as being similarly absurd? If this is true, then denying long-term migrants the right to full citizenship status even if they fulfilled the residence threshold and became full social members of the host society is once again close to creating a caste-like society.

If we accept that long-term immigrants should be put on the path to citizenship after a residence criterion is met, then what about long-term emigrants? The same principle of residence-based citizenship requires that they must lose citizenship status in the country of origin. This may seem extreme, but I am trying to show in chapter six on dual citizenship that keeping home state's citizenship *and* acquiring the citizenship of the host state may create various difficult problems for states in international relations (when for example several states can claim jurisdiction over a multiple citizen, or multiple citizenship can endanger bilateral relations because of a difficult history, or even when multiple citizenship is used in order to evade judicial prosecution) and for individuals (when, for example, dual citizens can be stripped by one home state of their citizenship as long as they retain other citizenships, or they must serve in the military service in several countries, etc.).

In this study I am trying to make a list of possible violations of the democratic principle of citizenship equality by dual/multiple citizenship status: these generally relate to the welfare state, to the substantive exit options, and to military-related judicial considerations. But probably the most important problem raised by dual citizenship is related to citizenship's meaning and core substance – that is, voting rights. Usually the two problems associated here with dual citizenship appear every time when either external citizens' votes decide the result of elections in the host state (thus they decide a political state of affairs they will not be subjected to and their will not have to bear the consequences of their vote), or they have multiple votes in international or supra-national and regional organisations because of their multiple citizenship.

Residence-based citizenship can overcome all of these problems since it consigns one citizen to only one state. But this doesn't mean that such a theory cannot recognise or accept different ties people have to different polities. On the contrary, it is perfectly consistent with a status used today by several states, called 'external quasi-citizenship.' Having this status implies an official recognition by a state that one person has different (emotional, cultural, linguistic, familial, etc.) ties with her community, and also represents an insurance that one can always return to live in that state. However, as long as she is not permanently resident in that country, she cannot be considered a full citizen. The normative thrust of residence-based citizenship is that it relegates one person to one state, and thus is avoiding different problems created by multiple citizenship to both states and individuals.

One serious counter-argument here is that dual citizenship can still avoid problems like those just presented by making a distinction between active and dormant citizenship. According to this proposal, the state of residence should offer an 'active citizenship' (that is, a full citizenship with political, especially voting rights) while the other states' citizenships should be 'dormant' (i.e., should not offer voting rights) as long as the individual is not a permanent resident in any of them. In this way, voting rights are consigned to residence (as a residence-based theory is requiring), but dual citizenship status is also secured. However, I will try to show in chapter six on dual citizenship that (a) a system of 'active' and 'dormant' citizenship cannot avoid all the problems raised by dual citizenship, and (b) a 'dormant citizenship' – that is, citizenship without the right to vote and the right to stand for elections – is an incoherent notion, as long as we accept, as I have tried to argue at the beginning of this section, that the only significance of citizenship today refers to the possession of voting rights in the state territory one resides in.

Finally, a residence-based citizenship must take into account polities' own point of view. Usually, political theorists argue that citizens must see each others as members of an inter-generational

community in order to guarantee the preservation of a polity over the generations. This is a major critique to the theory I am defending, since if this condition is critical for maintaining an inter-generational community, then a residence-based citizenship cannot provide it. And it cannot provide it because such a theory claims that citizenship is a basket of rights one individual enjoys *because* and only *as long as* she is a permanent resident of a specific state. When this individual is changing her state of permanent residency, she loses her basket of rights in the former state of residence after a period of time spent abroad and is offered another one basket of rights in the new state of residence after the time threshold is met. Of course, by the notion of ‘basket of rights’ I do not want to claim that *all* rights are lost when one changes her permanent residency. On the contrary, as I have already argued, states may offer an ‘external quasi-citizenship’ which may confer a large number of rights to its bearer. However, usually these depend on each state, so the content of this basket varies.

In consequence, throughout this work I intend to challenge the claim that in order to guarantee the preservation of a polity over the generations, citizens must see each others as members of an inter-generational community. I follow Costica Dumbrava and maintain that a society’s membership rules should be ‘partly voluntaristic’ (since some may choose to join that society) but most importantly ‘minimalist politic’ in the sense that (a) their only scope is to foster ‘a political community *instrumental* for individuals’ interests’ and (b) they require ‘only a *minimum connection* that is sufficient to maintain a functional political community [emphases mine]’ (Dumbrava 2010: 3).

From this perspective, it is difficult to understand why members of a polity should see each others as members of an inter-generational community. And if such a need could still be not only coherently supported at the normative level, but also empirically proved that it is a *sine qua non* condition for a political community’s continuity over time, then another problem must be taken into account. People tend to take roots at one point or another in their lives: they find a permanent job, they get married and have children. Being a part of the community where one lives and where one’s children are going to grow up seems enough in order to offer a stable sense of an inter-generational community. Why such a status needs citizens to see one another as being a part of collective endeavour, with a common territory, history, language, and fate/destiny? Such attitude seems to be more than ‘minimalist politics’ (as defined by Dumbrava) and more close to a masked or concealed nationalist view of a political community. This is why I reject the psychological dimension of citizenship this section began with and I claim that citizenship should be exclusively seen as a basket of legal rights any permanent resident should enjoy.

I am aware, of course, that such a residence-based theory of citizenship may seem unrealistic and may encounter real feasibility issues today. However, if migration will continue to rise and more people will migrate from one state to another, some residence-based theory will need to be employed in order to avoid the consequences of a ‘hypermigration model’, where the majority of residents are non-citizens and the majority of citizens are non-residents (Bauböck 2011). Indeed, this would be another example of a caste-like society, where the majority of residents would be the ‘subjects of a band of [external – my insertion] citizen tyrants, governed without consent’ (Walzer 1983). In such a case the only options may be either to ban migration (i.e., people’s right to leave a state) or to employ some form of a residence-based theory of citizenship.

## 1.4. Research Plan

### 1.4.1. Chapter two: residence-based citizenship in history

Chapter two offers a historical journey which tries to emphasise different avatars of residence-based citizenship in the 19<sup>th</sup> and 20<sup>th</sup> centuries. *Firstly*, it takes into account past practices of *ius domicilii* (*residence*): the Austrian *Heimatrecht* (‘the right of abode in a municipality’) practiced until 1938 and Switzerland’s three-level citizenship system are taken into account. I also show that *ius domicilii* has been applied by many states which came into existence in the last two centuries in order to determine their initial body of citizens. An interesting comparison between the early 19<sup>th</sup> century French Civil Code (1804) and the Italian *Codice Albertino* (1837) shows that both *ius soli* and *ius sanguinis* had their supporter-states; however, given the rise of nationalism, in time *ius sanguinis* took the lead in European citizenship legislation. Finally, I show that even communist states have sometimes used remarkably liberal citizenship provisions regarding *ius domicilii* and the right of option.

The *second* part of this chapter surveys historical practices of *ius soli*. A good example is offered by the Nordic countries (in the 19<sup>th</sup> and the beginning of the 20<sup>th</sup> centuries), which offered *ius soli* acquisition of citizenship combined with a voluntary act at the age of majority to those individuals who were born or who grew up in the country. The same optional *ius soli* at majority was also applied by France, Belgium, Luxembourg and Spain. Portugal offered an interesting *ex lege* and *automatic ius soli* between 1959 and 1981. Another example of a traditional *ius soli* country is the United Kingdom until 1983. However, not only Western countries applied this liberal provision, but also Eastern states, like Romania and Bulgaria. Finally, some historical instances of *double ius soli* are presented.

The *third* section takes into account historical *naturalisation* provisions. The oldest example is Russia, where in the 18<sup>th</sup> century an oath of allegiance was considered to be sufficient.<sup>7</sup> Even the first Russian communist constitution (1918) provided naturalisation for residents without imposing *any* formal condition. However the remaining European countries requested nothing more than a residence requirement for naturalisation in the 19<sup>th</sup> and the beginning of the 20<sup>th</sup> centuries. Usually there were few other mild obligations in some cases, such as having a good reputation or the capacity to support oneself. Still more important, in many European states at the end of the 19<sup>th</sup> century once an individual (usually, a man) was naturalised, his wife and children were also *automatically* naturalised (at that time in many places policies were not gender neutral, and in many places the status of the wife followed that of the husband).

However, the second important requirement for naturalisation (after residence) was renunciation of former citizenship: dual citizenship was not historically accepted by any country under consideration except probably France after the First World War. According to two authors, even though France formally signed the 1963 European Convention designed to reduce cases of dual citizenship, in practice it ‘has always allowed newly naturalised citizens to retain their previous citizenship. In fact, since the First World War, France has always tolerated dual citizenship, but for some extreme cases a provision permits revocation of citizenship for dual citizens (primarily for those who become an enemy of the French state)’ (Bertossi and Hajjat 2012: 2).<sup>8</sup>

The *fourth* section discusses historical instances of residence-based citizenship *loss*. Setting aside different exceptions, at the end of the 19<sup>th</sup> and the beginning of the 20<sup>th</sup> century simple residence abroad for more than a specific number of years usually implied loss of citizenship. However, in several countries, resuming permanent residence in the territory triggered citizenship reacquisition without any problems. But residence-based citizenship was also applied in cases where contested territories were ceded between states: inhabitants of those regions acquired citizenship of the new state because of their residence (however, they also had the right to choose to keep a former citizenship and to return to the former country of citizenship). Another example of loss concerns children born abroad who have never resided in the country, who were losing their citizenship at the age of majority. Finally, an illiberal type of law imposed loss only for *non-ethnic* citizens who took up permanent residence abroad.

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<sup>7</sup> It is also true that in this case naturalisation was not a right; on the contrary, the process was discretionary.

<sup>8</sup> I would like to thank Joseph Carens for drawing my attention on this exception (personal communication on file with the author, November 2013).

The *fifth* section discusses historical provisions *against residence-based citizenship* in Europe and beyond the continent, especially the infamous, internationally-sanctioned practice of ‘population exchange’. Such treaties have been signed, for example, by Turkey with Greece involving approximately two million people (1923), and by Bulgaria with Greece regarding 300,000 people (1920) and with Romania (1940). But we can spot at least three other historical examples of regulations that run against the principle of residence-based citizenship, under the ‘partial citizenship’ label: the case of *non-resident quasi-citizens* – this is the situation of ‘Dutch subjects, non-Dutch citizens’ (van Oers, de Hart et al. 2013: 33-34) in 1910 concerning native population of the Dutch East Indies; the case of *non-citizen permanent residents* (Jews in Romania until the end of the First World War, but also different ethnic groups excluded from citizenship by the first republican Turkish Constitution in 1924); and the case of *citizens without full citizenship rights* (this includes the positive example of the 1865 Italian ‘*piccola cittadinanza*’ ('small citizenship'), but also the negative case of naturalised persons who enjoy full citizenship status only some years after naturalisation, as in Lebanon and Morocco).

The *sixth* and last section presents two more historical examples of residence-based citizenship: one is offered by Bulgaria in 1879, which opted for residence-based citizenship rather than for *ius sanguinis* because of the problems a mass exodus of Bulgarians from the region would have created for the new state. The second example is Yugoslavia, which (because of its many ethnics groups) had to play in the communist period the residence rather than the ethnicity card in order to maintain an artificially constructed political community. In conclusion I claim that *throughout most of the 19<sup>th</sup> century and the beginning of the 20<sup>th</sup> century the principle of residence-based citizenship, or ius domicilii, was the usual standard for citizenship acquisition (through ius soli and naturalisation) and also for loss of citizenship (through long-term residence abroad)*.

#### **1.4.2. Chapter three: irregular migrants**

*Chapter three* examines the problem of illegal migration in our time. In the *second section* it acknowledges that all scholars agree that such a status is not acceptable, but it also sidesteps the never-ending debate in normative theory between those concerned with individuals’ lack of rights and those worried about the consequence such a status could have on the liberal-democratic outlook of our present-day polities. The chapter bypasses this quarrel by considering a third alternative, which tries to disentangle the status of irregular individuals from the rights they should enjoy as human beings. In this

sense, one author proposes a ‘firewall’ between immigration authorities and agencies responsible with the protection of specific rights which are normally not related with the immigration status of an individual (Carens 2008a). Another scholar proposes the concept of ‘ethical territoriality’, according to which the simple presence on a territory should trigger legal recognition of a large area of rights, irrespective of the legal status of that presence (Bosniak 2006). This latter proposal is very close to the idea of residence-based citizenship, since territoriality-based rights are doing a better job in annihilating caste-like distinctions than status-based rights. The problem with these two normative accounts is that *neither* goes as far as requesting and justifying full citizenship rights for resident irregular migrants, although this is the right solution because of the slippery slope character of their argument. On the one hand, disconnecting civil and social rights from immigration status does not solve the problem of illegal migration: irregular migrants will simply remain irregular even if they can access some rights; on the other hand, if both accounts are nevertheless compelled to extend voting rights to irregular migrants, then citizenship status becomes irrelevant. I argue that detaching enjoyment of rights from immigration and citizenship status cannot be a good way to deal with illegal migration.

In the *third section* I turn to the old quarrel between supporters of deportation and those of regularisation. This disagreement underlines two special features of irregular migrants: on the one hand, they are *illegally* present in the territory (even if their illegal presence is usually sanctioned by the host state); on the other hand, they *settle* in the country of immigration. The problem is that these two features pull in opposite directions: while illegality triggers deportation, settlement requires regularisation. However, as I argue in *section four*, deportation cannot be taken into account since there are both empirical obstacles and normative objections against it: I claim that all four main clusters of reasons which defend legitimate exclusion (public order, cultural disruption, protection of the welfare state, and community’s right to self-determination) are morally indefensible when applied to irregular residents.

But if it is the case both that irregulars become in time social members, and exclusion is not available from an ethical point of view, then regularisation seems to be the only solution. Against previous and current forms of regularisation (individual legalisation or collective amnesties), I claim in the *fifth section* that the only moral requirement for regularisation must be residence in the territory, and state policies requesting other conditions cannot be morally defended. As to what constitutes residence, I argue against both the ‘long term residence’ condition and the idea of a collective rolling amnesty (based on the ‘touch the territory and you’re in’ view) – and finally I support a shorter term of residence. I do not suggest a specific policy regarding the number of years required to live in the

country before accessing legal status; however, since chapter seven will show that liberal countries require three years of residence before an individual can qualify for *naturalisation*, then for obvious reasons a *legal status* should be obtained even quicker (I support a period of less than one year of residence).

In the second part of the chapter I discuss the problem of the voting rights irregular migrants should have in both home and host states. I emphasise in the *sixth section* the dilemma the home state may have between enfranchising its citizens-with-illegal-status-abroad and helping host state's authorities to fight illegal migration: I offer the example of a recent international conflict between Romania and France on the problem of Roma migrants, perceived as 'European citizens with illegal status'. *Section seven* claims that voting rights in the host state must be accessed by irregular migrants only *after* regularisation: this is not as obvious as it may seem, since in developing Asian countries (because of conditions regarding 'networks of complicity' and 'blurred membership') there are many situations when irregulars vote, and by voting they access documents which are afterwards used in order to legalise their stay. Moreover, both home states and host states are using irregular migrants in order to accomplish their own political goals such as claiming territories under foreign administration or implementing policies of ethnic cleansing.

*Section eight* concludes by claiming that irregular migrants should be regularised according to a short-term residence criterion and afterwards they should be set on the path towards becoming full citizens: a status of *permanent* residence without citizenship cannot be morally defended from a residence-based theory of citizenship, since it transforms the state of residence into a 'caste-like society'. Resident irregular migrants must receive quickly a legal status and then they must be set on the road to full citizenship, even if in their case this road can be longer as a penalty for trespassing immigration laws.

#### **1.4.3. Chapter four: temporary workers**

*Chapter four* investigates the problem of the second category of 'citizen-minus' – i.e., temporary workers. They are usually citizens of rather poor countries accepted by the host state on an (intended) short-term basis, in order to be employed in economic sectors where local citizens cannot or do not want to fill the market demand. The chapter surveys the problem of their rights both at the international and national levels and both from host states' and immigrants' points of view.

The *second section* discusses whether temporary migrant workers' rights can be secured through a progressive development at the international level. My answer is negative, and it is based on the argument that in this field international institutions cannot live well with the doctrine of state sovereignty. I examine the situation of a major international covenant regarding migrant workers' rights which have been signed by no important Western power (nor by any other member of The Organisation for Economic Co-operation and Development). I accept Bosniak's explanation that such conventions do not have any chance to be signed as long as states see them as undermining their sovereignty on immigration issues. However, since states usually *do sign* international legal documents that limit their sovereignty (as an important objection might underline), why is the case of the Migrant Worker Convention so different? In order to answer this question I appeal to international relations theory and survey the conditions under which states accept to limit their sovereignty under international treaties; however, I argue that none of the conditions obtains in the case of the Migrant Worker Convention.

If at the international level it is difficult to see an improvement in the foreseeable future in what concerns states' observance of Migrant Workers convention, then I believe it is important to understand both actors' perspectives. This is done by the following two sections. The *third section* discusses immigrant states' view on temporary workers and in this sense asks what happens when migrants' interests clash with host country's concerns. I thus examine the *rights versus numbers* dilemma and claim that one cannot solve it unless temporary migrants' own perspective and interests are taken into account.

In consequence, the *fourth section* discusses temporary migrants' own view and examines two different perspectives. The first one is offered by Daniel A. Bell who believes that various practices regarding temporary migrants around the world should not be subsumed under a Western model. In his view, different political and social spaces have different practices, so it is morally acceptable for a Western state to admit few temporary workers, to offer them a large set of rights and to even set them on the path to citizenship when a time threshold is met. But it is morally acceptable as well for an Asian state to admit large numbers without offering them too many rights or any possibility of accessing full citizenship status.

The second perspective is offered by Ottonelli and Torresi and it is known as the *bases of self-respect* puzzle. According to it, liberal democracies presuppose an identity between the political space of rights and the social space of self-respect: pursuing one's life plans is thus critically based on enjoying equal political rights. In the case of temporary workers however, these two spaces are

separated. The space of rights is situated in the host country, while the space of self-respect is located in the origin state. This way, temporary workers are ready to trade many of their rights in the host state in order to improve their future condition at home. I conclude this section by following these authors and supporting the view that migrants' agency and their preferences should be somehow taken into account.

Thus *section five* claims that democracy's concerns with formal equality should be balanced against migrant workers' needs. But it also argues that this balance can be accepted only if such a trade-off is temporarily limited, is respecting basic human rights, and is acceptable in migrants' own view. Using Soysal's distinction between human rights and citizens' rights, I further claim that human rights cannot be negotiated. However under very strict conditions some social and political rights may be traded off, but this can be done only as long as immigrants do not qualify yet for the three years residence-based criterion which sets them on the path to full citizenship rights.<sup>9</sup> However, I do not go further in order to finally design a complete range of rights that can be traded off, since in my opinion these may vary according to the local culture and customs.

Sections six hints at a problem in political philosophy situated beyond the subject of this study: the link between temporary workers (but also migrants in general) and the consent theory of political obligation. I claim that taking into consideration migrants' agency (i.e., their consent to move to another country to work, as well as their decision to respect host states' laws) can revive the consent theory as a serious component of a general theory of political obligation which combines several principles that can support political obligations of different categories of individuals.

#### **1.4.4. Chapter five: multiple citizens**

*Chapter five* examines the problem of multiple citizenship, and tries to investigate what the normative justifications and practical advantages of this condition are. In the *second section* I firstly explain the recent international acceptance of multiple citizenship against the long two-century history of 'one citizen, one state' policy. Both liberal (increasing inter-state cooperation, development of international institutions, acceptance of human rights norms) and neo-realist (lacking coordination among states) schools of thoughts can easily explain this phenomenon. But we might ask why multiple citizenship is desirable in the first place.

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<sup>9</sup> This chapter leaves open the problem of democratic legitimacy of human rights in self-governing polities – which could be the subject of a whole new study.

If we pay attention to this status, we surprisingly find out both that (a) its advantages are more imagined than real, and (b) its benefits are more easily realised through more convenient means. This applies to all three actors involved: sending states, receiving states, and individuals. I *secondly* explain that for sending states advantages are rather imagined: the flow of remittances decreases in time, the lobby for the origin country is difficult to spot, the spreading of liberal norms is counter-balanced with terrorists' enhanced free movement, and bilateral relations are rather worsened than improved. *Thirdly*, the same goes for receiving countries: dual citizenship is supposed to support the principle of congruence between the demos and the resident population. However this is rather false, since dual citizenship cannot legitimately be offered in an asymmetric manner to immigrants but not to emigrants; and if it is also obtainable by emigrants, then the congruence principle is violated. Moreover, the relationship between double citizenship and integration is debated; all things considered, in spite of political theorists' insistence on the positive value of dual citizenship, it seems that it is desired for its instrumental value rather than for promoting integration. *Fourthly*, is dual citizenship good for individuals who are enjoying multiple status? The argument here comes from freedom of movement, but this can also be achieved for a much larger category of persons through creating forms of political union (like the European Union) rather than through dual citizenship. Further, as we have already seen, the relation between this status and integration is rather inconclusive. And if dual citizenship provides an exit option whenever things go wrong, then it is difficult to defend it since this choice is accessed by only a group of privileged persons.

On the contrary, dual citizenship comes with many disadvantages: states can easily strip unwanted individuals of their citizenship if they possess multiple statuses (otherwise such an option is not available according to international agreements on the prevention of statelessness). Other disadvantages are related to access to different public positions, the problem of loyalty in cases of state and non-state modern terrorism, the idea of 'identity dilution', the promotion of irredentist policies, international conflicts regarding diplomatic protection, and judicial cooperation in civil matters. Actually there are few genuine benefits of dual citizenship; very often, disadvantages outweigh benefits; and finally, when these benefits are real, they can be promoted through other means.

The *third section* tries to demonstrate that dual citizenship is still acceptable, if it does not violate the democratic principle of citizenship equality. However, I find four ways in which such violation occurs. The *first* violation regards the welfare state and implies enjoying social benefits without contributing to the welfare scheme. The *second* one concerns the exit option provided only for dual (but not for mono-) citizens. The *third* violation is linked to some military and judicial

considerations, and the *fourth* one is linked to political rights and it comes in three instances: the impact of external voting on domestic politics, the problem of multiple voting, and the problem of office holding by dual citizens. One rejoinder asks for accessing political rights based on residency, such that political rights in other countries of citizenship become at the same time ‘dormant’. However, since nowadays human, civic, social and economic rights are decoupled from citizenship, decoupling political rights also would render citizenship status meaningless – since a status of ‘external quasi-citizenship’ can very well safeguard the last rights (free movement and the right to return) offered by such a weak perspective on citizenship. In consequence, since plural citizenship violates the democratic principle of citizenship equality it cannot be normatively justified.

The *fourth section* asks how political communities could still officially recognise individuals’ ties to multiple societies. *Firstly*, it is important to make a move backwards and see who has a membership claim in a polity: I claim that the principle of ‘genuine link’ can be easily but also radically interpreted as residence: thus both the need and the justification for multiple citizenship status disappear. But this does not amount to denying other various ties individuals may have to more than one polity: I only claim such ties do not need officially recognition through citizenship. *Secondly*, I propose to take seriously the difference between *citizenship* and *nationality* practiced today by many states: *citizenship* is a formal status (and thus I claim it should be exclusive and restricted to the country of residence) while *nationality* refers to ethnic, cultural and other ties an individual may have to other states (and thus it is non-exclusive). I advance the concept of ‘external quasi-citizenship’ (Bauböck 2007b: 2396), (Owen 2011a), which is intended to cover all other ties individuals may have to other polities except the state of residence and citizenship. *Thirdly*, I offer some real-world examples.

#### **1.4.5. Chapter six: ‘external quasi-citizens’**

*Chapter six* develops the idea that strong ties people may have to other countries than the state of residence/citizenship must be officially recognised even though dual citizenship is dismissed. I propose a status called ‘*external quasi-citizenship*’ (Bauböck 2007b: 2396), (Owen 2011a): people enjoying it are either migrants (or their descendants) who live (have residence and citizenship) in another country than that of their origin, or ethnic groups which, after different re-drawings of borders, have found themselves living in another, different state. Such authentic links legitimate different economic, social and cultural interests in securing them. The difficulty is that such people are not citizens of their ethnic or origin countries: they do not have any claim against such states except those based on international

laws. Global agreements may sometimes be enough for securing some economic interests but language and cultural interests, as well as freedom of movement cannot be secured unless the origin state accepts to offer them under some ‘favourable treatment’. So the normative question is what type of relationship is acceptable between ‘external quasi-citizens’ and their origin countries? Some scholars believe these types of links can be legally accepted, and their range is very large, from simple economic assistance to a straightforward offer of full citizenship rights. Others think that in world regions where bilateral relations are historically tense, ethnic communities’ right to self-government is better than a quasi-citizenship status offered by another state whose actions can be perceived as unfriendly.

I begin by investigating four cases of recent laws dedicated to ‘external quasi-citizens’. I divide this category into two sub-groups: the first class is made of migrants (*second* section), while the second one is made of ‘ethnic kins’ (*third* section). I have selected India, Mexico and Turkey (which offer ‘external quasi-citizenship’ regimes for migrants) and Hungary (offering a similar regime for ‘ethnic kins’). This selection is not random, but it wants to cover the whole range of possibilities from the most restrictive regime (India, offering a special status only to emigrants in wealthy states) to the most generous one (Hungary, which offered dual citizenship to all ‘ethnic kins’ from neighbouring countries).

The *fourth section* discusses both common developments and differences between these four cases of ‘external quasi-citizenship’ regime. *Firstly*, India and Mexico are more liberal than Turkey and Hungary, since qualification for this status is given in the first case by former presence in the territory (or former presence of a close relative), while in the second case it can be accessed only by ‘ethnic kins’. Moreover, Turkey offers this status only to native-born Turks and only if they have renounced citizenship with the state’s approval. Finally, Hungary’s regime has been based on ‘ethnizenship’ rather than on ‘external quasi-citizenship’. *Secondly*, regarding the rights offered by ‘external quasi-citizenship’ laws, I analyse the most important ones offered by all countries: the right to return (an exclusive citizenship right before this status has been invented), the right to re-acquire full citizenship status, the right to buy and own property, educational and cultural rights, and the right to live, work and invest in the country. Finally, other special rights offered by each government are considered.

The *fifth and last section* offers some normative considerations. *Firstly*, I claim that such a position must be seen as ‘favourable treatment’ rather than a special legal ‘status’. Regarding its extent, I endorse in a first step the Venice Commission’s decision in 2001 according to which special bonds between kin minorities and kin states must be acknowledged, but preferential treatment is acceptable only in the fields of culture and education. Moreover, I claim that this is not the case only for ‘ethnic

kins', but also for migrants and their descendants. *Secondly*, I ask why a state should be interested in offering benefits to non-citizens, as long as this also implies spending a large amount of funds: is there something to gain here? Four reasons seem to explain this attitude: flow of remittances, nationalistic sentiments, releasing pressure on the job market and keeping influence in the region. *Thirdly*, I normatively justify this status for two categories of people: for first generations born abroad (and generations beyond), who might well be interested in preserving their culture and learning the language; and also for first generation immigrants, as a better substitute of dual citizenship.

*Fourthly*, I enquire what other rights can be offered to 'external quasi-citizens' besides the provision of cultural and educational rights already accepted by the Venice Commission. I make an argument that the right to return should be also provided; however, the precise extent of rights can be decided by each country according to its own interests – as long as these are not based on ethnicity, but only on previous residence on the territory or on descending from previous residents. *Fifthly*, I raise the problem whether this quasi-citizenship regime may be discriminatory: I criticise the perspective that it can be inequitable for all the other citizens of a country if only a group of that country's citizens qualifies. What is indeed discriminatory is to link advantages not to former nationality or actual descent, but to 'ethnic kinship'. Moreover, if discrimination is a problem, then I believe that its real target regards citizens of the origin state, who are supposed to financially support an 'external-quasi citizenship' regime: in consequence, such a policy cannot be implemented unless citizens approve it. *Finally*, I argue that such a system can evade discrimination in situations in which a dual citizenship status cannot: I offer here some examples of European Union countries offering dual citizenship (hence European citizenship too) to some groups from non-European countries, thus discriminating between members of the same state regarding the possession of European Union citizenship.

#### **1.4.6. Chapter seven: a plea for residence-based citizenship**

We have seen that there are no serious arguments to deny access to full citizenship status to residents (temporary workers and irregular migrants) after a certain period of time. On the other hand, non-residents (multiple citizens and 'external quasi-citizens') lack a moral claim to have a say in their origin states and thus to full citizenship rights. It is interesting to see how this theory of residence-based citizenship is implemented in current laws. In this sense my analysis is relying on the 47 country

reports on citizenship legislation offered by the EUDO Observatory on Citizenship<sup>10</sup> plus the legislation in three other countries (Canada, the USA, and New Zealand). I am also referring to the EUDO Observatory on Citizenship's database on acquisition and loss of citizenship, and sometimes to a more recent EUDO comparative study called *ACIT – Access to citizenship and its Impact on Immigrant Integration*, which has compared citizenship laws, their implementation and their impact in Europe. It is important to note that this investigation is made from a political theory's perspective: it does not intend to substitute a cross-country *legal interpretation*, and it takes into account only the elements that support or deny the hypothesis I am trying to defend.

*Section two* discusses citizenship acquisition by *ius soli*. Ultra-liberal policies of a pure *ius soli* regime were abandoned in Europe at the end of the 20th century in order to avoid both 'accidental citizenship' and 'citizenship-tourism', and I accept that an *unconditional ius soli* regime is not always the best policy a liberal-democratic theory of membership based on residence could adopt. Following Carens, I also argue that the *double ius soli* system is hardly acceptable in a liberal democracy. In consequence, *ius soli* acquisition is now implemented by liberal countries in two different ways related to residence in the territory: for the child to acquire citizenship, some countries apply the residence criterion to parents while others apply it directly to the child, after only two years of residence or at the age of majority, offering the child a free choice regarding her legal status.

In *section three* I discuss residence-based naturalisation in four main steps. *Firstly*, I show that, except for a small number of liberal countries requesting only previous residence for naturalisation, most of the states are making naturalisation more difficult by adding various requirements and procedures. *Secondly*, I categorise these supplementary conditions and administrative practices in five main groups, which I am dismissing after discussing them in detail. I also interpret the principle of 'genuine link' as residence and offer arguments for disconnecting citizenship from nationality. *Thirdly*, I take a closer look at the number of residence years required to qualify for citizenship: I differentiate here between *liberal* requirements (three years), *normal* conditions (five years) and *conservative* thresholds (twelve years). *Fourthly*, I discuss different instances of residence-based naturalisation in present citizenship laws. The most interesting cases are those of Belgium, Norway and Sweden, where *the concept of legal residence has become more important than the concept of citizenship in recent years*.

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<sup>10</sup> EUDO Observatory on Citizenship, Country Profiles: <http://eudo-citizenship.eu/country-profiles> (last accessed 22 November 2012). This chapter is based on the reports present on this website on November 2012. However, the reports are regularly updated when a country legislation is changed, so changes made after the said date are not taken into account.

*Section four* takes into account the relation between a theory of residence-based citizenship and multiple status, and tries to argue against multiple citizenship in three main steps. *Firstly* I discuss external voting rights by attacking two unacceptable situations where either external votes decide the results of elections (offering persons a say in a political process they are not subjected to), or permanent residents representing more than a half of a state's population do not have the right to vote (this is the reverse of the situation of a majority resident population not having a say in the political process it is subjected to). In order to avoid such cases, I argue that the right to vote and the right to stand for elections should be restricted to residents.

*Secondly*, I claim that dual citizenship should not be accepted: I offer some real-world examples (the best one is Norway, which sees the loss of citizenship for living continuously abroad as the normal complement of citizenship acquisition for living continuously in Norway) and I criticise the normative theory of 'stakeholdership', according to which first generation emigrants and also the second-generation (under some conditions) are entitled to keep citizenship even when they become citizens of the host state. *Thirdly*, I offer examples of dual citizenship prohibition in present legislation and I make the point that in many situations multiple citizenship can and should be avoided because of reasons related to international relations. I show that out of the 50 countries studied, 28 practice one form or another of avoiding dual citizenship and I conclude by criticizing practices of dual citizenship which cannot be morally accepted. The first case is when a state allows one set of individuals to access dual citizenship, but denies the same status to others. The second case regards states which accept dual citizenship but impose restrictions on those enjoying this status.

*Section five* explains the connection between residence-based citizenship and free choice by discussing the internationally sanctioned provisions of 'the right to choose' and 'zero option' in the case of state formation and state succession. These stipulations are a legacy of peace treaties entered into after the First World War and were applied all over the European continent until the end of the 20<sup>th</sup> century. While 'the right to choose' is connected to an individual's free choice, the 'zero option' rather refers to residence. I finally discuss an illiberal instance opposed to 'the right to choose' and 'zero option' applied by Latvia and Estonia, which used the 'state continuity' option and did not offer citizenship to Soviet-era settlers.

*The sixth and final section* concludes by arguing against real-world cases which dismiss residence-based citizenship, either by legally sanctioning unacceptable cases of *permanent* partial citizenship, or by offering citizenship without requesting applicants to reside in the territory. I finally

argue against a recent claim according to which long-term residence is no longer considered to imply integration (hence it should not be the only criterion for citizenship acquisition).

#### **1.4.7. Chapter eight: conclusions**

*Chapter eight* tries to offer some conclusions. In the *first section* I criticise four alternatives of residence-based citizenship and explain why they are less successful than my proposal in offering a comprehensive theory of citizenship by hitting upon some problems each of them faces. The first alternative is the ‘*stakeholdership principle*’ – put forward by Rainer Bauböck – which is, according to my first objection, *over-inclusive*: it cannot justify the inclusion of long-term emigrants and second generation born abroad into the demos. The second objection claims that the insistence on the idea that citizens must see each other as belonging to an ‘intergenerational community’ rests on a false psychological assumption. The third objection criticises a claim regarding the proper function of a liberal-democracy where people frequently change membership (the ‘*hypermigration model*’): I question both the *number* of persons frequently changing citizenship and the *frequency* of this change.

The second theory is the liberal view of transnational citizenship advanced by David Owen, according to which all four categories I have discussed in this study must be included. I claim this theory is *over-inclusive*, too: its author cannot dismiss López-Guerra’s arguments for a residence-based citizenship theory, since his critique targets a different level: while López-Guerra asks the basic question of who should be a citizen, Owen raises a secondary question of how to treat individuals who are already citizens and live outside the territory. Even if this author could reply by showing that everyone (resident or non-resident) should have a say in deciding who should be a citizen, I argue that every normative principle we could employ excludes *ab initio* some categories in one way or another. Moreover, against Owen, I claim that the ‘non-instrumental value’ membership in a country other than that of residence may have is not enough in order to support a citizenship claim. Finally, I criticise his distinction between ‘political membership’ and ‘national citizenship’ and dismiss the claim that citizenship based on pure residence cannot meet ‘certain basic standards of sociological and psychological realism’ (Owen 2010).

The third theory is not only *over-inclusive*, but it also applies what I call *forced inclusion*: besides accepting non-resident members of a political community, Ruth Rubio-Marín proposes forced inclusion of temporary and irregular migrants through an *automatic* naturalisation after ten years of residence. I readily grant that such a perspective would solve the problem of ‘citizens-minus’, but it

cannot answer three other difficulties: (a) it can justify neither the inclusion of ‘citizens-plus’ nor their advantages; (b) it sets an unacceptable threshold of ten years of residence for citizenship acquisition; moreover, it cannot justify the perspective of five years-period an irregular migrant must avoid the law and live in precarious social and legal conditions in order to access legal residency; and (c) it cannot accommodate forced inclusion (a mandatory and automatic process) with liberal-democratic principles.

The fourth alternative is an *over-exclusive* one since it excludes both categories of ‘citizens-minus’ from access to full citizenship status. It comes in two versions: the first is a ‘negotiated exclusion’. According to Torresi and Ottonelli, in case of temporary migrants democratic standards should be ‘relaxed’ in order to accommodate ‘citizen-minus’s’ plans. The second version is a ‘forced exclusion’: Daniel A. Bell argues that if a state has to choose between accepting a small number of immigrants and putting them on the path to full citizenship rights (on the one hand) and accepting a large number of people without offering them any possibility of accessing citizenship status, then the second solution is morally better since it fares better in reducing world poverty. I challenge these views, by showing that (a) a residence-based citizenship is better than conscious infringement of liberal democratic values; and (b) Bell’s ‘either/or’ alternative is false: other possibilities like Western-backed programs of reducing world poverty may prove to be both normatively and practically better alternatives.

In the *second section* I honestly survey what problems residence-based citizenship can solve and what it cannot provide for (i.e., the problems my proposal finds difficult to answer). This theory can easily terminate partial statuses like those imposed on irregular migrants and temporary workers. Secondly, it can also easily help to match the two categories of ‘permanent residents’ and ‘citizens’, which is a rather complicated subject in today’s political theory. Thirdly, it can help terminating the present concern of many states regarding fictitious marriages (or other instrumental incentives for acquiring citizenship): indeed, since residence is the only requirement for citizenship acquisition, being married or not with a citizen has no influence on the naturalisation procedure. Fourthly, it does away with the immoral supplementary requirements for citizenship acquisition like citizenship tests, knowledge of local language and history, etc.

However, as any other normative theory, it also meets some serious difficulties. *Firstly*, it finds it difficult to answer to the ‘touch the territory and you’re in’ perspective on irregular migrants. Since irregular migrants are ‘impossible subjects’, I believe no solution can be entirely decent and flawless. *Secondly*, another difficulty is the difference between dual citizenship and ‘external quasi-citizenship’: why not use instead the Spanish system of ‘dormant’ and ‘active’ citizenship? My theory may have

difficulties in approaching such a proposal, but it is important to note that (a) a ‘dormant citizenship’ is still a full citizenship status so it still raises the problems discussed in chapter five; and (b) it can still generate international conflicts like those based on diplomatic protection.

The third and last part of this chapter discusses avenues for further research regarding each of the four categories I have analysed: irregular immigrants, temporary workers, dual citizens and ‘external quasi-citizens’. I also discuss reasonable and realisable prospects of residence-based citizenship in the future. Even if today such a theory does not seem to have many chances except in a very restricted number of countries, I believe that from a normative point of view this is (and should be) the way to go.

## 1.5. Commented bibliography

Before discussing the main bibliography in political theory, political philosophy, political science and sociology that represent the basis of this study, it is important to note that eight important projects constituted its starting point. The first is the *EUDO Observatory on Citizenship*<sup>11</sup> project (started in 2009), supported by the Robert Schuman Centre for Advanced Studies and the European University Institute: at the time of writing this study, it already provided 47 country reports on current citizenship legislation in all European countries, and other countries from Asia and Africa. These country reports were essential for writing chapter two (on the history of residence-based citizenship) and also for writing the seventh chapter on present-day legal provisions on citizenship based on residence. The seventh chapter also relies on the EUDO Observatory on Citizenship’s database on acquisition and loss of citizenship, which compares citizenship laws in Europe. The second study is the *Clandestino* project<sup>12</sup> (2007-2009), which examined the problem of irregular migrants (data, numbers, legislation and trends) in twelve European states.<sup>13</sup> The third project concerns two normative debates hosted by the *Boston Review*: ‘The Immigrants as Pariah’ (1998)<sup>14</sup> and ‘The case for amnesty’ (2009);<sup>15</sup> the third chapter on irregular migrants heavily uses the aforementioned study and the two public discussions to

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<sup>11</sup> Link: <http://eudo-citizenship.eu/> (last accessed: 12 August 2013).

<sup>12</sup> *Clandestino – Undocumented Migration: Counting the Uncountable. Data and Trends Across Europe*, 2007-2009, available at the following three links: (1) <http://clandestino.eliaemp.gr/>; (2) <http://research.icmpd.org/1244.html>; (3) <http://irregular-migration.hwwi.de/Country-reports.6114.0.html> (last accessed: 12 March 2013).

<sup>13</sup> It is important to note that later the country reports of this project have been published (in a slightly modified form than the one presented online) in Triandafyllidou (2010).

<sup>14</sup> *Boston Review*, 23 (5) (October/November 1998), available at <http://bostonreview.net/BR23.5/contents.html> (last accessed: 5 February 2013).

<sup>15</sup> *Boston Review*, 34 (3) (May/June 2009), available at [http://bostonreview.net/BR34.3/ndf\\_immigration.php](http://bostonreview.net/BR34.3/ndf_immigration.php) (last accessed: 5 February 2013).

support its normative claims. Other five projects are concentrated on dual citizenship and they are the main sources for writing the fifth chapter on multiple citizens: I am referring to an on-line normative debate about dual citizenship for transborder minorities (Bauböck 2010a)<sup>16</sup> and to other four published (edited) books: two are about dual citizenship in global perspective (Faist 2007a) and about dual citizenship in Europe (Faist and Kivistö 2007), while the last two are about rights and duties of dual nationals (Martin and Hailbronner 2003), and about the 2001 Hungarian Status Law which offered privileges to Hungarian ethnics living in the region (Kántor, Majtényi et al. 2004). The sixth chapter on ‘external quasi-citizenship’ heavily relies on this latter study.

*Chapter two on the history of residence-based citizenship* uses historical notes and clarifications offered by the 47 country reports on current citizenship laws published on-line by the aforementioned *EUDO Observatory on Citizenship*.

*Chapter three on irregular migrants* opens the discussion by relying on two important authors well-known for their interest in this subject. The first is Joseph Carens, a philosopher who drew academic attention on this subject more than 25 years ago and introduced it in philosophical and political debates (Carens 1987), (Carens 2008a). The second is Linda Bosniak, a law scholar who continued Carens’ work and advanced a form of residence-based proposal of warranting rights to irregular migrants (Bosniak 2006). Other important political and social theorists with close interests on illegal immigration and citizenship issues are taken into account, among them Rainer Bauböck (Bauböck 2009a), (Bauböck 2010b), (Bauböck 2011), Michael Walzer (Walzer 1983), Veit Bader (Bader 2005), Andrew Altman, Christopher Wellman (Altman and Wellman 2009), Daniel A. Bell (Bell 2005), Ruth Rubio Marín (Rubio-Marín 2000), Kamal Sadiq (Sadiq 2009), Bill Jordan, Franck Düvell (Jordan and Düvell 2002), Ryan Pevnick (Pevnick 2009), Mae Ngai (Ngai 2004), and Sarah Fine (Fine forthcoming, 2014). As already stated, the *Clandestino* country reports constituted the empirical basis of this chapter, while the two debates hosted by the Boston Review in 1998 and 2009 set this subject’s legal and normative framework.

*Chapter four on temporary migrants* begins with a discussion of an international covenant very important for the rights migrant workers should enjoy, but not signed by any important immigration country by now. This is the 1990 UN *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*. Important authors discussed in this chapter include law scholars like Linda Bosniak (Bosniak 2004) and Beth Simmons (Simmons 2009), political

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<sup>16</sup> This normative debate can be read online at: [http://eudo-citizenship.eu/docs/RSCAS%202010\\_75.rev.pdf](http://eudo-citizenship.eu/docs/RSCAS%202010_75.rev.pdf) (last accessed: 12 March 2013).

economists like Martin Ruhs (Ruhs 2005) or Thomas Straubhaar (Straubhaar 1986), sociologists like Stephen Castles (Castles 2006), political theorists like Rainer Bauböck (Bauböck 2011), Arash Abizadeh (Abizadeh 2010), Daniel A. Bell (Bell 2005) and Yasemin Soysal (Soysal 1994), but also scholars of international relations theory like Chris Reus-Smith (Reus-Smit 2011), Jack Goldsmith and Eric Posner (Goldsmith and Posner 2005), Stephen Krasner (Krasner 1999), Mary Ann Glendon (Glendon 2002), Lynn Hunt (Hunt 2008), and Neta Crawford (Crawford 2002). Other important scholars who focused on temporary workers are Thomas Hammar (Hammar 1985), Rita Chin (Chin 2007), Ray Rist (Rist 1978), Robert Mayer (Mayer 2005), Valeria Ottonelli and Tiziana Torresi (Ottonelli and Torresi 2012) and Edwin Reubens (Reubens 1986). Another important bibliographic material is the special issue of *International Migration Review* on ‘Temporary Worker Programs: Mechanisms, Conditions, Consequences’ (volume 20, issue 4, 1986).

*Chapter five on multiple citizens* heavily relies, as previously stated, on five collective projects: the first is the 2010 on-line normative debate about dual citizenship for transborder minorities (Bauböck 2010a). The following four projects published as edited books refer to dual citizenship in Europe (Faist and Kivistö 2007), to dual citizenship in global perspective (Faist 2007a), to the rights and duties of dual nationals (Martin and Hailbronner 2003) and to the 2001 Hungarian Status Law which offered privileges to Hungarian ethnics living in the region (Kántor, Majtényi et al. 2004). An important contributor in the debate on dual citizenship is Rainer Bauböck, who strongly supports a congruence principle regarding multiple status (if dual citizenship is accepted for emigrants, then immigrants must also be able to access it) (Bauböck 2005a); he also supports increasing freedom of movement through establishing more union of states like the European Union (Bauböck 2011); in another article he takes into account ‘swamping’ and ‘tipping’ scenarios in external voting (Bauböck 2007b); and finally he supports a ‘trade off’ between dual citizenship and autonomy in Eastern Europe (Bauböck 2007a). Other important contributions are taken into account: David Owen has an interesting view which differentiates between ‘dormant’ and ‘active’ citizenships of multiple citizens (Owen 2010); David Fitzgerald considers that in some countries lack of interest (in case of emigrants) to apply for their former citizenship when this possibility was offered shows a low interest in both former and dual citizenship (Fitzgerald 2005); Constantin Iordachi discusses about the instrumental use of dual citizenship, which seems to be the general case all over the world (Iordachi 2004); and political theorist Robert Dahl has a seminal contribution in which he discusses who can qualify as member of a political association (Dahl 1989).

*Chapter six on ‘external quasi-citizens’* starts with four examples of legislative measures taken in this sense in four different countries. I discuss favourable treatment offered to former citizens or ‘ethnic kins’ in India, and the most important references here are Katharine Adeney and Marie Lall, who discuss different institutional attempts to build a national identity in this state (Adeney and Lall 2005) and Anupama Roy, which surveys citizenship policies in the same country (Roy 2010). The second state under consideration is Mexico, and the most important contributions under consideration regarding nationality laws, migration and dual citizenship are offered by Manuel Becerra Ramirez (Ramirez 2000), David Fitzgerald (Fitzgerald 2005), (Fitzgerald 2006), and Pablo Lizarraga Chavez (Chavez 1997). Another significant input is offered by David Gutierrez on Mexico and external voting rights (Gutierrez, Batalova et al. 2012). The third country analysed is Turkey, and here I especially rely on Zeynep Kadirbeyoglu’s work on dual citizenship and transnationalism (Kadirbeyoglu 2007), (Kadirbeyoglu 2010) and on Ayse S. Caglar’s contribution regarding ‘external quasi-citizens’ as holders of the ‘pink’ card (Caglar 2004). The fourth and last country analysed is Hungary, and here I heavily rely on Myra A. Waterbury’s recent analysis of kin-state nationalism in Hungary (Waterbury 2010), and on the contributions to a working paper edited by Rainer Bauböck on dual citizenship for transborder minorities (Bauböck 2010a). The idea of offering ‘external quasi-citizens’ ‘favourable treatment’ (and not ‘formal status’) has been suggested in a paper written by Nándor Bárdi (Bárdi 2004). Other normative considerations have been offered in the extremely interesting 2004 on-line debate (later published as a book) on the Hungarian Status Law edited by Zoltán Kántor, Balázs Majtényi, Osamu Ieda, Balázs Vizi, and Iván Halász (Kántor, Majtényi et al. 2004). I have most cited articles written by George Schöpflin (Schöpflin 2004), Iván Halász, Balázs Majtényi and Balázs Vizi (Halász, Majtényi et al. 2004), Zoltán Kántor (Kántor 2004), Judit Tóth (Tóth 2004), Fernand de Varennes (Varennes 2004), Miroslav Kusý (Kusý 2004) and János Kis (Kis 2004).

*Chapter seven on residence-based citizenship* is based on the country reports on current citizenship legislation in 47 European and non-European states (delivered, as already mentioned, by the *EUDO Observatory on Citizenship*); I also added citizenship legislation from three other states: Canada, New Zealand, and the United States (whose citizenship laws are easily accessible online). Regarding normative discussions, the online debate on the liberal character of citizenship tests edited by Rainer Bauböck and Christian Joppke is an important point of reference (Bauböck and Joppke 2010d); Costica Dumbrava’s enquiry on the liberal nature of citizenship rules in the European Union countries is another significant contribution (Dumbrava 2010). I also mention Bauböck’s interesting proposal of ‘urban citizenship’, which is very close to my suggestion of residence-based citizenship

(Bauböck 2003); however, I criticise his later drift from this suggestion to one that would accept non-resident citizenship under a stakeholdership principle (Bauböck 2009a), (Bauböck 2012). Two other normative contributions by Rainer Bauböck are important in this chapter: the extended discussion on voting rights for external citizens (Bauböck 2007b), and the idea of offering political autonomy instead of dual citizenship to ‘ethnic kins’ in Eastern Europe (Bauböck 2007a).

*Chapter eight (conclusions)* uses references only in the section dedicated to criticising alternative normative theories to my proposal of residence-based citizenship. In this sense, I firstly discuss the stakeholdership theory proposed by Rainer Bauböck (Bauböck 2009a), (Bauböck and Perchinig 2009). Secondly, I assess the liberal theory of permissive inclusion in the citizenry of all those trying to access it (both ‘citizens-minus’ and ‘citizens-plus’) advanced by David Owen (Owen 2010), (Owen 2013). Thirdly, I take issue with the theory of automatic naturalisation by forced inclusion, advanced by Ruth Rubio-Marín (Rubio-Marín 2000). The fourth alternative I criticise is the proposal of keeping a *permanent* second-class citizenship status for temporary workers as a realistic way of reducing global poverty, supported by Daniel A. Bell (Bell 2005). Other political theorists taken into account here are Valeria Ottonelli and Tiziana Torresi (Ottonelli and Torresi 2012) and Thomas Pogge (Pogge 1997).

## Chapter 2. A history of residence-based citizenship

‘Gardens, scholars say, are the first sign of commitment to a community. When people plant corn they are saying, let’s stay here. And by their connection to the land, they are connected to one another’ (Anne Raver)

In this chapter I want to review the most important historical exemplars of residence-based citizenship. Firstly, I will survey the main provisions related to *ius domicilii* and residence-based citizenship, as they have been implemented by European countries and other states historically. Secondly, I review the key examples of residence-based citizenship laws: *ius soli*, naturalisation, and loss of citizenship. Finally, I will investigate some historical and regrettable instances of laws against residence-based citizenship, especially emphasising the internationally-sanctioned 20<sup>th</sup> century practice of ‘population exchange’.

Let me begin with six preliminary observations. Firstly, I do not misinterpret these older instances of *ius domicilii* as liberal. Of course most of them were not, because they were mostly associated with state power to *subject* all territorial residents, not with a democratic status of citizenship. However, as I will try to show in the next chapters, these provisions can easily be incorporated in the most liberal citizenship theory today. It is also important to underline that the existence of these historical antecedents shows that residence-based citizenship rules are not intrinsically incompatible with the legal and political traditions of many European states and are not necessarily unworkable or impractical.

Secondly, I also do not misinterpret the *absence* of conditions other than residence for naturalisation as liberal. Of course they are not, if they merely increase arbitrariness through the discretionary power of authorities to grant or deny nationality. What I want to argue instead is that arbitrariness and discretionary powers to grant citizenship are – or should be – totally dismissed when the only and strict condition for naturalisation is a specific number of years of residence.

Thirdly, it is important to note the gendered character of many of the rules. For example, when naturalisation was granted to an individual in the past, it was also automatically extended to ‘the spouse’ and minor children. However, at that time usually the naturalised person was a *man*, and ‘the spouse’ was of course his *wife*. This is an important issue because the elimination of gender discrimination has historically been a major contributor to the growth of dual citizenship via *ius*

*sanguinis* (although an *ius domicilii* principle could also have been used as an essential tool against gender discrimination).

Fourthly, it is essential to keep in mind that the most important mode of citizenship acquisition today, *ius sanguinis*, was reinvented by the French Civil Code (1804) and in the 19<sup>th</sup> century started to take the lead in European citizenship legislation. It replaced the older *ius soli* principle since the latter ‘connote[d] feudal allegiance.’ However, according to two authors, this substitution was not ‘ethnically motivated.’ it simply meant that ‘family links transmitted by the *pater familias* had become more important than subjecthood’ (Bertossi and Hajjat 2012: 2-4).

Fifthly, while the present historical analysis is based on a comprehensive source of 47 country reports delivered by the EUDO Observatory on Citizenship, it is nonetheless the case that the history of citizenship legislation in some countries is lacking for various reasons. Some states, like Iceland and Cyprus, were part of empires (in this case, the Danish Kingdom and the United Kingdom, respectively) until recently (in our examples, until 1944 and 1960, respectively) – so legal issues up to those dates more or less reflect those of their former empires. Other countries existed only briefly between the two world wars, losing independence in 1945 when incorporated into communist federations like the Soviet Union (Estonia, Latvia, Lithuania, Georgia, Ukraine, etc.). The history of citizenship legislation in such states is thus brief: only two decades or so prior to the 1990s.

Finally, other countries didn’t gain independence much before the end of the 20<sup>th</sup> century: this is the case with all members of the former Czechoslovakia and Yugoslavia (for example, Kosovo declared independence in 2008) but also with Moldova (which declared independence in 1991, after being first part of Romania, and then a socialist republic under the Soviet Union). The most important thing is that in such cases (of states becoming independent after 1945), citizenship legislation was created according to already existing examples – and for the most part, all those already existing examples were implementing contemporaneously the principle of *ius sanguinis* and (at the same time) terminating the application of *ius soli* or domicile principles. Usually (though not always) the new states simply copy-pasted *ius sanguinis* into their own legislation, without having any history of previous application of *ius soli* or domicile.

Sixthly, two distinctions have to be made. According to the first one, *ius domicilii* comes in two different forms: it can be the default rule in case of newly established states; but, it can also be a subsidiary principle of naturalisation in already established states. I will discuss both forms of *ius domicilii*. The second clarification regards my choice to treat *ius soli* as a principle ‘subordinated’ to

*ius domicilii* (see section 2.2). I am aware that these are two quite different principles, and it may seem a conceptual error to think of *ius soli* as residence-based. This is because *ius soli* and *ius domicilii* are both *territorially*-based, but only the latter is – by definition – residence-based. *Conditional ius soli* is mostly a combination of both principles, but *pure ius soli* has nothing to do with residence. That said, I will still consider, for the purposes of this study, *ius soli* as ‘subordinated’ to *ius domicilii* in the following sense: in a residence-based theory of citizenship, birth in the territory allows a presupposition that the child (whose parents are also long-term residents, and hence citizens) will be a resident of that territory (at least for the following years).

## 2.1. Historical instances of residence-based citizenship as *ius domicilii*

A very interesting example of *ius domicilii* is the Austrian *Heimatrecht* (‘the right of abode in a municipality’), which offered to the person that enjoyed this status unconditional residence and state assistance if she was poor. What is even more interesting is that until 1938 acquiring Austrian citizenship was conditional upon acquiring the *Heimatrecht* (also known as ‘provincial citizenship’, or the citizenship of a federal province – *Landesbürgerschaft*) (Çınar 2010: 2-3). One finds a similar system (which was implemented in 1874 and is still applied today) in Switzerland, where citizenship has three levels: federal, cantonal and municipal. Usually the federation ‘regulates the granting of citizenship through descent, marriage, and adoption and enacts minimal regulations on the naturalizations of foreigners’ (Achermann, Achermann et al. 2010: 4). Legally the cantons can regulate naturalisation ‘but rarely interfere with local naturalization politics;’ municipalities are actually in charge of the naturalisation of foreigners. The problem is that municipalities and cantons can amend federal regulations, so naturalisation requirements are different in each canton and municipality. Because of this, naturalisation conditions are often very harsh and this is the only example when *ius domicilii* is practiced today in a more brutal manner than other present-day naturalisation conditions: since 1941 the applicant has been screened (by means of a test) regarding her views, values, reputation, living and health circumstances, personal character, and so on (Achermann, Achermann et al. 2010: 7).

Another example of *ius domicilii* is that of Bulgaria in 1879, where all residents of the new state (former Ottoman subjects) were granted citizenship. It is important to underline in passing that *ius domicilii* has been used by almost every state which came into existence in the 19<sup>th</sup> and 20<sup>th</sup> centuries to determine the initial body of citizens – with the exception of Estonia and Latvia in 1991, which stripped (former Russian) residents of citizenship when determining their citizenries (Järve and

Poleshchuk 2010: 1). This practice of *ius domicilii* (as a primary rule of citizenship acquisition) implemented through the ‘zero option’ (which includes all residents on independence day) as mechanism for initially determining citizenship through residence at the moment of state formation (and also the additional provision that allows individuals to opt for the citizenship of another state that recognises them as nationals and thus opts out of the zero option) will be discussed later in chapter seven.

For now, one example is sufficient: in its 2006 decision, Lithuania’s Constitutional Court declared that ‘the body of citizens of the restored independent state of Lithuania was formed on the basis of permanent residents of Lithuania, irrespective of their nationality’ (Kūris 2010: 8). In 1879 Bulgarian residence was the only requirement for naturalisation, in the sense that having lived for at least three years in the country and holding a permit for permanent domicile was enough to qualify for citizenship status (lack of such a residence permit triggered the requirement of ten years residence before application) (Smilov and Jileva 2010: 5).

In 1918, after the fall of the Austro-Hungarian Empire, Czechoslovakia came to existence and its citizenship question was linked to the above mentioned municipal right of domicile under the Habsburg monarchy: residents of the new state became Czechoslovakian citizens, but again had a right to opt for citizenship of another kin state (Baršová 2010: 2). The same right to opt for residence and citizenship (this time, Ottoman citizenship) was enjoyed by Muslim residents of Thessaly after Greece was defeated by the Ottomans in 1897; moreover, those who had fled Greece had the right to return under the *ius domicilii* regulation. However, this was not something new at that time. In 1869 an Ottoman citizenship law had already declared the transition from the *millet* system – which regulated relationships between religious communities and the state, not between individuals (Krasniqi 2012a: 1-2), (Trimikliniotis 2010: 2) – to a citizenship system based on residency and paternal descent (Sarajlić 2010: 2). The same law declared that all residents of the Empire were ‘nationals’ (i.e., citizens). Interestingly, more than 50 years later, the 1924 Constitution of the Republic of Turkey made use of the same provision: all residents of the republic were declared citizens of the new state (Kadirbeyoglu 2010: 2).

The same principle of *ius domicilii* (residence) had already been used in the 19<sup>th</sup> century in Italy under the 1837 *Codice Civile Albertino*. Unlike the Napoleonic Code, which adopted a combination of strong *ius sanguinis* coupled with *ius soli* (the latter postponed until coming of age), the *Codice Albertino* delivered in Piedmont ‘gave priority to the stable residence of the father as the criterion for enjoying *ius soli*. As two authors argue, this happened because Piedmont’s intellectuals and lawyers

‘among which were Mancini and Pisanelli [...] knew what it was like to be a refugee or émigré’ (Zincone and Basili 2010: 4-5). The same code, very liberal even in comparison with today’s nationality laws, offered *ius conubii* (spousal transfer of citizenship without any other requirement – presumably only for wives, not husbands) and *ius soli* for children of long-term residents. It is important to stress the significant difference between the Italian *Codice Albertino* (1837) and the French Civil Code (1804): while both were written in approximately the same period, the first offered a strong support to *ius domicilii* and *ius soli*, while the latter re-invented and proposed *ius sanguinis*. This clearly shows not only that not everywhere have *ius soli* and *ius domicilii* been seen as ‘connoting feudal allegiance’ (Bertossi and Hajjat 2012: 3), but also that both systems had their own supporters in the same period in Europe. It just happened that *ius sanguinis* was by far ideologically closer to the new and (at that time) attractive doctrine of nationalism (born in the 19<sup>th</sup> century) than *ius soli*: indeed, we can say that the rise of nationalism in Europe determined the vast diffusion of *ius sanguinis* on the continent, although *ab initio* *ius sanguinis* was invented as a new, non-ethnic system of citizenship acquisition to fight old feudal allegiance.

It is also important to note that *ius domicilii* has not been used solely for citizenship acquisition. In Sweden in the 17<sup>th</sup> and 18<sup>th</sup> centuries, for example, permanent residence of a foreigner was enough to qualify the individual for citizenship (Bernitz 2012: 2). Moreover, it has been used recently as a basis for reacquisition *ex lege*: in Portugal for example, under the 1959 law a former citizen can reacquire *ex lege* her status by taking up residence in Portugal and expressing her intent (Piçarra and Gil 2012: 7).

Finally, it is interesting to see how *ius domicilii* functioned in the former communist bloc. The former Yugoslavia is a remarkable case from many points of view. First, it is important to note that the 1928 Citizenship Act of the Kingdom of Serbs, Croats and Slovenes expired officially in 1941, but it was used again in 1945 to determine the citizenship of the individuals born in the territory between April 1941 and August 1945 (Rava 2010: 3). Second, Yugoslavia had two-tiers of citizenship, federal and the republican: according to the 1946 law, the country of residence (domicile) was ‘the main ground for the determination of the republican citizenship’.<sup>17</sup> Moreover, termination of Yugoslav citizenship automatically implied termination of republican citizenship, but not the other way around: a Croat, for example, was able to move to Serbia and thus become a Serbian citizen (because of her

<sup>17</sup> Of course, this is not specific of communist states but typical in all federal states (including the United States, Canada, etc.). *Ius domicilii* is the standard rule for determining citizenship in constituent units of federations for those who are federal citizens. However Yugoslavia and the USSR constitute special cases since their constituent republics were linguistically and culturally very different: but even so, residence implied citizenship without other requirements like knowing the language, cultural assimilation, etc.

residence). This implied changing republican citizenship, but Yugoslav citizenship remained of course the same: for example, the 1950 Macedonian republican law on citizenship stated that ‘a foreigner admitted to Yugoslav citizenship acquires Macedonian republican citizenship if she or he has residency in the republic or by request’ (Spaskovska 2012: 4). In the same vein, the 1977 citizenship law of Bosnia and Herzegovina ‘provided that an individual from another Yugoslav republic could acquire Bosnian republican citizenship if he or she was above eighteen and resided on [sic] the territory’ (Sarajlić 2010: 5). Moreover, according to an 1947 law, Yugoslavia also used the right to opt for residence and citizenship, which was offered to ethnic Italians and to the Slavic population from the borderland between the two states (Ragazzi, Štiks et al. 2010: 3).

*Ius domicilii* was also applied in the USSR, where (according to the 1924 constitution) ‘every person in the territory of the USSR were [sic] considered as citizens of the Soviet Union, unless they expressly stated that they had foreign citizenship’ (Salenko 2012: 5). Moreover, a citizen of the Soviet Union also had the citizenship of the republic where she was a permanent resident. There was however a possibility to opt for another republican citizenship on specific grounds like nationality (Salenko 2012: 5). According to a 1939 Lithuanian law, if a Lithuanian citizen moved to another republic as a permanent resident, she was considered to have automatically lost Lithuanian citizenship ‘and [to have] become a citizen of another constituent republic’ (Kūris 2010: 11). The same *ius domicilii* (but coupled this time with both *ius soli* and *ius sanguinis*) was used after the fall of the Soviet Union by some of the successor states. In its 1991 citizenship law, for example, Ukraine defined its nation ‘on the basis of territory: a person’s birth or permanent residence, or that of an ancestor, on the territory [sic] of Ukraine became the basis for defining the body of citizens of the Ukrainian state’ (Shevel 2010: 4-5).

## 2.2. Historical instances of residence-based citizenship at birth through *ius soli*

As we have already seen, *ius soli* was an extremely important provision of citizenship acquisition in the 18<sup>th</sup> and 19<sup>th</sup> centuries. This was especially the case in the Nordic countries, where *ius soli* was liberally combined with a voluntary act. In Denmark, for example, a 1776 law determined that children of foreigners born in the state were to be seen as equal with all native-born citizens if they remained in the country; this was extremely important, since at that time only native-born citizens were able to access public positions (Ersbøll 2010: 4). One century later, in 1898, the law established that a child born and brought up in Denmark would acquire citizenship *ex lege* at the age of nineteen if she was without any other citizenship and unless she specifically declared that she did not want to become a citizen (Ersbøll

2010: 7). In Sweden, a 1894 law imposed a ‘socialization-based automatic acquisition of citizenship’ at the age of 22 for those living from birth in the state: the only requirement was that this acquisition must be voluntary (Bernitz 2012: 3). Later in 1950 the same provision was liberalised even further: this time, not only persons born in Sweden, but also those who grew up there were able to naturalise through a simple procedure called ‘acquisition through notification’ (Bernitz 2012: 5). Finally, according to a 1918 law in Iceland citizenship was open to any child born in the territory provided that she resided in the country until the age of nineteen, and unless she made a written declaration that she did not want to acquire Icelandic citizenship. However, such a declaration was not enough; as the government wanted to avoid statelessness, the child was also required to prove that she had citizenship in another country (Jóhannesson, Pétursson et al. 2010: 6).

The same legislation was applied in Belgium and France, where according to the 1803 Napoleonic Code Civil a foreign child born in the territory could become a citizen (on a voluntary basis) at the age of 22 ‘by making a *déclaration de domiciliation* [declaration of domicile]’ (Foblets and Yanasmayan 2010: 2). In 1815 children born in the territory were able to acquire citizenship if their parents were residents. The same rule has been applied ever since in Belgium, under both the 1909 and 1984 nationality laws (Foblets and Yanasmayan 2010: 3-5). A similar declaration of domicile, known as *option de la patrie* was available for children born in the Grand Duchy of Luxembourg since 1815, and it was strengthened in 1841 (Scuto 2010: 2-3). Another situation when only a ‘declaration of willingness’ to become a citizen was necessary can be found in Spain, where the 1889 Civil Code implemented ‘*ius soli* as *facultas soli*’: according to this provision, children born in the territory must declare that they want to be Spanish citizens at the age of majority (Rubio Marín, Sobrino et al. 2012: 5).

The same goes for Portugal according to the 1867 Civil Code: *ius soli* was available for children of foreigners unless they refused and opted, by expression of intent, for their parents’ citizenship (Piçarra and Gil 2012: 4). Almost one hundred years later, in 1959, *ius soli* became ‘*ex lege* and automatic’ (Piçarra and Gil 2012: 5). Unfortunately this lasted only until 1981, after which time *ius soli* was no longer applied as the sole basis for accessing citizenship. With the intention to exclude children of both irregular and temporary migrants, legislators decided that in order for a child to become a citizen by *ius soli*, his ‘parents must have lived in Portugal for at least six years’ and additionally must have obtained a residence permit (Piçarra and Gil 2012: 9-10).

*Ius soli* was also a tradition in the United Kingdom, where British people were defined by geography rather than descent, such that a strong *ius soli* principle was applied. According to two

authors, *ius soli* was ‘first codified in the British Nationality and Status of Aliens Act’ of 1914; however, the earliest confirmation of this regulation dates back to 1608. Notwithstanding this, in 1983 this tradition was ‘partially lost’ (Sawyer and Wray 2012: 3). Many other European countries also applied *ius soli*. For example, the 1837 Italian Civil Code provided access to citizenship for children of long-term resident aliens (on the condition that parents had resided in Italy for at least ten years). This provision was also maintained in the 1912 Nationality Act (Zincone and Basili 2010: 4-5). The Netherlands applied *ius soli* for a rather briefer period, from 1838 until 1892 (when it was replaced with *ius sanguinis*). Finally, Malta applied this mode of citizenship acquisition from independence (1964) until 1989 (Buttigieg 2010: 2-3).

It is interesting to note that not only Western European countries, but also those from the East applied the same legislation. The 1879 Bulgarian Constitution, for example, stated that ‘persons born in Bulgaria who have not obtained any other citizenship [...] are subjects of the Bulgarian Principality.’ (Smilov and Jileva 2010: 3). This provision was maintained in the 1880, 1883 and 1904 laws, which were ‘heavily reliant on the principle of *ius soli*’ (Smilov and Jileva 2010: 4). This law lasted until 1940, when *ius sanguinis* replaced *ius soli* (Smilov and Jileva 2010: 6). In the same vein, a 1924 Romanian law stated that foreigners born and raised in Romania could become citizens if they requested it upon reaching maturity (Iordachi 2010: 3). However, a communist decree in 1952 discontinued this *ius soli* policy (Iordachi 2010: 5). Moreover, even outside Europe *ius soli* was commonly implemented: according to a 1869 law of the Ottoman Empire, foreign children were able to apply for citizenship three years after reaching adulthood (Kadirbeyoglu 2010: 1-2).

Finally, it is important to note that another, less liberal (from the perspective of residence-based citizenship, as we will see in chapter seven) mode of *ius soli*, known as ‘double *ius soli*’, has also been in use in various places since the 19<sup>th</sup> century. According to this variation, a child born in a country who has at least one parent born in the same country can access citizenship status. Double *ius soli* has applied in France since 1851 (Bertossi and Hajjat 2012: 4), in Spain since 1954 (Rubio Marín, Sobrino et al. 2012: 8) and in Morocco since 1921 (Perrin 2011: 4). Additionally, it was applied in Luxembourg between 1878 and 1940 (Scuto 2010: 3-4), and in the Netherlands between 1953 and 1975 (van Oers, de Hart et al. 2013: 5).

### **2.3. Historical instances of residence-based citizenship in naturalisation**

Probably one of the oldest examples of naturalisation procedure comes from Russia, where starting with 1721 a foreigner could become a Russian subject only by swearing an oath of allegiance. In 1864 Russia introduced a five-years residence requirement, but it is important to note that many categories were entitled either to skip this condition (persons employed by the state) or to the reduction of the number of residence years (investors, gifted persons, etc.). Interestingly, not only were naturalised persons immediately granted full and equal rights; they were ‘also given special privileges, such as a two year exemption from Russian taxes’ (Salenko 2012: 3-4). Even in Leninist Russia, naturalisation was more liberal than in any other European state. According to the 1918 Constitution, local Soviet authorities had the power to grant citizenship to resident foreigners, especially to workers, peasants and to those ‘who were not using vicarious labour’. Moreover, in ‘compliance with the Soviet Constitution of 1918, this category of people could obtain Soviet Citizenship “without any baffling formalities” (Article 20)’ (Salenko 2012: 4).

In Nordic countries also, the only important requirement for naturalisation in the 19<sup>th</sup> and the beginning of the 20<sup>th</sup> century was residence. In 1858, in order to naturalise in Finland a foreigner needed only to demonstrate a permanent residence of three years, be of good reputation, and have the ability to support herself. What is more, if granted, naturalisation was automatically extended to the spouse and minor children (Fagerlund and Brander 2010: 4). In Denmark, the first Nationality Act of 1920 required five years’ previous residence, a good reputation, the ability to support oneself and one’s family, and renouncement of any former citizenship. The 1924 law in Norway required only five years of previous residence and ‘economic self-sufficiency’ (Brochmann 2010: 3). And the Swedish law of the same year (1924) requested that the applicant be an adult, have resided in the territory five years before the application, have a respectable life and have the means to support her family. Interestingly, the latter requirement was abolished in 1976 (Bernitz 2012: 4).

There are also a number of interesting cases of residence-based naturalisation in Austrian history. In the Austrian part of the Habsburg Empire, for example, the Civil Code of 1811 stipulated only two conditions for naturalisation as an ‘act of grace’: the individual was required to have ‘good manners’ and ‘sufficient income’. The same code also offered until 1833 another possibility of an automatic naturalisation after ten years of residence (Çınar 2010: 2). In its 1925 Citizenship Law, Austria had three naturalisation conditions: four years of previous residence, possession of *Heimatrecht* (the right to reside in a municipality – see supra, section 2.1), and a requirement that the applicant relinquish any former citizenship (Çınar 2010: 3). Finally, a rather curious right was offered by

Austria's 1949 law, which imposed a legal entitlement to naturalisation after 30 years of residence, on the condition that the applicant had no criminal record and relinquished any former citizenship. This possibility of purely residence-based acquisition is still in force today (Çınar 2010: 4).

In the same period at the beginning of the 19<sup>th</sup> century, the 1823 Greek Constitution also set for the first time conditions for the naturalisation of aliens. Besides discretionary naturalisation based on certain important services rendered to the country, ordinary conditions were five years of previous residence, possession of 'immovable property' and no criminal record (Christopoulos 2009: 4). Thirteen years later, in 1836, Portugal also took a liberal path, requiring only two years of previous residence (which could be waived for ethnic Portuguese) and the ability to acquire the means of subsistence (Piçarra and Gil 2012: 3). Later in 1867 Portugal changed the residency requirement to three years, and added two conditions: a clean criminal record and 'having performed all military duties in the origin country' (Piçarra and Gil 2012: 4). In 1892, naturalisation requirements were also very liberal in the Netherlands: being of age, five years of residence in the country or in one of its colonies, and renunciation of any previous citizenship. According to the authors of the report these constituted merely the formal/legal conditions, since in practice the authorities also imposed public order and financial requirements (van Oers, de Hart et al. 2013: 3). The cost of the naturalisation procedure was 'fairly high', but it is important to note that once the individual was naturalised, both her spouse and minor children were also *automatically* naturalised.

Spain presents an interesting case, as naturalisation requirements were not very well specified in the 19<sup>th</sup> century laws. For example, the 1886 Civil Code introduced a *facultas soli* according to which a simple declaration of intent and giving up former citizenship seemed to be enough for qualifying for naturalisation. Continuous residence was also a possibility to acquire naturalisation, but there was no specification of what 'residence' meant. This also happened three years later in 1889: the naturalisation provision 'simply stated that all those who had become residents of any locality in the monarchy would be Spanish, but added nothing as to how to define residence, the length of residence or the way of certifying it' (Rubio Marín, Sobrino et al. 2012: 5). Only in 1916 did a law introduce the requirement of ten years residence before qualifying for normal naturalisation (some exceptions were however set for people from Ibero-American countries, investors, spouses of citizens, etc.).

The United Kingdom is also an interesting case and maybe one of the best examples of residence-based citizenship legislation – since, as we have already seen, until 1983

‘(...) residence was the key to most social provisions such as health care or education, either formally or as a matter of practice, the highest formal status being in any event generally not citizenship as such but “settlement”. Citizens, but also others, are settled (...) British people had historically been defined essentially by geography rather than descent, and that geography had been defined by the extent of political sovereignty under the Empire’ (...) The method of defining nationals was historically characterised by a strong ius soli principle, rooted in the common law system and referring to the whole of the territory of the reigning monarch’ (Sawyer and Wray 2012: 2, 8, 9)

Two former communist countries with a brief period of independence before the 1990s had in fact been extremely liberal during that time. According to a 1919 Georgian law, the only requirement for naturalisation was two years of previous residence in the territory; moreover, authorities were obliged to offer an answer to every application within maximum period of one year (Gugushvili 2012: 2). Since independence in 1918, Lithuania also offered simple conditions for naturalisation: the only requirements were ten years of residence until 1914 and either having a permanent job, or owning real property (however, Russian officials were excluded) (Kūris 2010: 4). In the 1936 law conditions became more strict: besides ten years of previous residence and a permanent job, authorities also required that the applicant must have no criminal record, must renounce any former citizenship (one exception was made for American citizens), and must pay an application fee (this time, ethnic Germans and Poles were excluded). Finally, in 1939 Lithuania also required by law knowledge of the state language as a condition for naturalisation (Kūris 2010: 5, 8).

Two other interesting former communist cases are Romania and Czechoslovakia. In Romania before communism, a 1924 law required only ten years of previous residence and a declaration of intent. However, foreigners born and raised in the territory were exempt from the residential requirement and were able to access citizenship upon reaching maturity (Iordachi 2010: 3). The communist regime changed this law, but naturalisation conditions curiously seemed to remain liberal at least in theory: according to a 1971 citizenship law, the requirements for naturalisation were: five years of residence (or being born in Romania and living there at the time of the request), being of age, providing proof of sufficient means of subsistence, renunciation of former citizenship, and ‘attachment to the state’. Except for the last requirement, which was of course inserted in order to leave a lot of administrative discretion in the naturalisation procedure, all other requirements appear as if they were on the liberal path, just like the facilitated naturalisation for spouses of Romanian citizens, who were only required to have lived in the country for at least three years (Iordachi 2010: 5-6). Also in

Czechoslovakia in 1948 the principal conditions for naturalisation were five years of previous residence and giving up previous citizenship (Kusá 2010: 5).

Finally, it is interesting to note that one form of naturalisation based on residence was the *automatic* acquisition of citizenship upon marriage. This was probably based on the fact that, in the 19<sup>th</sup> and first half of the 20<sup>th</sup> centuries, married people were expected to live together, so in this case the residency requirement was superfluous. Such laws can be described as '*ius connubii*' or 'spousal transfer' in Italy (1837) (Zincone and Basili 2010: 4) or 'post-nuptial citizenship' in Ireland (1956) (Handoll 2012: 4). They were also present in Austria in the 1811 Civil Code (Çınar 2010: 2) and in France and Belgium under the 1803 Napoleonic Civil Code (Foblets and Yanasmayan 2010: 2). Other examples of automatic acquisition of citizenship upon marriage can be found in Bulgaria in 1879 (Smilov and Jileva 2010: 5), in Denmark in 1898 (Ersbøll 2010: 8), in Iceland in 1919 (Jóhannesson, Pétursson et al. 2010: 6), in Portugal in 1959 (Piçarra and Gil 2012: 6), in Romania in 1924 (Iordachi 2010: 3), in Spain in 1954 (Rubio Marín, Sobrino et al. 2012: 8), and in Turkey in 1928 (Kadirbeyoglu 2010: 2).

It is important to note that '*ius connubii*' did not usually apply in both directions. Typically only women acquired men's citizenship through marriage in most countries with such provisions (the case of Italy, Ireland, Austria, France, Belgium, Denmark, Portugal, Romania, Iceland and Turkey). Of course, '*ius connubii*' was applied on the condition that the couple would live in the territory, and usually the woman was losing her former citizenship because of the prohibition of dual status in the international law. Interestingly, there are two instances in which although '*ius connubii*' was not automatic, it referred to foreign men marrying women citizens: in this situation, the residence requirement was severely reduced in comparison with the normal one for foreigners: from three years to one year in Bulgaria according to the 1879 law, and from ten years to two years in Spain according to the 1954 law.

## 2.4. Historical instances of residence-based citizenship in case of loss

A residence-based theory of citizenship, which simply states that individuals should be citizens of a specific country as long as they are permanent residents in that state, naturally implies that emigrants (that is, citizens who left the country in order to permanently reside in another state) should lose citizenship and take the citizenship of their new state of residence. This was indeed the main tendency in the 19<sup>th</sup> and the first half of the 20<sup>th</sup> centuries. The Nordic countries again provide another excellent

example. In Finland, a 1858 law stated that simply taking up residence abroad implied losing Finnish citizenship (Fagerlund and Brander 2010: 4). However, the other Nordic countries imposed a somewhat more relaxed view. In 1894 Sweden declared citizenship lost after ten years or more residence abroad. Some exceptions were made for (externally resident) officials employed by the state and for those citizens who intended to keep Swedish citizenship, the latter being required to make a statement every ten years declaring such an intention. However, it is very important to underline that, as a perfect example of a residence-based regime of citizenship, Sweden was also prepared to re-activate full citizenship status to former citizens upon resumption of permanent residence in the country. Agreements were signed with Argentina (1885) and the United States (1869) according to which former Swedish citizens who returned to Sweden were considered to automatically lose their Argentinean or American citizenship (Bernitz 2012: 3). According to a subsequent law from 1924, ‘a Swedish man or unmarried woman lost Swedish citizenship at the age of 22 if he or she was born abroad and never had been domiciled in Sweden’. However, in some cases permission to retain citizenship was granted (Bernitz 2012: 4).

Denmark also offers a good illustration of residence-based citizenship. One example was the ongoing battle (at the end of the 19<sup>th</sup> and the beginning of the 20<sup>th</sup> centuries) between Denmark and Germany over the regions known as Schleswig, Holstein and Lauenburg. When Denmark ceded these regions to Germany in 1864, residents were allowed to retain Danish citizenship ‘if they moved to Denmark within a six year time limit’, and thousands of individuals did this (Ersbøll 2010: 5). Later in 1920, when Northern Schleswig was again assigned to Denmark, all inhabitants acquired Danish citizenship but also had the right to opt for German citizenship within a period of two years (Ersbøll 2010: 9). Denmark did not apply the theory of residence-based citizenship only in contested territories. According to a 1898 law individuals also had their citizenship suspended after continuously residing abroad for more than ten years (Ersbøll 2010: 8). Moreover, in 1925 it was decided that an individual born abroad who had never resided in the country would lose her Danish citizenship upon reaching the age of 22 (Ersbøll 2010: 10); the same provision was retained in the 1950 citizenship law reform and remains in force today (Ersbøll 2010: 13).

The Netherlands also took the same path in 1892, when a law determined that loss of Dutch citizenship would occur after ten years of residence abroad ‘without expressing the wish to remain Dutch at the municipality of the last place of residence or at a Dutch consulate’ (van Oers, de Hart et al. 2013: 3). It is interesting to see why a long-term emigrant was supposed to lose citizenship after ten years of residence abroad, but that the same individual was entitled to keep it as long as she declared

her intention to remain a citizen. The Lithuanian case may offer one answer: the 1938 Constitution stated that citizenship ‘could’ be lost if a person did not reside in Lithuania and ‘had lost a relationship to the “life of Lithuania”’ (Kūris 2010: 7). The assumption here seems to be that a citizen who did not make any effort to inform the authorities that she wanted to keep citizenship probably had no intention to retain it, and hence was considered to have lost her connection with the country.

Greece offers a further interesting case; its 1856 law provided for the loss of Greek citizenship in cases of *naturalisation* (not just long-term residence) abroad. This was in line with the general trend in international relations at that time, but it was nevertheless more moderate than the laws adopted by the aforementioned countries, which imposed loss of citizenship simply for long term *residence* outside the country. However, this moderation was lost in the period between 1927 and 1998, when only *allogenous* Greeks (that is, non-ethnic Greek citizens of Greece) were deprived of citizenship if they fled Greek soil with no intention to return (the intention to return was investigated and decided by the Minister of Foreign Affairs) (Christopoulos 2009: 7-8). This strictly refers to residence, not naturalisation abroad – since having ‘no intention to return’ does not guarantee a successful citizenship application elsewhere. Other examples of laws which enforced loss of citizenship for permanent residents abroad include Austria in 1832 (which also imposed, again according to the general trend in international relations at that time, the loss of citizenship for women upon marriage to a foreigner) (Çınar 2010: 2) and Belgium according to the 1803 Napoleonic Code Civil (Foblets and Yanasmayan 2010: 2).

## **2.5. Historical instances of regulations against (a liberal theory of) residence-based citizenship**

In the 19<sup>th</sup> and early 20<sup>th</sup> century there was no consistent liberal practice of residence-based citizenship. This is most clearly evident in compulsory population exchanges – which appeared after the First World War (1918) and were practiced until 1989 – and constituted in the aforementioned period ‘a regrettable principle in international law’ (Christopoulos 2009: 7). The rising of nationalist feelings at that time coupled with the process of state formation after the war determined ‘an internationally regulated version of ethnic cleansing’ (Smilov and Jileva 2010: 5). The best-known and largest population exchange took place between Greece and Turkey in 1923 and involved approximately two million people. Another example is Bulgaria, which signed population exchange treaties with Greece in 1920 and with Romania in 1940 (Smilov and Jileva 2010: 6). Finally, even though this was not the result of an international agreement, communist Bulgaria also expelled in 1989 more than 300,000

Turks to neighbouring Turkey; after a few months the communist regime collapsed, but only a proportion of between one-third and one-half of those expelled returned home (Smilov and Jileva 2010: 8).

The 1920 treaty signed by Bulgaria and Greece after the Treaty of Neuilly involved the transfer of some 300,000 people<sup>18</sup> and supposed a ‘voluntary migration of minorities on either side’ (Christopoulos 2009: 6). Three years later, the Treaty of Lausanne (the final treaty concluding First World War) included a measure for population exchange between Greece and Turkey, and this was closely supervised by the Mixed Committee for Exchanges of the League of Nations.<sup>19</sup> A further similar treaty was signed in 1926 between Greece and Albania (Christopoulos 2009: 6).

The same measure of population exchange was also applied after the Second World War. For example, Czechoslovakia ‘exchanged’ population with both Germany and Hungary. The transfer of ethnic Germans was agreed to by the Allied Powers (at the 1945 Berlin Potsdam Conference), and as a consequence ‘more than 2,820,000 inhabitants of German ethnicity were expelled’ (Baršová 2010: 3); (Kovács and Tóth 2010). On the other hand, in the following years ‘more than 200,000 Czechs, Slovaks and members of other Slavonic nations immigrated to Czechoslovakia’ (Baršová 2010: 3). However the exchange of Slovak and Hungarian population was not agreed at the aforementioned conference, so it was subsequently decided by the two countries involved: as a consequence, on a ‘voluntary’ basis, ‘89,660 ethnic Hungarians [...] were moved into Hungary, in return for receiving 73,273 ethnic Slovaks’ (Kusá 2010: 3-4).

However, population exchanges continued even after the Second World War. One example is the several Polish-Soviet Union ‘repatriation’ agreements between 1940 and 1957. For example, ethnically Polish and Jewish individuals ‘who had been Polish citizens as of 17 September 1939, were entitled to move and resettle within Poland’s new borders’ (Górny and Pudzianowska 2010: 4). On the other hand, non-ethnic Polish citizens (Russians, Ukrainians, Belarusians) were entitled to move to the USSR and they lost at the same time their Polish citizenship. The biggest ethnic group expatriated was again Germans (the expatriation was based on the Potsdam agreement too, but also on the 1946 Act on the Exclusion of Persons of German Ethnicity from Polish Society) (Górny and Pudzianowska 2010: 4). And Poland continued to expel its citizens of other ethnic backgrounds even at the end of 1960s: this time Jews were perceived as having dubious and ‘dual loyalty’ – in consequence they were forced

<sup>18</sup> Encyclopaedia Britannica, link: <http://www.britannica.com/EBchecked/topic/410481/Treaty-of-Neuilly> (accessed February 2013).

<sup>19</sup> The Convention Concerning the Exchange of Greek and Turkish Populations can be read at following this link: <http://www.hri.org/docs/straits/exchange.html> (accessed February 2013).

to leave Poland and to sign a document ‘expressing their intention to renounce their Polish citizenship upon acquisition of Israeli nationality’ (Górny and Pudzianowska 2010: 5).

Another example concerns Cyprus, where in 1963 (after the fall of the ‘consociational political system’, which presupposed an agreement according to which the state should have been governed by both Greek and Turkish communities) most of the Greek-Cypriots were displaced from the north, which later became a special republic recognised and supported by Turkey but not by the international community (Trimikliniotis 2010: 6). The last example of population transfer<sup>20</sup> in Europe is probably the already mentioned 1989 expulsion of ethnic Turks from Bulgaria.

However, population exchanges were not the only examples of regulations that run against the principle of residence-based citizenship; indeed, at least three other cases can be found in the history of the last two centuries. The first example concerns what I will call *non-resident quasi-citizens*: this status was offered by the Netherlands in 1910 to the native population of the Dutch East Indies. A person able to acquire such ‘second rank’ citizenship has been called a ‘Dutch subject non-Dutch citizen’. As the same authors argue, ‘After Indonesia’s independence in 1949, the Dutch government would use the status of Dutch subject non-Dutch citizen to allocate citizens to Indonesia’ (van Oers, de Hart et al. 2013: 3).

The second example is that of *non-citizen permanent residents*: for example, this was the case of Jews in Romania (legally until 1879, but practically until the end of the First World War). Until 1879 ethnic Jews were excluded from Romanian citizenship, even if they were born and raised in this country. Because of pressures from the international community the situation changed that year, however naturalisations were decided on an individual basis, and very few cases were recorded until the First World War (Iordachi 2010: 2). A second example of non-citizen permanent residents can be found in Turkey between 1924 and 1936: after the first Constitution of the Republic (1924) and the first citizenship law (1928), although Turkish citizenship was in theory offered to ‘all residents of the Republic irrespective of race or religion’, some groups were explicitly excluded from citizenship. A 1927 law excluded Armenians and Greek Orthodox who had left the territory during the independence war; other groups were simply forced to leave the territory since some laws excluded their employment in state services (1926), in medicine (1928) and other professions (1932). For example, ‘15,000 Greeks left the country as a result of this [latter] law’ (Kadirbeyoglu 2010: 2). A third case is that of the ‘guest workers’ in European states after the Second World War, who were expected to come only temporarily

<sup>20</sup> ‘Collective expulsion’, ‘population transfer’ and ‘population exchange’ are related but conceptually different phenomena. What is important here is that all of them illustrate extreme policies that deny residence-based claims to citizenship.

to work but remained in the host state definitively and were not offered citizenship. Variations of this example can be found even in our days: for example, until the 2000 citizenship law reform Germany provided access to citizenship for residents who did not qualify under *ius sanguinis* only through a demanding naturalization process that many chose not to pursue.

The third example is that of *citizens without full citizenship rights*. This is not necessarily a negative category: for example, in its 1865 Code Italy offered resident foreigners a citizenship status called ‘*piccola cittadinanza*’ (‘small citizenship’). That was a citizenship status lacking civil and political rights, but it was thought to pave the way to full citizenship for persons enjoying it (Zincone and Basili 2010: 5). However, this good intention was not always fulfilled. For example, in 1939 Romania offered former foreigners full citizenship rights only six years after naturalisation (Iordachi 2010) (3). Other examples (which are, unfortunately, still there in our days) include Lebanon, which offers equal rights to former foreigners only ten years after naturalisation (el-Khoury and Jaulin 2012: 16), and Morocco, which offers full rights to new citizens only five years after naturalisation (Perrin 2011: 9).

## **2.6. History of residence-based citizenship: conclusions**

It is interesting to observe that, also in a historical perspective, we can find instances of residence-based citizenship even in a period where nationalist feelings were overwhelming the whole European continent. Bulgaria is a good example: the Constituent Assembly of Veliko Turnovo (1879) opted for a residence-based citizenship rather than *ius sanguinis* for two basic reasons. One was purely irredentist: keeping ethnic Bulgarians in the region (but outside the state territory) was seen as a defensive and strategic move to maintain legitimate reasons for further territorial expansion; on the other hand, the second reason was easy to understand, since a mass exodus of ethnic Bulgarians ‘coming from Eastern Rumelia, Macedonia, Eastern Thrace and other regions’ would have created serious problems for the new state. These ‘ethnic kins’ were not offered citizenship but only special privileges (for example, less strict conditions for naturalisation) (Smilov and Jileva 2010: 4-6). Such ‘ethnic kinship’ policies were also continued in 1940, and this is one of the first historical cases of what I will call later, in chapter six, ‘external quasi-citizenship’ (which will be defended as a better alternative to dual citizenship, since this status is – unlike multiple status – congruent with the principle of residence-based citizenship) (Bauböck 2007b: 2396), (Owen 2011a).

Finally, it is interesting to note one last historical example of the struggle to link citizenship to residence rather than to ethnicity. This happened, maybe not surprisingly, in Yugoslavia. Because of its many ethnic groups, this communist state tried to disentangle citizenship and ethnicity. Its 1964 Federal Citizenship Law insisted ‘upon the civic and supra-national (Yugoslav) dimension, cross-republican mobility and an ideological shift in the Yugoslav political sphere which through the doctrine of workers’ self-management tried to minimise the importance of the republics as bastions of ethnic and national belonging’ (Spaskovska 2012: 5). It was probably too late, since nationalist and ethnic feelings already took possession of the whole region, and later at the end of the century these feelings directly generated another European armed conflict.

In conclusion we can say that in most of the 19<sup>th</sup> century and the first half of the 20<sup>th</sup> century the principle of residence-based citizenship, or *ius domicilii*, was considered (alongside *ius soli* and *ius sanguinis*) an important standard for citizenship acquisition – through *ius soli* (as defined in this chapter) and naturalisation – and also for loss of citizenship – through long-term residence abroad. Historical instances which run against residence-based citizenship were population exchanges (which implied stripping permanent residents of citizenship and moving them to another country) and different cases of partial citizenship (which presupposed offering permanent residents – or even newly naturalised persons – fewer rights than those enjoyed by full citizens). Finally, it is important to note that avoiding dual citizenship was also a principle of international law.<sup>21</sup>

On the other hand, starting with the French Civil Code (1803) *ius sanguinis* began to spread on the whole continent (and subsequently on the whole world). As we will see later in chapter seven, only a few countries still practice today a strong and liberal version of residence-based citizenship: the last legal instance of pure *ius soli* in Europe was terminated by Ireland in 2004, and naturalisation based exclusively on residence could be found only in Belgium until 2012, and with some other insignificant requirements in another small number of liberal European countries. However, the insistence on *ius sanguinis* and the opposition to naturalisation of foreigners in general (as it came to be performed lately in many European states) cannot be morally accepted. This study tries to rediscover, defend and propose the old alternative of residence-based citizenship (with its instances of conditional *ius soli* and naturalisation based on permanent residence) as a preferable option today.

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<sup>21</sup> See for example the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (link: <http://www.refworld.org/docid/3ae6b3b00.html>), the 1963 European Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality (link: <http://conventions.coe.int/Treaty/en/Treaties/Html/043.htm>), and the 1997 European Convention on Nationality (link: <http://conventions.coe.int/Treaty/en/Treaties/Html/166.htm>) [all three links accessed on 27 July 2013].

## **Chapter 3. ‘Citizens-minus’ (1): No Land’s Man – Irregular Migrants’**

### **Challenge To Immigration Control And Membership Policies**

‘(...) long-term undocumented aliens have become members of the society (...) social membership does not depend upon the judgment of political authorities. People who live and work and raise their families in a society are members of that society regardless of their legal status’ (Carens 1989: 44)

‘The illegal alien is thus an “impossible subject”, a person who cannot be and a problem that cannot be solved’ (Ngai 2004)

‘Solo voy con mi pena / Sola va mi condena / Correr es mi destino / Para burlar la ley / Perdido en el corazón / De la grande Babylon / Mi dicen el clandestino / Por no llevar papel’ (Manu Chao, ‘Clandestino’)<sup>22</sup>

### **3.1. Introduction**

In this chapter I want to raise the problem of the rights irregular migrants already *settled* in a host country (that is, residents for more than one year and having the intention to stay for a long period of time)<sup>23</sup> can enjoy before and after regularisation, with a special focus on voting rights. My claim is that illegal status cannot be tolerated; a first consequence of this claim is that it is not an acceptable policy to offer undocumented individuals a large package of rights *while at the same time* refusing to regularise them. Indeed, such a policy would simply mean that the host state tolerates illegal status. This goes against Joseph Carens’ firewall proposal which is meant to ensure social and economic rights for irregular immigrants even in the absence of a regularisation program. I also argue against Linda Bosniak’s suggestion of conferring rights based on territorial presence and not on status: the combination of territorially-based enjoyment of rights and continuous illegal status is either normatively defective or (since it cannot oppose offering irregulars voting rights too) renders citizenship status irrelevant (section two).

In consequence, if irregular migrants cannot enjoy civil, social, economic and political rights while being in an illegal status, only two other options are available: deportation (triggered by their

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<sup>22</sup> English translation: ‘Alone I go with my sorrow / Alone goes my sentence / To run is my destiny / To escape the law / Lost in the heart of the great Babylon / They call me clandestine / For not having any papers’ (source: <http://www.loglar.com/song.php?id=19638>, accessed 12 February 2013)

<sup>23</sup> I explain later in section 3.3. why I focus explicitly in this chapter only on this category of irregular migrants.

illegal status) or regularisation (supported by the fact that in time undocumented persons become members of the host society) (section three). However, none of the reasons for which states can legitimately exclude foreigners can justify irregular immigrants' expulsion; deportation is not a solution to the problem of illegal migration (section four). This leaves states with only one option – that is, legalisation of their status. However, none of the regularisation programs until now have been able to eradicate the existence of illegal status because they are based on the 'long-term residence threshold' proposal. The latter is not only violating existing international and domestic legal norms; it is also practically ineffective. However, since this proposal cannot be altogether dismissed, I argue for a short-term residence threshold (section five).

The last two sections discuss the problem of irregular migrants' franchise in both origin and host states, before and after regularisation. If an origin state actively supports its citizens-with-illegal-status-abroad, then it may generate serious diplomatic conflicts: a good example is that of the diplomatic tensions between Romania and France regarding *irregular-migrant-European-citizens*' right to freedom of movement. This is indicative of the serious diplomatic tensions an origin state would generate if it had actively supported voting by its citizens-with-illegal-status-abroad in national elections (in the country of origin). On the other hand, once they are regularised (let alone naturalised) in the host society, the origin state may not be under a moral obligation to support the franchise of its non-resident citizens, former irregulars included (section six). The problems raised by irregular migrants' franchise in the host state are even more complicated: on the one hand, if they vote while still being in an illegal status (as it happens in many developing countries), they can open the path not only to international conflicts, but also to an insidious politics which resorts to ethnic and demographic manipulation in order to maintain or access political power.

However, it is not clear that even in developed, Western countries voting rights can be accessed only after naturalisation. Some authors propose to disconnect local from national citizenship, and this suggestion could facilitate former irregulars' access to political rights since it does not require previous naturalisation. However we conceive citizenship status, it is clear that voting rights can be acquired by irregulars only after regularisation. I conclude by claiming that after their status is legalised former irregulars may be treated differently than other legal immigrants by the state – in the sense that their franchise can be delayed for a longer period of time; however, this differential treatment understood as partial citizenship is acceptable only as long as it is temporary (section seven).

### **3.2. How to deal with illegal migration (a): rights without status**

Most of the (still thin) normative literature on illegal immigration considers the illegal status of individuals in the host countries as being morally intolerable.<sup>24</sup> Keeping them in an illegal status is deeply objectionable because of mainly two reasons. Firstly, they lack basic human and social rights: even when some of them are provided (like human rights) irregulars usually do not make use of them because of fear of being discovered by state's authorities and deported. Secondly, a liberal democratic state that keeps a number of people in such an intolerable situation is creating a caste-like social system (Bosniak 2007a) that undermines its main liberal democratic ideas. Indeed, as we will see this would amount to have long-term residents who are 'subjects of a band of citizen tyrants, governed without consent' (Walzer 1983). In consequence I will start from the premise that there is a moral duty to eliminate illegality (i.e., 'irregularity') as a status – even though, as I explain in section four below, states are morally entitled to some extent to restrict entry and settlement.

Theorists disagree, however, on the reasons offered for this moral stance. Some take undocumented migrants' perspective and show that illegal status unacceptably strips individuals of most of their rights, human rights included. Others concentrate on the polities third country nationals migrate to, and they argue that toleration of illegal status subverts the liberal and democratic ideals these states are committed to. Both camps converge in condemning host states' current policies, but they differ regarding the solutions they propose. This section analyses the proposal of disconnecting enjoyment of rights from immigration status (advanced by those focusing on migrants' rights), while the subsequent section discusses the dilemma between amnesty and expulsion (disputed by theorists concerned with preserving the liberal democratic character of receiving states).

Exhausted by the endless debate between regularisation and deportation, and also aware of the formidable political interests in maintaining the status quo,<sup>25</sup> theorists concerned with irregular migrants' rights have proposed detaching immigration status from enjoyment of rights. The upshot of this suggestion is straightforward and deeply humanitarian: the goal seems to be to help irregulars actually enjoy human, civic, social, economic and even political rights, while at the same time letting normative theorists and politicians quarrel among themselves about designing the appropriate status for such individuals.

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<sup>24</sup> With the exception of Bell (2005) and Sadiq (2009).

<sup>25</sup> As I will show in the next section, in spite of their political rhetoric states are actually comfortable with maintaining the status quo – that is, they tolerate illegal migration.

The case for irregular migrants' civil and socio-economic rights has been put forward by Joseph Carens, according to which undocumented individuals must enjoy general human rights, work-related rights (like payment for work, decent conditions in the workplace, and access to work-related social programs concerning compensation for injuries, pension plans, and compensation for lost income), social and administrative rights (drivers' license, access to libraries, subsidised tuition, etc.) and children's right to education (Carens 2008a). His case is almost convincing: nobody could seriously deny an individual her most basic human rights (such rights depend on simply being under the jurisdiction of a state), so the latter can be easily detached from immigration status.

But this example is telling enough in order to be extended to other types of rights: for example, work-related rights like payment for work or decent, humane conditions at the workplace seem to be very close to basic human rights. And even regarding rights that are usually enjoyed by citizens, such as access to social programs (e.g., pension plans), one can make a case for them being offered to undocumented migrants too: at the end of the day, if irregulars pay taxes and contribute to insurance schemes it is unfair to deny them the benefits these systems usually offer. Finally, minor children have a right to education irrespective of their status: arguments regarding their innocence related to their parents' choices, the terrifying impact of lack of education on their future lives and the possibility of host states having to deal in the future with a class of uneducated persons are compelling, so few would seriously oppose children's access to education irrespective of their status.

In fact, some states already offer (while many others deny) some of these rights to people without a legal status: for example, since 1999 in France irregular foreigners can benefit from State Medical Aid (Courau 2009). This also happens in Spain on the condition that irregulars register with the local *Padrón* (González-Enríquez 2009). In contrast, the access of irregular migrants to health services is 'highly limited' in the UK (Vollmer 2009). Likewise, in Greece schools 'are obliged by law to accept all children regardless of the regularity of their presence in the country' (Maroukis 2009: 59), while in the UK some schools 'have a policy to accept children with no status', but this is 'on a formal basis against the law' (Vollmer 2009: 24).

However, formally providing rights to irregular migrants is not enough, since they may choose not to make use of them out of fear of not being discovered by state officials and deported. So Carens proposes a 'firewall' (a 'firm legal principle') between immigration authorities and the various agencies responsible for the protection of specific rights (Carens 2008a: 167-168). In other words, hospitals, schools, employers and even police should not be obliged to offer information about

individuals' immigration status to immigration authorities. The firewall is meant to replace the 'administrative linkage' actually in force in some host states.

Another proposal of disconnecting enjoyment of rights from immigration status is advanced under the concept of 'ethical territoriality', according to which 'rights and recognition should extend to all persons who are territorially present within the geographical space of a national state by virtue of that presence' (Bosniak 2007a: 389-390). This comes as an alternative to the current practice of most immigration-receiving societies, where rights derive from individuals' formal status under the law. Of course, ethical territoriality has its own problems: first, it has an exclusionary side, in the sense that those outside the territory are not covered by this egalitarian doctrine; moreover, it also justifies immigration control at the borders. The problem is that immigration control also functions in the interior (for example, immigrants already in the territory can be deported), so the splitting strategy (the 'hard-on-the-outside and soft-on-the-inside' view) cannot be fully implemented (Bosniak 2007a: 395-398). Second, ethical territoriality cannot answer two basic questions, one regarding access to territory (who should get in?) and one regarding territorial limits (which is the exact scope of the territory?).

However, if we have to choose between territoriality-based rights and status-based rights, the former is preferable because of its promise of annihilating caste-like distinctions among co-residents. According to Bosniak a status-based approach has two aspects which may be seen as illegitimate under liberal and democratic values: first, it is differentiated (different statuses are allocated to individuals, which undermine the principle of equality) and it is gradual (there is an 'incremental progress from less to more') (Bosniak 2007a: 391). Basically, ethical territoriality promises to destroy the partial membership of resident immigrants justified by the status-based approach, thus eliminating the possibility of having residents who are 'subjects of a band of citizen tyrants, governed without consent' (Walzer 1983).

Interestingly enough, neither Carens nor Bosniak go as far as supporting the extension of full rights to irregular migrants: political rights, especially voting rights, are missing from both proposals, which is rather odd. True, political rights are membership (i.e., citizenship) rights *par excellence*, whereas all the other rights may conceivably be detached from membership. However, Carens explicitly says that irregulars are 'already members' (Carens 2008a: 175) of the communities they live in. And Bosniak puts forward the 'affiliation' argument for ethical territoriality, according to which 'the physical sharing of national territory serves to tie people together through proximity and linkage to place' (Bosniak 2007a: 404): by being 'co-inhabitants' and long-term residents people develop attachments and social ties – in other words, they become members of the social setting. The

recognition of this fact is most evident in some countries which offer third country nationals the right to vote in local elections, which is conditional on a period of legal residence and registration (Belgium and Estonia). Having more or less the same requirements, other countries offer them full political rights at the local level – i.e., the right to vote and the right to stand as candidate (Denmark, Finland, Ireland, Slovakia, Sweden, UK, etc.) (Bader 1999), (Gropas and Triandafyllidou 2007), (Shaw 2007), (Stavilă 2010), (Stavilă 2011). So in order to be consistent, both proposals must also support, by way of logical consequence, extending political rights – or at least voting rights at the local level – to irregular migrants.

One counter-argument here is that such a conclusion may be too hasty. According to Carens, it assumes that it is not possible to make morally defensible distinctions on the basis of immigration status among the rights one should have. To take just one example, it presupposes that it is morally wrong to distinguish between the status of citizen and the status of visitor. But if one thinks that it is acceptable to give citizens different rights from tourists, one is already drawing this sort of distinction.<sup>26</sup> However my argument is that it is not morally defensible to draw distinctions among the rights enjoyed by different types of *permanent residents* (be they citizens or long-term residents). For example, it is not morally permissible to grant the right to vote in national elections to citizens but not to permanent residents. My claim is that every distinction between citizens and long-term residents (and I will propose a three years residence threshold for ‘long-term residency’) should be rejected.

Both proposals discussed above are extremely appealing in their liberal, egalitarian flavour. And it is important to stress that both strongly support regularisation programs. However, they both have two negative and mutually contradictory consequences, which make their arguments inconsistent. On the one hand, disconnecting civil and social rights from immigration status does not solve the problem of illegal migration: it just tries to justify that individuals deserve these rights from a moral perspective. But irregular migrants will remain irregular, which means first that in spite of their access to more rights they will always be under the threat of deportation unlimited in time,<sup>27</sup> and second that they will still be second-class citizens, hence the state will still be a caste-like society. On the other hand, if – as we have already seen – both accounts are compelled to accept extending the franchise to irregular migrants, then citizenship status becomes irrelevant. This consequence is indeed compatible with the idea that illegal status cannot be tolerated, since in this case such status does not matter

<sup>26</sup> I would like to thank Joseph Carens for raising this objection (personal communication on file with the author, November 2013).

<sup>27</sup> I am not assuming here that there is something wrong with deporting people who are present without authorization. But this right must be limited in time and, as I will try to argue later, after one year of (illegal) residence a state loses the right to deport an individual and must regularise her.

anymore. But the broad outcome of such irrelevancy – like the impossibility of distinguishing between members and non-members, or at least the impossibility of having a stable demos (Bauböck 2012) – would be catastrophic for the liberal democratic societies as we know them (Bauböck 2011). If this is correct, then detaching enjoyment of rights (other than basic human rights) from immigration status cannot be a way to deal with illegal migration.

### **3.3. How to deal with illegal migration (b): deportation versus regularisation**

The following two proposals for solving the problem of illegal status (deportation and regularisation) are mainly based on irregular migrants' two special features. The first feature is *illegality* itself, a more complex status than it might seem at a first look. It is generally believed that immigrants are the only agents responsible for their illegal status, by the simple fact that they broke the law (either by entering illegally, or by overstaying their visa). However, a closer look reveals that the receiving country's national and local authorities also share a great deal of responsibility for the existence and perpetuation of this phenomenon. They may tolerate illegal migration in order to fulfil demands for '4D' (dirty, dangerous, demeaning, and demanding) jobs (Carens 2008b), or even the demands of an extended underground economy. Additionally, they may pass alien or residence laws and other directives that leave a lot of people in an illegal status overnight, sometimes without the latter even being aware (Sawyer and Wray 2012). Finally, the bureaucracy in the receiving state may be so slow in processing visa renewal applications, such that foreigners may become irregular without intending to (González-Enríquez 2009). The point is that if the receiving state has a responsibility in creating or tolerating irregular migrants, then the latter (or at least some of them who are long-term residents – for example, over one year) may acquire some moral claims against expulsion or detention.

The second feature of irregular migrants is the fact that many of them *settle* in the receiving state: that is to say, they not only *transit* states, but remain within the host country for more brief (in the case of circular illegal migration) or longer periods of time. This chapter focuses on irregular migrants *already settled in the receiving country*. This is not to say that there is no normatively interesting case concerning the relation between irregular migrants and transit (or origin) states' authorities. However, for the purposes of this paper I will take it for granted that, besides common problems that *both* transit *and* receiving states must face (like maintaining public order and health, respecting general human rights, etc.) receiving countries also have to tackle specific situations, such as the possibility of offering irregular migrants civil, social and political rights which are commonly conferred to citizens.

From the normative point of view, the most interesting problem is that the two crucial features of illegal migration seem to pull in opposite directions. On the one hand, by illegally entering or choosing to remain in the host state undocumented migrants break the law. Although this trespassing is usually considered an administrative, not a criminal offence,<sup>28</sup> irregular migrants still have to be punished (Swain 2009) and sent back to their origin countries. However, legal considerations are not the only ones used to justify irregulars' removal: theorists also add reasons connected to the state's capacity to maintain public order and to preserve the welfare state, the protection of public culture from rapid cultural change, and the polity's alleged right to control both entry and membership<sup>29</sup> (according to the latter, the view is that irregular migrants may be removed simply because 'they are here against our will'). I will discuss at length all legitimate motives for exclusion of aliens and immigration control in the next section.

On the other hand, the time of residence – even if illegal – does matter morally. Most political philosophers accept the idea that long-term residence can support a legitimate claim to membership; however, they disagree when it comes to the nature of this membership. At a minimal level, what seems clear even from the beginning is that irregular migrants create social ties: they usually come to the host country to work, so they have fellow *colleagues*. Many of them get to know their neighbours and meet other people with which they become *friends*. Some go to local churches, and integrate in religious (and other types of) *communities*. Others find a *partner* and fall in love, and *get married*. To have a family, friends, colleagues, and to be a member of various groups and communities means, for most of us, to be a part of the social setting. In some countries (e.g. Spain) this membership of irregular migrants is officially recognised: they are obliged to register with the local *Padrón* and the registration is the base of some benefits such as access to education and the health care system. Save for their illegal status, undocumented persons seem to be like any other citizen or legal resident of a state. This fact has led some normative theorists to contend that irregular migrants acquire in time a legitimate claim to *social membership* in the host country (Carens 1987), (Carens 2009) and this becomes a strong argument for their regularisation.

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<sup>28</sup> With the exception of Italy, whose government passed a law in 2009, making illegal residence a criminal offence.

<sup>29</sup> The state's rights to control entry into the territory and access to membership is highly debated: some authors who define the society as a voluntary association believe that the state has an unrestricted right to control entry and an almost unrestricted right to control membership (Altman 2009); some communitarians believe that the state has an unrestricted right to control entry but no right to deny full citizenship rights to the immigrants it has taken in (Walzer 1983). Others think that states have no right to control entry (Carens 1987). Finally, there are authors who believe that the state has a very limited right to control entry (it can restrict immigration only if unrestricted freedom of movement threatens its capacity of maintaining democratic self-government, public order, public health, the welfare state, and in case of natural disasters) and no right to control membership (Bauböck 2012), (Fine 2014, forthcoming).

The crucial problem is that from a moral point of view the *social membership* status cannot be permanent.<sup>30</sup> In other words, once irregulars become long-time residents and so a time threshold is met, the host state automatically acquires some duties towards them; and the most important obligations are first to regularise them, and second (after a second time threshold is met) to open the path to *full citizenship* for former irregular migrants. In other words, the host society must not keep individuals in a permanent status which implies enjoying no rights (illegal status) or enjoying only civil and social, but not political rights (permanent partial citizenship, or permanent residency without the possibility to acquire full citizenship rights). The argument for this requirement is a strong one: a permanent status of ‘in-betweenness’ (Schuck 1998) would transform them into ‘second-class citizens’ (Bosniak 2006), since they would be subjects to the coercion of a political decision-making system in which they have no stake (in which they have not been represented) (Walzer 1983), (Brubaker 1989), (Bauböck 2010b). However, if long-term legal residence automatically implies access to political membership, then this is a reason for the state not to regularise undocumented migrants in the first place: their presence on the territory is not legal, so the best policy would be to deport irregulars before the length of stay would qualify them to acquire citizenship.

In consequence the policy alternatives prompted by these two features of irregular migrants (their *illegality* and their *stay*) are different: illegality triggers sanctions and expulsion (even when their basic human rights are secured), while residence for a long enough period of time supports some form of regularisation. In other words, illegality seems to require tighter immigration control and deportation, whereas residence-based social membership is a good argument for affording amnesty to at least long-term resident irregular migrants, for extending civil, social and economic rights and, finally, after another time threshold is met, for offering irregular migrants full political rights, the franchise included.

### 3.4. Empirical obstacles and normative objections to deportation

Some theorists accept that foreigners can legitimately be excluded from a state’s territory, and from membership of its citizenry. Four principal clusters of reasons are presented. The first concerns the state’s capacity to ensure civil and political rights to all members within its territory, and its capacity to maintain public order (Fine 2014, forthcoming). The second cluster refers to the protection of the

<sup>30</sup> With the exception of permanent *voluntary denizens* who choose not to naturalise. Some theorists think that they should not have this right to choose: long-term residence simply triggers automatic acquisition of citizenship (Rubio-Marín 2000). I argue however against this proposal and accept that it raises a problem for a residence-based theory of citizenship (see section 8.1.).

ethno-national culture from compelled and rapid change (Bader 2005). The third has to do with economic considerations: restrictions are permitted if immigration threatens the state's ability to guarantee social rights and to maintain the welfare system (Bauböck 2009a), (Bauböck 2010b). Finally, border and membership controls are legitimate for reasons connected to national sovereignty, democratic self-determination, and the priority citizens owe to their compatriots (Bader 2005), (Altman and Wellman 2009). Indeed, unlimited immigration over a brief period of time can seriously threaten public order, produce extreme cultural disruption, damage the welfare state, and allegedly deny a community's right to self-determination. In other words, sheer weight of numbers legitimises exclusion.

The question is whether all these reasons for exclusion of would-be immigrants in general can also be legitimately used to exclude irregular migrants *already living in the receiving country*. In other words, can we use the motives for restriction of freedom of movement in general as reasons for expelling individuals whom the state did not accept in the first place?

To my knowledge, to date no political theorist has ever used empirical findings in order to support a proposed solution to the problem of illegal migration. If the difficulty is linked with sheer numbers, then before deciding what threats irregular migrants present we must first determine what the numbers of irregular migrants actually are. The *Clandestino* project<sup>31</sup> has produced country reports of twelve European states; in a comparative perspective, the findings regarding estimated numbers are summarised in table 1 (see the Annex). As we can see in this table, in the twelve European countries considered, the estimated number of irregular migrants ranges between 0.1 per cent out of the total population (minimum estimate for Germany, Poland, and the Czech Republic) and 2.8 percent (maximum estimate for the Czech Republic); for the United States, the maximum estimate of irregular migrants is 3.9 per cent.

Let us discuss now the above mentioned reasons for deportation /exclusion. The first concerns the state's capacity to maintain public order. The number of irregulars seems to be too small in order to be a real threat from this point of view.<sup>32</sup> Moreover, most undocumented migrants commit administrative offenses rather than serious crimes (Farrant, Grieve et al. 2006). To my knowledge, no study has been able to show that the percentage of criminal offences performed by irregular migrants is

<sup>31</sup> *Clandestino – Undocumented Migration: Counting the Uncountable. Data and Trends Across Europe, 2007-2009*, <http://clandestino.eliamep.gr/>; <http://research.icmpd.org/1244.html>; <http://irregular-migration.hwwi.de/Country-reports.6114.0.html> (accessed 12 March 2013).

<sup>32</sup> One may object that the number of irregular migrants may be small, but if the undocumented are concentrated in specific places they can still raise security concerns. This may be true, but it still does not show that a state's capacity of keeping public order is thereby undermined.

greater than that carried out by native citizens and legal residents. Finally, irregulars usually want to avoid any contact with authorities in order to be able to continue to work in the host country. All these considerations support the conclusion that individuals with illegal status are not a threat to public order; hence this reason cannot be invoked in order to exclude those already present in the receiving state.

One exception here is when one considers the breaking of immigration laws on a massive scale as itself a threat to public order. The plausible version of this argument is that only *pervasive* violation of laws is a threat to public order, which could be regarded as analogous to the difference between (individual) theft, which is not a threat to public order although a crime, and (collective) looting, which is a threat to the public order. But firstly, as I will show later in this chapter, the number of irregular migrants in European states is so small that we cannot talk about ‘pervasive’ violation of immigration laws. Secondly, remember that we are discussing about administrative, not criminal laws: in consequence there is no reason to believe that irregulars who violate immigration laws are posing a greater threat to state security than citizens breaking driving laws (Carens 2008a: 167).<sup>33</sup>

The second reason for exclusion was the community’s protection from externally forced and rapid cultural change. However, if the percentage of irregular migrants is even smaller than that of legal immigrants (whose entry was accepted and arguably welcomed by the host state), it is hard to understand how the former could determine such a dramatic transformation. Again, the conclusion seems to be that rapid and forced alteration of ethnic and national culture cannot be a reason for excluding irregular migrants already present in the receiving state.

The third reason is socio-economic, and it concerns the state’s capacity to ensure social rights and the stability of the welfare system. Here, the percentage of irregular migrants, however small, may constitute a problem: if the majority of the undocumented is unemployed, retired or too young to work, then the pressure on the welfare system can be quite significant. However, this possibility is not consistent with the findings of the *Clandestino* country reports. In table 3 (see the Annex) we observe that the vast majority of irregular migrants (80-90 per cent) is of working age (16-50 years), so irregulars do not put pressure on the pensions system.

Two other considerations are also important here. First, irregulars (unlike asylum seekers) are economic migrants: they usually come in the host country to work and, more often than not, to send remittances back home; but they would not be able to do this if they stay unemployed for too long, or if they live only on social security subsidies. Some *Clandestino* country reports found that the percentage

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<sup>33</sup> Rainer Bauböck, personal communication on file with the author, June 2012.

of unemployment among irregulars is much smaller than that of regular migrants and citizens. In Poland, for example, ‘periods of unemployment in the case of Ukrainian immigrants are very short or do not exist at all’ (Iglicka and Gmaj 2008: 16). Second, usually irregulars work in the underground and ‘grey’ sectors of economy, doing dirty, demeaning, demanding and dangerous (4D) jobs: because there is a constant need for people to fill these jobs, and because citizens and regular migrants usually reject them, the percentage of unemployment among irregulars is rather small.

Of course, unemployment is not the only factor putting pressure on the welfare system. One could argue that unregistered employment reduces the insurance payments financing pensions. However, there is no conceptual connection between illegal employment and illegal migration: thus, while in the United States some irregular migrants do pay taxes and contribute to social funds (Carens 2008a), in most European countries with robust underground economies there are also high percentages of illegal employment *among citizens*.<sup>34</sup>

However, another socio-economic argument for the exclusion of undocumented individuals claims that social citizenship is not only about transfer payments, but also about regulation of labour markets and that, by definition, illegal work undermines this feature by destabilising the regulation of working conditions and wages in significant sectors of the labour market. Moreover, irregular migrants ‘take citizens’ jobs’, raising the unemployment rate among (poor) citizens. However, the evidence revealed by the *Clandestino* project shows a different reality: as already indicated, far from taking citizens’ jobs, irregulars and immigrants in general fill an ‘occupational gap’ left by native citizens in the host countries (González-Enríquez 2009), (Drbohlav and Medová 2009); in the United Kingdom, regular and irregular migrants constitute 90 per cent ‘of all low-paid workers in the industry sectors of cleaning, hospitality, home care and food processing’ (Vollmer 2009: 42). Asian irregular migrants are a case in point. In some European countries they more often than not work within their own ethnic communities, which are ‘rather isolated and their contacts with majority society are limited’ (Divinský 2008: 11). Or, like Chinese and Vietnamese irregular migrants in Hungary and Slovakia, they are retailers and vendors of cheap goods from China; interestingly enough, Chinese immigrants are ‘not seeking jobs with Hungarian employers but [are] rather employing Hungarians’ (Futo 2008: 41).

An interesting counter-argument claims that welfare states may be interested in reducing the occupational gap left by natives rather than filling it. As Carens argues, ‘there are no jobs for which workers cannot be found if the pay is high enough, even in rich states’ (Carens 2008b: 432). According to this line of argument, accepting that 4D jobs are filled by irregular migrants means accepting the

<sup>34</sup> See *Clandestino* country reports.

preservation of exploitative working conditions and wages for the worst kind of jobs. However, the economic reality is that increasing wages to make 4D jobs more attractive to natives also implies increasing prices: indeed, the absence of immigrants in low-paid economic sectors ‘may push prices up dramatically or lead to some jobs not being done at all’ (Farrant, Grieve et al. 2006: 12).

As far as working conditions are concerned, it is true that illegal work has an undermining influence. However, as we have already seen, in Europe illegal work is also done by natives and even by citizens from other EU Member States. Moreover, in countries like Austria irregular immigrants are involved in ‘semi-legal, i.e. non-compliant forms of employment’ (pseudo self-employment, undeclared work, under declared work, etc.) rather than in illegal employment (Kraler, Reichel et al. 2009: 4). And even if irregular migrants accept diminished working conditions, the latter cannot become exploitative unless the state fails to enforce its own laws. As long as they are consistently enforced, minimal working conditions accepted in a liberal democracy are not identical with exploitative working conditions.

Moreover, far from putting pressure on the welfare system, even irregular migrants contribute (or may contribute, if regularised) to it. The problem is that they contribute far less than legal immigrants, which is yet another argument (based on fiscal public interest) for regularisation. In France irregulars pay taxes (Courau 2009), and this was also the case in the Netherlands until 1998, where ‘white illegals’ were able to register with the population registry and thus obtain a social security number (van der Leun and Ilies 2008: 12). In UK, the Institute for Public Policy Research released a study in 2006 according to which the regularisation of undocumented migrants would add to the state budget about £1 billion a year (as income taxes and national insurance contributions paid by the amnestied individuals); and the Spanish government estimated that its last regularisation ‘has increased revenue by €750 million in 2005, and [was] set to add a further €1,350 million in 2006’ (Farrant, Grieve et al. 2006: 20).

Finally, I argue that it is in fact deportation, rather than regularisation, that exerts real pressure on the receiving state’s budget. The farther the irregular migrant’s origin country is, the higher the cost of expulsion: in Spain, ‘the repatriation of a Chinese citizen costs €6,750, that of an Ecuadorian €3,834 and that of a Senegalese €2,000’ (González-Enríquez 2009: 18). Other costs amount to a minimum of €1,800 in France (Courau 2009: 56), €5-6,000 in Greece (Maroukis 2009: 30), £11,000 in UK, \$6,000 in the USA and €4-6,000 in Italy (Fasani 2009: 73). The cost of deportation of all irregular migrants would be ‘around £4.7 billion’ in the UK and ‘a much larger total of \$206 billion’ in the USA (Farrant, Grieve et al. 2006: 12). The conclusion of all the above socio-economic considerations is that

threatening the state's ability to guarantee social rights and to maintain the welfare system cannot be a serious reason to exclude irregular migrants already living in the host society.

The last reason for exclusion is connected to national sovereignty and the alleged polity's right to democratic self-determination. But the reality is that, in spite of the violent rhetoric of 'fighting against illegal migration'; quite often states unofficially tolerate this phenomenon, especially during the harvest season in agriculture (Maroukis 2009: 36). Indeed, states themselves are sometimes the employers of irregular migrants (Courau 2009). If this is correct, then the 'they are here against our will' argument simply fails. Of course, the pattern I am describing here may be more characteristic of some states than others, but at the end of the day some form of toleration still occurs: as one author claims, '[i]f no government wants to admit foreign workers, no international labor migration will occur' (Straubhaar 1986: 853).

But even if the host state did not tolerate illegal status, this last reason would still not have more weight than the others in supporting the exclusion of irregulars. This is because not even the greatest supporters of state sovereignty believe that polities have an *unconditional* right to control entry and also an *unconditional* right to control membership. For example Altman and Wellman define society as a voluntary association and thus support these two sovereign rights. However they consider that admission into territory and citizenship acquisition should not be informed by ethnic or racial considerations. The justification here need not rest on claims of a duty states may have to foreigners, but of a duty of non-discrimination states have towards their own members of different ethnic groups, since the overwhelming majority of them are now multicultural (Altman and Wellman 2009). Walzer also believes that controlling entry is not an absolute right: a 'White Australia' can only be accepted as a 'Little Australia' – i.e., enough land must be left for other ethnic groups, natives included (Walzer 1983: 47). Regarding citizenship acquisition, Walzer believes that a polity has no right to control access to membership for long-term residents. In fact, there is a growing tendency in the literature on citizenship and immigration to claim that states have only a very restricted, conditional right to control borders (not as a right to self-determination, but only to protect domestic citizenship institutions) and no right to control access to membership for long-term residents (Bauböck 2012), (Fine 2014, forthcoming). If this is true, then according to the membership argument the (alleged) right of a polity to control both entry into territory and access to membership cannot be a reason to deport already settled irregular migrants (that is, those who are residents for more than one year and also have the intention to stay for a long period of time) or to refuse setting them on the path to full citizenship status.

One last problem must be discussed in connection with the above considerations, and this is the ‘call effect’ a residence-based citizenship would have on other would-be immigrants. The question about regularisation is often not so much whether one state accepts those who violated the law in the first place but also whether it will give a signal to other individuals that if they come unauthorised, sooner or later they will be regularised. If a very liberal residence-based theory sets the time threshold to one year for the regularisation of a migrant and also to three years of legal residence for citizenship acquisition, then it can have such an effect. Unfortunately, the ‘call effect’ is not something much discussed in migration theory, and we still do not know much about it. On the one hand, in the case of migration from Mexico to the USA we have the consequences of something similar to a ‘call effect’ even before the 1986 regularisation, the only one implemented by the state. So the call effect seems not to be directly related with the promise of regularisation in this case but with personal desire to find a job or probably with having a relative already working in the host state.

On the other hand, regularisations in European states do not necessarily show a clear call effect. While the numbers in Italy and Spain could support the view (from around 100,000 individuals in 1985 to around 600,000-700,000 in 2002 and 2005), the number in other countries show the opposite (France: 150,000 in 1982 but only 6,000 in 2006; Poland: 2,747 in 2003 but only 554 in 2007; the Netherlands: 15,000 in 1975 but only 1,800 in 1999 and then again 27,500 in 2007) (see table 2 in the Annex). Of course, the numbers depend on different considerations like the type of regularisation, conditions that have to be met, the target individuals, the way information is disseminated by the government, etc. But it doesn’t seem clear that regularisations have by themselves a clear call effect. My intuition is that the call effect is a consequence that must be taken into account. However further studies should investigate whether it is directly related with states’ policies regarding regularisation, or rather with irregular migrants’ view on life possibilities in specific immigration states and with their opinions being transmitted to relatives and friends in the host states. Even these latter considerations may be related with host states’ general policies regarding immigration, but they are not necessarily strictly related to regularisation programs.

### **3.5. Regularisation and the residence threshold**

Because of the fact that irregulars become in time social members (as discussed in the third section above) and because of the already mentioned legal and practical difficulties concerning expulsion, two general forms of regularising undocumented migrants have been considered: individual rolling

regularisations, and collective amnesties. Common to both are (a) a focus on the long-term residence threshold as a special requirement for eligibility; and (b) additional conditions difficult to meet, such as proof of successful integration in the society, proof of having accommodation, health insurance, employment, a sufficient income or a sponsor that takes over the legal responsibility to bear all costs for several years, and no criminal record (Kraler, Reichel et al. 2009).

Regarding such supplementary conditions, I believe they should be dismissed as discriminatory: the legal status of irregulars should not depend on conditions not required of other immigrants, such as ‘successful integration in the society’ or ‘sufficient income’. Moreover, such conditions target only specific categories of individuals like workers (i.e. people who have a job offer), but not inactive or unemployed family members. In any event, in the former case some employers refuse to officially offer their workers a job because they want to avoid paying social security contributions, so not all workers can be legalised.

But what about the criminal record? If someone arrives and acquires a criminal record within a short time, is that a sufficient justification to deport him?<sup>35</sup> My view here is that if the criminal record is acquired within a period of time less than one year, then it makes no difference since the state is anyway allowed to deport irregulars who resided on its territory for less than one year. If the criminal record is acquired after one year (that is, after the person has been regularised, according to my proposal) then the person should be treated as any other criminal resident. This is an important point, because we have to take into account the fact that a *criminal* record has no conceptual link with immigration status. As I will try to argue later in section 7.3.2. regarding the lack of criminal record as a requirement for a complete citizenship application, criminal law transgression does not have anything in common with citizenship and migration laws: as Orgad put it, ‘[i]f an immigrant violates the law, civic and criminal sanctions exist’ (Orgad 2010: 22). In consequence, if the absence of a criminal record should be dismissed as a condition for citizenship acquisition, then it should be also dismissed as a reason to deport an already legal resident. If all of these considerations are correct, the period of residence should be the only requirement for regularisation.

We are thus left with the former requirement. Building the argument on two premises (that illegal immigration cannot be acceptable and that long-term residence matters morally), the threshold solution holds that if the irregular qualifies, then she is automatically granted residence. If she does not qualify, then the appropriate state action is deportation (Bauböck 2011). In what follows I want to

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<sup>35</sup> I would like to thank Joseph Carens for drawing me attention on this case (personal communication on file with the author, November 2013).

critically analyse this proposal, by showing that (a) it violates existing national and international legal norms; and (b) it is practically inefficient. However, dismissing it altogether has perplexing consequences. After investigating various options supported by the residence threshold, I argue for the short-term residence alternative.

According to the perspective under scrutiny, irregulars who do not meet the threshold may be removed. However, such an action meets strong legal obstacles: first, a complete removal of all individuals not qualified is not acceptable under international treaties. For example, mass deportations are prohibited by the 1949 Fourth Geneva Convention,<sup>36</sup> and deportation of groups who are identified by something other than their unauthorised immigration status (for example, their skin colour) infringe basic human rights. Second, in several cases national laws also forbid deportation. With the exception of the UK and the Netherlands (van der Leun and Ilies 2008), in most European countries the detention period of an unidentified irregular migrant was strictly limited until 2008 usually to a maximum of three months. If the individual was not identified within this period, she had to be released. However, the 2008 Directive 1008/115/ EC of the European Parliament and of the Council established that Members States must set a period of detention ‘which may not exceed six months’ (chapter IV, art. 15, para. 5); and that this period may be extended to a maximum of another twelve months ‘in cases where regardless of all their reasonable efforts the removal operation is likely to last longer’ because the-third country concerned does not cooperate or because delays in obtaining documentation from the third countries (chapter IV, art. 15, para. 6).<sup>37</sup> Third, in some states a non-qualification verdict does not automatically lead to deportation: the administrative or court decision regarding deportation may be appealed, and the whole process may take several years, a period in which individuals remain irregular, or at best regulars ‘in limbo’ (Maroukis 2009). This category of persons is also known as ‘non-removables’ or ‘non-returnables’.<sup>38</sup> Their situation is of course not acceptable under a residence-based

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<sup>36</sup> Convention relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, art. 49, source: <http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/6756482d86146898c125641e004aa3c5> (accessed 13 January 2011).

<sup>37</sup> ‘Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals’(also known as the ‘Return directive’), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0098:0107:EN:PDF> (last accessed 16 November 2013).

<sup>38</sup> There is an increased interest lately about the so called ‘non-returnables’ or ‘non-removables’ – that is, individuals who are undocumented but for various reasons cannot be sent back to their home states. See for example the study released by Ramboll and EurAsylum for the European Commission in 2013, Home/2010/RFXX/PR/1001, called ‘Study on the situation of third-country nationals pending return/removal in the EU Member States and the Schengen Associated Countries’ – available at [http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/immigration/return-readmission/docs/11032013\\_sudy\\_report\\_on\\_immigration\\_return-removal\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/immigration/return-readmission/docs/11032013_sudy_report_on_immigration_return-removal_en.pdf) (last accessed 16 November 2013). There are current plans for reforming the ‘Return directive’(see the previous note) to create avenues for the regularisation (and re-entry to the ‘normal’ system) of the so-called ‘non-removables’ after a specific number of years that they are left in limbo. I

theory, and if migrants cannot be sent back in the first year since arrival they must receive a legal status. Even if after a number of years there is a final court decision against one's migrant intention to live in the territory, as Carens puts it time matters morally, and after a specific period of time deportation should not be considered an acceptable solution.

But even when an irregular is identified and the expulsion decision is definitive, deportation is not a viable solution. Indeed, it is practically inefficient: sometimes the origin country refuses to cooperate, and moreover as we have already seen the cost of expulsion is generally too high. For example in France, in 2004, 'out of 64,221 pronounced' deportation orders, '12,729 were effectively executed and more than 50,000 people remained on the French territory irregularly. This number has been a yearly average since 2004' (Courau 2009: 46). One exception may be the United States, which easily deports hundreds of thousands of irregular immigrants<sup>39</sup> because most of them come from neighbouring Mexico; and we also have to take into account the people who leave on their own precisely because they are threatened with deportation. However in spite of these exceptions the number of irregulars does not seem to decrease. Overall, such experiences reveal that, by itself, expulsion cannot significantly decrease the number of irregular migrants.

In consequence, the most important problem with the long-term residence threshold is that it leaves many irregulars out even in the case of collective amnesties, which significantly reduce the number of irregular migrants (see table 2 in the Annex). Moreover since deportation, as we have already seen, is neither a legal nor a feasible policy for all those that cannot be regularised, large numbers will continue to remain irregular. This may not be morally unacceptable in the case of newly arrived migrants. But for long-term irregular migrants who become social members such a status cannot be accepted.

Since deportation and the time threshold do not even come close to solving the problem of illegal status (indeed, they cannot even diminish the phenomenon on the long term), it seems that both of them must be discarded as major policies meant to deal with illegal migration. The perplexing consequence is that, taking into consideration all the relevant conclusions of the *Clandestino* project, the only feasible solution seems to be a variation of the 'hard on the outside, soft on the inside' perspective (Bosniak 2006), according to which tough immigration control applies at the border, but

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would like to thank Anna Triandafyllidou for drawing me attention on this study (personal communication on file with the author, November 2013).

<sup>39</sup> For example 396,906 individuals were deported in 2011, according to the U.S. Immigration and Customs Enforcement (ICE). Source: U.S. Immigration and Customs Enforcement' website: <http://www.ice.gov/news/releases/1110/111018washingtondc.htm> (last accessed 14 November 2013).

once inside individuals enjoy almost all citizens' rights. More concretely, the alternative looks like a collective<sup>40</sup> rolling amnesty regardless of the length of stay, coupled with an increased immigration control.<sup>41</sup> A couple of factors support this unexpected solution.

On the one hand, it is very important to be aware that the number of irregular migrants in the European Union has sharply declined in the recent past (Drbohlav and Medová 2009).<sup>42</sup> A number of important factors have contributed to this reality. First, the two waves of European Union enlargement (2004 and 2007) and the 'visa waiver' program for countries like Serbia, Macedonia, Bosnia, and Albania have been important 'pathways into legality' for many eastern and south-eastern European irregular immigrants. Second, immigration laws (including those regulating legal labour migration, family reunification and asylum procedure) have been tightened, and readmission agreements with origin and transit countries have been signed. Finally, the technological advance and the creation of Frontex, the European agency tasked to increase European border security, made border control more successful than ever before – a phenomenon called now 'Fortress Europe'. In general, we could confidently say that illegal migration has been reduced by transforming former irregulars into European citizens, by setting other nationals on the path of becoming European citizens, and by further tightening immigration laws and border control.<sup>43</sup>

On the other hand, while collective amnesties implemented by different European states may have been quite problematic, in some countries these amnesties are the direct cause of 'the decrease of irregular migration over the years.' (Maroukis 2009). Table 2 in the Annex reveals some interesting figures: for example, over 1.1 million irregular migrants have been regularised in Spain over five collective amnesties in the last 25 years (González-Enríquez 2009: 11). Consequently, in 2008 the

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<sup>40</sup> A 'collective' rolling amnesty here means a rolling amnesty which would legalise continuously all irregulars irrespective of their individual circumstances like long or short-time presence on the territory, etc.

<sup>41</sup> The *Clandestino* project revealed that contrary to what one might have expected, more than half of irregular migrants in Europe did not illegally cross the border, but overstayed their visas. In consequence, by 'an increased immigration control' I understand not only an amplified border control, but also a tougher visa system. Of course, I am not directly supporting for the time being an increased immigration control and a tougher visa system: there are obvious important moral objections to them. At this point I just want to explore all directions that must be taken into account when discussing the phenomenon of illegal immigration.

<sup>42</sup> It is important to note that this does not imply that the trend cannot be reversed in the years to follow. This claim was made by sociological studies at the time they were published (like that of Drbohlav and Medová published in 2009). But we have to take into account that the 2008 crisis 'has led to de-regularisation of many immigrants in the crisis ridden countries. Asylum systems are under pressure and many potential asylum seekers prefer to remain undocumented migrants instead of registering as asylum seekers' (Anna Triandafyllidou, personal communication on file with the author, November 2013). So whether reducing illegal migration will continue to be a trend in European Union or not remains to be proven in the years to come.

<sup>43</sup> I am not assuming that all these restrictive measures like tightening immigration laws and borders are morally defensible. For example, some theorists like Joseph Carens (1987) convincingly support a case for open borders. Even though I am sympathetic to his view, just like him I am bracketing for the moment this problem and I am developing my argument from the presupposition that borders and especially border and immigration controls are legitimate.

estimated number of irregulars was only 349,000. This compares favourably to the UK, which has no collective amnesty (if we set aside three very small and specifically focused regularisation programs) and where the estimated number of irregulars has been as high as one million (Vollmer 2009).

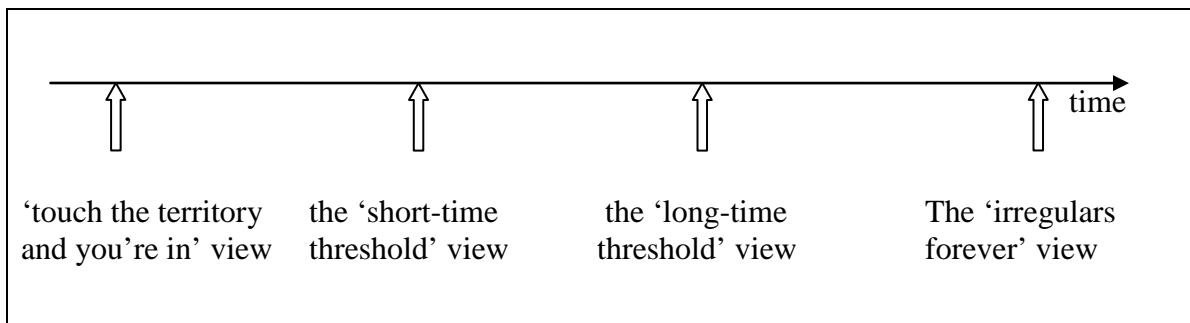
If we accept that, on the one hand, tougher immigration laws and border controls are increasingly successful in keeping irregulars out and that, on the other hand, regularisations are the only successful means to ‘legalise’ large numbers of undocumented individuals, then the ‘hard on the outside, soft on the inside’ perspective seems to support, along with tougher immigration control, a specific interpretation of the ‘touch the territory and you’re in’ view (Bosniak 2007a). That is, a collective amnesty that would regularise all irregular migrants regardless of the length of their stay in the host country. What is more, the amnesty must be a *rolling* program if the phenomenon of illegal status is to be eradicated. It seems then that a *collective rolling amnesty* coupled with stronger immigration control may solve the problem of illegal status while at the same time avoiding the two big problems the residence threshold faced: illegality and practical inefficiency.

However, as we have already seen in section 3 above, the strongest argument for regularisation of undocumented migrants is the fact that they become in time social members of the host polity. Indeed, they start to hold a stake in it. In spite of its shortcomings, the residence threshold was a strong supporter of long-term irregular residents’ regularisation. I have explained that this proposal may be dismissed because of consequences it has on those who do not qualify – that is, on short-term irregular residents. But the ‘touch the territory and you’re in’ view, by superseding the residence threshold requirement, also destroys the strongest argument for regularisation; namely, the fact that in time irregulars become social members. No or not enough time spent in the host country implies no membership claim for irregular migrants; they hold no stake in the receiving polity.

This self-defeating proposal shows that the residence threshold cannot be dismissed altogether.<sup>44</sup> In fact, there is a whole range of alternatives it can offer, as shown in the figure below. All we can do is to pick the best alternative solution – or, as may be the case, the lesser evil.

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<sup>44</sup> Of course, it can be easily dismissed by those who support an open borders regime (see the previous note).



*Figure 1. Different views of an appropriate residence threshold for regularisation*

In the above figure the horizontal arrow represents time and the vertical arrows represent various residence threshold alternatives. One extreme position is ‘touch the territory and you’re in’ view which, as we have seen, can eradicate the illegal status only at the expense of dismissing the best argument for regularisation in the first place. The ‘ethical territoriality’ view on migrants’ rights (discussed in section 2 above) directly supports such a proposal (Bosniak 2007a). But this idea is also implemented in some countries’ national laws: in Spain, for example, an irregular migrant who registers herself with local authorities can access public education and the health care system (González-Enríquez 2009) irrespective of her length of residence. And the recent (and generous) Immigration Act unanimously approved by the Mexican Senate on 24 February 2011 not only decriminalises irregular migrants, but also offers the option of presenting in person without penalty at the immigration office in order to regularise their status. Authorities promise an answer within 24 hours, and if it is positive then we observe an instance of a ‘touch the territory and you’re in’ policy.<sup>45</sup> This liberal position can be implemented since it does not depend on the residence argument: indeed, it can be based on other grounds like humanitarian concern or commitment to increased freedom of movement. Few governments, however, would be inclined to embrace such a policy.

The other extreme position is the ‘irregulars for ever’ view. One version claims that there should be no prospect for irregular immigrants to regularise, and that they must be deported as soon as the authorities discover them (Swain 2009). This position indirectly accepts an ongoing illegality since it cannot extinguish this status. Another account of the same view directly supports continuous illegal status by claiming that, if there is a trade-off between tolerating irregulars coupled with no prospect for

<sup>45</sup> ‘Con la nueva ley, ningún illegal sera considerado delincuente’ [According to the new law, no illegal will be considered criminal], Informador.com.mx, 25 February 2011, available at <http://www.informador.com.mx/mexico/2011/273557/6/con-nueva-ley-ningun-illegal-sera-considerado-delincuente.htm> (accessed 5 August 2011). The text of the new law (in Spanish) can be found at <http://www.diputados.gob.mx/LeyesBiblio/pdf/LMigra.pdf> (accessed 5 August 2011). I am indebted to Luicy Pedroza for drawing me attention on this law and for providing these sources.

regularisation and not tolerating irregulars coupled with tougher border control and deportation, then the first alternative is better since it is both supported by irregulars themselves and justified by a normative argument requiring the reduction of world's poverty through relocating people instead of money (Bell 2005). However such extreme views and their consequences (mass deportations, the creation of a class of permanent partial citizens, etc.) cannot be accepted in a liberal democracy.

Between these two extremes, various positions can be found according to the length of the period the migrant is required to live in illegality or, at best, in limbo. In France, for example, until 2006 a difficult requirement obtained, according to which automatic regularisation of irregular migrants occurred only following 10 years of residence. However, in 2006 the Sarkozy Government passed a new law on immigration which eliminated automatic regularisation altogether, irrespective of the length of stay, thus making irregulars' condition even worse (Courau 2009). In the same vein, in the UK an indefinite leave to remain is not automatic, but may be granted on discretion by the Home Secretary after 14 years of (legal or illegal) residence (Vollmer 2009 : 17). Such perspective is better than the illiberal extreme since it does not create permanent second-class citizens, but it still allows for mass deportations and it keeps large numbers of immigrants in a position in which they cannot make use of their formal rights for an unreasonable period of time.

We are left then with the last option, a version of the time-threshold proposal which would require a shorter period of residence before regularisation. To be sure, this is not an ideal resolution.<sup>46</sup> On the one hand, if the period is too short, then it has the drawbacks of the 'touch the territory and you're in' view; on the other, if it is longer, then there is enough time for governments to organise mass deportations. Additionally, illegal status is not fully eradicated. It may be the case that the latter is an impossible task; but it seems to be clear that if individual rolling regularisations or collective amnesties are to be effective, the residency requirement should be (a) the only condition, if discrimination is to be avoided; and (b) based on a rather short-term threshold, if the phenomenon of illegal status is to be kept to a low level. How short the residence period should be is not a question that can be answered within political theory; it should be decided according to the practical context and political values of each host country. However, we will see later in chapter seven that liberal countries like Canada, Serbia, and New Zealand require only three years of residence before a *legal* migrant could qualify for

<sup>46</sup> The 'short term residence' solution can be seen as falling between two horns of a dilemma: the 'touch the territory and you're in' view (i.e., 'zero time of residence', which would also include those who have never entered or attempted to do so – Rainer Bauböck, personal communication on file with the author, September 2013) minimises illiberal consequences of enforcement (non-tolerance of illegal status), while the 'long-term residence' solution optimises positive reasons for regularisation (according to the 'membership' argument). The short-term residence solution strikes a balance, but it is not clear whether it is an ideal solution, since the answer depends on the view one takes on the trade-off.

*naturalisation*. In a case like this, the residency requirement in order to qualify for *legal status* should be even shorter, maybe under one year. It is important to note here that (as I will explain fully in chapter seven) I consider *simple* residence (and not residence under a specific legal status) as being enough to support one's claim to citizenship. In consequence, *simple* residence should qualify an immigrant for legal status after one year of illegal presence, and simple residence should also qualify the former irregular, after three more years of legal residence, to full citizenship status.

### 3.6. Voting rights for irregular migrants: origin states

At first glance, if we take into consideration irregular migrants' status we might be tempted by the claim that their origin state is morally obliged to secure irregulars' full citizenship rights at home, by actively supporting and encouraging irregulars to use their external vote in national elections.<sup>47</sup> However, by doing so the origin state and its embassies may face a dilemma between enfranchising their citizens-with-illegal-status-abroad and collaborating with host state's immigration authorities in order to fight illegal migration (for example, such collaboration might be prompted by good bilateral relations). But after regularisation it is not obvious that the origin state has the same moral obligations: as in the case of other non-resident citizens, we may still ask whether it is morally acceptable to deny voting rights to individuals who are residents abroad after they pass a time threshold. Since the latter discussion is specific not only to irregular migrants but also to long-term non-resident citizens in general, this section focuses on the former point.<sup>48</sup>

In international relations, one's citizenship proves one's identity, and it behaves as an international treaty, or institution: it works 'on trust and reciprocity and [is] grounded in international norms' (Sadiq 2009). This is because citizenship (and the documents that prove it) is a 'threat neutraliser': the person that possess the citizenship of a state can easily be identified, verified and assessed as regarding her eligibility to enter the host state. In this way, the latter is confident that the individual in question will cause no harm while on its territory: its security concerns are satisfied, and the safety of its citizens guaranteed (Sadiq 2009). This safety is challenged when irregular migrants are either undocumented or documented but their origin state actively supports their illegal status abroad.

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<sup>47</sup> I am not assuming here that the state of origin would or should know anything about the immigration or legal status of its citizens who live abroad. However, a government may generally know (through diplomatic communication, for example) that some of its citizens have an illegal status abroad, and may advertise its support offered to these individuals.

<sup>48</sup> Chapter five on multiple citizens openly discusses this problem and tries to argue against both external voting and dual citizenship.

In such cases the international treaty which is embodied in citizenship (Sadiq 2009) is broken, and a conflict arises between the origin and the host state.

Indeed, helping its citizens with illegal status abroad may generate strong diplomatic tensions between the origin country and the immigrant-receiving state. I have no knowledge of such a conflictual situation created by irregular migrants voting abroad in their own national elections. However, a close example regards the most important feature of European citizenship – that is, freedom of movement. Protecting its citizens' right to freedom of movement as European citizens opened up a conflict between a new EU Member State and a major immigrant-receiving country, which saw that state's nationals not as European citizens but as irregular migrants.

In August 2010 France started deporting what it considered 'irregular' Roma people back to Romania and Bulgaria. Although just one year earlier France had sent back around 10,000 Roma to both countries,<sup>49</sup> this time the decision generated Europe-wide outrage. The situation was also complicated by confusion within European legislation. In the first place, France accepted that Romanian and Bulgarian Roma were European citizens and that they had the right to enter without a visa. Yet, according to existing French law, Romanian citizens cannot stay longer than three months without residency or work permits until more open rules on freedom of movement come into effect in January 2014. At present, if they ignore this law, they automatically become irregular immigrants.<sup>50</sup>

There is recognition from both French officials' declarations and the reactions of European institutions and NGOs that the legal situation is not that clear. Firstly, France was warned that it could face an EU infringement procedure if it fails to implement the 2004 EU directive on freedom of

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<sup>49</sup> 'Q&A: France Roma expulsions', *BBC News*, 19 October 2010, available at <http://www.bbc.co.uk/news/world-europe-11027288>, accessed 17 May 2011.

<sup>50</sup> The relevant law here is Code de l'entrée et du séjour des étrangers et du droit d'asile ('The Code of entry and residence of foreigners and of right to asylum'), articles L511-3-1 (link: [http://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=30285D50FE18F1141F8C363D2DEDD28B.tpdjo01v\\_3?idArticle=LEGIARTI000024195750&cidTexte=LEGITEXT00006070158&dateTexte=20130719](http://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=30285D50FE18F1141F8C363D2DEDD28B.tpdjo01v_3?idArticle=LEGIARTI000024195750&cidTexte=LEGITEXT00006070158&dateTexte=20130719)) and L521-5 (link: [http://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=30285D50FE18F1141F8C363D2DEDD28B.tpdjo01v\\_3?idArticle=LEGIARTI000024196820&cidTexte=LEGITEXT00006070158&dateTexte=20130719](http://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=30285D50FE18F1141F8C363D2DEDD28B.tpdjo01v_3?idArticle=LEGIARTI000024196820&cidTexte=LEGITEXT00006070158&dateTexte=20130719)) (accessed: 23 July 2013). Article L511-3-1 offers three cases in which a citizen of another Member State can be subjected to expulsion: (a) he doesn't justify any right of residence as provided by articles L121-1 (conditions for the right to stay for more than three months: having a professional activity in France or being a student, having sufficient resources, etc.), L121-3 (conditions for children of immigrants and other family members) and L121-4-1 (the right of an EU citizen to reside in France for three months as long as he does not become 'an unreasonable burden on the social assistance system'); (b) the stay constitutes an abuse of rights (renewal of the three-months stay permit without meeting the conditions, or staying in France 'with the primary aim to benefit from the social welfare system'); (c) during the period of three months an EU citizen's behaviour 'constitutes a genuine, present and sufficiently serious threat to a fundamental interest of the French society'. Article 521-5 states that a citizen of another Member State can be subject to expulsion if his personal conduct 'constitutes a genuine, present and sufficiently serious threat to a fundamental interest of society' (translations are mine). I would like to thank legal scholar Pierre Stéphane Cazenave for clarifying the relevant articles of law.

movement.<sup>51</sup> Secondly, the French government offered each Roma immigrant 300 Euros in order to leave the country,<sup>52</sup> giving the then Minister of Immigration Eric Besson the opportunity to claim that repatriation of Roma people was ‘voluntary’. But if deportations were perfectly legal and Roma individuals were ‘irregular immigrants’, it is not clear why France both offered money for return and insisted on the voluntary character of repatriation. Thirdly, Roma are European citizens, and ‘while it’s true that most Gypsies are in the country unlawfully, France can’t prove that it’s expelling the right people unless it checks the paperwork of every single person it deports’<sup>53</sup> – which of course was not the case. Finally, European Commissioner of Justice Viviane Reding declared that she was ‘appalled’ by the French government’s actions, expressed doubts regarding their legality and threatened France with an infringement procedure.<sup>54</sup> The European Commission against Racism and Intolerance concurred and warned ‘the government against stigmatising Roma immigrants’.<sup>55</sup>

The important thing is that diplomatic tensions appeared between Romania (rhetorically supporting the rights of its Roma citizens as European citizens) and France (playing the illegal immigration card). Bogdan Aurescu, state secretary in Romania’s Ministry of Foreign Affairs declared that ‘to repatriate foreign nationals, France needed to prove that they were guilty of crimes and offences, which apparently was not the case’;<sup>56</sup> in consequence, France’s decision was based on the suspicion of future crimes, which was against the presumption of innocence. Romanian President Traian Băsescu asked French President to ‘try to stop’ Roma expulsions and the Romanian Parliament condemned France for ‘serious violations’ of its citizens’ rights and for ‘discriminatory actions’.<sup>57</sup> Romanian Foreign Affairs Minister Teodor Baconschi said expelled Roma will probably go back to France soon, since Romania ‘cannot block at the border any citizens unless they have been found guilty

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<sup>51</sup> ‘Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States’, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:EN:PDF> (accessed 23 July 2013).

<sup>52</sup> Claire Suddath, ‘Who Are Gypsies, and Why Is France Deporting Them?’, *Time*, Thursday, 26 August 2010, available at <http://www.time.com/time/world/article/0,8599,2013917,00.html>, accessed 17 May 2011.

<sup>53</sup> *Ibidem*.

<sup>54</sup> Constant Brand & Jim Brunsden, ‘Reding Slams France on Roma expulsions’, *EuropeanVoice.com*, 14 September 2010, available at <http://www.europeanvoice.com/article/2010/09/reding-slams-france-on-roma-expulsions/68855.aspx>, accessed 17 May 2011.

<sup>55</sup> ‘Romanian officials in Paris to discuss deportation of Roma’, *France 24*, 25 August 2010, available at <http://www.france24.com/en/20100825-romania-officials-france-ministers-roma-meeting-deportations>, accessed 17 May 2011.

<sup>56</sup> ‘France accuses Romania of dumping its Roma’, *EurActiv.com*, 2 September 2010, available at <http://www.euractiv.com/en/socialeurope/france-accuses-romania-dumping-its-roma-news-497324>, accessed 17 May 2011.

<sup>57</sup> Valentina Pop, ‘Romania wants France to stop Roma expulsions’, *EUobserver.com*, 23 September 2010, available at <http://euobserver.com/9/30873>, accessed 17 May 2011.

of a crime'.<sup>58</sup> French officials retaliated and Prime Minister François Fillon went so far as to threaten to block the accession of Romania to the Schengen zone (which was supposed to take place only seven months later, in March 2011) 'unless it does more to stop Gypsies leaving the country': 'The Romanian government must make this a national priority and if it doesn't, certain things will happen – notably concerning adhesion of Romania to Schengen'.<sup>59</sup> French State Secretary Pierre Lellouche reiterated the threat.<sup>60</sup>

In response, Matthew Newman (spokesperson for Justice, Fundamental Rights and Citizenship of Commissioner Viviane Reding) 'urged France not to mix Roma issue with Schengen'.<sup>61</sup> However, France suddenly declared that it will oppose Romania's accession to Schengen and started to offer curious motivations for its position,<sup>62</sup> such as judicial problems and internal corruption (which – as integration of ethnic minorities – were not part of the Schengen *acquis*). Pierre Lellouche also declared that 'the technical evaluations, which so far have all been positive, are not enough'.<sup>63</sup> However, European Affairs Minister Laurent Wauquiez, ignoring the same 'technical evaluations', declared that France would not get involved in 'weakening our borders and the capacity of Europe to manage and control its flow of migrants'.<sup>64</sup>

Romania responded in a very odd, unexpectedly rough and undiplomatic manner. *The Economist* summarises this retaliation as follows:

Romania's response did its cause little favours [sic]. First Mr Baconschi threatened to impose extra obligations on Croatia, the EU candidate country closest to accession. He then said that Romania could leave the 'co-operation and verification mechanism,' a set of rules on tackling corruption to which Romania and Bulgaria signed up when they joined the EU. Separately, a group of Romanian

<sup>58</sup> Lizzy Davies, 'France's Roma crackdown could spark xenophobia, says Romanian minister', *The Guardian*, 18 August 2010, available at <http://www.guardian.co.uk/world/2010/aug/18/france-xenophobia-roma-flights>, accessed 17 May 2011.

<sup>59</sup> 'France warns Romania as Gypsy expulsion continue', *Irish Times*, 28 August 2010, available at <http://www.irishtimes.com/newspaper/world/2010/0828/122427778389.html>, accessed 17 May 2011.

<sup>60</sup> 'EU urges France not to mix Roma issue with Schengen', *EurActiv.com*, 24 August 2010, available at <http://www.euractiv.com/en/socialeurope/eu-urges-france-mix-roma-issue-schengen-news-497080>, accessed 17 May 2011.

<sup>61</sup> *Ibidem*.

<sup>62</sup> The Romanian Centre for European Policies, a think-tank usually critical regarding Romanian authorities, refuted Frances's allegations. See Cristian Ghinea, 'Refuting France's claims regarding Romania's Schengen accession', *EurActiv.com*, 13 December 2010, available at <http://euractiv.blogactiv.eu/2010/12/13/12160/>, accessed 17 May 2011.

<sup>63</sup> Valentina Pop, 'France wants to delay Schengen accession for Bulgaria and Romania', *EUobserver.com*, 11 November 2010, available at <http://euobserver.com/9/31246>, accessed 17 May 2011.

<sup>64</sup> 'France blocks Romania, Bulgaria's Schengen bids', *EurActiv.com*, 14 December 2010, available at <http://www.euractiv.com/en/future-eu/france-blocks-romania-bulgarias-schengen-bids-news-500445>, accessed 17 May 2011.

MPs said they would delay ratification of a Lisbon Treaty protocol that would add 18 MEPs to the European Parliament.<sup>65</sup>

The result was that, in spite of passing the technical evaluation of Schengen officials on 14 January 2011, the accession of Romania and Bulgaria to Schengen in March 2011 was vetoed by France and Germany and it was delayed without any further date being mentioned at which this accession may take place. At the date of writing this study, France continues to deport Roma individuals (who are considered both European citizens but also as belonging to a category of ‘irregular migrants’) *en masse*.<sup>66</sup>

### 3.7. Voting rights for irregular migrants: host states

Just as in the case of irregular migrants’ franchise in the origin country’s national elections, their access to voting rights in the host state can take place before or after regularisation. I have already argued in section two above that since toleration of illegality is unacceptable, voting rights cannot be offered to irregular immigrants, just like many of the social and economic rights Carens (Carens 2008a) argues for. This would actually amount to tolerating illegal status. I believe that all rights (voting rights included) except basic human rights can be offered only *after* regularisation (which according to my proposal should be accessible after one year of residence in the territory). Carens disagrees and believes that ‘not all rights are rights of citizenship or even rights of membership’, and thus ‘there is no contradiction in granting rights that are not rights of citizenship or membership to people who are not citizens or members, including recently arrived irregular migrants’.<sup>67</sup> I believe this is correct, but (a) offering a large range of rights (excepting voting rights probably) to people who are present against a polity’s consent, and (b) still considering those individuals as ‘irregular’ is a contradictory standpoint.

However, the fact that most rights must be offered only after regularisation is not as obvious as it may seem at a first look. In fact, in many developing countries irregulars use their voting rights while still being in an illegal status. Against the traditional immigration and citizenship theories (according to which citizenship rights are consequential to citizenship status), Sadiq claims that in developing countries the situation is exactly the opposite: irregular migrants first exercise citizenship rights and

<sup>65</sup> T.N. & R.W.-M., ‘Let us in’, *The Economist*, 19 January 2011, available at [http://www.economist.com/blogs/easternapproaches/2011/01/romania\\_v\\_france](http://www.economist.com/blogs/easternapproaches/2011/01/romania_v_france), accessed 17 May 2011.

<sup>66</sup> ‘France resumes deportations of Roma people from Romania’, *Romea.cz*, 13 April 2011, available at [http://romea.cz/english/index.php?id=detail&detail=2007\\_2336](http://romea.cz/english/index.php?id=detail&detail=2007_2336), accessed 17 May 2011.

<sup>67</sup> Joseph Carens, personal communication on file with the author, November 2013.

they acquire documents for making use of these rights (Sadiq 2009). Only then do they use these (whether false or genuine, always illegally acquired) documents for acquiring citizenship status. They can do this because in developing countries there is a phenomenon called ‘blurred membership’ (the absence of documents proving the citizenship of nationals in poor and remote areas) and because of ‘networks of complicity’ (groups within various institutions of the state, immigration authorities included), which illegally facilitate irregulars’ acquiring documents to entry, settle and participate in the social, economic and political life (Sadiq 2009: 111). Irregular migrants’ citizenship is thus called ‘documentary citizenship’. The proof for their citizenship is that irregulars vote in their host states, sometimes hold public offices and travel across borders using these documents. This way, the ‘distinguishability assumption’ of traditional immigration and citizenship theories (the clear distinction between immigrants and citizens) is blurred.

The fact that individuals with illegal status can vote in their host societies is used by *both* origin states *and* parties across the political spectrum in the receiving polity, thus creating dangerous conflicts. Origin states may use the franchise of their citizens-with-illegal-status-abroad in order to support their claims to territories currently belonging to the immigrant-receiving country. For example, in the Indian province of Assam, Muslim illegal immigration from Bangladesh is changing the national and ethnic make-up, which is used by Islamic extremists to support their dream of a ‘greater Bangladesh’ (Sadiq 2009). This situation has triggered the escalation of already existent tensions between India and Bangladesh.

But such pernicious politics are also practiced *within* immigrant-receiving states. On the one hand, political parties which dominate the government in some developing countries encourage illegal immigration of certain religious or ethnic groups’ members in order to maintain political power. In Malaysia such a ‘demographic manipulation’ is used by Malays, who dominate the government. They support Filipino and Indonesian Muslim illegal immigration, in order to change the ethnic and political profile of Sabah province, originally dominated by non-Muslim natives (Sadiq 2009). On the other hand, opposition parties opportunistically exploit governmental policies with the intention of raising nationalist and xenophobic feelings among natives to obtain more votes. Situations such as these sometimes degenerate into violent conflicts and civil wars.

One could argue that irregular migrants’ franchise before regularisation (let alone naturalisation) is an anomalous and temporary situation that can be found only in developing countries because of their ‘weak infrastructure of citizenship’ (Sadiq 2009: 74). It is anomalous because from the normative point of view it is not acceptable, and it is temporary because as new technologies will

become available to poor countries and as the fight against corruption progresses, the infrastructure of citizenship will become stronger. If this is so, irregulars in developing countries will find it increasingly difficult to access citizenship rights (the franchise included) without passing first through the whole process of status regularisation. However, it is not clear that voting rights should be accessed only *after* naturalisation. On the one hand, as we have already seen above in section two, some countries offer local voting rights to third country nationals if they meet some requirements regarding the period of legal residence and registration.<sup>68</sup>

On the other hand, some theorists take further the idea of local voting rights and propose the disconnection of local from national citizenship. Exploring the way urban democracy can be strengthened, Bauböck argues that ‘cities should enjoy greater autonomy *vis-à-vis* national and provincial governments,’ and this can happen by exempting municipalities ‘from certain aspects of national government monopolies in immigration, trade and foreign policy’ (Bauböck 2003: 148). According to this scholar, cities can add an ‘automatic *ius domicilii*’ mechanism for citizenship acquisition, besides the three ‘national’ mechanisms of *ius sanguinis*, *ius soli* and naturalisation. Unlike national citizenship, local citizenship not only allows horizontally overlapping membership in several cities, but it also suspends ‘the requirement of vertically nested membership’ (Bauböck 2003: 151) for immigrants (that is, possessing national citizenship is thereby not *a sine qua non* condition for acquiring local citizenship). Thus local and national citizenship are disconnected, and the most important sign of this detachment is the fact that non-citizen residents are able to vote in local elections: ‘extending the franchise to foreign nationals merely abolishes an artificial restriction imposed by national authorities that does not make sense from a local perspective’ (Bauböck 2003: 152).

This is an extremely interesting account and it can easily be used in order to facilitate the extension of some version of citizenship rights to irregular immigrants. However, we have to pay attention to the distinction between *regularisation* and *naturalisation*. Bauböck argues for enfranchising non-citizen residents at the local level without also requiring previous naturalisation in the larger polity – but there is no place in which he claims that immigrants should be enfranchised at the city level without also having a regular status at the same time. Skipping naturalisation does not imply skipping regularisation. In other words, for Bauböck too, illegal status cannot be tolerated.

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<sup>68</sup> I consider this policy as a ‘legitimate option’ rather than a ‘moral requirement’. Not every democratic state is morally obliged to extend local voting rights in this way. According to the residence-based theory I am supporting, after three years of residence a legal migrant should be put on the path to citizenship, and only afterwards he can enjoy full citizenship rights. However, if some very liberal states offer some (local) voting rights before naturalization, I would say that such policies are rather welcome. I would like to thank Joseph Carens for drawing me attention on this point (personal communication on file with the author, November 2013).

Irregular immigrants' franchise is a contradiction in terms: they can – and they must – be enfranchised *only after regularisation*. But after this process individuals are not 'irregular' anymore. We can consistently discuss only about the voting rights of '*former* irregular migrants'.

So what can one say about the voting rights of *those already granted amnesty*? For some theorists, once regularised former irregular migrants should be treated exactly as any other legal migrant and, after the residence requirement is met, they should be given the opportunity to naturalise (Bauböck 2011). Not everyone agrees: the undocumented are economic migrants and what they are looking for is access to residence and the labour market, not access to citizenship: 'the rights to enter and stay in a country are increasingly more significant than the rights to settle permanently or take citizenship' (Jordan and Düvell 2002: 245). If this is true, then why shouldn't states be allowed to offer immigrants 'residence without citizenship' (Pevnick 2009)? If there is a dilemma or a trade-off between rights and numbers – that is, between accepting large numbers of immigrants but restricting the rights they can access and accepting small numbers of individuals but opening them the path to full citizenship rights (Bell 2005), (Chang 2011), (Castles 2006), (Ruhs 2005) – then maybe helping large numbers is a better moral option, or at least the lesser of two evils.

The celebrated argument against this view belongs to Walzer who warns that tolerating second-class citizens (that is, permanent residents who have no possibility of upgrading their status to full citizenship rights), a group of citizens that do not have a say in the making of the laws and policies that affect them, is extremely damaging for a state. It turns the liberal democratic polity into a caste-like society (Walzer 1983). Not everyone agrees. Pevnick argues that Walzer's argument does not work since it fails to disaggregate the power of the state over immigrants' lives (Pevnick 2009). According to this objection, immigrants who do not have access to naturalisation are thus exempted from many laws that apply only to citizens, so there is no point in insisting that they should have a say in making those laws. What Walzer's argument implies, according to Pevnick, is not excluding non-citizenship status altogether, but redesigning it.

However, the author does not explain exactly how to redesign this status. One option suggested only in passing is to associate the status of immigrants with that of tourists or of asylum seekers until their situation is settled. In the latter case the state's authority over them is limited and is connected to residence, not membership. But this cannot work: the case of tourists and asylum seekers is acceptable exactly because it is temporary. Temporary partial citizenship may be morally acceptable in some circumstances, but this is because it is not permanent, hence it does not create a society with castes whose membership borders are impenetrable *ad infinitum*. Maybe another option of disaggregating the

state's power could be to devise the immigrant status such that non-citizen residents have a say only in those laws that apply to them. The problem with this interpretation is that there are so many laws that do apply to non-citizen residents (from driving laws to labour market laws to tax laws) that the state has only two options. It can deny residents a say in the making of these laws just as it denies tourists a say (but on a permanent basis, which relegates them to second-class citizenship), or it can offer them a say in designing these laws, which is similar to opening the path to naturalisation and enjoyment of full citizenship rights. I believe therefore that Pevnick's objection against Walzer fails.

Another objection against Pevnick is that the principle of enfranchising only those affected by particular laws is the wrong one when determining voting rights in representative democracies.<sup>69</sup> According to Bauböck, the 'all affected principle' (a) implausibly derives from a duty to justify decisions to those who are affected by them a criterion for participation; (b) each decision would create in this case a different demos; moreover, it is impossible to know 'who will be affected before the decision has been taken'; (c) not all decisions affect people in the jurisdiction equally, and some affect non-citizens who live in other states; (d) at the end of the day, such a principle would require an all-inclusive global demos (Bauböck 2009a: 12-16).

The upshot of this discussion is that it is not permissible to deny non-citizen residents (that is, legal immigrants) access to naturalisation and full citizenship rights on a permanent basis. But if this is so, then an important question arises regarding former irregular migrants: is it acceptable to make a distinction within the class of legal immigrants between those who waited in the line ('continuously' legal migrants) and those who in the past illegally crossed the border or overstayed their visa (former irregular migrants)?

Some theorists believe the answer is negative: once given amnesty, former irregulars should be subjected to the same laws and enjoy the same rights as all the other legal migrants (Bauböck 2011). But this may not be the only solution. I believe that treating all legal migrants on an equal basis is the best moral policy a liberal democratic state can implement, but at the same time I claim that a particular distinction is also morally *acceptable* (that is, not necessarily required). The distinction I have in mind regards the time threshold an immigrant must meet in order to have access to naturalisation and full citizenship rights. In the case of former irregulars, access to *full political rights* can be delayed for a longer period of time than in the case of 'continuously' legal immigrants.

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<sup>69</sup> Rainer Bauböck, personal communication on file with the author, April 2013.

I believe that this longer period of partial citizenship status is morally *permissible* on three key grounds. First, this delay can be based on individuals' consent: one can argue that by illegally migrating individuals have implicitly consented that social and economic rights are more important to them than political rights. Second, this may be seen as a punishment for violating immigration laws. However, just like any punishment, this should be proportionate with the trespassing so voting rights cannot be delayed indefinitely. Finally, the postponement can be a symbolic statement of the receiving society aimed at would-be immigrants, according to which illegal entry and stay are not tolerated.

But what does 'delay of *full* political rights' mean? Political rights cannot be reduced only to voting rights. They also include the right to membership in political associations, the right to membership in political parties, the right to public manifestation and protest, the right to strike, and so on. Some of these rights cannot be denied to regularised individuals, and laws that do deny them – like the 2000 Spanish immigration law, which applied limitations to irregulars of the right of association, strike and demonstration (González-Enríquez 2009) – cannot be morally justified. Arguably, even voting rights at the local level must be offered to newly regularised persons after a specific period of residence.<sup>70</sup> But some rights which can be denied on a temporary basis to legal immigrants, such as the right to membership in political parties (Owen 2013) and the right to vote in national or federal elections can also be denied for a longer period to former irregulars.

Two caveats must be made here. First, as I have already mentioned, the denial of full political rights is not a normative requirement, but rather an acceptable policy a polity might pursue. There is nothing in my argument that would deter a more liberal state to offer full political rights to individuals immediately after regularisation (i.e. post-amnesty). Second, this limitation is acceptable only as long as the percentage of such 'partial citizens' is rather small: a polity in which most residents were only 'partial citizens' in this sense (even for a limited period of time of, say, five years) would no longer be recognisable as a liberal democracy (Bauböck 2011).

### 3.8. Conclusions

Ngai claimed that irregular migrants are 'impossible subjects', because 'It is their territorial hereness that brings them within the circle of national normative concern, but it is also their territorial hereness that is objected to, that subjects them to potential territorial removal and renders them vulnerable to subordination in the process' (Ngai 2004), (Bosniak 2006: 139). This chapter has tried to show that

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<sup>70</sup> The long-term residence threshold, which was both inefficient and unacceptable as a criterion for regularization, may be a good tool for deciding when naturalisation and full citizenship rights can be accessed by long-term residents.

irregulars are far from being ‘impossible subjects,’ once we understand that illegal status cannot be tolerated by the state and that deportation violates national and international legal norms and is also practically inefficient. The only solution is an individual rolling regularisation or a collective amnesty with only a short-term residence threshold as a valid qualifying condition. Such a program should offer the enjoyment of civil, social, economic and political rights to newly regularised individuals. After regularisation former irregulars may still be treated differently than other legal migrants by the state: their path to naturalisation and their access to voting rights may be delayed for a longer period of time. However, this is acceptable only as long as it is a temporary measure: former irregulars cannot be permanent partial citizens.

## **Chapter 4. ‘Citizens-minus’ (2): The Rights of Temporary Workers**

*‘there is nothing more permanent than temporary foreign workers’  
[popular slogan, cited in (Ruhs 2005: 1)]*

*‘The fact that the use of the word “race” waned, however, did not mean that assumptions of racial difference were concomitantly eliminated from public discourse. The very category of guest worker, for instance, presumed clear, immutable distinctions between native and foreigner’ (Chin 2007: 16)*

*‘The workers of the South were brought to the North as if they were an abstraction or an image. Behind the term guestworker was a belief that such workers were like replaceable parts [...] Behind the abstraction, however, lay, of course, a human being who was more than simply the sum total of his working hours per week. Beyond the role of worker were other roles that each migrant filled, and each role had its own implications for the host societies. The worker was father, husband, friend, countryman, neighbor, consumer, believer, and carrier of language, to name but a few. Midst it all remained the unresolved ambiguity that encompassed his existence – whether in fact he was a “guest” or, more likely, an unwanted but tolerated intruder’ (Rist 1978: 27)*

### **4.1. Introduction**

The second category of ‘citizens-minus’ I want to discuss is represented by temporary workers. Usually they are foreign citizens officially accepted by the host country on a provisional basis, in order to be employed in economic sectors where the native population cannot or does not want to fill the market demand. This chapter concentrates on the rights of this category of migrants and discusses five important normative issues.

Firstly, since these workers are ‘temporarily’ present in the host state, their rights are restricted compared to native citizens or other types of migrants. They may be able to apply for jobs only in some economic sectors but not in others, they may not be able to bring their families into the host state, they may have only a strictly time-limited contract and afterwards they must leave the host state, and so on. How can we normatively design the range of rights a temporary worker should enjoy irrespective of her host country? The second part of this chapter asks whether temporary migrants’ rights can be adequately met through a progressive development in international law. My answer is negative, since at the present moment it is impossible to accommodate international institutions with the doctrine of state sovereignty when other concerns than general basic human rights are taken into account. I offer the example of the Migrant Workers Convention, which has not been signed up to date by any OECD

immigration country, and following Bosniak I claim that the main reason for this is its incompatibility with the generally accepted principle of state sovereignty. In the following step I answer the obvious objection according to which in practice states did sign many international conventions that actually limit their sovereignty. Why should the case of Migrant Worker Convention be seen differently? My rejoinder explores the conditions emphasised by the international relations theory under which states sign international covenants that limit their sovereignty and show that none of these conditions obtains in the case of the convention under scrutiny.

If we accept that a positive development in international law is not foreseeable in the near future, then how can we approach the problem of temporary workers' rights nowadays? Two points of view must be taken into account here: that of migrants and that of host states. The third section discusses host states' point of view, which is usually based on the *rights versus numbers* problem. Basically, this dilemma's horns are whether states should accept a great number of migrant workers without also offering them a large number of rights (especially the right to access full citizenship after a number of years of residence), or if they should accept only a small number of migrants that must be put on the path to citizenship after the same residence threshold is met. I claim that this dilemma cannot be solved as long host states do not also take into account temporary migrants' interests.

In consequence, the fourth part of this chapter discusses the aforementioned migrants' perspective and asks whether their rights should depend on migrants' own preferences for (a) a higher income over stronger rights or for (b) their social spaces of reference. Regarding the first type of preferences, I discuss Daniel A. Bell's account of foreign domestic workers' rights and the treatment they are subjected to in Hong Kong and Singapore. Regarding the second type of preference, I examine Ottonelli and Torresi's proposal of negotiating an 'equality based on special status' which is meant to take into account migrants' needs and choices even when they do not easily come to terms with democratic ideals. I support a general claim made by these authors according to which democracy's concerns with formal equality should be balanced against migrant workers' needs – however, I claim that this balance should be accepted only as long as the trade-off is temporarily limited, is respecting basic human rights, and is acceptable in migrants' own view.

The fifth section tries to pinpoint to the direction we have to look towards in order to find an answer to the question regarding legitimate limits of states' and migrants' bargaining capacities concerning temporary workers' rights. I use Soysal's distinction between human rights and citizenship rights and claim that (a) human rights must be observed by immigration states (irrespective of local practices in undemocratic countries), and (b) under strict conditions, some citizenship rights may be

traded off in order to support migrant workers' projects. I stop short of offering a detailed basket of rights that can be negotiated, since there may be differences in design according to local customs and traditions. However, I claim that supporting migrants' agency and their freedom to negotiate an 'equality based on special status' (Ottonelli and Torresi 2012) may become the most urgent thing to do as long as international conventions on this topic are not going to be observed in the foreseeable future.

The final section hints at a problem in political philosophy situated beyond the subject of this study. If temporary workers' own perspective is acceptable and if we should take into account migrants' *agency*, then this argument has broader implications that take us beyond migration theory. I enquire what the chances are of reviving the consent theory as a serious contender in the philosophical field of political obligation. I claim that we need a broader theory with several principles of political obligation in order to support different individuals' duty to obey the law – which is a new direction in political obligation today, running against most accounts based on different singular, exclusive principles. If we accept this view then we might have a case where consent theory may well support political obligations of a specific category of individuals – that is, temporary workers (but also irregular migrants and 'external quasi-citizens'). This way, the consent theory could become a serious principle supporting migrants' duties and thus could be a part of a general theory of political obligation, among other principles.

#### **4.2. Can temporary migrants' rights be adequately met through a progressive development in international law?**

This section argues that in some legal and political areas today, it is difficult to accommodate state sovereignty with international institutions and documents regarding specific categories of rights. Such an accommodation may be possible on the topic of serious criminal state practices such as genocide, but when it comes to lesser human rights violations sovereignty still carries the day and makes international conventions irrelevant. Take the example of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*,<sup>71</sup> which was adopted by the General Assembly of the United Nations on 18 December 1990. Motivated by the increasing phenomenon of labour migration and by the weaker status – as compared with native workers – enjoyed by permanent resident workers, temporary workers and irregular migrants in the host societies all over the world, the Convention promised to become a major human rights instrument whose

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<sup>71</sup> Henceforth *Migrant Workers Convention*, MWC.

importance would equal that of the 1948 Universal Declaration of Human Rights and the subsequent 1966 International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. The *Migrant Workers Convention* entered into force on 1 July 2003, but by 2013 it had not been signed or ratified by any OECD immigration country.<sup>72</sup>

The justification of this failure is related to the principle of national sovereignty. As Bosniak remarks, although the MWC tried to accommodate competing concerns regarding both sovereignty and human rights, the former seems to have won the debates surrounding the drafting of this document. In the first place, states may ratify it with reservations. Secondly, the ‘Convention permits state parties to pursue the immigration control policies that they see fit’ (Bosniak 2004: 316). If this is the case, then why has no immigrant country signed the MWC? The answer lies, I believe, in the fact that fears regarding loss of sovereignty still carry the day. The extensive human rights protections afforded by the document are seen to infringe both states’ right to control immigration and their alleged right to treat citizens and resident aliens differently.

The obvious objection to this view is that states have often signed conventions that largely limit their sovereignty, even in the field of immigration. A good example is the 1951 Refugee Convention, under which every country must respect the *non-refoulement* principle, which denies states the right to expel aliens in countries where their lives or basic rights might be threatened. So in fact states *do* sign treaties which limit their sovereignty. We might ask, then why the case of the MWC is so different.

In international relations theory there are different explanations for the reasons states sign international human rights laws. Goldsmith and Posner offer three possible motives. The first is *coincidence of interests*: governments are rarely interested in committing crimes against humanity.<sup>73</sup> The second is *cooperation*: multilateral agreements regarding reciprocal treatment of ethnic minorities. The third is *coercion*: signing under the threat of force (Goldsmith and Posner 2005). The problem is that multilateral human rights treaties are not based on cooperation, be it symmetric – like the protection of Protestant and Catholic minorities in the post-Westphalian world – or asymmetric – like the UK’s ‘carrot and stick’ strategy for ending the slave trade in the 19<sup>th</sup> century. Moreover, since there is no ‘effective coercive enforcement mechanism’ – usually non-liberal non-democratic states can sign them without any problem, since they incur no or little cost by violating those norms – the benefits of

<sup>72</sup> Many authors have pointed out that no major immigration country has yet signed this Convention. However, this is wrong, since some signatory states (such as Mexico) have now become major immigration countries. Moreover, Argentina and Turkey are today also significant countries of immigration. This is why I refer only to the Organisation for Economic Cooperation and Development (OECD) countries.

<sup>73</sup> On the other hand, it is true that governments may have an interest in keeping control over judgments about what constitutes a crime against humanity (Joseph Carens, personal communication on file with the author, October 2013).

signing, economic benefits included, can be rather substantive. On the other hand, liberal democratic states can easily sign the treaties because they already comply with their terms; and where they do not comply, RUDs (reservations, understandings, declarations) are tools that are easily available.

The same conclusion is supported by other researchers in international relations theory. Krasner explores Western states' compliance with treaties concerning respect for minority rights in Europe in the last 500 years, and his conclusion is that rights are respected only as long as great powers have (a) an interest in, and (b) enough capabilities for upholding and enforcing them on non-observant states (Krasner 1999). Even scholars outside the realist school seem to support, even if half-heartedly, these ideas. In her study on the importance of moral arguments in changes in world politics, Crawford argues that the slave trade ended principally for two reasons. Firstly, normative arguments had convinced public opinion about the immoral character of slavery and about the 'greater profitability and moral virtues of free labour' (Crawford 2002: 171). Secondly, after abolition the demand for slaves collapsed. It is not clear whether Crawford would support moral arguments alone as causing the end of slave trade even in the context of a growing demand for slave labour. However, lack of demand seems to be in any case to have been a contributing factor.

Finally, there is another possibility to change states' behaviour towards human rights, both domestically and at the international level. According to constructivist approaches in international relations, when people adopt new understandings and ideas about individual rights, and in the process challenge 'traditional definitions and allocations of entitlements', the political system can either try to accommodate the new rights claims or, if it fails to do this, it can collapse under such struggles. A good example is the disintegration of imperial systems, which came about when subject peoples, unsatisfied with the metropole's way of addressing its crisis of legitimacy, turned from 'voice' to 'exit' (Reus-Smit 2011). On the other hand, some liberal theorists underline that the position of states concerning human rights can be changed through negotiations at the international level: a growing body of literature explains that references to human rights in the Charter of the United Nations were not intended by the great powers. On the contrary, this came about as a consequence of the diplomatic efforts of smaller, non-Western states' (former colonies, Latin-American and Asian countries, etc.) (Hunt 2008), and as a consequence of the influence of some providential personalities (Glendon 2002).

Without the intention of exhausting the entire possible range of causes, we can thus conclude that generally a great power signs a human rights treaty if at least one of the following conditions obtains: (a) its domestic practices are already similar to the norms promoted by the international

document; (b) it is in the state's interest to take this course of action;<sup>74</sup> (c) it is the best thing the state can do given the moral and material context within international relations at a specific moment; and (d) changes in people's paradigms of moral thinking occur, public opinion is gradually convinced by the new perspective, and the struggles for individual rights become powerful enough to change states' behaviour. On the other hand, smaller and/or non-liberal democratic states sign international human rights treaties because: (a) they are not affected by them (Järve and Poleshchuk 2010), and even if they are affected, there is no cost of violating signed treatises, or the cost is extremely small; (b) the benefits of signing them can be substantive; (c) there is some threat of force from great powers.

Now let us apply this to the case of temporary workers, in order to find the answer to the question raised above: why has no immigration country signed the MWC? The reason seems obvious. Emigration countries, which are usually underdeveloped, have signed it because most of them are not immigrant-receiving countries (even if they may have small immigrant communities).<sup>75</sup> Moreover, the document does not infringe their sovereignty: violating the treaty bears no costs since there is no control mechanism. Moreover, their image on the international arena is improved by signing yet another human rights instrument.

On the other hand, immigration states don't sign for five principal reasons. Firstly, they do not already comply with most of the terms set by the MWC. In spite of publicly condemning infamous temporary worker programs like the *Gastarbeiter*<sup>76</sup> program in Europe or the *Bracero*<sup>77</sup> program in the United States, and in spite of a general acceptance that past policies regarding migrant workers' rights cannot be accepted anymore, immigrant democratic states are not ready to receive large numbers of people who can easily qualify, sooner or later, for almost all citizenship rights. The second motive is closely connected with immigrant countries' interests. According to Martin Ruhs and Stephen Castles many Western states contemplated before the 2008 global economic crisis the possibility of reintroducing migrant worker programs. In times of crisis the attractiveness of such programs may be indeed lower,<sup>78</sup> but even in such situation high-income states still need temporary workers for the reasons quoted in the last chapter, like dirty and demeaning jobs that are refused by natives. So as long

<sup>74</sup> A broader definition of 'interest,' which includes the interest to be seen as creating 'codes of conduct' and promoting 'standards of civilization' (Goldsmith and Posner 2005: 128), would need to be drawn on here.

<sup>75</sup> As I have pointed out above in note 72, it is true that some of them, as Mexico, Argentina and Turkey have already become (and others are on the way of becoming) countries of immigration. But it is interesting to see how they would fulfil their international duties once immigration becomes a serious political domestic issue.

<sup>76</sup> For a general discussion of the *Gastarbeiter* program see Rist (1978) and Chin (2007).

<sup>77</sup> For a general discussion of the *Bracero* program see Reubens (1986).

<sup>78</sup> I would like to thank Anna Triandafyllidou for drawing me attention on the potential changes at the international level regarding temporary migrant programs in times of economic crisis (personal communication on file with the author, November 2013).

as there is a strong demand for them, *temporary migrant workers* may continue to come even if governmental-sanctioned temporary worker *programs* are terminated for political and economic reasons. Since these countries' governments are very much aware of the slogan 'there is nothing more permanent than temporary foreign workers', signing a convention that severely restricts their policies regarding the treatment of non-citizen residents is something that states are not ready to engage in (Ruhs 2005), (Castles 2006). The third reason is that there is an increase rather than a decrease in demand at the international level not only for foreign workers (within immigration states) but also for more temporary worker programs (within emigration states). Another reason is that in spite of many NGOs activities, there are no conditions yet for a major shift in our moral thinking, and the struggles for migrant workers' rights are not powerful enough in order to be able to change immigrant states' behaviour. And finally, there is no pressure – regarding migrant workers' rights – at the international level similar to that raised immediately after the Second World War regarding general human rights, which resulted in the proclamation of the 1948 Universal Declaration of Human Rights.

In conclusion, I claim that migrant workers' rights are probably not going to be enhanced at the international level in the foreseeable future because of the impossibility of accommodating in this specific case state sovereignty and international institutions. Even if most countries accepted some limits on their sovereignty, as the general observance of the *non-refoulement* principle shows, there are specific reasons – some of them discussed above in detail – for which further limits on sovereignty are not likely to be welcomed. True, today 'it is no longer acceptable for a government to make sovereignty claims in defence of *egregious* [my emphasis] rights abuses' (Simmons 2009: 3). But short of being '*egregious*,' any rights abuse which is not gross enough *can* be defended by making such claims. The fact that the *Migrant Worker Convention* has not been signed yet by any major immigration country fits well in this logic.

#### **4.3. The 'rights versus numbers' dilemma**

If in the international legal system it is difficult to predict a change in migrant workers' rights in the foreseeable future, maybe we should turn our attention to the main actors' perspectives. The present section discusses the host states' viewpoint, while the next one takes into account temporary workers' specific point of view. From the immigration countries' perspective there are moral dilemmas that can appear irrespective of the social and temporal context. Generally, all these dilemmas are more or less instances of one major conundrum: when a receiving polity's interests and migrants' interests clash,

which one should take precedence? Is it morally acceptable to restrict individual persons' opportunities because of a liberal democracy's legitimate concern with formal equality?

An instance of this major conundrum, called the *rights versus numbers* dilemma, is based on the claim that integration of immigrants involves economic, social and cultural costs.<sup>79</sup> If these costs are too high, immigration can put pressure on the welfare state, on states' capacity to maintain public order, and it may in principle lead to rapid cultural disruption (Bader 2005), (Fine 2014, forthcoming). Of course, this claim has been challenged from many points of view. For example, Jordan and Düvell argue that from the economy's perspective in the case of migration, benefits outweigh costs both in the case of host and in that of origin countries. According to them, if we presuppose that the migrant herself fulfils her goals, then immigration can be a win-win-win situation (Jordan and Düvell 2002). However, things may not be that simple. It is not easy to measure, let alone compare, the real economic costs of world migration. True, remittances can be an engine for development, but they can also cause inflation and can increase the developmental gap between sending and receiving countries (Miller 1986).<sup>80</sup> Even if remittances have no negative effect, it is still difficult to weight them against the negative effects of brain drain. It is not my intention here to make a definitive argument that migration has costs, hence immigration controls are acceptable, and the dilemma between rights and numbers is valid. I rather want to argue that the costs are reasonable enough in order to make this dilemma a real subject of concern.

Let us then return to the argument that unrestricted immigration can jeopardise states' capacity to maintain viable social institutions and programs, public order, and protection against rapid cultural change.<sup>81</sup> If this is correct, then some immigration restrictions based on consequentialist arguments (taking into account immigration's effects on the host states) are justified.<sup>82</sup> For example, restrictions can refer to already over-populated areas, and temporary migrants can receive work permits only for those economic sectors where demand for labour exists – and not for those characterised by high rates of unemployment. Restrictions can be made on other reasonable grounds like housing capacities or, as we have already seen in the last chapter, general welfare state capacities. One standard counter-

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<sup>79</sup> The major statement of this conundrum is by Martin Ruhs, according to whom the dilemma is not a trade-off for receiving states, but for migrants themselves: either many can get admission to weak rights positions or few to strong rights positions (Ruhs2005). I decided to discuss this dilemma in Bader's and Fine's formulation, since the decision is always taken by governments.

<sup>80</sup> For the counter-argument which emphasizes that there is no evidence that remittances have created inflationary pressure in the development of Asian countries see Stahl (1986).

<sup>81</sup> For a discussion about reasonable motives for immigration control see above section 3.4.

<sup>82</sup> This implies of course that other immigration restrictions based on non-consequentialist grounds like ethnic or nationalist homogeneity are unacceptable.

argument here is that temporary workers and immigrants in general do not put pressure on the welfare system since they – just like native workers – pay all their taxes. This may be true, but we also have to take into consideration migrant workers’ dependants – their spouses, and children. If the spouse cannot be employed, or simply cannot find work, she needs social services. Furthermore, children must go to school. If immigration is unrestricted, then it is reasonable that situations like these will put pressure on the welfare system. This is especially the case when migrant workers earn less than natives – or less than the alleged native worker would have earned, had she accepted the job.

Another standard argument here is that in order to solve this welfare state problem the government should guarantee equal pay for equal work to both native and migrant workers. The argument can also be made for equal working conditions, equal social housing, and so on (Carens 2008b), (Mayer 2005). The argument has of course not been used in order to restrict immigration, but to support equal rights for native and migrant workers. But the claim misses the point, since making migrants’ wages identical to those of native workers would not solve the problem, because of two principal reasons. Firstly, such a policy would undermine the very reasons for implementing a temporary foreign worker program: had the employers been obliged to hire migrant workers on contractual terms identical to those they must offer to natives, they wouldn’t have demanded migrant workers in the first place. Some may be very happy with this proposal, which would terminate the need for such programs, but the scholars who support labour migration as a way of alleviating at least a small part of global poverty might disagree. The second reason for which the above rejoinder does not bite is that the presupposition according to which ‘there are no jobs for which [native] workers cannot be found if the pay is high enough’ (Carens 2008b: 432) is at best unfounded. Even if salaries are significantly – but also reasonably<sup>83</sup> – increased for 4D (dirty, dangerous, demeaning and demanding) jobs, it is doubtful that native workers would necessarily agree to do them. This is because, from the conceptual point of view, dirty, dangerous, demeaning and demanding jobs are not necessarily identical with low-paid jobs. Even increasing significantly wages for current 4D jobs, they will still remain at least dirty, dangerous and demanding (if not also demeaning), since more money does not necessarily mean added social and cultural value, and many native workers may still refuse to accept them.

So it is clear that if states want to accept migrant workers, they must be ready not only to enjoy the benefits, but also to pay the costs. And these costs may be quite high for a host country committed to liberal-democratic values. If such a state accepts migrants, it must be able to set them on the path to

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<sup>83</sup> This is an important caveat. Of course it may be the case that even a celebrated university professor would quit her job and prefer to wash dishes in a restaurant for three million US dollars per month, but the example is not only too far-fetched, but also ridiculous.

full citizenship rights, if the residence threshold is reached. However, non-liberal democracies do not have such a problem. As we will see in the next section, when a state is not committed to the idea of equality of individuals as human beings – and maybe not even to the idea of equality of citizens – then it can accept large numbers of migrant workers. The latter will not put pressure on states' capabilities as long as their rights are severely restricted. For example, they may not have the right to bring their families to the receiving country, they may have restricted access to social services, etc. But this amounts to creating a caste-like system. Indeed, permanent partial citizenship without the possibility of acquiring full citizenship rights amounts to establishing such a scheme (Bosniak 2006). We could confidently say about temporary workers in these polities that '[while] they are guests, they are also subjects. They are ruled, like the Athenian metics, by a band of citizen-tyrants' (Walzer 1983: 58).

As a consequence, it seems that the choice a polity faces is between restricting numbers in order to offer more rights – an option usually selected by Western countries – and, as we will see in the next section, restricting rights in order to admit more temporary workers – preferred by immigrant-receiving polities like Hong Kong and Singapore. The crucial point I want to underline here is that it is not obvious that the moral, liberal-democratic solution is either better or more desirable than the non-liberal, undemocratic one. Firstly, to use Bell's realist assessment, the Asian example demonstrates that migrant workers leave poor but fairly democratic states in order to work in wealthier, undemocratic countries – and it seems they fare better in the latter. A lack of democracy seems beneficial for foreign domestic workers also for another reason: had natives, especially employers, the chance to vote for their representatives, they would have favoured policies more disadvantageous for temporary workers' interests. Conversely, as long as politicians are not compelled by a democratic decision-making process to satisfy the general public's preferences, foreign domestic workers enjoy some level of protection, low as it may be (Bell 2005).

Secondly, what seems the right thing to do *prima facie*, at a closer look may not necessarily represent the right action required by justice. Howard Chang formulates the same dilemma between rights and numbers as 'the immigration paradox:' liberal democratic states take for granted the moral principle that, once accepted, guest workers must be given equal rights. But the impossibility of offering equal rights to large numbers is the reason that guest workers are not accepted in the first place. In other words, concern for the well-being of temporary migrants makes liberal democracies accept fewer migrants, thus rendering their situation worse than it would have been, had host states accepted them and offered them fewer rights. But 'this moral stance is unsatisfactory from the standpoint of human welfare. The liberal who prevents a poor alien from escaping poverty while citing

principles of justice and equality for that alien seems vulnerable to the charge of “superstitious «rule worship»” (Chang 2011: 97).

If this is the case, then the choice is between two evils, guest-worker programs being one evil and exclusion the other. Both Bell and Chang consider that accepting more temporary migrant workers while restricting their rights is clearly a better alternative than largely closing borders to immigrant labour. This alternative is ‘better’ because immigration states may have to somehow solve a dilemma between their commitment to equality and the moral duty to alleviate the world’s poverty. Since according to the quoted authors the last quest is more important, the problem of rights versus numbers should be solved by immigration states in favour of numbers, and temporary migrants’ rights may thus be restricted. However, none of these scholars offers guidelines regarding the extent of such restrictions.

#### **4.4. Should migrant workers’ rights depend on their own preferences?**

Let us turn our attention now to temporary migrants’ own preferences. From this point of view the solution may be to design different system of rights that depend either on their own predilection for higher income over stronger rights, or on their social spaces of references. This section intends to investigate both proposals.

According to the first suggestion, there is no moral problem in having different practices regarding temporary migrants’ access to rights in different parts of the world. Bell argues that Canada may legitimately accept few temporary workers while setting them on the path to full citizenship, and Hong Kong may also legitimately admit large numbers of temporary workers while denying them many social, economic and political rights (Bell 2005). Bell makes his argument in four steps. Firstly, he takes into account the personal concerns of temporary workers and reveals that in some Asian countries they do not see the problem of equal rights as their most pressing issue. Quite the contrary, they are usually worried about other, more pressing subjects: they fight against the idea of limiting their work to eight hours a day, against cutting wages in time of crisis, and against the ‘two-week rule’, according to which if they lose their job they must go home as long as they don’t find employment in two weeks. Secondly, Bell claims that in some parts of the Asian continent lack of democracy benefits temporary workers: some of them leave democratic countries in order to work in autocratic but wealthier states; in some minimal democratic countries temporary workers fare worse than in dictatorial regimes; and, finally, lack of democracy may be beneficial for temporary workers since in

some states if employers would have the chance to vote for their decision makers, they would prefer policies that go against migrant workers interests, and politicians would also favour their constituency and not migrant workers' concerns.

In the third step Bell accepts that ideally migrant workers should be given equal rights, but still claims that some counter-arguments have their own merit. Migrants consented to come to the host state (and such a consent cannot be compared with selling oneself into slavery); in some undemocratic states citizens would not agree with extending migrant workers' rights as long as their own rights are restricted; sometimes, as we have already seen, it is not clear that the rights versus numbers dilemma should be solved in favour of rights; and finally global poverty reduction may be better served through migrant workers programs than through idealistic arguments like increasing foreign aid. Finally, Bell argues that cultural characteristics must also be taken into account. Unlike citizens in the western states, Asians consider domestic workers as 'extended family members.' This is the explanation of a lack of demand for day-care centres in Asia: given 'the choice between at-home care for children and day-care, most people seem to prefer the former' (Bell 2005: 57).

A second proposal of taking migrants' interests into account is connected to their social spaces of reference, and is usually referred to as the 'bases of self-respect' puzzle. As we have already seen, migrants are ready to trade off some of their rights for material gains, thereby making vulnerable not only their own position within the host country, but also their prospects regarding savings, possibility of return, family reunification, and so on. The interesting question here is why they are so ready to undertake this bargain. Additionally, we may ask what the normative grounds which make such a trade possible are.

Ottonei and Torresi make an interesting argument according to which temporary migrants' self-assumed vulnerability undermines liberal egalitarian ideals (Ottonei and Torresi 2012). The problem is complicated by the fact that the standard solution (i.e., offering them more rights) fails. Interestingly enough, this shows that even if the dilemma discussed above between rights and numbers can be solved, this does not necessarily imply a solution to the problem of migrant workers' vulnerability. And the standard solution fails because even if these individuals formally enjoy equal rights, they would still be ready to trade them off (as shown by the case of EU citizens from new member states who trade off their rights under pressure to secure employment in the 'old' member states' segmented labour markets).<sup>84</sup> This is because liberal democracies presuppose an identity

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<sup>84</sup> I would like to thank Anna Triandafyllidou for drawing my attention on this point (personal communication on file with the author, November 2013).

between the political space of rights and the social space of self-respect: for their citizens, equal political rights represent the *sine qua non* condition for their ‘right to pursue their own happiness and life plans’ (Ottonelli and Torresi 2012). However, this is not the case of temporary migrants. In their situation, there is no match between the social and political spaces. Their bases of self-respect are situated in the origin country: their migration project is intended to improve their life plans *at home*. However, the political space of equal rights is situated in the *host state*. Since these two spaces are disconnected, the trade-off becomes possible. Migrants are simply ready to trade temporarily some – arguably, many – of their rights in order to improve their future condition at home.

However, this creates a problem for any liberal democracy dedicated to the principle of individuals’ equal standing. The choice is between letting temporary workers pursue their plans and thereby abdicating the principle of equal standing, on the one hand, and upholding this principle which means to disregard migrants’ life plans, on the other (Ottonelli and Torresi 2012). We face again the conflict between the public interest and migrant workers’ interests. Like Bell and Chang, Ottonelli and Torresi support a solution which gives more weight to temporary workers’ concerns. In this case, ‘the more ambitious goals of social equality’ should be given up in order to make room for a more complex notion of ‘equality based on special status’ which is supposed to be more sympathetic to migrant workers’ plans.

However, neither of these authors further develop their normative solution for this unresolved dilemma in the standard liberal approach: which rights can be traded off, and for how long such a bargain is acceptable? What rights could be lowered for the sake of better immigration opportunities and higher remittances for country of origin populations? No author seems able to provide the necessary tools to impose limits on what can be traded off by foreign temporary workers when their interests collide with those of a liberal democratic host country.

#### **4.5. What can be negotiated and what cannot be traded off?**

We have thus to know what can be negotiated and what cannot be traded off. In her book on *Limits of Citizenship*, Soysal makes a useful distinction between *citizen rights* – based on state sovereignty and on the view of the individual as a member – and *human rights* – based on transnational society and on the view of the individual as a person (Soysal 1994). Against Bell’s proposal one could argue that human rights should be imposed on states irrespective of local practices. The prohibition of genocide

may be a good example that such top-down impositions are feasible at the international level in spite of the sovereignty doctrine.

However, one could also reasonably argue that it is permissible for states to tolerate temporary workers as ‘partial citizens’ and to allow them a ‘margin of trading off’ their rights as residents, as long as their consent is acknowledged, the possibility to leave is not only formal but also substantive, and their human rights – and possibly other crucial social and economic rights – are safeguarded. Bargaining some social or political rights (if we look at the problem from a migrant workers’ perspective) or denying such rights to a class of residents (taking the host country’s point of view) is permissible only as long as human rights are not affected by the trade-off and as long as this bargain or denial is *temporary*. Since the resident-based theory of citizenship I am defending claims that citizenship should be accessed after three years of residence in the host state’s territory, the logical consequence is that such a bargain cannot be accepted for a period of time longer than three years. The host state is thus responsible to either limit temporary workers’ contracts to less than three years, or to put them on the path to citizenship once the requirement of three years of residence is fulfilled.

The *temporary* character of this transaction is important not only for immigrants themselves, who otherwise would be transformed in a class of ‘metics’ ruled by a ‘band of citizen-tyrants’ (Walzer 1983), but also for the immigrant-receiving polity, for two main reasons. First, by accepting only short-term departures from its liberal-democratic values based on foreign workers’ special status and taking seriously into consideration their own projects, such a polity can consistently uphold its values and, at the same time, recognise that it may temporarily bypass them when other more important moral values are at stake. Secondly, even such a temporary bypassing can be tolerated only as long as the number of partial citizens is low: if sidestepping political rights were permanent and the numbers of long-term partial citizens large, a liberal democracy accepting this situation would face dramatic decline. Indeed, as Bauböck argues using his ‘hypermigration’ model, in a world in which ‘in most countries a majority of citizens would be non-residents and a majority of residents would be non-citizens [...] the impact on democracy would be quite dramatic’ (Bauböck 2011: 684).

However, the most difficult questions here are: what are the limits to individuals’ free choice? How much can they bargain? Which rights can be traded off for material benefits, and for how long? It is probably difficult to say at this moment (so further normative work is needed) who decides what these other crucial social and economic rights are and on what basis one decides that.<sup>85</sup> For example,

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<sup>85</sup> I would like to thank Joseph Carens for drawing me attention on this point (personal communication on file with the author, October 2013).

one may argue that an international convention or maybe even each state may decide minimum standards that must be acknowledged besides human rights, and may set a limited package of rights that can be negotiated by employers and employees. It is difficult to outline here such a project. However, one thing is clear. Ever since John Locke (Locke 1690),<sup>86</sup> Immanuel Kant (Kant 1785) and John Stuart Mill (Mill 1859),<sup>87</sup> it is obvious that freedom of will cannot justify unlimited power to negotiate a contract. Selling oneself into slavery cannot be a morally valid action even if one freely consents to it.

This view is also embedded in international human rights instruments. For example, art. 3 para. a) of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children* lists slavery as one category within the broader term of ‘exploitation,’ while the latter notion is defined as the purpose of trafficking. Further, art.3 para. b) clearly states that the consent of a victim is irrelevant even if – as stated in the preceding paragraph – the consent was achieved as a consequence of receiving of payments or benefits.<sup>88</sup> However, it is extremely difficult to define what slavery is: when can a practice be considered as slavery? In a paper exploring the anti-slavery project, Quirk notes that

‘[...] it can often be difficult to say whether the term is being invoked literally or rhetorically. Behind this conceptual ambiguity is an underlying model, which maintains that particular practices can be equated with slavery when they cross a certain threshold and are sufficiently horrendous and/or analogous to be classified as such. This model is at the heart of contemporary slavery, but it is not always clear where this threshold applies, or whether it should apply in one case but not another [...]’ (Quirk 2006: 578)

Indeed, it is difficult to say where the threshold lies between trafficking and forced labour, on the one hand, and smuggling and indentured migration, on the other. While the former always imply overt coercion and can be easily termed as slavery, the latter examples may or may not imply such practices.

The threshold problem brings us back to migrants’ agency and interests. Because Bell, Chang, Ottonelli and Torresi support locally-negotiated practices regarding migrant workers’ rights, their perspectives avoid the line of criticism according to which foreign workers are presented with an

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<sup>86</sup> See Chapter IV. *Of slavery*.

<sup>87</sup> See Chapter V. *Applications*.

<sup>88</sup> United Nations, *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children*, 2000, available at [http://www.uncjin.org/Documents/Conventions/dcatoe/final\\_documents\\_2/convention\\_%20traff\\_eng.pdf](http://www.uncjin.org/Documents/Conventions/dcatoe/final_documents_2/convention_%20traff_eng.pdf) (accessed 14 April 2011).

already-designed contract offered on a ‘take it or leave it’ condition (Bauböck 2011). In practice, this happens in many Western immigrant-receiving countries but not, as Bell emphasised, in some Asian polities like Hong Kong where many associations for the protection of foreign workers’ rights are constantly negotiating wages, immigration laws such as the two-week rule,<sup>89</sup> and so on. Of course, I am suggesting neither that the organisational support for migrant workers is stronger in Asian polities like Hong Kong than in Western states, nor that the presence of NGOs renders legitimate the polices against which they are protesting. I am only trying to show that in some Asian states, migrants’ agency may be (for better or for worse) exhibited in ways it is not in the Western states, and incidentally this does not go against migrants’ own plans.<sup>90</sup> The attractiveness of such a perspective is given by its capacity to account for both migrants’ and governments’ agency, thus not only resurrecting the consent theory in political philosophy, as we will see in the next section, but also – and more importantly – turning attention from liberal democracies’ own concerns regarding equal rights to temporary foreign workers’ interests.

#### **4.6. Temporary workers and the consent theory of political obligation**

The argument regarding migrants’ bargaining capacity has an implication not entirely made obvious by its proponents: by turning our attention from the public interest of host countries to temporary migrants’ projects, we cannot avoid the latter’s agency. Usually concerned with liberal and democratic values in Western liberal democracies, political philosophers tend to forget, or at least to minimise, the choices individuals make within a polity. This attitude is not necessarily odd, since apart from Locke few major liberal theorists really took seriously the consent theory of political obligation. In this philosophical domain the main questions are what exactly grounds a moral duty to obey the laws of one’s state and how a person acquires such an obligation. According to the consent theory (and contrary to other contemporary theories of political obligation based on other singular principles like gratitude, fair play, association, or natural duty), citizens must obey a polity’s laws because they accepted to live on that polity’s territory. However, since no citizen ever ‘actually’ (i.e., conscientiously and formally) consents to her state’s laws, today political philosophers generally agree that consent can be neither a principle for individuals justifying their duty to obey political authority’s

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<sup>89</sup> See above, section 4.4.

<sup>90</sup> I would like to thank Joseph Carens for drawing me attention on this point (personal communication on file with the author, October 2013).

laws(Simmons 1979), (Klosko 1991), nor a principle for political associations justifying their character as voluntary associations (Fine 2010).<sup>91</sup>

However, new developments which have taken place both in the real world and in immigration theory and citizenship studies may offer new grounds for reviving the consent theory. The increase in the number and the speed of means of transportation, low fares, greater accessibility, the development of tourism and structural needs of various labour markets and economic systems have allowed people to move faster and more often. According to some estimates, in 2008 there were over 200 million interstate migrants worldwide; that is, over 3 percent of the world's population.<sup>92</sup> In some Western European countries the share of immigrants is between five and ten percent of the total number of citizens, and in Germany more than fifteen million people have an 'immigration background'.

What these developments show is that people are increasingly *choosing* their country of residence and they are doing this intentionally, knowingly, more or less voluntarily, and in spite of all the difficulties generally associated with the act of emigrating or of those linked with the reality of competing loyalties. All individuals who emigrate and apply for another country's citizenship can thus be seen as *consenting* to the authority of the political power of the host society. If this view is correct, then two consequences need to be taken into account. First, the consent theory of political obligation is back in philosophical business. True, it cannot justify the obligation of all citizens of a state – especially of those who did not openly consent – to comply with that state's laws. However, it is not clear why a single principle should account for political obligations of all types of members: the compliance with a state's laws may be justified by different principles for different categories of citizens. If this is true, consent theory can account for political obligations of at least three large groups of individuals: irregular immigrants, temporary workers and dual citizens.<sup>93</sup>

Some people disagree on this point. Joseph Carens, for example, believes that this is not self-evident and offers the usual example used against the consent theory: 'if a robber says "your money or your life" and you give him your money, have you consented?'<sup>94</sup> Carens is thus worried about the underlying legitimacy of the political and social orders within which individuals have to make choices. However, unlike native citizens, a migrant's situation is not best explained by the robbery example.

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<sup>91</sup> The most important recent defences of consent theory are offered by Beran (1987) and Altman (2009).

<sup>92</sup> United Nations, Department of Economic and Social Affairs, Population Division 'International Migration Report 2006: A Global Assessment ', <[http://www.un.org/esa/population/publications/2006\\_MigrationRep/report.htm](http://www.un.org/esa/population/publications/2006_MigrationRep/report.htm)> (accessed 30 June 2013). See also Abizadeh (2010).

<sup>93</sup> Of course this is not true for dual citizens *by birth* who never consented to either of their citizenships. However, in the next chapter I support the view that, according to the residence-based theory of citizenship I am defending, dual citizenship should not be accepted since citizenship must be linked to residence.

<sup>94</sup> Personal communication on file with the author, October 2013.

Any migrant makes plans before leaving her origin state, and she also reflects on which country she would like to move to. Unlike a native-born citizen, the migrant has a list of options regarding accessible host countries, and this makes her choice valid. It may not be a perfectly unconstrained choice, but it is still an authentic one. And what Carens calls the ‘underlying legitimacy of the political and social orders within which individuals have to make choices’ is a problem for the home country (the country where the migrant usually makes her choice), not for the host country where the migrants want to arrive.

The second consequence is that consent is not only a principle justifying some categories of citizens’ duties to obey the law; it also becomes *a principle of inclusion into the demos*. As one author puts it trying to make a stand against the idea of *automatic / mandatory* acquisition of citizenship (Rubio-Marín 2000), ‘naturalization can be either discretionary or an entitlement, but *it always depends on the active consent* [my emphasis] of the person to be admitted’ (Bauböck 2003: 150). Indeed, for both temporary and permanent migrants the contract theory and the consent it presupposes – the consent of both the migrant and the host state – can be seen as principles of membership. For example, a sociologist observes that ‘every foreigner that is admitted to reside in France for the first time or that has entered France regularly between the age of 16 and 18 needs to sign a “reception and integration contract”. This contract makes provisions for civic training and, if necessary, language education’ (Courau 2009: 14).

Sociologists as well as economists have supported the link between migration and consent, even as philosophers have rejected it. Criticizing the neoclassical approach, which tries to explain labour migration using ‘push’ and ‘pull’ factors, or ‘in terms of wage-rate-differentials and unemployment-rate-differentials’ (Straubhaar 1986: 852), one author proposes a demand-determined approach which takes demand for foreign labour in the host country as the sufficient condition, and the ‘migration-willing workers’ as the necessary condition for labour migration (Straubhaar 1986: 835). Taking a ‘migrant’s projects’ point of view, like Ottonelli and Torresi, and connecting it with the rational choice theory, Straubhaar enlists some elements which are involved in an individual’s decision to migrate to work in another country: the costs related to migration abroad; profession-specific factors (sometimes subjective evaluation of the job can override higher salaries); expectations regarding return and employment in the origin country; availability or lack of information regarding conditions in the host country; the personal degree of risk-aversion; the evaluated risk of remaining unemployed in the receiving state; and so on (Straubhaar 1986: 838-839). Migrants’ agency in explaining the causes of labour migration is crucial: it elucidates why labour migration does not occur at a much higher scale, as

the neoclassical approach emphasizing only push and pull factors or differences in wages and unemployment rates between wealthy and poor countries would seem to imply.

What is important to stress is the fact that Straubhaar lays emphasis not only on migrant workers' consent, but also on the receiving polity's will. The author explicitly says that 'if no government wants to admit foreign workers, no international labor migration will occur' (Straubhaar 1986: 853). The host country's consent plays an important role for other scholars too. Although he accepts the 'free choice of the migrant', Penninx quotes Bohning (Bohning 1981) and considers that

'we do not start from the assumption that the "free choice of the migrant" explains all migration phenomenon: in the context of international (labor) migration the "free choice" of the migrant is largely determined by and dependent on regulations set by the receiving industrial nations, which draw a borderline around themselves over which non-belongers may not step without explicit or tacit consent' (Penninx 1986: 961).

All of the above seem to imply that both host polity's *consent* and temporary foreign workers' *free choice* play a crucial role in explaining both international labour migration and migrants' inclusion in the receiving society. If this is correct, then further normative work is needed in order to fully develop a new role for consent theory in the field of political obligation. This section only tried to illustrate the main directions of such a development and how could one get together migration theory and political obligation.

#### 4.7. Conclusion

The importance of these considerations on migrants' agency is crucial especially in our time. In 1978 Ray C. Rist wrote in his book on *Guestworkers in Germany*: 'To build and firmly establish the legitimacy of a multicultural society stands as perhaps the preeminent challenge to Germany today' (Rist 1978: xiii). On October 2010, 32 years later, German Chancellor Angela Merkel declared that 'attempts to build a multicultural society in Germany have "utterly failed,"'<sup>95</sup> and that 'immigrants needed to do more to integrate – including learning German.' Other European leaders followed suit. In Munich on 5 February 2011, British Prime Minister David Cameron declared that in the UK 'state

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<sup>95</sup> 'Merkel says German multicultural society has failed', BBC news, 17 October 2010, available at <http://www.bbc.co.uk/news/world-europe-11559451> (accessed 2 April 2011).

multiculturalism has failed;<sup>96</sup> five days later French President Nicolas Sarkozy said that multiculturalism was a “failure,” warning that such a concept fostered extremism.<sup>97</sup>

Rists's call for multicultural policies was meant to come as an appropriate answer to the fact that Germany became a multicultural polity as a result of its ‘guest worker program.’ In this author’s view, since so-called temporary workers had already permanently settled and were economically perfectly integrated, denying social and cultural integration would be an unacceptable policy. A few years later, exploring the case of Sweden as a happy exception from the European *Gastarbeiter* program, Thomas Hammar went even further and warned that ‘[i]f many foreign workers are excluded from political participation over a long period of time, the legitimacy of the political system is endangered’ (Hammar 1985).

In the context in which all high-income countries openly or tacitly accept migrant labour and if after the economic crisis which began in 2008 some of these countries will consider to reintroduce state-sanctioned temporary foreign worker programs, the above declarations of the German Chancellor, French President and British Prime Minister are not only detrimental to multicultural policies *per se*. By moving from one extreme (accepting permanent second-class citizenship of migrant workers in the 1970s and beyond) to the other one (forced assimilation and integration) they are also detrimental to every future migrant because they destroy the most important insight revealed by authors like Bell, Chang, Ottonelli and Torresi; namely, temporary migrants’ agency, and their freedom to negotiate an equality based on special status (Ottonelli and Torresi 2012).

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<sup>96</sup> ‘State multiculturalism has failed, says David Cameron’, BBC news, 5 February 2011, available at <http://www.bbc.co.uk/news/uk-politics-12371994> (accessed 2 April 2011).

<sup>97</sup> ‘France’s Sarkozy: Multiculturalism Has Failed’, CBNNews.com, 11 February 2011, available at <http://www.cbn.com/cbnnews/world/2011/February/Frances-Sarkozy-Multiculturalism-Has-Failed/> (accessed 2 April 2011).

## Chapter 5. ‘Citizens-Plus’ (1): Multiple Citizens

*‘Perhaps the most clearly justifiable restriction on naturalisation from a liberal democratic perspective is the requirement that those applying for naturalisation renounce any other citizenship they possess. It is justifiable because it fits with a vision of a democratic community as one in which the citizens have a mutual and exclusive commitment to one another, and it does not violate any liberal democratic principles’ (Carens 1989: 47)<sup>98</sup>*

*‘... despite academics’ interest in – and, in some cases, concern with – dual citizenship, the vast majority of immigrants care little about their access to multiple political memberships’ (Bloemraad 2007: 174-175)*

*‘... [r]ecent events and trends have led me to think that plural citizenship is not as unproblematic as I once thought it was’ (Liebich 2010: 29)*

### 5.1. Introduction

The majority of states acknowledge today one form of multiple citizenship<sup>99</sup> or another (Faist 2007d). This liberal trend is remarkable, given the fact that just a few decades ago the international community was struggling to limit the incidence of membership in more than one political community. Although many theorists welcome and celebrate this development both as a big step on the road towards a post-national world and as an increasing acceptance of liberal values by the international community (Benhabib 2007), this chapter intends to stop the cheering for a minute and ask in a sceptical tone about both normative justifications and practical advantages of multiple citizenship.

The second section briefly surveys the causes of multiple citizenship and the developments that have triggered its wide acceptance at the international level. After understanding how such a status occurs and why it is accepted, I ask why plural citizenship is supposed to be so desirable in the first place. My claim here is that at all the levels implied – the sending state, the receiving polity, and the individual – advantages are either rather more imagined than real, or they can be achieved through more convenient means. Moreover, when assessed against the practical, legal and political difficulties it raises, multiple citizenship does not seem to be justified. However, since such shortcomings can be – and some of them already have been – corrected through international treaties, plural citizenship might be accepted if it can also be normatively defensible.

<sup>98</sup> Meanwhile Carens has changed his view on dual citizenship and now claims that toleration is a matter of justice – see for example Carens (2014, forthcoming).

<sup>99</sup> For the purposes of this chapter I use the expressions ‘multiple citizenship’, ‘plural citizenship’, ‘(formal) plural/multiple membership’ and ‘dual citizenship’ interchangeably. However, as I explain later in section three, I consider these notions as being distinct from the notion of ‘multiple/plural/dual nationality’.

The third section discusses the most important moral objection against multiple citizenships: that it violates the democratic principle of citizenship equality. I claim that the nature of such infringement is both economic – enjoying social benefits without contributing to the welfare scheme – and political – multiple voting, external voting, and the availability of an exit option that mono-citizens do not have. The conclusion is that plural citizenship as such goes against the democratic principle of citizenship equality and thereby is not normatively justified. But if this is the case, then how can we account for the official recognition of individuals' ties to multiple communities?

The fourth and final section asks who has a claim to membership in a polity in the first place. I discuss the principle of genuine link and support a radical interpretation of the 'stakeholdership' principle, according to which 'genuine link' must be understood in the restricted sense of residence. If this is correct, then the need for dual or plural citizenship disappears. However, I accept that individuals may have cultural, ethnic and affective ties to more than one polity. But the question is whether such ties must necessarily be officially recognised through citizenship. My answer is negative. I finally make a distinction between citizenship and nationality and claim that while citizenship should be exclusive and restricted only to the state of residence, multiple nationality is non-exclusive and 'ethnic' and / or 'cultural kins' may enjoy preferential treatment by their kin states but should not be offered access to kin states' citizenship status.

## **5.2. How multiple citizenship occurs and why is it desirable**

### **5.2.1. How multiple citizenship occurs**

Let me begin by asking first how dual citizenship status occurs. This has yet to be explained, since the fact that multiple citizenship has flourished is rather a puzzle as long as several elements of international law clearly express a norm against it. During the second half of the 19<sup>th</sup> century (see, for example, the Bancroft Treaties)<sup>100</sup> and almost the entire 20<sup>th</sup> century states struggled to stick to the principle of 'one citizen, one state' (Triadafilopoulos 2007). International conventions against multiple citizenship include, among others, the 1930 Hague 'Convention on Certain Questions Relating to the

<sup>100</sup> The Bancroft treaties are contracts signed in the 19<sup>th</sup> and 20<sup>th</sup> centuries between the United States and other countries, which 'recognized the right of each party's nationals to become naturalised citizens of the other; and defined circumstances in which naturalised persons were legally presumed to have abandoned their new citizenship and resumed their old one' (source: Wikipedia, [http://en.wikipedia.org/wiki/Bancroft\\_Treaties](http://en.wikipedia.org/wiki/Bancroft_Treaties)). According to Spiro, under 'the Bancroft agreements (...) individuals returning to reside permanently in their countries of origin would revert to their original nationalities' (Spiro 2011: 708).

Conflict of Nationality Laws', the 1930 League of Nations' three conventions (on 'Military Obligations in Certain Cases of Double Nationality', on 'Special Protocol Concerning Statelessness' and on 'Certain Case of Statelessness'), and the 1963 Council of Europe's 'Convention on the Reduction of Cases of Multiple Nationality'. At the national level, the 1978 decision of the German Constitutional Court which affirmed multiple citizenship is an 'evil' for both states and individuals (Gerdes and Faist 2007a: 151) is a famous example. Briefly put, from the perspective of international relations theory, two points of view can explain this development from a total rejection of multiple citizenship to today's general toleration or even acceptance.

The *liberal* standpoint would probably emphasise the increasing cooperation between states, the development of international institutions and the wide compliance with human rights norms. Indeed, the fact that democracies do not wage war against each other has rendered military conscription obsolete and opened the path to building professional armies. For this reason, citizens' loyalty to the state has increasingly been seen as non-exclusive (Triadafilopoulos 2007: 28), (Faist 2007b: 172). The development of international human rights norms such as gender equality has also been another important factor. On the one hand, by disconnecting women's citizenship from that of men and allowing women also to pass their citizenship on to their children, an increasing number of children have been born with dual citizenship. On the other hand, the possibility of citizenship acquisition by marriage allowed the naturalising spouses of either sex to become dual citizens (Faist 2007d: 4), (Koslowski 2003: 160-162).

By contrast, the (*neo-)realist* school of thought in international relations would instead emphasise the lack of coordination among states regarding citizenship policies. Since in its view the world is a stage where the state-actors are competing for power, multiple citizenship is the consequence of this international chaos generated by states blindly and boldly following their own interests. Thus, according to a legal theorist the cause of plural citizenship is 'the interaction of three fundamental maxims:' (a) 'each state decides who its own nationals are;' (b) 'in making those decisions, a given state typically provides alternative, multiple routes to nationality' – i.e., *ius soli*, *ius sanguinis*, and naturalisation; and (c) 'the rules vary from state to state' (Legomsky 2003: 81). But states wanted to further other interests too. On the one hand, new sending countries started to strengthen ties with their emigrants for economic and political reasons (Faist 2007d: 4), (Triadafilopoulos 2007: 28) while historical sending states wanted to maintain post-colonial ties (Koslowski 2003). On the other hand, immigration countries not only came to accept that residence gave rise to a membership claim (Kivistö 2007: 274), (Martin 2003: 5), but they were also interested in sticking to the principle of congruence

between the resident population and the demos (Koslowski 2003: 160-162). Finally, dual citizenship has been considered in some receiving states as an alternative to expanding voting rights to denizens (Faist 2007c: 12-13).

### 5.2.2. Why dual citizenship is desirable: sending states

The increasing tolerance of multiple citizenship might make one think that this status is some sort of good.<sup>101</sup> But what kind of good? And, more importantly, for whom? There are three actors that have to be taken into account here: sending states, receiving countries, and individuals, i.e. the dual citizens themselves. Let me call the ‘traditional view’ the theory which holds that plural political membership is a win-win-win situation – that is, a state of affairs that benefits all the actors involved. Let’s test this perspective. Concerning emigration states, the most cited argument is that dual citizenship can augment their political and economic power (Faist 2007d: 7). In fact, one of the most important reasons for which sending countries have officially accepted or at least tolerated multiple citizenship is that such a move is seen to strengthen ties with their diasporas, guaranteeing thereby the flow of remittances (Faist 2007d: 13), (Kadirbeyoglu 2007: 127). However, studies have demonstrated that this is wishful thinking rather than what actually happens. On the one hand, the flow of remittances decreases as the length of time the immigrant spends abroad increases. On the other hand, multiple citizenship has a perverse influence on remittance flows in the long term, since once the immigrant acquires also the citizenship of the state of residence she can apply for family reunification;<sup>102</sup> and once the family establishes itself in the host state the reason for sending remittances in the first place vanishes (Itzigsohn 2007: 128).

Another reason for which sending polities accept dual citizenship is the hope that, once integrated in the host state, emigrants will lobby for their origin country in the new state of residence (Jones-Correa 2003: 312). But this may prove to be either a non-sequitur, or another example of wishful thinking. On the one hand, it is not clear why multiple *formal* ties are necessary for emigrants to lobby. Indeed, an immigrant – say, in the United States or in Germany – who acquires the citizenship of the state of residence may nevertheless lobby for her origin country, even though she had to

<sup>101</sup> United Nations, Department of Economic and Social Affairs, Population Division, ‘International Migration Report 2006: A Global Assessment’, accessible at [http://www.un.org/esa/population/publications/2006\\_MigrationRep/exec\\_sum.pdf](http://www.un.org/esa/population/publications/2006_MigrationRep/exec_sum.pdf) (last accessed 18 August 2013).

<sup>102</sup> The EU law provides for family reunification rights for Third Country Nationals (TCNs) – since the 2003 family reunification and long-term resident directives – so it is not true that naturalisation is strictly required here. But even in this case, naturalisation often leads to stronger reunification rights.

relinquish her former citizenship. Such an action would depend on purely affective ties rather than on formal status. According to Spiro, there is no evidence that multiple citizenship ‘reinforces state ties’, or that affective ties *necessarily* depend on formal plural membership (Spiro 2007: 193).<sup>103</sup> On the other hand, the evidence concerning immigrants’ desire to keep ties with the origin country is rather inconclusive. If for some immigrants the strength of these ties do not diminishes with time – for example, for Hong Kong immigrants in Canada (Preston, Siemiatycki et al. 2007: 213) – for others they do, or at least strong affective ties do not translate into the need for formal dual citizenship status. For example, when Mexico allowed retention of its nationality upon naturalisation in another state and restitution of nationality for those who were required to relinquish it, few former citizens applied for restoration (Spiro 2007: 193). Some authors claim that only 0.5 per cent of the eligible non-resident former citizens applied for re-acquisition of Mexican citizenship and even less for voting abroad (Jones-Correa 2003: 330). According to Rainer Bauböck, the fact that few apply for reacquisition does not imply that few are interested in preventing citizenship loss in the first place.<sup>104</sup> This is of course true, but we have to make a distinction between those who ‘had an *interest* in preventing the loss’ and those that simply didn’t care whether they keep or lose the citizenship of the former country of residence. It is pretty plausible that those who really had this interest applied for reacquisition, but, as Jones-Correa demonstrated, the percentage is only 0.5. Moreover, this shows again that affective ties do not depend on formal citizenship.

Finally, the last argument maintains that plural citizenship helps spreading liberal and democratic norms, thus improving bilateral relations between sending and receiving countries (Bloemraad 2007: 182). Both claims are contestable on empirical grounds. There is no evidence that liberal and democratic norms are better pursued through dual citizenship than through immigration – and freedom of movement in general – mass-media, or the internet.<sup>105</sup> Moreover, there are many cases of individuals holding both Canadian and Afghan citizenship that have chosen to fight against the Canadian army in Afghanistan (Macklin 2007: 54-57), and of individuals holding both German and

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<sup>103</sup> Some scholars disagree. According to Rainer Bauböck (personal communication on file with the author, 23 April 2013) there is a case when formal citizenship may reinforce emigrants’ ties: for countries of origin the choice is only between granting dual citizenship to those who naturalise abroad or withdrawing their citizenship in this case. It is pretty plausible that the former option will strengthen ties to emigrants *compared to the latter option*. I disagree with this point, since I still find it difficult to understand how a formal status (or the lack of it) would strengthen (or weaken) my affective ties with my place of birth or the people living there (hence, with my former country of citizenship).

<sup>104</sup> Rainer Bauböck, personal communication on file with the author, April 2013.

<sup>105</sup> Of course, someone may object that different factors have different and relative strengths. Toleration of multiple citizenship may be both a result of peaceful international relations, and may also contribute in turn to these. My interest here is only to underline the fact that some believe that dual citizenship is just one – hence not a *sine qua non* – factor that can contribute to improve bilateral relations.

Yugoslav citizenship who fought against the Western coalition – of which Germany was a member – in Kosovo (Legomsky 2003: 117), (Koslowski 2003: 168-169).

As for the supposed improvement of bilateral relations between countries through dual citizenship, the facts reveal quite an opposite state of affairs: plural formal status has rather worsened bilateral relations even in a time when the phenomenon was already largely accepted, as can be seen in the conflicts between Germany and Turkey,<sup>106</sup> Romania and Moldova (Horváth 2010: 34), Hungary and Romania (Varga 2004), and Hungary and Slovakia (Bauböck 2010a), to name only a few cases.<sup>107</sup> It is true that there is little potential for interstate conflict in two constellations where both states involved tolerate dual citizenship or where both don't tolerate it. As a consequence all major conflicts emerge from one state tolerating and the other state rejecting dual citizenship. The question here is whether toleration or non-toleration is the source of conflict in these cases,<sup>108</sup> and the answer probably depends on each case, since the reason for accepting or not accepting this status is linked to historical, political and other types of considerations. For example, as we will see further in chapter seven, in Montenegro dual citizenship is not accepted because of the fear that ‘dual citizenship from among the successor states of the former Yugoslavia (most likely Serbia) would have [...] a high impact on the voting population of the country and their electoral choices’ (Džankic 2012: 8).

### **5.2.3. Why dual citizenship is desirable: host states**

But maybe formal plural membership fares better in relation to receiving countries. The best argument here is that dual citizenship encourages naturalisation of long-term residents, thereby promoting the democratic principle of congruence between resident population and the demos (Faist 2007d: 1), (Gerdes, Faist et al. 2007b: 57). The assumption here is that integration in the country of residence is best promoted if the host polity does not request the potential candidate to relinquish the citizenship of her country of origin. Two remarks are appropriate here: on the one hand, if dual citizenship is to be formally accepted then this cannot be implemented only for immigrants, but also for emigrants. Indeed, countries that accept dual citizenship for one category of migrants but not for the other violate the

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<sup>106</sup> Some might consider that this case does not fit, since Germany does not accept dual citizenship. But acceptance (or non-acceptance) of dual citizenship is exactly the issue here. The conflict started because one country (Germany) does not accept, while the other country (Turkey) does accept dual citizenship.

<sup>107</sup> It is true that the last three cases are all kin-state conflicts, so they cannot be generalized to migration-context cases. However, together with the other conflict between Germany and Turkey, they create an important set of cases where conflicts have been generated by double citizenship.

<sup>108</sup> I would like to thank Rainer Bauböck for raising this objection (personal communication on file with the author, September 2013).

symmetry principle of (non-)toleration of dual citizenship for both immigrants and emigrants. As one scholar puts it, ‘strongly asymmetric policies towards foreign residents in the country and towards a state’s own nationals living abroad’ (Bauböck 2005a: 18) violate the ‘generalizability of policies’ principle for citizenship policies in the international community arena. But if this is the case, then it is hard to understand how dual citizenship is supposed to support the congruence principle<sup>109</sup> – between the resident population and the demos – as long as dual citizenship also implies the existence of non-resident citizens.<sup>110</sup> On the other hand, some claim that dual citizenship is quite the opposite of integration: it delays ‘immigrant adoption of citizenship’<sup>111</sup> (Jones-Correa 2003: 312), it transforms ‘immigrant groups into national minorities’ (Gerdes, Faist et al. 2007b: 61), and it may amount to a ‘balkanisation of a nation’ (Kivistö 2007: 278).

Be that as it may, the relationship between citizenship and integration is heavily debated between the liberal camp – according to which acquiring full citizenship rights helps integration in the state of residence – and the republican camp – claiming that citizenship should be awarded only after the process of integration in the host society is already complete (Gerdes, Faist et al. 2007b), (Hart 2007), (Spång 2007: 114). A study on immigrants in Canada demonstrated that there is no relation between integration and dual citizenship; quite the contrary, ‘the propensity to claim dual citizenship decreases as length of residence in Canada increases’ (Bloemraad 2007: 174).<sup>112</sup> Even a supporter of dual citizenship admits in a study on immigrants in the United States that dual citizenship has ‘positive’

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<sup>109</sup> Bauböck believes that it is not impossible to accept this, if the congruence principle is seen as maximising the inclusion of residents as citizens. This seems to depend on what version of the principle one defends: it could be perfectly possible to say that all one cares about is the maximum inclusion of residents – and this is enhanced by facilitating naturalisation through abandoning a renunciation requirement (personal communication on file with the author, 23 April 2013). However, I understand the congruence principle – between the resident population and the demos – as also having the flip side which requires the exclusion of emigrants.

<sup>110</sup> For the purposes of this chapter, by ‘non-resident citizens’ I mean ‘long-term non-resident citizens.’ Moreover, from the latter expression I exclude diplomats and soldiers, whose residency status comes from actively serving their countries abroad. I further assume that long-term non-resident citizens have also the citizenship of the country of residence, thereby being dual citizens. This is obviously not necessarily the case, so my arguments are not meant to apply to either short-term non-resident citizens or long-term non-resident mono-citizens.

<sup>111</sup> According to Correa, the argument here is that dual citizenship ‘encourages immigrants to retain their ties to their home countries at the expense of deepening their new ties to the country in which they now reside’ (Jones-Correa 2003: 319). Correa also quotes Yang, according to whom dual nationality discourages naturalisation in the United States (Yang 1994: 449): ‘The odds of naturalization of immigrants from countries that recognize dual nationality, he calculated, were about 20 percent lower than those from countries without provisions for dual nationality’ (Jones-Correa 2003: 321).

<sup>112</sup> Some may object here by saying that this is perfectly consistent with the assumption that toleration of dual citizenship leads to earlier naturalisation. Since Canada is the country with the highest naturalisation rates early after immigration, non-toleration of dual citizenship would be very likely to lead to much longer residence periods and those who apply after very long-term residence indeed may care less about retaining a previously held citizenship. This objection can be answered in two ways. On the one hand, if usually long-term residents become indifferent to a previously held citizenship after a number of years, then it is not obvious why they should retain it in the first place. On the other hand, by implementing my proposal of linking citizenship with residence, the danger that non-toleration of dual citizenship could lead to much longer residence periods simply disappears.

but ‘relatively small’ effects on naturalisation (Jones-Correa 2003: 330). Whatever the relation between citizenship and integration, it is important to note that *dual* citizenship has nothing to do with it. On the one hand, it is true that sometimes immigrants – like some Mexicans in the US – prefer not to apply for the citizenship of the state of residence if this also implies relinquishing the citizenship of the home country. But on the other hand, when Mexico offered in 1997 the possibility of reacquisition of nationality for those who had renounce it in order to naturalise in the United States, few really took this possibility (Fitzgerald 2005: 99-100). So the evidence is at best inconclusive.

But this is not unusual. It is interesting to note that there is only one argument which fully supports *dual* citizenship, and that is the argument from freedom of movement. All the other arguments can be reduced to support either immigration or *one* citizenship in the country of residence. For example, the argument that dual citizenship is an alternative to denizen voting (Hammar 1990), (Gerdes and Faist 2007a: 142), (Spång 2007: 106) is not actually an argument for *dual* citizenship, but simply one for *citizenship acquisition in the country of residence*, which may or may not be offered together with the option of retaining the original citizenship. Of course, this claim is valid only from a residence-based point of view; it may not be accepted under other approaches. For example, one may argue that it is not true since ‘denizenship’ is combined with ‘external citizenship’, just as dual citizenship is. In this case, naturalisation under condition of renunciation is not an alternative to denizen voting, since it requires abandoning a core element of denizen status.<sup>113</sup> However, if we understand the citizenship status as residence-based, then the whole concept of ‘denizenship’ loses its meaning.

Far from promoting integration, many academics agree that plural citizenship is desired rather for its instrumental value. Some countries actively promote what has been called ‘economic citizenship,’ such as the ‘highly commodified regime of citizenship in Canada’ (Preston, Siemiatycki et al. 2007: 205). Usually, however, this ‘citizenship of convenience’ is a subject of concern in the host states. Citizens in the Netherlands, for example, fear that ‘immigrants [make] instrumental use of dual citizenship’ (Hart 2007: 91). In Sweden the term ‘citizenship shopping’ was coined (Spång 2007: 113), while similar concerns have been expressed about Moldovans taking Romanian citizenship (Iordachi 2004: 250), and about Macedonians taking Bulgarian citizenship (Bieber 2010: 20). Usually, citizenship is seen in utilitarian terms also by ‘a global economic elite, some of whom obtain second

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<sup>113</sup> I would like to thank Rainer Bauböck for drawing me attention on this point (personal communication on file with the author, April 2013).

nationalities in order to avoid taxes, conceal international movement, and ease travel' (Koslowski 2003: 170).

Whether it is used in an instrumental manner or not, some authors hold that dual citizenship undermines solidarity in the host state. A person not willing to relinquish her former citizenship is seen as downgrading the country of residence to a 'second choice' option (Spiro 2007: 195), which devalues the meaning of citizenship (Jones-Correa 2003: 312). Finally, multiple citizenship is seen in residence states as not only dividing citizens' loyalty, but also as implying a loss of sovereignty through 'the meddling of other countries in the domestic affairs' of the host state (Jones-Correa 2003: 320).

#### **5.2.4. Why dual citizenship is desirable: immigrants**

Since multiple citizenship is not much of a good either for emigration or for immigration countries, could it still be an asset for individuals? That is, could it benefit those who enjoy formal plural membership? The strongest argument here is that dual citizenship enhances freedom of movement in a world in which security concerns greatly constrain immigration and free movement of people. I admit this is the strongest argument. I also believe, however, that there are better and more egalitarian ways of enhancing freedom of movement. One of them is the 'further enlargement of the European space of free movement and the creation of similar unions in other parts of the world' (Bauböck 2011: 681). The latter strategy is more egalitarian since it terminates 'the modern equivalent of feudal privilege' (Carens 2010a: 252) that dual citizens seem to enjoy over mono-citizens. True, this is politically hard to achieve – but normatively it is indeed more attractive and a better way to promote freedom of movement than dual citizenship.

One could object here that if dual citizenship tracks multiple individual stakes in polities, then the allocation of scarce free movement rights through dual citizenship is more just, because less dependent on morally arbitrary circumstances than the allocation through regional unions of states (Bauböck 2009a: 17). However such an objection seems to be based on several undefined notions and claims. Firstly, there is no definition of what an 'individual stake' means. Claiming that

'all those and only those individuals have a claim to membership in a particular polity who can be seen as stakeholders because their individual flourishing is linked to the future of that polity.'

Individuals hold a stake if the polity is collectively responsible for securing the political conditions for

their well-being and enjoyment of basic rights and liberties' (*the dependency criterion*) (Bauböck 2009a: 15)

does not offer an explanation under what *explicit* circumstances an individual's flourishing is linked to the future of a specific polity or under what *precise* conditions the polity is 'collectively responsible for securing the political conditions for their well-being and enjoyment of basic rights and liberties.'

Secondly, this objection offers no explanation as to why free movement rights should be 'scarce.' If immigration can be legitimately restricted only as long as it does not threaten a state's capacity to maintain public order and the welfare system (as we have seen above in section 3.4), then it is not clear why free movement rights should be 'scarce.' Finally, this objection offers no explanation as to why all other circumstances except the undefined 'individual stakes' are supposed to be morally arbitrary. At the end of the day, the allocation of free movement rights through regional union of states may be less morally arbitrary and more egalitarian than an allocation based on multiple citizenship status.

Other advantages for individuals that can be offered by multiple status are not that obvious. A second argument is that multiple citizenship promotes integration (Bloemraad 2007: 160). Two remarks are in order here. First, as we have already seen, some claim that the status is an obstacle to integration since sometimes it hinders immigrants to develop certain capacities deemed to be necessary for incorporation in the host society, like 'self-reliance, individual autonomy, personal responsibility and primary identification with the respective nation-state' (Gerdes and Faist 2007a: 153). However, even if we set aside such a republican perspective and take a more liberal view, the relationship between formal multiple status and integration is at best inconclusive. But we can probably agree that 'with the passage of time, the salience of the citizenship of the nation of origin progressively declines', so 'dual citizenship is in some sense a temporary phenomenon' (Kivistö 2007: 282).

Another possible advantage of dual citizenship is that it provides an extra entry option in another state (and this is often seen as indirectly enhancing their effective exit options). In other words, whenever something goes wrong, an individual enjoying this status can immediately leave her state of residence.<sup>114</sup> Beside the equality problem such an extra option raises – to which I will return in section three below – this advantage is counterbalanced by other drawbacks. Far from enhancing an

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<sup>114</sup> It could be said that additional entry options are much more widely available for EU citizens in the EU (26 additional entry options) or for citizens whose states conclude visa-waiver agreements with other states than for dual citizens (Rainer Baubock, personal communication on file with the author, April 2013). But this is exactly why such inter-state agreements are more egalitarian than dual citizenship: such advantages are not offered to individuals because of their particular circumstances like dual citizenship (e.g., having parents with different citizenships) but because of being citizens of the signatory states.

individual's security, dual citizenship can be used by the country of residence to get rid of unwanted persons by stripping them of their citizenship. States bound by international legal norms, such as the 1961 Convention on the Reduction of Statelessness, cannot do this with their mono-citizens since this Convention prohibits citizenship withdrawal if the result would be statelessness;<sup>115</sup> however, this is obviously not the case with plural citizens – in consequence, ‘the ironic outcome is that among those citizens likely to arouse the state’s suspicion, two citizenships provide less security than one’ (Macklin 2007: 61-62).

Finally, it is important to note that I have discussed until now only instrumental reasons why individuals may be interested in dual citizenship. It is plausible that, depending on the conditions offered by states of origin and immigration, immigrants’ naturalisation choices are not only driven by instrumental reasons but also by non-instrumental ones. According to Bauböck, the conditions under which non-instrumental reasons might prevail are near equality of rights between ‘denizens’ and naturalised citizens, individual entitlements to naturalisation without high material and procedural obstacles, and toleration of dual citizenship by both the states of origin and of immigration. In the absence of any of these conditions, naturalisation choices are likely to be more instrumentally motivated (Bauböck 1994a: 105-106). Another non-instrumental reason is that immigrants regard renouncing their citizenship of origin as giving in to demands for assimilation: a formal act of renouncing a previous citizenship thus also implies an emotional (and probably also material) loss. I will discuss later this problem and I will claim that nationality rather than citizenship satisfies this emotional (and other types of) interests since according to the theory I am defending nationality need not be renounced when acquiring a new citizenship.

### **5.2.5. Disadvantages and problems created by dual citizenship**

There are other disadvantages that come with multiple citizenship. Some of them, such as dual military service or dual tax payments, have already been dealt with more or less through international, regional or bilateral treaties (Jones-Correa 2003: 314). Although such problems still appear, the trend toward solving them through inter-state agreements seems promising. But other disadvantages still remain. For example, Mexico does not accept dual citizens for voluntary enlistment in the army, and in the United States dual citizenship ‘can be an obstacle to security clearance, which is a requirement for officer status’ (Legomsky 2003: 87). As I discuss later in this chapter, some countries also prohibit office-

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<sup>115</sup> However, not even all democratic states have signed this convention and it is just one among several international treaties on statelessness.

holding by dual citizens (Spiro 2003). And finally, it seems that not even dual citizens themselves know exactly why they choose to keep this status. Some of them claim that it enhances their political participation in the host state – which is not exactly accurate, since participation is achieved not through dual citizenship *per se*, but through citizenship acquisition in the state of residence independently of toleration of dual citizenship. Others believe that dual citizenship helps to keep open the option to return to the home country (Jones-Correa 2003: 312-313). This is indeed done by multiple status, but it raises problems regarding integration and instrumental uses of citizenship that have been already treated above.

In consequence, it seems that at all the levels analysed – the sending state, the receiving polity, and the individual – the advantages are either more imagined than real, or they can be achieved through more convenient means. But what about the disadvantages? Some of these, such as the claim that multiple citizenship undermines integration, have been already discussed. Others, such as the objection according to which such a status raises serious concerns about state security, will be discussed in chapter seven. For now it is enough to stress that the transformation of military conflicts – from classic war to modern forms of state and non-state terrorism – brings back on the agenda the problem of citizen's loyalty to the state. Kivistö even considers that in the context of terrorist threats the trend towards a professional military and hence tolerance of multiple loyalties is not irreversible (Kivistö 2007: 280).<sup>116</sup> But even in the context of classic wars the problem of loyalty still arises, as we have already seen above regarding the military conflicts in Afghanistan and former Yugoslavia.

Another worry about dual citizenship expressed in rather republican or communitarian terms is that it causes an ‘identity dilution’ (Faist 2007d: 16). In other words, having more ‘state-based identities’ (Spiro 2007: 189) downgrades the importance of any national identity by reducing it to a type of ‘voluntary association’ (Spång 2007: 113). Except for the supporters of the aforementioned ideologies, probably few people really believe that this is necessarily a bad thing in itself; nevertheless, it could have at least two undesirable consequences. On the one hand, it could diminish the level of solidarity needed for a normal functioning of democratic institutions and the welfare scheme. On the other hand, the diluted state-based identity could be replaced by other (religious, ethnic or racist) forms of identity which are less tolerant of multiple affiliations (Spiro 2007: 201).

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<sup>116</sup> Not everyone agrees. Some believe that the changing nature of war and especially the increasing salience of terrorist threats make the trend towards professional security forces *irreversible*. What is reversible, according to this point of view, is the diminishing of loyalty requirements imposed on citizens – and these are two separate issues (Rainer Bauböck, personal communication, April 2013, on file with the author).

An additional worry is related to immoral and even dangerous ways a state can use dual citizenship to further its own interests. I have already mentioned that states make use of this status in order to get rid of unwanted citizens, but formal plural membership can also be employed as a means to promote irredentist politics (Faist 2007d: 11),<sup>117</sup> as has often been the case in Central and Eastern Europe. A good example of this is the recent conflict between Hungary and Slovakia on the new Hungarian Citizenship Law (2010) which offered Hungarian citizenship to ethnic Hungarians living in neighbouring states (Bauböck 2010a). Finally, usually states use dual citizenship in a very inconsistent and morally dubious manner to promote specific national policies. Thus, they accept or tolerate a formal multiple status for their emigrants, but deny it to immigrants or minority nationalities. This ‘selective tolerance’ or ‘differentialist transnationalism’ (Faist 2007c: 5) is practiced, among others, by the Netherlands<sup>118</sup> (Hart 2007: 91-92), (van Oers, de Hart et al. 2013: 43, 46), by Germany (Kreuzer 2003: 358), Turkey (Kadirbeyoglu 2007: 137), Poland (Górny, Grzymała-Kazłowska et al. 2007) and Romania (Iordachi 2004: 268).

Finally, there are some other specific difficulties raised by dual citizenship. Some of them concern diplomatic protection. While since the Nottebohm case<sup>119</sup> the concept of genuine link is interpreted through the principle of habitual residence,<sup>120</sup> there has been a trend in international courts to accept claims of states regarding personal jurisdiction based on ‘passive personality’ (‘the nationality of the victim of the crime’) – that is, on formal citizenship when the genuine link is missing – as the Pinochet case revealed (Oeter 2003: 61-62).<sup>121</sup> There are also problems regarding judicial cooperation

<sup>117</sup> Some authors believe that such conflicts can be labelled ‘post-irredentist’ in some parts of the world: for example, some states that had to renounce claims to territorial revisions in order to access the European Union tried to reunite the nation through inventive legislation while still accepting the current borders – for Hungary, see Waterbury (2010).

<sup>118</sup> However in the Netherlands (in 2012) there was a pending amendment that would introduce symmetry by depriving Dutch ‘external’ citizens of Dutch citizenship if they naturalise abroad. See Maarten Vink, *Dutch government agrees to get tough on dual citizenship, also for the Dutch*, EUDO Citizenship News, 5 March 2012, <http://eudo-citizenship.eu/news/citizenship-news/599-dutch-government-agrees-to-get-tough-on-dual-citizenship-also-for-the-dutch> (accessed 16 May 2012).

<sup>119</sup> Nottebohm, ICJ Reports 1955, 4 (23).

<sup>120</sup> However some consider that the genuine link has not been accepted as a general principle for determining effective citizenship in international law (Sloane 2009); the latter is also true for EU law, see the Micheletti case (Case C-369/90 Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria, Italy, Spain, European Court of Justice, 07/07/1992). For an overview of the case, see also <http://eudo-citizenship.eu/databases/citizenship-case-law/?search=1&name=&year=&country=Italy&european=1> (last accessed 15 September 2013).

<sup>121</sup> According to Oeter, such theoretical conflicts may be solved easily: ‘The usual case of conflicting requests, as in the Pinochet case, will be linked to the existence of victims with different nationalities. The case of one or more victims having dual nationality with both states of nationality requesting extradition seems to be rather academic, although possible in principle. The difficulties in choosing between the various requests, however, will not differ from other cases of conflicting requests based on passive personality. The only real problem that has already arisen in practice - again in the Pinochet case - is the conflict which may evolve between the state where the acts were committed, and which is also the state of effective nationality of the victims holding dual nationality, and the other state whose nationality the victims possessed. If the state where the crime was committed has decreed an amnesty, for any political reasons whatsoever, it will protest against prosecution of the offender by a third state basing its jurisdiction on a purely formal or ineffective nationality. Personal

in civil matters: for example, court decisions regarding cases of divorce, maintenance obligations or inheritance may differ according to each national civil code and this constitutes an incentive for the dual citizen to engage in ‘forum shopping’ – that is, he or she can ‘choose the place of adjudication most favourable to his or her interests’ (Oeter 2003: 69).<sup>122</sup>

As a conclusion derived from the above discussion we may confidently claim that there are rather few evident benefits of formal dual citizenship, and when such advantages exist, they may be better promoted by other means than plural membership status. The win-win-win situation is a state of affairs than can be found in the eye of the beholder rather than in the real world. Last but not least, when compared to numerous concerns raised by such a status, the supposed benefits seem to become even thinner. This may be a good reason to take the first proposition of this chapter – ‘The majority of states acknowledge today one form of multiple citizenship or another’ – with a grain of salt, since toleration does not necessarily mean acceptance. As Spång has observed: ‘the German and Dutch cases show [that] extensive *de facto* toleration does not necessarily lead to acceptance of dual citizenship in principle’ (Spång 2007: 120). However, even if multiple citizenship doesn’t have much to offer in terms of benefits, it can still be accepted on the condition that it does not violate the concept of equality. As one scholar put it, ‘The thrust of modern citizenship, indeed what makes it modern, is the notion of equality’ (Liebich 2010: 29-30). The following section explains the various ways the democratic principle of citizenship equality is infringed by formal multiple membership.

### **5.3. Multiple citizenship and the democratic principle of citizenship equality**

There are four ways in which formal multiple membership violates the democratic principle of citizenship equality. The first is related to the welfare state, the second to the exit option that it provides to the dual citizen, the third concerns some military and judicial considerations, and the last one is linked to political rights. Let me address them in turn.

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jurisdiction based on passive personality tends to override in these cases the primary responsibility of the territorial state where offenders and victims resided and where the acts were committed. State practice, however, seems to be in a process of change and to accept in principle claims of states like Spain and Switzerland, which in the Pinochet case based its jurisdiction purely on passive personality arguments concerning mainly victims who also held Chilean nationality’ (Oeter 2003: 61-62).

<sup>122</sup> For other interesting examples where laws of different countries of nationality conflict on cases of marriage and divorce and for the consequences such a conflict have on dual citizens see Rumpf (2003: 370).

### 5.3.1. First violation: the welfare state

The first way in which multiple citizenship violates the principle of equality is related to the welfare state. Let me first define the relevant scope of welfare benefit equality. For contribution-based systems, the scope includes all contributors (although the relevant standard of equality may require that benefits are not proportional to contributions but reflect needs or deserts), e.g. social insurance. For residence-based systems, it is all residents (e.g. in public education). There are hardly any citizenship-based systems in liberal welfare states. In the past, citizenship was more widely used as a discriminatory criterion that excluded non-citizen residents from some non-contributory needs based benefits (e.g. social assistance). What I am concerned about are systems that are residence-based but do not require long-term residence, so that dual citizens can easily access them because of their immigration privileges. It is true that non-contributory benefits that do not depend on long-term residence are comparatively rare and small in terms of the overall share of welfare state expenditures. However, some examples do exist – see for example the Hungarian dual citizenship offer for Hungarian ‘ethnizens’ (which will be discussed below and also in chapter six).<sup>123</sup>

Suppose now than an individual (a dual citizen by birth or a naturalised immigrant) has lived for an extended period of her life in one country of nationality, to which she is also genuinely linked, and suddenly decides to move to the second country of nationality. She knows this language and culture well, of course, but has never lived there nor contributed to the social system. If dual citizenship makes her eligible to access welfare benefits in the second state,<sup>124</sup> this could be an obvious case of equality infringement. The situation is even worse when dual citizenship is offered *en masse* to large number of individuals. On 5 December 2004 Hungary organised a referendum on offering ‘extraterritorial, non-resident citizenship to ethnic Hungarians living outside Hungary by lifting all residency requirements from among the preconditions for obtaining a second, Hungarian citizenship’ (Kovács 2007: 92). The

<sup>123</sup> Someone may reply that exactly the same objection (the violation regarding the welfare state) applies to EU citizenship, which is in this regard like a 27-fold citizenship (Rainer Bauböck, personal communication on file with the author, April 2013). This is actually happening in some Member States – where some governments are trying to restrict access to different types of welfare benefits to the new EU citizens from Bulgaria and Romania – see, for example, the concerns raised (among others) by Migration Watch UK ([http://news.migrationwatch.org.uk/welfare\\_benefits/](http://news.migrationwatch.org.uk/welfare_benefits/)). Even the UK government planned in 2013 to fight EU over access to benefits (see Nicholas Winning and Frances Robinson, ‘U.K. Plans to Fight EU Over Access to Benefits’, *The Wall Street Journal*, 30 May 2013, <http://online.wsj.com/article/SB10001424127887324412604578514921248129106.html>), and thus the EU took Britain to the ECJ over immigrant benefits. However, the situation is even more complicated since other EU member states (Germany, Austria, and the Netherlands) support the United Kingdom (see Rowena Mason, ‘Brussels takes Britain to EU court over immigrant benefits’, *The Telegraph*, 30 May 2013, <http://www.telegraph.co.uk/news/worldnews/europe/eu/10088297/Brussels-takes-Britain-to-EU-court-over-immigrant-benefits.html>).

<sup>124</sup> This may seem a problematic assumption, but in what follows I offer the Hungarian example which shows that such cases are not imaginary.

referendum was declared invalid because of the low number of participants, and more than 48 per cent of those who participated voted against this proposal. As Kovács acknowledges, one of the main arguments that motivated the voters either to not participate or to vote against was ‘welfare protectionism’ (Kovács 2007: 98).

Another variation of this type of equality violation is when for whatever motive the new citizen – or the citizen who just took residence in the country – does not contribute to the social scheme. Probably this is one reason why republican opponents to formal multiple status frame their arguments not in terms of ascriptive features like ethnicity but in terms of ‘the contributions immigrants are expected to make to economic development and to social welfare systems’ (Faist 2007d: 15). Indeed, supporters of the performative aspect of citizenship underscore the importance of the ‘principle of subsidiarity’, as Gerdes and Faist (2007a) call it: in the Netherlands and Germany, for example, full citizens are expected to be active, to provide for themselves and for their families without relying on social security funds, and to develop ‘civil capacities such as tolerance and respect for gender equality’ (Gerdes and Faist 2007a: 148).

### **5.3.2. Second violation: the substantive exit option**

The second infringement of the principle of equality by plural membership concerns the *substantive* exit option it provides to the bearer of the status – an option which a mono-citizen does not have. In other words, every citizen of every state has the *human right* to leave her country, but there is a difference between the mono- and dual citizenship status with regard to unconditional admission rights, since dual citizens have two and mono-citizens have one.<sup>125</sup> Thus dual citizens have a more ‘substantive exit option’ since they have another state that must admit them. If the political, social or economic states of affairs in the country of residence deteriorate, dual citizens can always leave, while the same option becomes more problematic for mono-citizens.

For example, in post-conflict countries ‘the extra citizenship is also a sort of insurance policy, combined with an exit ticket’ (Bieber 2010: 20). Even though the dual citizen is entitled to her status according to both rules of citizenship acquisition of her countries of nationality and international laws, the moral problem of equality still remains. A second concern raised by the exit option regards the viability of a political community where citizens can leave if they do not like the outcome of the vote

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<sup>125</sup> With the exception of the European Union, where a European citizen has admission rights in any member state.

and do not have to live with community's decisions (Bloemraad 2007: 168-169).<sup>126</sup> In consequence, the exit option offered by dual citizenship raises a concern about citizenship equality which has to be dealt with.

Two comments are in order here. Firstly, EU citizens are like multiple citizens with 27 citizenships in this respect. Some claim that if this expansion of free movement is problematic, then EU citizenship should also be opposed. However, the case under consideration is different. An exit option based on a union of states law, which applies to any mono-citizen of such a union, is different from an exit option based on dual citizenship – which applies only to some particular individuals. Secondly, another possible objection states that the same privilege of a substantive exit option is also enjoyed by 'external quasi-citizens' – the so-called 'ethnizens' – and if this privilege is morally problematic then the latter should also be deprived of it.<sup>127</sup> I readily accept this objection. I do believe that a greater freedom of movement and more exit options should be implemented not through dual citizenship or 'external quasi-citizenship' status, but through more unions of states like the EU.

### 5.3.3. Third violation: military-related judicial considerations

A third violation of the democratic principle of citizenship equality by multiple citizenship is linked to military and military-related judicial considerations. Firstly, regarding conscription, a widely accepted international norm<sup>128</sup> prohibits double conscription of dual citizens. That being said, in countries which still practice conscription there are only two ways of dealing with dual citizens. One is based on the habitual residence principle (the citizen must serve in the country of residence), while the other is based on the option model (the citizen is allowed to choose the country in which she is going to serve). As one scholar acknowledges, the latter is a clear instance where dual citizens are treated more favourably than mono-citizens (Legomsky 2003: 105) hence the principle of equality is violated.<sup>129</sup> But the free choice model raises problems not only connected to the principle of equality, but also to that of

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<sup>126</sup> It is true that this would entail a general critique of exit rights for mono-citizens too, which is hard to state on liberal grounds. I believe that this is not Bloemraad's intention. She is referring here strictly to the unequal balance of rights and opportunities between mono- and dual citizens, in the sense that dual citizens can simply leave if they do not like the outcome of the vote, while mono-citizens cannot. This does not mean, of course, that no citizen should be allowed to leave.

<sup>127</sup> Rainer Bauböck, personal communication on file with the author, April 2013.

<sup>128</sup> For example, among the international treaties that prohibit dual conscription are the 1930 Hague Protocol Relating to Military Obligations in Certain Cases of Double Nationality, the 1963 European Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality, and the 1997 European Convention on Nationality.

<sup>129</sup> Some may object that mono 'external' citizens who do not have to serve in any army – either in the country of origin or that of residence – are even more privileged than dual citizens who can choose the shorter military service. The objection fails since its thrust lies on the non-existence of compulsory drafting rather than on citizenship status.

fairness, since dual citizens ‘tend to opt for military service in the state where the duration of military service is shorter’ (Reermann 2003: 131).

Secondly, regarding military-related judicial considerations, let us consider the situation of a plural citizen who ‘voluntarily takes up arms for one of his states of nationality against his other state of nationality’ (Legomsky 2003: 119). Usually the state against whom he has served considers this an act of treason and the citizen is sanctioned accordingly. It is important to note here that the charge of treason is the same irrespective of whether the defendant is a mono- or a dual citizen. However, Legomsky proposes denationalisation instead of criminal sanctions for dual citizens (Legomsky 2003: 122). In other words, in identical cases sanctions attached to the charge of treason are fine for mono-citizens but not for dual citizens. This is yet another violation of the democratic principle of equality by multiple citizenship status.

It is important to note that the situation is not only an imaginary one. Audrey Macklin relates the story of a Saudi-American dual citizen detained in the United States as an enemy combatant. The story ends with the negotiated agreement according to which the United States government allowed the defendant to leave prison and go to Saudi Arabia in exchange for renouncing his US citizenship (Macklin 2007: 58). There could be one objection here, according to which extradition to Saudi Arabia (where torture is practiced) is not quite a privilege, hence this may be a case where dual citizenship becomes a liability since it allows to deport enemy combatants or terrorist suspects to countries where there is no rule of law.<sup>130</sup> However, in the case mentioned the solution has been *negotiated*, so the defendant preferred to go to Saudi Arabia rather than to keep US citizenship and remain in a safe country’s prison.

#### **5.3.4. Fourth violation: political rights and external voting**

The fourth and final violation of the democratic principle of citizenship equality concerns the enjoyment of political rights and it is connected to the impact external voting may have on domestic politics, the problem of dual voting – infringement of the ‘one person, one vote’ principle – and the question of office holding by dual citizens. Let me take the three instances in turn.

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<sup>130</sup> Rainer Bauböck, personal communication on file with the author, April 2013.

### (a) The impact of external voting

With regard to the impact non-resident voting has on election outcome worries have been expressed concerning the quality of democratic institutions – especially parliamentary democracy – and the reduced sovereignty of the polity’s resident citizens (Kovács 2010: 6), (Bieber 2010: 19). What is the threat large numbers of organised emigrants raise to domestic politics? The infringement of equality materialises in election outcomes rather than in external voting *per se*, and it has to do with two general considerations. On the one hand, residents have to live with a state of affairs that they cannot exclusively decide for themselves, while on the other, non-residents are not obliged to live with the state of affairs they helped to bring about, and this potentially encourages irresponsible voting.

Some scholars tend to answer to these worries by pointing at various studies which reveal very low percentages of political participation among non-resident dual citizens (Itzigsohn 2007: 130-131), (Bloemraad 2007: 182, note 25). Such a rejoinder fails because of mainly two reasons: first, it does not address the normative problems of equality and fairness – non-residents still have a say in a political process they are not subjected to; second, even low turnout rates may sometimes weigh heavily in deciding an outcome. One good example is the 2005 regional elections in Galicia (Spain), where ‘the composition of the autonomous regional government was decided by votes from abroad’ (Itzigsohn 2007: 132). Another example is the 2009 presidential elections in Romania, where the diaspora vote decided the new president.<sup>131</sup> And finally, overseas absentee voting tipped the balance in the 2000 US presidential election (Spiro 2003: 141). A *prima facie* obvious solution might be to offer a limited number of seats in the parliament for non-resident citizens (Blatter 2010: 15). But this doesn’t solve the problem, it just casts it at another level. After Italy passed a law offering special representation in the senate for emigrants, ‘migrant representatives gave the majority in the senate to the centre-left coalition in the 2006 national elections’ (Itzigsohn 2007: 132).

Aware of the complications raised by a non-resident franchise, some theorists who accept in principle external voting believe however that it must be seriously restricted. For example, a harsh ‘double test’ for it has been proposed. Firstly, external voting rights ‘should not be granted on the basis of morally arbitrary criteria, such as descent from citizens,’ while at the same time ‘they should not create a risk of external domination of the domestic citizenry’ (Bauböck 2010c: 39). But if we seriously take into account the cases cited above, it becomes difficult to see under what design external voting

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<sup>131</sup> George Sava, ‘Diaspora a decis președintele României’ [The Diaspora decided Romania’s president], *Pagini românești* [Romanian Pages], 15 December 2009, link: <http://www.paginiromanesti.ca/2009/12/15/diaspora-a-decis-presedintele-romaniei/> (accessed 12 March 2013).

could meet the second condition. Presumably no kind of external voting whatsoever could pass Bauböck's test, and later in this chapter I will claim that this is one of the reasons why we should abandon altogether the idea of external voting.

In order to deal with such problems raised by external voting, Bauböck distinguishes between 'swamping' and 'tipping' scenarios. In 'the former, the external vote dominates the domestic vote or is seen to be disproportionately large, while in the latter, the external vote's size may be comparatively small, but it is perceived to determine the outcome in a close electoral competition' (Bauböck 2007b: 2444). According to this scholar, only the former can be said to involve domination. Potential tipping is unavoidable and it is fallacious to pick out any particular group of voters whose voting patterns differ from the rest of the voters and accuse it of tipping the results. In other words, any outcome may be said to have been tipped by a potentially infinite number of groups – defined by age, sex, class, education, ethnicity, body height, and so on. In consequence, the proposal is to deal only with 'swamping' scenarios by proposing a fixed number of reserved seats in the legislature and to set aside the 'tipping' scenario of external voting just as we set aside the 'tipping' scenario in the case of groups defined by age, sex, class, etc.

Nevertheless, if we seriously take into account the proposal of residence-based citizenship, then the tipping scenario of external voting is *qualitatively* different than the tipping scenarios supported by differences regarding age, sex, class, education, ethnic, body height, and so on. The big difference is, of course, the fact that those who tip the vote are not residents – while all the others, irrespective of age, sex, and so on, are indeed residents. This indeed follows from my premise that external voters cannot legitimately influence the outcome of elections. But according to Bauböck this makes the question of tipping irrelevant, since a supporter of the residence-based theory of citizenship has to oppose external voting even where no tipping ever occurs. Bauböck considers that it would violate citizenship equality to treat those who legitimately vote from abroad as fundamentally different from those identified by body height (and I accept this argument, since I also accept external voting in the case of short-term emigrants or people serving the state from abroad, like embassy personnel).

So the disagreement is at a different level: who should be a citizen in the first place? I will discuss this problem (together with Owen's argument for including 'external' citizens at least in constitutional referenda) later.<sup>132</sup> Nevertheless, what I want to emphasise here is that there is a subclass of tipping scenarios that Bauböck dismisses too quickly: those in which voters are not residents.

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<sup>132</sup> Rainer Bauböck, personal communication on file with the author, April 2013. For the discussion of who should be a citizen in the first place, see further sections 5.4.1. and 8.1.2.

Having to live in a context decided by a group of fellow resident citizens – defined according to a specific body height but also subjected to the political power they voted for – is qualitatively different from having to live in a context decided by non-resident citizens – who are not subjected to the political power they helped to bring about.

*(b) The problem of dual voting*

A second way multiple citizenship violates the principle of equality in connection with political rights is linked to the infringement of the ‘one person, one vote’ principle (Gerdes and Faist 2007a: 143). The idea here is that dual citizens have more votes than mono-citizens and this infringes citizenship equality. The obvious rejoinder admits that plural citizens have more votes, but it also claims that these votes are cast in different polities, such that a dual citizen still has only one vote in each country of citizenship, just like his fellow mono-citizens. However, this argument overlooks some more subtle points. One scholar summarises the way equality principle could still be violated as follows:

‘Practical obstacles to the exercise of double voting do not touch the objection where it is most completely operative, at the level of important symbolism, particularly if international cooperation and involvement continue to grow and the significance of single sovereigns continues to decline. As nations participate increasingly in regional and international bodies, those bodies take on some important characteristics of a single governance system. Those who can vote in two constituent units have twice the voice in such a system, compared to those who are mono-nationals. The relevant political arena is no longer simply the single nation-state.’ (Martin 2003: 14)

Take the example of two countries of the European Union who accept dual citizenship and external voting. Because of their status, dual citizens who can vote in these two national elections are represented twice in legislative institutions of the Council (Owen 2011a: 22). But there is also a slightly different manner in which double voting can make a difference: a plural citizen can contribute to elect politicians in all of his countries of nationality ‘on the same side of certain policy issues. For example, U.S.-Canadian dual nationals might vote for pro-NAFTA politicians in both the U.S. and Canada’ (Koslowski 2003: 178). As these examples show, in an increasingly interconnected world the problem of double voting looms large even though a dual citizen casts his two votes in two different polities; so the equality principle is still violated. To be sure, the substantive impact of such double voting as in the cases presented above is almost insignificant. However, its real significance is, as Martin – quoted

above – noted, at the symbolic and – I would also add – at the normative levels. We can of course agree that if we find a minimal violation of the ‘one person one vote’ principle but there are independent moral reasons for tolerating dual citizenship and external voting, then the infringement is not decisive for the normative judgement.<sup>133</sup> However, what I am trying to demonstrate here is that there are no such strong independent moral reasons.

### *(c) The problem of office holding by dual citizens*

Finally, the third violation of the equality principle in relation to political rights concerns office holding by dual nationals. At the international level current practice varies. In Turkey, for example, dual citizens ‘can be selected for any position in administration, government, parliament, or the judiciary’ (Rumpf 2003: 372) and several members of parliament are multiple citizens. International institutions seem to follow a liberal path. In 2010, for example, the European Court of Human Rights decided that Moldova couldn’t introduce restrictions on candidacy rights for dual citizens in a context where this would disfavour political competitors (i.e. the opposition) in forthcoming elections.<sup>134</sup> On the other hand, Valdas Adamkus, an American-Lithuanian dual citizen, had to renounce his American citizenship in 1998, before being invested as the president of Lithuania. The incumbent Estonian president Toomas Hendrik Ilves had done the same thing prior to his investiture in 1993.

At a first look, there is nothing wrong with dual nationals serving in high office. As Spiro claims, we should trust voters to decide for themselves whether dual citizens can represent their interests or not in elective offices. Indeed, *the best argument on the pro side* is that voters have a right to elect persons by whom they want to be represented. If voters know and decide to elect a multiple citizen – maybe because they are themselves multiple citizens – then denying eligibility to that candidate infringes on democratic freedom of election. Moreover, for appointed offices, usual rules employed to solve conflicts of interests should be applied (Spiro 2003: 146-152). The only problem Spiro sees in this regard is one of ‘dual office holding [sic], not of office holding [sic] by dual nationals.’ Holding office in two national parliaments or governments need not raise any concern beside the usual worry regarding effectively carrying out two full-time jobs at the same time. In other words, there is no problem with dual citizens holding offices in several countries sequentially, only with them holding such offices simultaneously.

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<sup>133</sup> Rainer Bauböck, personal communication on file with the author, April 2013.

<sup>134</sup> However, the ECtHR left it to member states to restrict office holding by dual citizens in other contexts. See Tanase v. Moldova (Grand Chamber), E.Ct.H.R. 7/08 (2010).

However, such a lack of concern may prove to be a bit too quick. In some regions of the world where conflicts over borders are not yet settled – or even when settled, memories of past injustice are still alive in people's minds – not only office holding by plural citizens, but multiple citizenship as such may not be a good idea if the primary goal is to maintain peace. This is actually the case in Central and Eastern Europe, where there is a trade-off between dual citizenship and autonomy. National minorities may have one or the other, but not both (Bauböck 2007a). A Slovak-Hungarian dual citizen performing as a minister or a member of the Slovak Parliament would cause serious conflicts. But this is not the case only for regions where conflicts over borders are not yet settled. Suppose that a dual citizen is a member of parliament in each of his two countries of nationality. In performing his duties he could always help to bring about decisions that support the interests of the country he is most attached to. This is clearly a violation of the principle of equality, since mono-citizen representatives do not have the same power.

*The best argument on the con side* is that members of governments and legislative assemblies have special duties towards the common good of that polity that are stronger than those of citizens who vote for them. They have a mandate, and this mandate may be incompatible with being simultaneously eligible for office in another polity. This argument is advanced by one author who believes not only that ‘residence is a reasonable requirement for officeholders’, but also that ‘[c]andidates’ role is that of agents or trustees and their task demands full devotion. This role, in contrast with that of voters, is hardly compatible with simultaneous commitments towards another country’ (Bauböck 2007b: 2430-2432); see also (Bauböck 2005a: 22).

Moreover, keeping high offices exclusively for mono-citizens may also prove to be an important preventive policy of national security as long as there is no guarantee, as Martin warns, that the ‘no war between democracies’ trend cannot be reversed. Moreover, since some policies may have disastrous consequences, popular anger directed at dual citizens in high office may ‘spill over into cross-border hatreds or suspicions. As a way of avoiding any such risk, states may validly require mono-nationality of high policymaking officials serving in their governments’ (Martin 2003: 17).

### **5.3.5. Preliminary conclusions: why dual citizenship should be abandoned**

If political rights of non-resident citizens raise so many difficulties, one possibility would be to *suspend* them altogether, perhaps by making them dependent on residency (Owen 2010). On this proposal we can build an argument that can be called the ‘dormant second citizenship’ model. It refers strictly to

emigrants and, in more generous regimes, also to their children – the first generation born abroad – whose citizenship rights in the non-residence country are ‘dormant’ and can be activated only *if* and *when* these individuals take up residence there. Let us take a closer look to this proposal. The problem it seriously faces is that, in the last fifty years, in the international system human, civic and social rights have been decoupled from citizenship. This means that political rights are the only ones left at the core of the notion of citizenship – as Carens put it, ‘all states limit the political activity of aliens. If they did not, what meaning would be left to citizenship?’ (Carens 1989: 36).<sup>135</sup> If political rights are ‘suspended’ for ‘external’ citizens – just as many other rights dependent on residence are suspended – then it is very hard to see what this ‘dormant second citizenship’ is supposed to mean. Of course, some may claim that it is still extremely important since it offers *the right to return*. But as I am trying to argue in the following chapter, the right to return is also already decoupled from citizenship. In the last years it is also offered by many countries to ‘external quasi-citizens’. If this is so, then it is hard to see what dual citizenship – or the dormant second citizenship – can offer more than the ‘external quasi-citizenship’ status except simple recognition by other states under international law.<sup>136</sup>

However, as Spiro rightly remarks, such a move – suspending political rights by making them dependent on residency – raises an equality problem of its own. Since, as we have already seen, the democratic principle of equality is at the core of citizenship status, suspending political rights of some citizens while still accepting them as members of the polity would amount to creating second-class citizens (Spiro 2003: 143-144). Not everyone agrees with this view. Rainer Bauböck considers that ‘external’ citizens always have fewer rights and duties than resident citizens; according to him, this follows from the limits of territorial jurisdiction of states.<sup>137</sup> Two responses can be made here. First, as I have already spelled out, if political rights for ‘external’ citizens are also suspended – along other rights which cannot be accessed since their enjoyment presupposes residence – then it is hard to see what ‘external’ citizenship amounts to – except the right to return, which, as I have already emphasised, can also be enjoyed by ‘external quasi-citizens’. Second, in our times territorial jurisdiction is not an argument for restricting voting rights, since the voting process can also be organised abroad in consulates and embassies. So not providing the possibility of voting abroad – at

<sup>135</sup> However, in some countries local political rights – for example, local voting rights – are also offered to denizens. Usually only national political rights can be regarded as the exclusive right of citizens – although in a few cases (UK, Portugal, New Zealand, Chile, Uruguay and Malawi) even national voting rights are no longer strictly attached to citizenship; in these situations, a national franchise is offered to (some categories of) foreign citizen residents (Bauböck: 2005b).

<sup>136</sup> ‘External quasi-citizenship’ is a status under domestic law. Dual citizenship, even if dormant, remains a status regulated also under international law and triggers mutual recognition of individuals’ ties to states.

<sup>137</sup> Rainer Bauböck, personal communication on file with the author, May 2012.

least in cases where this is feasible, does not raise enormous costs, and does not threaten to always dominate the domestic vote – may be seen as a step towards creating second-class citizens.

In consequence, if Spiro is correct, it seems that we are in an impossible situation. Offering full citizenship rights to non-resident citizens would violate the principle of equality; not offering them these rights would also violate citizenship equality. Moreover, since – as this chapter tried to show – dual citizenship violates in many other ways the principle of democratic equality, there is one option left – an option which Spiro believes to be blatantly absurd: ‘if rights other than the franchise loom large, the answer to the equality objection is to prohibit dual nationality altogether, not to limit the parallel political rights that may come with the status’ (Spiro 2003: 143). I believe such an option is not as absurd as Spiro claims. Since dual citizenship (a) has no real practical advantages for either actor involved; (b) has real practical disadvantages for every actor concerned (as I have already shown in the section two above); and (c) violates in several ways the principle of democratic equality, then the obvious solution is to terminate the status of dual citizenship altogether.

## **5.4. One citizenship, multiple nationality**

But if we reject the dual citizenship status altogether, then what happens with citizens who leave and take on another citizenship? Does losing their political relationship with the country of origin imply losing an important relationship? Not necessarily. This section tries to propose and support a distinction – already discussed in chapter one – between citizenship and nationality by arguing that citizenship must be exclusive – and strictly dependent on residence – while nationality may be plural. The way I am using these terms, ‘citizenship’ refers to political belonging to a state – which triggers full political rights for the resident citizen – while ‘nationality’ refers to the fact of belonging to an – ethnically distinct or ethnically diverse – nation. The first part of this section asks who is entitled to which exclusive mono- citizenship and proposes a radical interpretation of the ‘stakeholdership’ principle, which is taken to imply resident status. The second part explains the distinction between citizenship and nationality. Finally, the third part offers some examples.

### **5.4.1. Who is entitled to which exclusive, mono-citizenship? ‘Stakeholdership’ as residence**

To begin with, let us set aside for the time being the fact that I have dismissed dual citizenship and let us ask who has a claim of membership in a political community in the first place. According to some views – also expressed in the Nottebohm case – a person has a claim to membership in a polity if she

has a ‘genuine’ link with that state. The problem of ‘effective link’ is more important than it may be considered at a first look because citizenship is at its core a special relation between the individual and her polity – or to put it in other words, between all community members. Everything else, from state security to the proper functioning of political institutions and of the welfare scheme depends on the trust members have in each other: thus securing community requires securing the shared bond. This is why leaving formal membership status to an individual’s unconstrained choice – as liberal as it may seem at a first look – devalues citizenship (Bauböck 2010c: 38). And it does so not only because it decreases trust among community members, but also because people start to feel ‘so tangentially connected to their multiple communities that they do not participate at all’ (Jenne and Deets 2010: 23) in either of them. Such an option should be constrained according to who has a legitimate interest in choosing; the genuine or effective link is the accepted condition for proving that an interest is justified.

All these points may seem *prima facie* obvious, but this is where all the hassle begins, since there is no commonly accepted interpretation of what ‘genuine link’ is supposed to mean. The best proposal to settle membership claims I am aware of, the ‘stakeholdership’ principle, is ambiguous regarding this issue. According to it,

‘all those and only those individuals have a claim to membership in a particular polity who can be seen as stakeholders because their individual flourishing is linked to the future of that polity.

Individuals hold a stake if the polity is collectively responsible for securing the political conditions for their well-being and enjoyment of basic rights and liberties’ (Bauböck 2009a: 15)

But when is an individual’s thriving linked to the future of that polity? Or, to put it differently, when is the polity responsible for her security and well-being? I believe there can be two interpretations of the stakeholdership and the genuine link principles: one is more permissive, the other more restrictive. The more permissive one is advanced by the proponent of the above mentioned principle himself: ‘Migrants who are permanent residents in a receiving society but retain strong economic, social, cultural and family ties with a sending country have a plausible claim to citizenship in both polities’ (Bauböck 2007a: 72). According to this interpretation economic, social, cultural and family ties are enough to prove the existence of a genuine link – or of holding a stake – and thereby to legitimate a membership claim. Moreover, there is a trend in international law towards such a permissive, liberal interpretation: according to the 2008 OSCE Bolzano Recommendations states ‘may take preferred linguistic

competencies and cultural, historical or familial ties into account in their decision to grant citizenship to individuals abroad'.<sup>138</sup>

However, the problem with this permissive interpretation is that it is obviously over-inclusive: one may learn several languages and may own property in a lot of states. Moreover, because today people travel and move a lot, one may also have family ties in various states. All these considerations would trigger several citizenship statuses for one and the same person, and this clearly ends up in devaluating citizenship and the special bond created by membership in a particular polity. Because of this reason some scholars have begun to be sceptical about a lax interpretation of the effective link principle. André Liebich, a plural citizen himself, admits that he has ties to four different states; however, he began to 'think that plural citizenship is not as unproblematic as [he] once thought it was' (Liebich 2010: 29).

Moreover, journalists and politicians also believe dual citizenship may be extremely problematic for future independent states, as it may be the case for Scotland.<sup>139</sup> The 1997 European Convention on Nationality also understands 'genuine link' as meaning 'habitual residence' (Kovács 2007: 103), since it considers that loss of nationality can be determined by the 'lack of a genuine link between the State Party and a national habitually residing abroad' (art.7(1)(e));<sup>140</sup> some states like Sweden for example already implement this interpretation in offering access to their citizenship (Spång 2007: 107). Finally, other scholars readily support this view too (López-Guerra 2005), (Benhabib 2007: 250), some of them underlining the fact that, in order to avoid difficulties raised by multiple citizenship status, the provision of political rights and the decisions in international conflicts concerning diplomatic protection, taxation laws, military service and so on should all be based on the residence principle (Martin 2003), (Hailbronner 2003: 26), (German Marshall Fund 2003: 387-388).

It is important to note that the more restrictive interpretation is also congruent with the democratic principle according to which every person subject to the laws of a state must also have a say in the making of those laws, or to use Dahl's words: 'The demos must include all adult members of the association except transients and persons proved to be mentally defective' (Dahl 1989: 129). Since the converse – no person not subject to the laws of a state should have a say in making those laws – is also

<sup>138</sup> OSCE High Commissioner on National Minorities , 'Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations', 2008, downloadable at <http://www.osce.org/hcnm/33633> (accessed 12 March 2013).

<sup>139</sup> Russell Vallance, 'The idea of dual citizenship on a mass scale is completely impractical', *The Herald Scotland*, 13 March 2013, available at <http://www.heraldscotland.com/comment/letters/the-idea-of-dual-citizenship-on-a-mass-scale-is-completely-impractical.20485027> (accessed 26 March 2013).

<sup>140</sup> European Convention on Nationality (1997), available at <http://conventions.coe.int/Treaty/en/Treaties/Html/166.htm>, accessed 7 May 2012.

valid, then non-residents cannot enjoy political rights because they are not subject to home state's laws.<sup>141</sup> But if, as we have already seen, we are not allowed to design different classes of citizens – one enjoying more rights than the other – then dual citizenship should be abandoned.

However, an interesting objection here is that non-resident citizens *are* subject to some of their home-state laws – for example, laws that define the nature of the polity – so they should have the right to vote at least in constitutional referendums<sup>142</sup> (Owen 2010). I readily grant this point as long as we are talking about non-resident *citizens* – that is (according to a residence-based theory), individuals living *temporarily* outside state's borders or those living for a long time outside the country *being in their state's service* (these two exceptional groups should remain generally enfranchised in national elections since they are full citizens according to the residence-based theory of citizenship I am proposing: they are either just *temporarily* outside state borders or they are living outside *serving their state*). However this does not harm to the argument that long-time non-residents – who also acquired full citizenship status in their current country of residence – should otherwise be excluded from the political life of the polity in which they do not reside and thus from its formal membership. As I explain below, this can be done by disconnecting nationality from citizenship status.

This more restrictive interpretation – residence as the *sine qua non* condition for holding a stake – seems to avoid all the problems raised by the more permissive one. The interesting thing is that if habitual/permanent residence is the only condition for proving the existence of a genuine link and thereby the only one legitimising a membership claim, then the reason for having multiple citizenship vanishes: an individual cannot permanently reside in two countries at the same time,<sup>143</sup> so she has only one legitimate claim to membership – that is, a claim against her country of residence. This is, to be

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<sup>141</sup> One counter-argument here would be that non-residents are subject to immigration laws and thus have a claim to political representation; this argument would a fortiori apply to 'external' citizens who want to return. However, as I am trying to show in the next chapter, an 'external quasi-citizenship' regime (which may offer different rights to 'external quasi-citizens' but no political rights) would easily address this problem, so dual citizenship is not necessary.

<sup>142</sup> Some may argue that there are in fact several exceptions, like laws on taxation of expatriates and on diplomatic services and protection (Rainer Bauböck, personal communication on file with the author, April 2013). However, these cases are more controversial. It is questionable whether taxation of expatriates by the US government is really defensible from a normative point of view. Regarding diplomatic protection, this should be offered in my view by the country of citizenship – according to the residence citizenship proposal. This would also easily deal with cases of international conflicts based on diplomatic protection of multiple citizens.

<sup>143</sup> What about individuals who do not have any permanent residence, but habitually reside in two or more states? Should their citizenship change every time they move from one residence to the other? As I will try to show later in sections 8.1.1. and 8.1.4., the experience of temporary workers shows that in time they become 'permanent': in other words, in time most people tend to take roots rather than to move continuously. As Rubio-Marín suggests, setting aside a small cosmopolitan elite 'people are generally inclined to set down roots in specific residential habitats (in which they make long-term investments) and to rely on specific institutional, social and cultural frameworks to lead a meaningful existence' (Rubio-Marín 2000: 17). Probably even people from the 'cosmopolitan elite' would finally set down roots, so I see no problem in changing citizenships according to residence (until the moment of setting down roots) for this small category of individuals.

sure, a radical interpretation of holding a stake or having a genuine link. I do not claim that speaking the language of a country, having cultural affinities or family ties, owning property and so on do not qualify as ‘genuine’ links that could support a strong relationship of the individual with that community. What I do claim is that they should not qualify as claims to membership. From now on, I want to make a difference between a *genuine link to a community* – which can be legitimated by family and cultural ties, etc. – and *having a stake in a political community* – which legitimises a claim to citizenship.

#### 5.4.2. Citizenship versus nationality: clarifying the concepts

This distinction made above is the basis of another one between *nationality* and *citizenship*. Briefly put, individuals may have genuine links to many social and cultural communities – they may have ties to different cultures, speak several languages, own properties in many countries – so they do have relationships to those polities; I call this, in a very loose sense, ‘nationality’.<sup>144</sup> Such a person may have multiple nationalities according to her multiple genuine links. However, the same person may hold a stake in – hence can be a citizen of – only *one political community*: the community of which she is a resident and where she must enjoy full political rights. The distinction between nationality and citizenship allows us to claim that *an individual may have multiple nationalities, but only one citizenship*.

This distinction is obviously not a new idea. The problem is that both terms have been used in so many different ways that it is hard to make an argument without rigorously defining them. For example, one scholar characterises nationalism as the sum of practices emigration countries employ in order to strengthen ties with their diasporas, while citizenship is considered a rather legal term comprising rights and duties of members. In this way, nationality and dual nationality become broader terms than citizenship and dual citizenship (Faist 2007d: 1). However, the same author published in the same year another work where he claims that the two terms are so radically distinct that – in some regions of the world, especially in Western and Central Europe – they belong to two different domains: while nationality is a legal concept, citizenship is supposed to be a political one (Faist 2007c: 8). The

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<sup>144</sup> As already explained in the first chapter, nationality can refer either to “nationality identity” – in nation states or stateless nations – or to a legal status of individuals in relation to states under international law. Throughout this study which supports the idea of ‘residence-based citizenship’, I am using the term ‘nationality’ in the first sense, i.e. ‘national identity’. Whenever referring to nationality as a legal status of individuals in relation to states under international law I will call this ‘citizenship’.

question is whether these two views are consistent with one another.<sup>145</sup> Interestingly, a legal theorist views the relationship as being diametrically opposed to Faist's first view: she defines nationality as a form of citizenship, the result being that 'citizenship is the broader category' (Bosniak 2003: 28, note 3). Finally, another scholar considers that citizenship and nationality are different terms which entitle individuals to different types of rights and benefits (Bloemraad 2007: 180, note 6).

But scholars are not the only ones to be blamed for this conceptual confusion. The distinction is sometimes also caused by different political and historical contexts. For example, in Eastern and Central Europe nations and modern states have known dissimilar and sometimes quite separate developments. As a result, for example, '[i]n the Polish tradition, citizenship and belonging to a nation are conceptually distinct' (Górny, Grzymała-Kazlowska et al. 2007: 147), see also (Faist 2007b: 184). The consequence of such a distinction is the fact that in Poland the concept of nationhood is more important than that of citizenship (Górny, Grzymała-Kazlowska et al. 2007: 161). This is not quite difficult to understand since, as the Kurdish and Catalan cases show, there are nations in the world which do not have their own state. In other words, an 'ethno-cultural nation' is an entity quite distinct from a 'political nation', and actually it is pretty hard to find a real world case where both entities coincide.<sup>146</sup>

As the above examples illustrate, nationality and citizenship are indeed two distinct notions. If this is correct, then I want to clearly define the way I am using them in the context of this study. The best way to do this is to say that nationality indicates affiliation to one or more specific (ethnic, cultural, etc.) groups defined as 'nations'. This relationship may in some cases be used by states as a basis to entitle the qualified non-resident individuals to some – arguably all – membership rights *except political rights*. Obviously, citizenship is thus exclusively referring to political rights. In other words, citizens – as I have defined the term above, a citizen of a state should be any permanent resident in that state<sup>147</sup> – enjoy political rights, while nationals – persons ethnically or culturally linked with that state but who do not habitually reside there – do not: 'dual nationality does not necessarily entail access to all the rights and benefits of national citizenship, like voting or the right to hold office' (Jones-Correa

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<sup>145</sup> I would like to thank Joseph Carens for drawing me attention on this point (personal communication on file with the author, November 2013).

<sup>146</sup> The same distinction between citizenship – the legal relationship between a person and her state – and nationality – belonging to a nation – is also implemented in other states' laws, similar to Mexico's – as we will see in the next two chapters – and many European countries, as already explained in chapter one.

<sup>147</sup> Of course, this is my proposal: few states today practice naturalisation of permanent residents based on *ius domicilii* – see chapter seven on present-day legislation. Moreover, my claim that 'a citizen of a state should be any permanent resident in that state' does not exclude a residency requirement – I have proposed a threshold of three years previously lived in that state.

2003: 304). One example of a state that employs these terms according to my proposed definitions is Mexico, for which citizenship is simply nationality *plus* political rights (Jones-Correa 2003: 316).

But is such a distinction justified? The present chapter tried to show that it is. Let me summarise my points. First, the advantages offered by dual citizenship are either nonexistent or they can be obtained through other means. Second, the various difficulties this status raises are serious. Third, formal plural status violates in several ways the democratic principle of citizenship equality. Fourth, the same principle of equality prohibits us from designing different classes of citizens according to the rights they can or cannot enjoy. If we add to this that citizenship is a right but *dual* citizenship is not (Faist 2007d: 7), then we can confidently accept only one citizenship – based on the permanent residence criterion – and then recognise all the other ties a non-resident individual might have to the state – or states – in question through the concept of nationality – or multiple nationality.

Indeed, why is it necessary to recognise multiple ties individuals might have to several states by according them *formal* plural status, as many scholars seem to ask for (Owen 2010: 64), (Kusý 2004: 307), (Blatter 2010: 16), (Egry 2010: 26), (Faist 2007d: 21), (Spång 2007: 113), (Bloemraad 2007: 179)? Or, to put it in another way, why ‘a legal status such as nationality should be treated as a vehicle to recognise or confirm a specific identity or group belonging – or, as Spiro puts it, to “actuate identities”’? (Horváth 2010: 35). The problem is that for migrants themselves citizenship and identity are quite different concepts. A study on immigrants in Canada revealed that they see ‘dual citizenship as an identity claim rather than as a legal status’; ethnic affinities ‘do not translate into a strong desire for formal political and legal attachment to the country of origin’; and finally, immigrants who qualify for dual citizenship ‘do not bother to apply for it’ (Bloemraad 2007: 174-175).<sup>148</sup> Another study in Canada, this time specifically on Hong Kong immigrants, reveals that for them ‘self-reported citizenship reflects people’s identities more than it describes citizenship rights’ (Preston, Siemiatycki et al. 2007: 209). The ironical conclusion seems to be that ‘despite academics’ interest in – and, in some cases, concern with – dual citizenship, the vast majority of immigrants care little about their access to multiple political memberships’ (Bloemraad 2007: 174-175).

If, as we have already seen, there is no evidence that dual citizenship reinforces individual ties to states; if, moreover, affective connections to family, friends, the place of birth and so on ‘are not contingent on citizenship status’ (Spiro 2007: 193); finally, if most of dual citizens value formal plural

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<sup>148</sup> Evidently, strictly speaking nobody applies for dual citizenship in countries that tolerate it such as Canada. You can only apply for the citizenship of Canada and become a dual citizen as a result.

status only for its instrumental worth, then the argument that multiple citizenship recognises or actuates plural identities is doomed to fail.

Before concluding, two more problems must be addressed. Firstly, the most important meaning of ‘nationality’ today is (unlike the definitions I have proposed above) citizenship seen from the perspective of international law. This may seem to leave open the question what my proposal entails: will multiple nationals in my sense of the term enjoy any of the protections offered to nationals under international law (e.g. exemption from state powers over foreign nationals)? I believe they do, since they are also citizens (or ‘nationals’, according to the international law) of a specific state. Secondly, one may ask whether multiple nationality in my sense entails specific obligations of mutual recognition of such ties between individuals and states. I believe such mutual recognition is desirable, but not necessary since recognition of a class of ‘external quasi-citizens’ is a domestic political problem, not an international issue.

### 5.4.3. Examples

The distinctions between nationality and citizenship and between cultural and political nation are very important in parts of the world where conflicts over borders are not yet settled or, if they are, then memories of historic injustice loom large. A case in point here is Central and Eastern Europe, where after the fall of communism states started to engage in nation politics which reached individuals and had consequences beyond their own borders, creating what has been called a ‘Status Law syndrome’ (Ieda 2004: 4). After the two waves of European enlargement states like Hungary replaced the external protected status applicable in its EU member state neighbours with semi-dual citizenship status in a first step (that is, citizenship minus political rights, what I have called here ‘nationality’) and full dual citizenship in a second step. Political rights have been accorded to non-resident citizens (the former ‘ethnic kins’ in neighbouring states) on 1 January 2012 when the new Hungarian Constitution came into force. I will discuss later in the next chapter the problem of external protected status – or of what I will call ‘external quasi-citizenship’; what is important to underline here is that in such cases dual citizenship is clearly not an option: ‘kin nationalities’ are better protected through some form of cultural and political autonomy in the state of residence than through citizenship offered *en masse* by the kin state. However, because of disputed borders and memories of historic injustice kin minorities cannot have both autonomy *and* dual citizenship status: indeed, there is a trade-off between the two (Bauböck 2007a), (Bauböck 2010a).

If this is correct, then the distinction I have proposed between nationality and citizenship is an important one and it must also be applied in Central and Eastern Europe. Here, as elsewhere, not plural citizenship, but *one citizenship plus multiple nationality* (or, as I will call it in order to avoid a strictly ethnic interpretation, ‘external quasi-citizenship’) is the answer. The advantages of certifying and coding ‘nationality’ will be discussed in the next chapter. But one could claim that it also creates more problems than it solves – for example problems of discrimination, precisely in those societies where nationality and citizenship could actually be separated in meaningful ways.<sup>149</sup> However in chapter six I design the concept of ‘external quasi-citizenship’ in such a way that, firstly, it is not based only on ethnicity or ‘nationality’, but also on different other ties people may have to an origin country. And secondly, such a status is applied by the home state on its territory; the codification is not at the international level so it does not have legal influence in other states.

In the next chapter on the ‘external quasi-citizenship’ status I will go into detail regarding the rights ‘nationals’ – more exactly, a part of nationals defined as ‘external quasi-citizens’ – may enjoy. For the moment it is enough to say that the range of rights may be anywhere between ‘full citizenship rights minus political rights’ – as in Turkey, where having Turkish nationality but not citizenship has almost no consequence in what concerns enjoyment of rights (Rumpf 2003: 369) – and simply receiving financial aid for the protection and promotion of kin minority’s language and culture in the state of residence (on the one hand) and other small benefits in the ‘kin country’ (on the other hand) – as provided by the revised 2004 Hungarian Status Law (Ieda 2004: 49-53). Of course, it goes without saying that in the case of nationals having no electoral rights, their status does not imply that they enjoy no forms of political manifestation at all: for example, they can still engage in lobbying, delivering electoral discourses, or can even be allowed to form a consultative council that can have an official or semi-official status in the home country (Spiro 2003: 146).

Before ending this section, a specific objection must be answered. According to it, it makes no sense to have a distinction between citizenship and nationality, as long as some citizenship rights – for example, political rights – can be provided according to the residence criteria: since this is easily feasible, the proposed distinction becomes superfluous (Spiro 2003: 143), (Owen 2010: 61-62). But there are two motives for which this division may not be so. The first reason is normative. As we have already seen, equality is citizenship’s main thrust; introducing a second class citizenship – for those nationals stripped of their political rights for residence-related reasons – may not be a liberal and

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<sup>149</sup> I would like to thank Anna Triandafyllidou for drawing my attention on this point (personal communication on file with the author, November 2013).

democratic way to conceive a political community. The second reason is rather pragmatic. Since citizenship status is very demanding – it requires permanent residence within state's borders – criteria for nationality can be relaxed, such that any link which can be considered ‘genuine’ – speaking the language, sharing the culture, having family ties, owning property, and so on – may be used by individuals to access nationality status in the countries they feel linked to. However, neither relaxed rules for offering nationality nor the possible multiplicity of such a status have an impact on citizenship. In other words, citizenship – that is, political membership – is not devalued by recognizing various ‘nationality’ ties an individual may have to one or multiple states of which he is not a citizen.

## 5.5. Conclusions

This chapter has led to the following findings: (a) the advantages offered by formal plural membership are either nonexistent or they can be obtained through other means; (b) dual citizenship can raise various and serious difficulties for all the actors involved; (c) normatively, this status violates in several ways the democratic principle of citizenship equality; (d) the same principle of equality prohibits creating different classes of citizens enjoying different types of rights; (e) citizenship status should be offered only to individuals who have a legitimate claim, and the only legitimate claim is based on permanent residence; (f) normatively, politically and historically there is a real distinction between nationality and citizenship. From these six premises, I conclude that we should abandon multiple citizenship status altogether.<sup>150</sup> Instead of it, I have advanced the proposal of ‘one citizenship, multiple nationalities’ – according to which a person may enjoy only one, exclusive formal political status if she permanently resides in a state, but she can also have recognised her various ties with the states in which she does not reside through nationality status which enables her to enjoy different rights short of political rights.

There are two simple ways to eliminate the incidence of dual citizenship in order to implement my proposal. The first one is the option model – as in Germany, where between the age of eighteen and 23 a plural citizen who acquired German citizenship via *ius soli* (as the child of settled immigrants) is

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<sup>150</sup> But what happens in this case to immigrants who do not want to naturalise? One could say that a consistent defence of residence-based citizenship that wants to avoid a ‘citizenshipless’ status would have to abolish consent in both exit and entry, i.e. automatically withdraw citizenship and automatically bestow citizenship based on *ius domicilii*. As I will show in the last chapter, I do not want to go that far. First of all, according to sociological studies regarding immigrants, the longer the residence period, the stronger the desire to naturalise. Moreover, I claim that the onus is on states to offer stimulating incentives for immigrants to naturalise. And finally, if even in this case there would still remain a number of long-term immigrants that refuse to naturalise, I claim that this number of second-class citizens is extremely small, so accepting some dissenters cannot destroy liberal democratic values. In their case we can apply Ottonei and Torresi’s view discussed in chapter four, according to which one may need to strike a balance between migrants’ individual plans and liberal democratic values.

obliged to choose only one citizenship (Gerdes, Faist et al. 2007b: 47).<sup>151</sup> Of course, the formulation of the law implies that those who acquired citizenship based on *ius sanguinis* can usually continue to keep any other citizenship acquired at birth. However, the law could apply to every individual irrespective of the way she acquired citizenship, so it should also address the question of inherited dual citizenships. The second way is the renunciation requirement for those who apply for another state's citizenship.<sup>152</sup> The only possible exception from the principle of avoiding dual citizenship I am aware of emerges in the case where origin country refuses to release its citizens from their formal status. This refusal cannot be defended in normative terms, but it does happen in the real world, for example in Afghanistan, Morocco, and Tunisia (Hagedorn 2003: 191), (Gerdes and Faist 2007a: 154). The solution here is not acceptance of dual citizenship status but strengthening international norms of human rights in the direction of obliging non-democratic states to release their citizens from their formal status according to their request – arguably, they cannot only be released from their citizenship status, but this status may be also withdrawn. There may be, of course, different conditions of and sanctions for renunciation. As one scholar puts it, the state may permit renunciation but is not obliged 'to be gracious about it' (Legomsky 2003: 112). However, the possibility of renunciation must exist and the conditions must not be difficult to fulfil.

Finally, it should be stressed that citizenship must be exclusive only in its horizontal dimension. It is not and should not be exclusive vertically. A state's formal membership can be the basis of vertically nested citizenship either internally – in the case of federations – or externally – in the case of unions of states, like the European Union (Bauböck 2010b), (Skrobäck 2007). Moreover, vertically nested citizenship could promote better than dual citizenship objectives such as enhanced freedom of movement, since it would not discriminate against mono-citizens, as formal plural status presently does. Of course, in the near future states will continue to accept or tolerate dual citizenship, hence my proposal of 'one citizenship, multiple nationalities' may seem rather utopian. However, the fact that most of the international community accepts such a status does not thereby render dual citizenship normatively legitimate.

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<sup>151</sup> Obviously, this model does not eliminate dual citizenship for children. This may raise some problems like military service, if at least one country conscript at the age of 18. The law could be modified to the extent that the decision must be taken either by parents at birth or by the child between the age of 16 and 18, for example.

<sup>152</sup> This condition may require enforcing universal compliance, since multiple citizenship would still result if some states do not comply (e.g. do not release their citizens).

## Chapter 6. ‘Citizens-Plus’ (2): ‘External Quasi-Citizens’

‘... the country of origin becom[es] a source of identity, the country of residence a source of rights, and the emerging transnational space, a space of political action combining the two or more countries’  
[Riva Kastoryano, quoted by Anupama Roy (Roy 2010: 152)]

### 6.1. Introduction

In the preceding chapter I argued that, for both symbolic and practical reasons, dual citizenship is a status that in most cases should be avoided. However, I did not dismiss the fact that many people have real and strong ties to more than one country. To put this more precisely, they have strong ties to countries other than the country of residence – which is, or should be, as I have argued, the country of citizenship. I refer to people in these circumstances as ‘*external quasi-citizens*.’<sup>153</sup> Three categories of people are included under this rubric.

The first category of ‘*external quasi-citizens*’ are migrants or their descendants who live – have residence – in a country other than that of their origin. The second category includes ethnic groups that, after a re-drawing of borders, find themselves living in a different state. The final category covers co-ethnic groups who have never in the past shared a state territory with a current kin state but whose kin cultures have emerged in a historic period before state formation. For example, Turkey now officially includes Turkic populations – Turkmenistan, Azerbaijan, etc. – in its conception of diaspora although these territories were not part of the Ottoman Empire. Consequently, as I will try to argue, normative claims to ‘*external quasi-citizenship*’ depend on cultural commonalities – so there is a wide scope of inclusion – and not only on involuntary incorporation as a minority into a nationalising state, which reduces the scope of such claims greatly.<sup>154</sup>

As a consequence of such links, ‘*external quasi-citizens*’ have some interests in preserving the tie with their kin country. They may simply want to have a larger space of free movement; they may have inheritance interests, economic interests, or simply regard that country as the only entity able to provide resources for preserving their language and cultural identity. The normative question here is:

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<sup>153</sup> The term was first proposed by Bauböck (2007b: 2396) and was also used by Owen (2011a). A term which is more often used in the literature is ‘ethnizens’ (also proposed – but later dropped – by Bauböck, who thinks now that ‘ethnizens’ are a specific subcategory rather than synonymous with ‘*external quasi citizens*;’ personal communication on file with the author, September 2013). I prefer not to use the term ‘ethnizenship’ since it refers directly to a person’s ethnicity, while I am interested not in ethnicity *per se*, but in various strong links – which include ethnicity, but are not reduced to it – a person may have with other countries besides the country of residence.

<sup>154</sup> In this chapter I am discussing only the first two categories of ‘*external quasi-citizens*;’ since I am arguing that the status depends on cultural commonalities, it is obvious that it naturally covers the third category too.

what type of relationship is acceptable between an ‘external quasi-citizen’ and her country of origin? Some authors – and governments – believe that such links should be legally acknowledged in one form or another, ranging from the provision of resources to ‘external quasi-citizens’ to preserve their language and culture to a direct offer of full citizenship rights. Other authors believe that, especially in cases where there are difficult historical relations between countries, such persons should be supported only by their country of residence. Finally, some think that certain groups have a right to self-government or even the right to secession.

The first part of the chapter starts by revisiting four cases of ‘external quasi-citizenship’ laws implemented in recent years. I divide ‘external quasi-citizens’ into two categories: people who have this status because they migrated – in this sense, they are also *migrants* – and people who have this status because of a border revision – in this sense, they are also ‘*ethnic kins*’ of another state. The selected cases are India, Mexico, and Turkey – representing an ‘external quasi-citizenship’ regime predominantly<sup>155</sup> for *migrants* – and Hungary, presenting an ‘external quasi-citizenship’ regime for ‘*ethnic kins*.’ This is not a random selection of countries. It ranges from the most restrictive regime – India, which offered this status only to some ‘external quasi-citizens’ who were also citizens of wealthy countries – to the most generous one, Hungary. The Hungarian state recently offered dual citizenship to Hungarian ethnics from neighbouring countries.

The second part of the chapter discusses in a comparative perspective who qualifies for such a position and what is the range of rights enjoyed by an individual eligible for this status. The third part examines the normative implications of these cases: whether ‘external quasi-citizenship’ should be conceived as a ‘status’ or as ‘favourable treatment;’ what home<sup>156</sup> states proffer as reasons for offering some benefits through such a legal standing; whether such a regime is also normatively justified; what type of rights ‘external-quasi citizens’ may enjoy; and finally, whether such a regime may be discriminatory, and for whom it may prove to be so.

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<sup>155</sup> Each of these countries also has potential border-revision based kin groups: India/Pakistan, Mexico/US Chicanos, Turkey/Ottoman Empire territories. For Turkey the historic period of border revisions is even the same as for Hungary – the post First World War Peace Treaties. So the difference is not on the history of emigration and border revisions, but on the current diaspora policies.

<sup>156</sup> The concept of a ‘home state’ belongs to a rather ambivalent terminology which is biased in favour of the ‘kin state’ claims. I will however use it given the lack of a better term that applies both to kin states and sending states.

## **6.2. Three examples of migration-based ‘external quasi-citizenship’ regimes**

### **6.2.1. India**

India is the most restrictive state out of the four analysed here regarding the treatment of its ‘external quasi-citizens’; moreover, the simple fact that this category of people has been taken into account by their country of origin had purely economic reasons.<sup>157</sup>

The creation of Indian citizenship was a difficult task and took a particular path because all normal conditions for such an endeavour were lacking. The multiplicity of ethnic, linguistic and religious groups rendered the creation of a homogeneous national identity out of the question. From the very beginning the process was not only a top-down endeavour, but it also started with a strictly *territorial* notion of identity. This approach was reinforced soon after this country’s independence when, because of the partition that created Pakistan in 1947, India decided to withdraw citizenship from all Indians that wanted to stay in Pakistan. In 1955 the Citizenship Act went further and simply abolished dual citizenship, although the approach was rather permissive. By migrating a person lost Indian citizenship, but the same person was able to reacquire it by returning to the state territory. Thus independent India came into being with a ‘territorial conception of citizenship rather than an ethnic one’ (Adeney and Lall 2005: 11) and dual citizenship was officially excluded.

However, after approximately forty years things started to change because of remittances. On the one hand, the state wanted to attract economic investment in India by relying on ‘external quasi-citizens’ money; on the other hand, the fear of foreign interference rendered dual citizenship out of the question. ‘External quasi-citizens’ were thus categorised into different groups by the Indian government and subjected to various restrictions. In 1999 there were at least two legal categories of ‘external quasi-citizens’: PIO – Person of Indian Origin – and NRI – Non-Resident Indian. But the distinction was far from sharp: the main difference is that NRI may have or may not have Indian citizenship, while a PIO always lacks it. However, having Indian citizenship while living outside India did not make a big difference in the past for a NRI in comparison with a PIO. In the mid-1980s the government restricted the rights of its citizens who are not also residents – for example, the right to buy and own property (Adeney and Lall 2005: 18). These restrictions were later dropped for NRIs.

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<sup>157</sup> On the other hand, the fact that former Indian citizens and their descendants in Pakistan and Bangladesh were excluded had purely political reasons.

But soon remittances started to have an important economic impact. Roy estimates that ‘in 2005, the overseas Indians sent remittances to India of an estimated 21.7 billion dollars, more than what China (21.3 billion) and Mexico (18 billion) received’ (Roy 2010: 143). Given these changing circumstances, the government shifted its position towards ‘ethnizens’ and called them now the ‘extended family’. In 1999 a green card was launched for the PIOs which allowed them to invest and live in India for longer periods and to be treated on a par with NRIs. They were permitted to buy and own immovable property, their children acquired the right to be admitted to educational institutions in India, and they became eligible for national housing schemes (Adeney and Lall 2005). However, the government restricted the scope of this notion. Firstly, the status was accepted only in order to attract more remittances; only Indians from the wealthy countries were eligible to apply for Indian quasi-citizenship. In this way, for example, Indians from South East Asia and those from East Africa were excluded – this made Fatima Meer, a member of National African congress, declare that PIO is actually a ‘dollar and pound citizenship’ (Roy 2010: 141). Secondly, Indians from Pakistan and Bangladesh<sup>158</sup> were also excluded because of political reasons.

In a final step, in January 2005 the Indian government announced that all former Indians would become eligible for the PIO status – however, Indians from the colonial diaspora and those who migrated to Bangladesh and Pakistan were still excluded. What is important to note is that PIOs will still not enjoy important political rights – i.e., the right to vote and the right to stand for elections. Even if we set aside the controversial exclusion of Indians from Bangladesh, Pakistan and colonial diaspora – which is, in fact, a political and not an ethnic way of building ‘the nation’, since the so-called ‘ethnic’<sup>159</sup> Indians from those regions are not considered ‘real’ Indians – we still have the problem that a ‘person of Indian origin’ is not a full citizen because she lacks political rights. In other words, the status of such a person is that of an ‘external quasi-citizen’ in one of the two senses in which I have defined this term earlier: a migrant or her descendants who live/have residence in another country than that of her origin. Because of this connection the ‘external quasi-citizen’ is offered some rights by his origin country – but not full citizenship rights.

<sup>158</sup> The terminology does not help us here, since it is difficult to say who the ‘Indians’ in Pakistan and Bangladesh are, since the whole population of these two countries is of ‘Indian origin’. I consider the notion as referring to Muslims from what is now Indian state territory who were resettled in what was then still united Pakistan after partition and to other former Indian citizens who preferred to remain there.

<sup>159</sup> As I have already pointed out above, there are no real ‘ethnic Indians’: the partition was done on religious, not on ethnic grounds.

### 6.2.2. Mexico

The Mexican case is even more inventive and interesting, since it differentiates between (multiple) nationality and (multiple) citizenship – but once again, the difference is residence within or outside the country. Put simply, once a Mexican lives abroad *and* acquires another citizenship, she loses Mexican citizenship. However, since 1997, such a loss does not also imply losing her Mexican nationality. Mexican ‘citizenship’ may be lost in several ways, but Mexican ‘nationality’ is everlasting and cannot be lost.<sup>160</sup> This difference between citizenship (which is based on residence and offers full political rights) and nationality (which may offer a bundle of rights to a person except political rights) encompasses exactly the definitions I have proposed in the previous chapter. From the Mexican constitutional perspective, ‘nationality’ is a *sociological* concept and refers to ‘the sense of belonging felt by a group of persons who share one culture, including language, traditions, history, and social values’ (Ramirez 2000: 313-314). Moreover, nationality links an individual to her state and is acquired at birth or through naturalisation. By contrast, as Ramirez also notes, ‘citizenship’ is a *legal* concept and refers to the legal relationship between an individual and her state, specifying both parties’ rights and responsibilities. Unlike nationality, citizenship confers political rights and is acquired at the age of eighteen – in consequence ‘[s]trictly speaking, no one is born a Mexican citizen’ (Fitzgerald 2005: 178).<sup>161</sup>

Thus, such a system must be considered one of dual or multiple nationality, but *not* one of dual or multiple citizenship (Ramirez 2000: 326-327);<sup>162</sup> in other words, co-nationality is permitted, while co-citizenship is not (Chavez 1997). Even if, as in the Indian case, we cannot speak of a dominant, overarching ethnicity – since Mexico, just as India, is composed of various ethnic groups and, unlike in

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<sup>160</sup> However, there is still one category that can lose not only Mexican citizenship, but also Mexican nationality, and that is the category of naturalised Mexicans (Ramirez 2000: 321-323). It is important to note that, in comparison with Mexicans by birth, the same category of naturalised immigrants are not allowed to keep dual nationality as it is defined in the Mexican law (Ramirez 2000: 336).

<sup>161</sup> In *The Second Treatise of Government* (1689), Locke makes an analogous argument: ‘But it is plain governments themselves understand it otherwise; they claim “no power over the son, because of that they had over the father;” nor look on children as being their subjects, by their fathers being so. If a subject of England have a child by an English woman in France, whose subject is he? Not the king of England’s ; for he must have leave to be admitted to the privileges of it : nor the king of France’s ; for how then has his father a liberty to bring him away, and breed him as he pleases ? and who ever was judged as a traitor or deserter, if he left or warred against a country, for being barely born in it of parents that were aliens there ? It is plain then, by the practice of governments themselves, as well as by the law of right reason, that “a child is born a subject of no country or government.” He is under his father’s tuition and authority till he comes to age of discretion; and then he is a freeman, at liberty what government he will put himself under, what body politic he will unite himself to: for if an Englishman’s son, born in France, be at liberty, and may do so, it is evident there is no tie upon him by his father’s being a subject of this kingdom; nor is he bound up by any compact of his ancestors. And why then hath not his son, by the same reason, the same liberty, though he be born any where else? Since the power that a father hath naturally over his children is the same, wherever they be born, and the ties of natural obligations are not bounded by the positive limits of kingdoms and commonwealths.’ (Locke 2003: 152).

<sup>162</sup> Of course, this was the situation before external voting rights were introduced – as I will further discuss.

India, *mestizaje*, i.e. mixed indigenous and European descent, is regarded as the dominant national identity<sup>163</sup> – a person born as a Mexican remains a Mexican national for the government even if she loses Mexican citizenship. Once again, such a person can be considered as an ‘external quasi-citizen’ in the sense defined at the beginning of this chapter.

In Mexico citizenship is thus based on residence. Establishing permanent residence outside the state *and* being granted another country’s citizenship implies losing Mexican citizenship, but it is important to note that, because nationality is retained even in such a case, the loss of citizenship rights is effective only as long as the person maintains permanent residence abroad as a citizen of another state. When the same person of Mexican nationality comes back to permanently reside in Mexico and renounces that country’s citizenship, she becomes a Mexican citizen again. Having Mexican nationality is therefore only a qualifier for Mexican citizenship, but the former does not, by itself, imply the latter.

The reason why the Mexican government implemented this distinction between citizenship and nationality – which was considered to imply ‘a dual nationality, and not a dual citizenship, system’<sup>164</sup> (Chavez 1997: 124) – is, just like in the Indian example, purely economic in nature. But in this case there were four causes that drove the change in the government’s position. The first was, just like in India, the desire to increase the flow of remittances – according to some estimates, these ranged ‘from \$3.2 billion to \$5 billion per year’ (Chavez 1997: 127). The second cause was not less important: according to some authors, in 2000 there were 7.8 million people of Mexican birth living in the United States – roughly eight per cent of Mexico’s population. Moreover, ‘[a]n additional 13.8 million persons born in the United States claim Mexican ancestry’ (Fitzgerald 2005: 174). This is why the Mexican government was directly interested in keeping those emigrants outside Mexico in order to relieve pressure on the job market. Such a concern was motivated by US legal initiatives in the 1990s against illegal migration – among which the infamous 1994 California Proposition 187 – which raised the threat of large masses of Mexicans returning home and putting pressure on the job market.

The third cause was the hope that keeping ties with Mexican-Americans eligible to vote in the U.S. and offering them some rights through an ‘external quasi-citizenship’ regime would create a large bloc of voters in the US elections sympathetic to Mexico and thus policy makers themselves would be more favourable to their voters’ country of origin. But such a reasoning, which may prove to be well

<sup>163</sup> At the terminological level we find here a difference between ‘ethnic heterogeneity’ and ‘*mestizaje*’ (on the one hand), both of which can be contrasted with a ‘dominant ethnicity’ (on the other hand).

<sup>164</sup> Chavez may be wrong here: if the Mexican conception entails that nationality is an indissoluble bond acquired at birth, then it is highly unlikely that it would be possible to acquire another *nationality*. A Mexican national can become the citizen of another country, but not a national in the same sense that Mexico attributes to this term (Rainer Bauböck, personal communication on file with the author, April 2013).

founded in other countries of immigration, does not succeed in the case of Mexico. According to some authors, Mexicans in the United States are more and more taking a stance against illegal immigration and against immigration in general: ‘in recent years many newly naturalised U.S. citizens have aligned themselves with anti-immigrant groups and a 1995 poll showed that a majority of Mexican-Americans residing in Texas supported the general concept of Proposition 187’ (Chavez 1997: 134-135).<sup>165</sup>

Finally, the fourth economic reason for accepting dual nationality was that, in the increasingly competitive Mexican politics beginning with the 1980s, opposition parties suddenly acquired an interest in migrants and started to advertise themselves among the Hispanic groups in the U.S. in order to attract funds for political campaigns (Fitzgerald 2005: 184). In summary, according to Fitzgerald,

‘Mexico has recognised dual nationality because of US-resident Mexicans’ increased remittances, the unparalleled numbers of Mexicans abroad in absolute and relative terms, their potential source of support for the Mexican state as an ethnic lobby, and the contested incorporation of emigrants into Mexican partisan politics’ (Fitzgerald 2005: 186)

Regarding the rights dual nationals enjoy in Mexico, the most important rights seem to be the right to return and the right to acquire property in the coastal and border zones – the last one being reserved until the 1997 Constitutional reform only to native citizens. However, there is a large range of rights that are reserved only for Mexican native citizens<sup>166</sup> and thus they cannot be accessed by dual nationals or, in this case, ‘external quasi-citizens’. These range from eligibility for political offices to peacetime military service. A number of reforms called the ‘restricted employment’ laws were passed in order to

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<sup>165</sup> This should of course be taken *cum grano salis*: the opinion of Mexicans holding US citizenship and residing in Texas is not necessarily the opinion of all Mexicans holding US citizenship and residing in the Unites States. Moreover, Chavez wrote this in 1997 so his claim is in need of updated opinion poll evidence in 2013. The Republican Party is trying to regain the Latino vote by moving towards supporting regularisation and immigration more generally – so why would they do this if a majority of Mexican naturalised citizens opposed immigration? The stance the Republican Party should take towards immigration reform is however highly debated among Republicans themselves – see, for example, *The Economist*, ‘The highest hurdle – Getting a bill through the House will be harder than climbing the border fence’, *The Economist*, 6 July 2013, available at <http://www.economist.com/news/united-states/21580475-getting-bill-through-house-will-be-harder-climbing-border-fence-highest?fsrc=scn/fb/wl/pe/immigration> (last accessed on 31 July 2013).

<sup>166</sup> It is important to note that because of historically motivated fears of foreign interventions, the Mexican state imposes a series of restrictions on emigrants and naturalised immigrants, thus creating a regime of ‘differentiated citizenship’: among other restrictions, naturalised immigrants cannot serve in some public positions or in the military, must renounce any former nationality, are susceptible to denaturalisation, and so on. However, this is not the only type of differentiated citizenship imposed by the Mexican state: one can also find distinct statuses – each with its proper bundle of rights, duties and restrictions – like ‘foreigners’, ‘naturalised Mexicans’, ‘native Mexicans of native parents’, ‘native Mexicans of foreign-born parents’, and finally ‘citizens’ (Fitzgerald 2005: 178, 187).

‘carve out certain services, occupations, and employment prohibited to dual nationals and, of course, to foreigners’ (Ramirez 2000: 338).

An interesting recent development is that in 2005 Mexicans living abroad were granted the right to vote for presidential elections and they voted for the first time in 2006, when the external voting turnout was surprisingly small.<sup>167</sup> However, starting with this point, the situation seems to be very unclear. On the one hand, some authors announced that the vote was open ‘to all Mexican *citizens* [my emphasis] ages [*sic*] 18 and older who ha[d] a valid voting ID card’ (Gutierrez, Batalova et al. 2012). On the other hand, the Mexican Federal Electoral Institute/*Instituto Federal Electoral* announces on its website that double *nationals* – i.e., not only citizens – are granted the right to vote.<sup>168</sup> Thus, the difference that legally still exists between ‘nationality’ – belonging to the Mexican nation – and ‘citizenship’ – belonging to the Mexican nation, plus living in Mexico, plus voting rights – becomes difficult to understand and both concepts of nationality and citizenship turn out to be more fluid than before. In order to avoid confusion, I will limit my discussion of the Mexican case to the period that starts with the moment when Mexican nationality was declared as being ‘everlasting’ (1997) and finishes with the moment Mexican nationals were granted the right to vote in presidential elections (2005). In this period, three points are important to our discussion: (a) Mexicans living abroad were not allowed to vote; (b) the strict difference between nationality and citizenship was maintained; (c) since Mexico accepted dual nationality but not dual citizenship, a Mexican acquiring another citizenship was stripped of Mexican citizenship. I am interested here only in Mexicans who in this period: (1) were stripped of their Mexican citizenship because of their second citizenship; and (2) still kept the Mexican nationality since it was ‘everlasting’.

Finally, it is interesting to ask why the Mexican government preferred to accept double nationality but not full double citizenship. There seem to be two types of reasons for such a decision. The first is historical and refers to fears of interventions from other states: because a large part of immigration to Mexico comes from the three countries that have in the past occupied parts of the territory of this state – Spain, France and the U.S. – Mexico developed an ‘anti-interventionist

<sup>167</sup> It is important to add that there was also a very low turnout in the 2012 presidential elections. Some authors attribute this to very high administrative hurdles for voter registration for Mexican nationals abroad – see for example Lafleur (2011) – while others take it as evidence for a lack of interest among American Mexicans in Mexican politics – see Spiro (2007).

<sup>168</sup> ‘Puedo votar si cuento con doble nacionalidad? R: Si. Todos los connacionales que residen fuera del país y que realizaron su trámite para inscribirse en la Lista Nominal de Mexicanos Residentes en el Extranjero, pueden participar en la elección de Presidente de la República, aun cuando tengan doble nacionalidad’. Translation: ‘Can I vote if I have double nationality? A: Yes. All co-nationals that live outside the country and that made the procedure for registration in the Nominal List of Mexicans Living Abroad can participate in the election of the President of the Republic, even if they have double nationality’ – see [http://www.ife.org.mx/documentos/votoextranjero/voto\\_menu-preguntas.htm](http://www.ife.org.mx/documentos/votoextranjero/voto_menu-preguntas.htm) (accessed 16 May 2012).

nationalism' (Fitzgerald 2005: 183) based on the fears that emigrant Mexicans who are citizens of other states could influence the politics of those states against Mexican interests. The second type of reasoning is more recent and it is mainly politically motivated. It refers to irresponsible voting; that is, to the huge numbers of emigrant voters – as we have seen, the number of emigrant Mexicans is as high as eight per cent of the Mexican population – who do not have to bear the consequence of their voting.<sup>169</sup>

### 6.2.3. Turkey

The third case under consideration, and one which seems to be even more liberal than that of India and Mexico, is that of Turkey – the first instance out of the four considered in this chapter that tolerate dual citizenship. There are three main reasons for this toleration: the number of Turkish citizens living abroad, their economic importance, and the pressure of expatriate Turkish organisations. The result is that since 1981 dual citizenship has been allowed as long as the person enjoying it informs the Turkish authorities (Kadirbeyoglu 2007: 127-128).

However, the simple acceptance of dual citizenship was not enough for Turkey, since the largest part of its external population based in Europe – approximately 2.1 million people (Caglar 2004: 274) – was living in Germany, a country that does not accept dual citizenship through naturalisation. In these conditions, the logical step for Turkey was to also create an 'external quasi-citizenship' regime in 1995 – that is, a 'privileged non-citizen status' – by offering a 'pink card' (*pembe kart*) to persons that renounced Turkish citizenship in order to take the German one, but who still want to keep ties with their country of origin (Kadirbeyoglu 2007: 133). This way, a former Turkish citizen was able to *both* take German citizenship *and* secure the rights offered by the pink card in Turkey.

The Turkish state went even further and actively pressured Germany to put the problem of dual citizenship on the political agenda while also encouraging emigrants to both take German citizenship and keep ties with their home state. However, it is interesting to note in passing that the Turkish Government didn't apply the same vision and conditions to *immigrants* in Turkey. Starting with World War Two – when Christian and Jewish minorities had to pay rates ten times higher than those of Muslims – and continuing with today's non-reciprocal tolerance towards immigrants, the Turkish state applies different standards to emigrants and immigrants (Kadirbeyoglu 2007: 137-138). Moreover, even for dual citizens of Turkish origin the requirement of notifying Turkish authorities

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<sup>169</sup> It is true however that the presumption of irresponsibility is not plausible for transnationally mobile Mexicans.

about the dual status is strictly enforced: for example Merve Kavackci, a former deputy in the Turkish Parliament, was stripped of her Turkish citizenship under the accusation that she took US citizenship without permission from authorities (Caglar 2004: 291).

The aim of the pink card was obvious: Turkish emigrants were encouraged to apply for citizenship in countries that did not accept dual citizenship, but they were also encouraged to keep ties with their ‘home’ state. Before this opportunity, relinquishing Turkish citizenship was a pretty hard option for German Turks, since once they became ‘foreigners’ they were subjected to harsh conditions and restrictions in Turkey, ranging from ‘the restrictions on practicing certain professions (e.g. opticians) to buying land in the villages or in security sensitive areas. Even the funeral and burial of a foreigner in Turkey requires special permission from the Interior Ministry’ (Caglar 2004: 289, note 10). This is why the rights offered by the pink card to which foreigners do not have full access – free movement, property rights, residence, the right to work and to invest in the country – were substantial and, at least at the beginning, the Turkish authorities anticipated that a large number of emigrants would apply for it.

The most interesting thing about the pink card is that by using it, its holder – who is legally *not* a Turkish citizen, but a *non-resident alien* – acquires a bundle of rights that other aliens do not enjoy. Moreover, the children of the holder also acquire these rights. As Caglar puts it, this document defined as a residence permit is a ‘clear case of extending substantive rights without formal citizenship status’ (Caglar 2004: 278-280), although the legal subtlety to which the Turkish authorities appealed to incorporate ex-members (treating non-resident aliens as virtual residents) is a rather forced move.

But in spite of these legal efforts, the two important effects of the pink card are, according to some authors, rather disappointing. On the one hand, after the introduction of the new German citizenship law the number of applications for German citizenship within the Turkish emigrant community dropped considerably in spite of the legal possibility offered by the pink card. On the other hand, the number of ethnic Turks who applied for a pink card was not as high as Turkish authorities had hoped (Caglar 2004: 283-284). This seems to be a complete failure of the pink card, since it fell short of increasing the number of Turkish emigrants applying for both German citizenship and the pink card.

According to the same author the reasons for this failure are twofold. The first one does not lie in the ‘ethnizenship’ regime *per se*, but in the ‘trust relations’ between Turkish emigrants in Germany and ethnic German citizens, which were at a very low level. The second reason is the relationship

between Turkish emigrants and the Turkish state. On the one hand, in some cases in Turkey the administrative staff and state executives refused to take the card into account. On the other hand, German Turks are aware of their ‘negative stigmatisation’ and lack of symbolic capital in Turkey. At the end of the day, in Germany the card stigmatises its holder as a ‘foreigner’, while in Turkey it stigmatises him as a member of the lucky and wealthy ‘diaspora’. Its holder is thus vulnerable both in Germany as an object of stigmatisation, and in Turkey, since the card does not also offer voting rights (Caglar 2004: 286-287).

Setting aside the special political problems of Turkish emigrants in Germany, the pink card is an obviously better alternative to the two legislations we have talked about before. Unlike the cases of India and Mexico, it seems that in Turkey emigrants’ political activism in host countries and Turkish government’s economic and political interest explains not only the toleration of dual citizenship, but also the readiness to find a substitute for it in cases of countries that, like Germany, do not accept it in the first place (Kadirbeyoglu 2007: 143). In 2004, however, the citizenship law was amended: the ‘pink card’ was renamed as the ‘blue card’, and the latter allowed privileged non-citizens and their non-adult children to retain social security rights. However, the amendment stated clearly ‘that these people lose their voting rights, the right to be elected and employed in the public sector’ (Kadirbeyoglu 2010: 7). The possessor of the blue card is therefore an ‘external quasi-citizen’ rather than a dual citizen.

### **6.3. Hungarian ‘ethnic kins:’ from ‘external quasi-citizenship’ to dual citizenship**

The fourth and final example of an ‘ethnizenship regime’ is Hungary. The situation here is a bit different, since ethnic Hungarians living in neighbouring countries are not migrants, as in the Indian, Mexican, and Turkish cases. On the contrary, they are ethnic groups whose territories, after the redrawing of European states’ borders after the First and the Second World Wars have been assigned to other states.

A quick historical review is necessary here. Up to 1918, under the Habsburg Monarchy (until 1867) and then under the Dual Monarchy of Austria-Hungary (1867-1918), Hungarian nationalism was ‘more political than culturo-linguistic’ – because of several attempts of the Hungarian elite to obtain independence from the Habsburg rule – and ‘more territorial than ethnic’ (Waterbury 2010). On the one hand, the Hungarian territory had to be defended first against the Ottomans and then against the Habsburgs; and, on the other hand, the privileges of the ruling class were more important than ethnicity. After all, ‘at the end of the eighteenth century, only 29 per cent of the population in the

Hungarian lands identified as Magyars' (Waterbury 2010: 26-27). However, at the end of the 19<sup>th</sup> century, after the liberal ideas of the 1848 revolution, Hungarian nationalism started to become exclusionary through demands of 'Magyarisation' targeted at the subject nationalities, and through closing minority language schools and limiting other minority cultural activities.

After the First World War Hungary's union with Austria was dissolved, but at the same time Hungary lost through the Treaty of Trianon (4 June 1920) two-thirds of its former territory and 'one-third of its Hungarian-speaking population to neighbouring Romania, newly created Czechoslovakia and Yugoslavia, and Austria' (Waterbury 2010: 30). Although from an ethnic point of view Hungary became fairly homogeneous through these partitions, Trianon became a symbol of suffering and very strong revisionist nationalism emerged between the two World Wars. Under the long term office of Miklós Horthy, irredentist organisations emerged and the government tried to keep ties with Hungarians across the border: (a) by offering subsidies for ethnic Hungarian educational, cultural, and media institutions; (b) by offering political support to Hungarian political organisations in their new states; and (c) by trying to gather economic and demographic data about Hungarian ethnic communities in order to support claims for border revisionism. In the Second World War Hungary aligned with Nazi Germany and for a while succeeded in taking back the lost territories. However, the 1947 Peace of Paris forced Hungary to accept a return to the Trianon borders.

Then half a century of Communist rule followed, and under the social-internationalist ideology the situation of co-ethnics beyond the borders was considered an internal matter of each state. However, unofficial cross-border connections and the *samizdat* literature kept the problem of ethnic Hungarians over the borders alive. In the 1970s and 1980s, because of a shift in interstate relations with the Soviet Union, Hungary started to gain a stronger position in international relations and this allowed it to put on the table the diaspora issue and to criticise the treatment of Hungarian minorities by their communist 'host states.' The government allowed populist dissidents to ally with ethnic Hungarian dissidents in neighbouring countries and fight for the rights of ethnic Hungarians there, since this move deflected other critiques of the regime. At the end of the 1980s, both the government and Hungarian academic intellectuals started to claim that ethnic Hungarians across the borders are in fact members of the Hungarian nation (Waterbury 2010: 47). In 1988 the government set up a special fund to help Hungarian refugees fleeing Romania, and in the next year Hungary succeeded in getting the UN Commission on Human Rights to condemn rights violations in Romania.

Immediately after the fall of communism in 1989, all political parties shared a consensus regarding the main policy lines concerning ethnic Hungarians in neighbouring countries. Although

serious problems did exist (for example, the fate of ethnic Hungarians in Vojvodina in the time of the Yugoslav succession wars and Romanian and Slovak attempts to restrict bilingual signs and education in the minority's language), the Hungarian political class treated all these problems with moderation and interest for ethnic Hungarians, considering that diplomacy and integration into European organisations would improve their conditions.

However, as criticism against the first political party in power – the Magyar Democratic Forum, which won the first elections in 1990 – grew stronger, this party turned to a nationalistic rhetoric. Meetings with the World Federation of Hungarians intensified and the political and financial support for ethnic Hungarians' political parties attracted a sympathetic clientele. Moreover, diplomatic relations with neighbouring countries and support to integrate in regional organisations were conditioned by the improvement of ethnic Hungarians' situation and by guarantees regarding minority rights. In turn, the opposition responded by underlining: (a) the regional instability such a policy would create; (b) the threat that irredentist policy would cast upon Hungary's accession to European institutions; and (c) the danger of rising anti-Hungarian feelings in neighbouring countries. In 1994 socialists won the elections and set the state policy towards Hungarian ethnics on a normal path. It signed bilateral treaties and normalised relationships with Romania and Slovakia, and the diaspora issue became a less important goal of its foreign policy.

The main danger for these normalised relations between neighbouring countries was the economic belt-tightening which was politically exploited (alongside the diaspora problem) by the right-wing *Fidesz* – which became the main opposition party. The critiques against socialists' economic reforms, the poor state of economy and the way ethnic Hungarians were treated – with deteriorating political conditions for them in the neighbouring countries, for example restricted mother-tongue education, and the lack of proper response from the Hungarian government – helped *Fidesz* to win the 1998 elections. After its political success, *Fidesz* quickly began to propagate its kin-state nationalism: the diaspora was presented as an asset and not a burden, and the contact with ethnic Hungarian leaders was institutionalised through an organisation named the Hungarian Standing Conference.

The beginning of negotiations for EU membership in 1998 revealed, however, that a possible accession to European Union and the Schengen zone would once again break ties with ethnic Hungarians in neighbouring countries. There seemed to be a consensus that Hungary should come up with a new, creative legislation that could support even in such a case Hungarian ethnics beyond the European Union's borders. The offer of dual citizenship was out of the question at that time. On the one hand, public opinion held an ambiguous attitude towards Hungarians abroad and a clear negative

opinion about ethnic Hungarians that had immigrated to Hungary. On the other hand, a massive immigration of ethnic Hungarians would stop the Hungarian right wing's project of Hungary's cultural and linguistic influence in the region. Furthermore, even some political leaders of ethnic Hungarians opposed the idea since this could have meant losing both voters and political prospects (Waterbury 2010: 99), (Stavilă 2011).

The so-called 2001 'Status Law' seemed thus to be the best solution Hungary could find. On the one hand, this law offered some benefits to ethnic Hungarians from neighbouring countries, ranging from subsidies to public transportation to free access to Hungarian universities. On the other hand, Hungarian ethnics were authorised to receive a labour permit valid for three months per year and they were allowed to support and consequently receive benefits from the state welfare and health-care systems. Moreover, the Status Law offered subsidies for ethnic Hungarians even if they remained in their countries of residence in the form of educational, cultural and entrepreneurial projects. The practical effects of this law were minimal: for example, the three-months labour permits were not able to stop illegal migration and illegal work and were no longer valid after Hungary joined the European Union. However, the most important effect of this law was symbolic: ethnic Hungarians valued the identity cards offered by Budapest as an official acceptance of their membership in the Hungarian nation.

The Status Law was heavily criticised by Hungarian opposition politicians, by neighbouring countries, and by European institutions. At home people feared that: (a) the law would tie the diaspora too closely to Budapest, creating a form of paternalism that would impede its independence; (b) several provisions of the Status Law would create tensions with neighbouring countries; (c) the law would encourage massive immigration of ethnic Hungarians in Hungary; (d) the ability of ethnic Hungarians to fully incorporate themselves in their kin state would thus be severely disrupted; and finally (e) that offering free movement rights in Hungary to citizens of some countries that have no prospects of joining the European Union in the foreseeable future (for example, Ukraine and Serbia) presented the possibility of thus breaking EU laws.

Slovakia and Romania also accused the Status Law of: (a) violating their state sovereignty through its extraterritorial aspect – for example, the institutions mandated by the Hungarian government to decide eligibility for the Hungarian card in each case were supposed to work on the territory of other states; (b) discrimination – offering work permits to only some of their citizens but not to the others; and (c) creating a special subset of their populations that would be officially seen as Hungarian through the special identity cards received from Budapest.

Finally, the international aspect of the conflict generated by the Status Law was considered by the Venice Commission in 2001, in response to Romania's accusation that Hungary was violating established European norms. In a landmark decision, the Commission decided that European states like Hungary have the right to intervene to support 'ethnic kin' groups in other states but only with the goal of minority protection. At the same time, it clearly stated that minority issues cannot be solved unilaterally through domestic legislation by the kin state, but only through bilateral treaties. The consequence was that *Fidesz* had to negotiate modifications to the Status Law with both Romania and Slovakia.

After the 2002 elections *Fidesz* was again in opposition, and in 2003 the socialist majority in the parliament changed the most controversial provisions of the Status Law. Work permits were withdrawn, educational benefits were extended to anyone learning Hungarian, subsidies were granted to organisations rather than to individual families, and mention of 'the united Hungarian nation' in the preamble of the law was replaced with a reference only to cultural connections between Hungary and its diaspora (Waterbury 2010: 121). However, in the same year *Fidesz* struck back and allied itself with the World Congress of Hungarians in asking the government to hold a referendum on dual citizenship – the intent being to offer ethnic Hungarians citizenship without residence. The socialist government opposed the referendum, pointing to the threat of increased migration, the socioeconomic costs of dual citizenship, and the pressure on the healthcare and pensions funds levied by more than three million ethnic Hungarians who did not work in Hungary. The referendum failed due to the small numbers of those who bothered to vote – but even so, it is interesting to note that out of those who did vote, 49 per cent were against the proposal.

The failed referendum made *Fidesz* set aside for a while its claims related to diaspora, and this helped the socialist party to implement a more realistic set of reforms in this domain. In the following eight years in which the socialists governed (2002-2010) the diaspora policy was radically changed: (a) diaspora problems were placed under economic development policy, the central point being modernization, development and competitiveness of the Hungarian communities in the region; (b) the strong dependence of ethnic Hungarians on Budapest was changed and the clientelistic networks terminated at least for that period of time; (c) the funding process became more transparent; (d) the decision-making process related to diaspora matters was shielded from the influence of the diaspora elites. These processes were supported by the expectation that, after the EU accession of Bulgaria and Romania in 2007, more than 90% of Hungarians would be reunited in a common Europe.

The economic recession and government scandals after 2006 had three direct consequences: the socialists lost the support of the majority of their voters, the extreme right was strengthened through the creation of the far-right *Jobbik* party, and ethnic politics came once again to the fore. The decline of the completely discredited socialists and the rise of the right wing extremists of *Jobbik* made the right wing nationalists of *Fidesz* the voters' preferred choice. *Fidesz* returned to power in 2010 with an incredible majority of two thirds of the votes. Immediately after the elections *Fidesz* and its Prime Minister Viktor Orbán started a set of major and controversial reforms in different areas – the judiciary, mass-media, the economic system – which set Hungary on a collision course with European Union laws. Amongst others, *Fidesz* wanted to change again the relation with ethnic Hungarians abroad – and this time it simply offered dual citizenship to all Hungarians in the neighbouring countries with the notable exception of Austria, which had already been exempted from the geographic scope of the 2001 Status Law.

At the beginning, the offer was not exactly one of full dual citizenship since ethnic Hungarians were not allowed to vote. However, the proposed law had tremendous effects in Slovakia, where the government reacted quickly by changing its own citizenship law to the effect that any person who would acquire another citizenship would automatically lose her Slovak citizenship<sup>170</sup> – for a further discussion about the ‘Hungarian-Slovak tit-for-tat’ see (Bauböck 2010a). Surprisingly, the same offer did not raise any serious reactions in Romania, since at that time the Romanian government was also offering citizenship *en masse* to persons from the Republic of Moldova.

The Orbán government made yet one further and final step. In December 2011 it passed a new electoral law which offered new Hungarian non-resident citizens from neighbouring states *political rights* (Bozoki 2013: 4).<sup>171</sup> External voting is expected to be implemented for the 2014 national elections (Bozoki 2013: 9). Even if they are enfranchised only in national legislative elections – not being allowed to ‘vote or run as candidates in local or regional ones’ (Bozoki 2013: 8) – the circle is

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<sup>170</sup> In 2012 the current Slovak government planned to change this law in order to limit the withdrawal of citizenship in such cases – see Dagmar Kusa, ‘New Slovak government plans to limit withdrawal of citizenship in case of acquisition of a foreign nationality’, *EUDO Observatory on Citizenship*, 17 March 2012, available at <http://eudo-citizenship.eu/news/citizenship-news/614-new-slovak-government-plans-to-limit-withdrawal-of-citizenship-in-case-of-acquisition-of-a-foreign-nationality> (accessed 19 August 2013). However, in June 2013 the European Court of Human Rights rejected two complaints by citizens stripped of Slovak citizenship – see Zuzana Vilikovská, ‘ECHR rejects two complaints by citizens stripped of Slovak citizenship’, *The Slovak Spectator*, 7 June 2013, available at [http://spectator.sme.sk/articles/view/50312/10/echr\\_rejects\\_two\\_complaints\\_by\\_citizens\\_stripped\\_of\\_slovak\\_citizenship.html](http://spectator.sme.sk/articles/view/50312/10/echr_rejects_two_complaints_by_citizens_stripped_of_slovak_citizenship.html) (last accessed 19 August 2013).

<sup>171</sup> According to the current electoral law, there are some differences between electoral rights of non-resident citizens and those of residents: ‘the former can vote only for party lists’, and not in single seat constituencies (Bozoki 2013: 6, 8-9). Another difference is that unlike residents, non-resident citizens have to register before elections; also unlike residents, they are allowed to cast their votes by post according to the new electoral law of April 2013 (Bozoki 2013: 7, 11).

now closed. For the first time after the Trianon Treaty, that is, after almost 100 years, ethnic Hungarians from neighbouring countries are once again incorporated into the Hungarian nation. The story that started with some form of ‘ethnizenship’ and ‘external quasi-citizenship’ ends with full citizenship status and rights.

## 6.4. Common developments, surprising differences: discussion of the four cases

### 6.4.1. Who qualifies for ‘external quasi-citizenship’ status?

Before asking what is and what is not normatively acceptable in the above ‘external quasi-citizenship’ regimes, it is important to see in a comparative perspective who qualifies for such a position and what is the range of rights enjoyed by an individual eligible for this status (see table 4 in the Annex).

The first interesting thing is that while in India and Mexico the criteria of inclusion seem to be former citizenship and presence in the territory, in Turkey and Hungary – the states whose ‘external quasi-citizenship’ regimes seemed to be more liberal at the beginning – the criteria are strongly connected with ethnicity. Indeed, as we have seen in the preceding section, the governments in India and Mexico developed a territorial notion of citizenship. Previous presence in the territory *and* previous citizenship status of a candidate or of one of her relatives seem to be the only qualifiers for ‘external quasi-citizenship’ regimes: their target is formed by the group of former citizens and their children *irrespective* of ethnicity. However, there is an important difference between the Indian and Mexican regimes. In India, the existence of previous citizenship status for first generation migrants or the existence of a family link with a former citizen – for second generation migrants and beyond – are the only requirements in order to get the ‘external quasi-citizenship’ status.

Mexico is a bit more restrictive. Since the 1997 constitutional reform, ‘a legacy of anti-interventionist nationalism restricted emigrant nationality by limiting *ius sanguinis* to the first generation born abroad’ (Fitzgerald 2005: 183). Thus it is clear that second and third generations born abroad will not automatically receive citizenship. Moreover, they would not even keep the ‘nationality’ status – and, with it, the ‘external quasi-citizenship position.’<sup>172</sup> Consider the following imaginary case. Pedro is born in Texas to a Mexican-born father and a French mother; he automatically receives

<sup>172</sup> This decision seemed to have been influenced by US politicians, who warned Mexico about the possible huge number of Mexican dual nationals in the future – for example, if we take into account that today there are approximately ten million Mexicans in the US and consider also that they tend to have several children per family, we can easily make an estimate about the huge number of Mexican dual nationals on the US territory in four or five generations.

Mexican nationality – and, if he doesn't have another citizenship, he also receives Mexican citizenship at the age of 18. Now suppose Pedro has two children, a boy Carlos with another Mexican woman who is also born in Texas and thus belongs to the second-generation and another boy Yoshiro with a Japanese-American woman (also born in Texas). The two children would not qualify for Mexican nationality: Carlos would thus be a third-generation Mexican, while Yoshiro would be the grandson of one Mexican national. Suppose now that Pedro has three other girls: Rosita, born in the US (with a native Mexican mother who has just crossed the border), Blanca (born in Spain to a Spanish mother who previously naturalised in Mexico), and Larisa (born in Mexico whose mother is a Romanian tourist Pedro met during a crazy holiday in Cancún). All these three girls *will acquire* Mexican nationality: Rosita (her mother is Mexican-born), Blanca (her mother is a naturalised Mexican), and Larisa (because of *ius soli*).<sup>173</sup>

In Turkey, both the pink card and the document that replaced it – the blue card – were strictly designed only for Turkish emigrants living in states where dual citizenship was not accepted. Moreover, both cards have been designed only for former Turkish citizens who meet two very strict conditions: (a) they must be Turkish *by birth*, and (b) have renounced their citizenship *with state approval*. Since this strict possibility of renouncing citizenship became available only after the 1981 law, it is clear that the Turkish ‘external quasi-citizenship’ regime was designed to exclude minorities who left Turkey before 1981 – like Armenians, Jews, Roma, etc. The reason for this exclusion was that the Turkish state wanted to eliminate the possibility for members of these minorities to come back to Turkey and ‘reclaim property that had been confiscated when they changed their citizenship’ (Kadirbeyoglu 2010: 7). Again, the same regime excludes those individuals who became Turkish citizens by naturalisation. As we can see, although the Turkish state accepts dual citizenship, its ‘external quasi-citizenship’ regime is the most restrictive – in comparison with that of India and Mexico, where these two conditions do not apply.

In Hungary, the first ‘external quasi-citizenship’ regime (1920-1947) and part of the second (2001-2003) were designated only for ethnic Hungarians and their families – mixed families included – so this was actually *not* an ‘external quasi-citizenship’, but an ‘ethnizenship regime’ just like the Turkish one. Moreover, after the Venice Commission’s decision in October 2001, Hungary had to sign a Memorandum of Understanding with Romania in order to successfully implement the Status Law;

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<sup>173</sup> See Article 30 – ‘The Mexicans’ – of the Mexican Constitution:

<http://www.juridicas.unam.mx/infjur/leg/constmex/pdf/consting.pdf> (accessed 9 May 2012). I want to thank Henio Hoyo for offering me Pedro’s imaginary example (email on file with the author, 9 May 2012) and to Lucy Pedroza for checking the accuracy of my interpretation of the Mexican Constitution (discussion on file with the author, 15 July 2013).

some modifications were implemented at the request of the Romanian Government – one of them, for example, being that ‘non-Hungarian dependants of ethnic Hungarians would no longer be eligible for Certificates or benefits’ (Waterbury 2010: 113). From this point of view, and with the unintended help of the Romanian Government, the ‘ethnizenship regime’ centred even more on ethnicity than ever before. Since the revision of the Status Law in 2003 by the Socialist government, the benefits retained – after the elimination of the most controversial ones – in the ‘external quasi-citizenship’ regime have been extended not only to ethnic Hungarians, but also to everyone learning Hungarian. However, this law’s ethnic flavour has remained, since in order to qualify for the identity card a person should be supported by an organisation – a local Church or political party – which must testify that she is an ethnic Hungarian. Since 1 January 2012 any ethnic Hungarian from a neighbouring country can acquire Hungarian citizenship, thus becoming a dual citizen.

#### **6.4.2. What rights could ‘external quasi-citizens’ access?**

Let me now investigate the range of rights that can be accessed by an individual eligible for ‘external quasi-citizenship’ status. Clearly, the most important right enjoyed by all those who qualify for this position – in all the four countries studied above – is *the right to return*. This was, until the emergence of quasi-citizenship regimes, a right reserved only for citizens. This is logical, since one cannot be eligible for national housing in India, acquire property in the coastal and border zones in Mexico, practice certain professions reserved only for Turkish citizens, or apply for a state-subsidised place at a Hungarian university unless one is able to come back to the country of origin.

Another important right is *the right to re-acquire full citizenship status* by re-establishing permanent residence. In Hungary the situation was, until 2012, more complicated. During the communist period national minorities were considered the problem of the state in which they lived. Since the fall of communism and until the Status Law the Hungarian state was afraid of mass migration so it decided to design a system of benefits that could be accessed by ‘external quasi-citizens’ especially in their countries of residence. However, after the 2004 and 2007 accessions to the European Union, more than 90% of ethnic Hungarians became free to travel to Hungary, so acquisition of Hungarian citizenship became initially less important. Further, since 2012 ethnic Hungarians have been able to apply for Hungarian citizenship; this is important not only for ethnic Hungarians living in non-EU countries – since they can thus acquire free movement rights within the European Union – but also for those living in EU countries which are not part of the US visa waiver program – for example,

Romania – and thus cannot travel to the US without a visa; Hungary has been in this program since 2009.

The third right concerns *buying and owing property* in the origin country. This may not be a spectacular offer in Hungary and the rest of the Western world, where foreigners are not restricted in acquiring property. However, the other three countries under scrutiny restrict foreigners in their rights in this respect. Until 1997 only Mexican citizens were allowed to buy land in the coastal and border zones; in Turkey, foreigners cannot buy land in the villages or in security sensitive areas; while India also offered ‘external quasi-citizens’ similar property rights.

The fourth important right that is offered by all four regimes without exception is *admittance to state educational institutions*. This right is accompanied by other educational and cultural rights for both individuals and cultural associations, ranging from subsidised tickets for state-owned cultural museums – for individuals – to eligibility for state-supported cultural activities for cultural organisations.

There are also some differences between these four regimes regarding the rights offered to ‘external quasi-citizens.’ For example, only India and Turkey clearly underline *the rights to live, work and invest in the country*. Mexico most likely takes them for granted, while Hungary has to offer these rights to all European citizens, so probably only the small number of Hungarians living in non-EU countries would benefit from such entitlements. Some social rights that foreigners cannot access, such as *eligibility for national housing schemes* in India or the *retention of attained social security rights* in Turkey, are generously offered to ‘external quasi-citizens’. The Turkish state also offers them *the right to practice certain professions* reserved only for Turkish citizens, makes them *eligible for inheritance*, and allows them *to have funerals in Turkey*. Hungary goes even further: it offers not only a set of rights that ethnic Hungarians abroad can use while on Hungarian territory (for example, *subsidies to public transportation*) but also a set of benefits that can be accessed even from the country of residence, without having to go to Hungary. Among these, one can find subsidies for ethnic Hungarian educational, cultural, and media institutions, as well as subsidies to political parties and organisations in the host state.

However, there is a type of rights neither of these countries has offered to ‘external quasi-citizens’: *political rights*. There may be extensive differences between the four regimes analysed here, but this seems to be the most important similarity. Interestingly, even Turkey, a country which otherwise readily accepts dual citizenship, strips the holders of the pink and blue cards of their political

rights and the right to be employed in the public sector. The motive for this reasoning advanced by origin states seems to be that, while there are important justifications for keeping some formal ties with ‘external quasi-citizens’ – such as promotion of common language and culture, or securing the flow of remittances – these ties are not strong enough to qualify such a person for full citizenship status. Another alternative interpretation is that democratic representation is the one aspect of citizenship that requires a clear distinction between members and non-members. While rights to ownership, return, benefits, etc. can be extended to various categories of quasi-citizens, voting rights cannot because this creates uncertainty about the boundaries of membership that undermines democratic representation.

However, when some government mistakenly considers these formal ties strong enough, or when political purposes require it, the ‘external quasi-citizenship’ regime is transformed into some form of dual citizenship. This happened in 2005 in Mexico, when the government decided to offer non-residents the right to vote in presidential elections. It also happened in 2011 in Hungary, when the false dual-citizenship regime – arguably, an ‘external quasi-citizenship’ regime, since it offered no political rights – was transformed into a real dual citizenship status through the offer of some form of voting rights to dual citizens. One could argue that I wrongly assume here that ‘real’ dual citizenship always entails external voting rights. According to such a critique there are many countries that have traditionally tolerated dual citizenship but do not grant ‘external’ citizens voting rights, no matter whether they are mono- or dual citizens – e.g. Ireland and Greece; the question of whether citizenship comes with external voting is thus considered to be a separate one.<sup>174</sup> However, as I have already tried to explain in chapters one and five, I consider political rights as the only item that still offers citizenship some particular value: anything else – social rights, economic rights, and the right to return – is now largely disconnected from citizenship status. So if we go further and disconnect citizenship and political rights too (a move which some countries have already made, as we will see in the next chapter), then it is hard to understand what citizenship is supposed to mean anymore.

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<sup>174</sup> Rainer Bauböck, personal communication on file with the author, April 2013.

## **6.5. What is acceptable and what is not in an ‘external quasi-citizenship’ regime? Normative considerations**

### **6.5.1. ‘External quasi-citizenship’ between ‘formal status’ and ‘favourable treatment’**

The first thing that must be clarified is whether ‘external quasi-citizenship’ should be conceived as a ‘status’ or as ‘favourable treatment’ (Bárdi 2004: 78). The distinction has been proposed by Bárdi in his article on the Hungarian Status law. He is not clearly defining the terms but according to what he writes, in the ‘debates following the announcement of the Status Law’ in 1999, the question of *status* versus *favourable treatment* for ‘ethnic kins’ was one of the ‘issues of principle’ Bardi (2004: 78). The way I understand this distinction, a ‘status’ implies not only some ‘duty’ of a state towards a category of individuals, but also a new law concept which must be agreed on in international law, related to ‘a systematic codification of measures to support Hungarians living beyond the borders’ Bardi (2004: 79). On the other hand, ‘favourable treatment’ seems to imply a treatment a state may or may not (but it is under no moral or legal obligation to) offer to some category of foreign individuals exclusively on its own territory.

Thus, in the first case of a ‘status’, the home state creates a new special legal status (probably also accepted in the international law) for the specified category of individuals. In the second case of ‘favourable treatment’, the state chooses (according to some simple selection rules) some individuals which are citizens of other states – which may or may not have resided in the country that grants the benefits – and offers them a bundle of privileges under the label of ‘favourable treatment’. My claim is that ‘external quasi-citizenship’ is – or *should be* – all about favourable treatment and *not* about creating a special status. Since I argue that the important thing is to match as far as possible the category of ‘citizens’ and that of ‘residents’, creating a new status besides ‘citizenship’ does not make much sense. In consequence, ‘external quasi-citizenship’ should not be a legal status in international law: a state simply decides to offer a favourable treatment to a group of individuals that do not reside within its borders, and this is – or again, it *should be*, as we will see soon – an internal affair of that country.

One obvious counter-argument here is that this creates a big problem for a residence-based theory of citizenship: international law currently protects foreign residents based on their nationality/citizenship of origin. If we substitute this with citizenship for long-term residents and we

also consider ‘external quasi-citizenship’ as merely a bundle of privileges under domestic law, then we do abolish the protection that international law offers to foreigners. Moreover, the objection could go further and consider that this argument could also undermine my claim in chapter 4 that international law and courts should have a more prominent role. They would merely protect general human rights without being able to defend the claims of foreigners based on their affiliation with a country of nationality involving for example a right to diplomatic protection.

However, I believe this objection does not undermine my argument. Firstly, even under a residence-based citizenship regime – coupled with an ‘external quasi-citizenship’ regime – international law would continue to protect many foreign residents based on their nationality/citizenship of origin. I am referring here to those foreign residents who do not qualify for the citizenship of their country of residence – because they do not meet the residence criterion yet – and to those who are residing outside their origin country being in their country’s service – persons working in the military, embassies, and so on. So conceiving ‘external quasi-citizenship’ as ‘favourable treatment’ does not amount to putting an end to the protection international law offers to foreigners. Secondly, international courts would obviously still be able to defend the claims of these types of foreigners.

The problem though is whether a state has the right to offer this type of favourable treatment to citizens of another country. Moreover, if the answer is affirmative then what is the extent of this right? The landmark decision of the Venice Commission in October 2001 answers both questions regarding the situation of kin minorities. On the one hand, it acknowledges a special bond between kin minorities and their kin states; on the other hand, as a consequence, it considers that preferential treatment of kin minorities by their kin states is acceptable, but only in the fields of culture and education. This decision was however expected: ‘many states make provision for the acquisition of benefits [...] for ethnic kin who are citizens of another state’ (Schöpflin 2004: 93). Among these, the most important and recent cases are Romania, Slovenia, Slovakia, Poland, Ukraine, Germany, and Portugal (Halász, Majtényi et al. 2004: 333-335).

Moreover, since the Venice Commission acknowledges ‘special bonds between a state and its kin minorities, this could arguably amount to the ‘recognition of the nation conceived in ethno-cultural terms’ (Kántor 2004: 115). But if this is so, then the same situation applies not only to ‘ethnic kins,’ but also to migrants and their descendants: they are also ‘part of the nation conceived in ethno-cultural terms’. However, it is important to note an extremely important fact here: in the Venice Commission’s terms, accepting ethnic and cultural relations between a state and ‘ethnic kins’ – or migrants and their

descendants – does not amount to anything else except preferential treatment limited to the fields of culture and education.<sup>175</sup> In other words, no other kinds of links (related to work permits or political rights) are acceptable.<sup>176</sup>

It is important to note that Hungary was not the first European state to offer a special status to ‘ethnic kins’ who have never lived in or even visited the country. This type of legislation had been used by other states before Hungary without respecting the emergent European norms (that is, without restricting preferential treatment only regarding culture and education). For example, before modifying its citizenship laws in the 1990s, Germany permitted “ethnic” Germans [living in East European states] to acquire German citizenship, while denying it to “Turks” living in Germany for three generations’ (Adeney and Lall 2005: 5), (Brubaker 1992). And this preferential naturalisation especially happened in the case of many members of the German diaspora ‘even though they may never have visited the country’ (Adeney and Lall 2005: 5), (Tóth 2004: 383).<sup>177</sup> It is important to note that in this case, unlike in the Hungarian one (at the time of Venice Commission’s decision), the German state directly offered citizenship to ‘ethnic kins’, not simply preferential treatment in the field of culture and education. Schöpflin considers therefore that the Hungarian Status Law was ‘an attempt at a moderate solution... one that gave the Hungarian minorities some status in the eyes of the Hungarian state, but one that fell short of full citizenship which would necessarily mean dual citizenship’ (Schöpflin 2004: 102).

### 6.5.2. States’ reasons for offering an ‘external quasi-citizenship’ regime

But why would a state be interested in keeping such ties with ‘external quasi-citizens,’ since this also means outlaying resources for the benefits bestowed? Beside the economic motivation connected with

<sup>175</sup> According to the Venice Commission, ‘In fields other than education and culture, the Commission considers that preferential treatment might be granted only in exceptional cases, and when it is shown to pursue the genuine aim of maintaining the links with the kin-States and to be proportionate to that aim (for example, when the preference concerns access to benefits which are at any rate available to other foreign citizens who do not have the national background of the kin-State)’. See Venice Commission, *Report on the preferential treatment of national minorities by their kin-state*, Venice, 19-20 October 2001, D(d), available at <http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=10094&Language=EN> (last accessed 4 September 2013); for the French version, see [http://www.venice.coe.int/webforms/documents/CDL-INF\(2001\)019.aspx](http://www.venice.coe.int/webforms/documents/CDL-INF(2001)019.aspx) (last accessed 4 September 2013).

<sup>176</sup> In my view we could also include the right to return – as I will later try to argue, based on the example of the four ‘external quasi-citizenship’ regimes analysed here.

<sup>177</sup> Preferential naturalisation is indeed very common and exists in many more European countries. For a discussion of preferential naturalisation and its limits in international law, see the OSCE High Commissioner of National Minorities (HCNM), *The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations & Explanatory Note*, June 2008, available at <http://www.osce.org/hcnm/33633?download=true> (last accessed 19 August 2013).

the flow of remittances (at least in the migrant-sending states analysed here), one author suggests an additional three main reasons (Ieda 2004: 15).

One is to ensure that those who live outside the country but are ethnically and/or culturally linked with it form part of the nation as a whole. The second is to promote and preserve the well-being of ‘external quasi-citizens’ *in their home country*. This is very important, at least in Mexico and Hungary, because both countries want to keep their ‘external quasi-citizens’ in the place where they currently reside. Economic reasons predominate here. In Mexico more than eight per cent of the population lives outside the country, while according to some estimates the number of ethnic Hungarians in neighbouring states could be up to one third of Hungary’s current population. A high percentage of return migration would obviously put incredible pressure on the job market in both countries. The final reason for keeping ties with ‘external quasi-citizens’ is to promote their awareness of national identity, with the goal of maintaining the home state’s influence in the region (Hungary), of promoting the home state’s interest through lobbying in the host state (Mexico), and of securing the flow of remittances (Mexico, India, Turkey).

Up to now I have succeeded in showing: (a) that an ‘external quasi-citizenship’ regime which simply offers favourable treatment to citizens of another country in the fields of culture and education is accepted by at least one international organisation (Venice Commission); and (b) what reasons home states give for offering some benefits through such ‘favourable treatment.’ What remains to be discussed in the rest of this paper is: (c) whether such a regime is also normatively justified; (d) what type of rights ‘external-quasi citizens’ may enjoy; and (e) whether such a regime may be discriminatory, and for whom it may prove to be so.

### **6.5.3. The normative justification of an ‘external quasi-citizenship’ regime**

In what concerns the normative justification of ‘external quasi-citizenship,’ we have to understand that, unlike in the case of dual citizenship, we do not have here the possible alternative of ‘dormant citizenship.’ The latter refers strictly to emigrants – and, in more generous regimes, to their children (the first generation born abroad) – whose citizenship rights in the non-residence country are ‘dormant’ and can be activated only *if and when* these individuals take up residence there.<sup>178</sup> I have tried to argue

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<sup>178</sup> There are, of course, extremely generous regimes which do not limit the transmission of citizenship over generations: according to one author, ‘seventeen EU countries allow for endless transmission of their citizenship to persons born abroad to a citizen parent’ (Bauböck 2010a: 1). However I will not take them into account since I agree that such a stance is normatively indefensible – see for example Bauböck (2007b and 2009a).

in the previous chapter that dual citizenship status should be rejected not only for the disadvantages it creates for all actors involved, but also with the goal of matching as far as possible the categories of ‘citizens’ and ‘residents.’ However, even if we *would* accept *full* dual citizenship only for the first generation of immigrants, it seems fairly reasonable to suppose that second, third and possibly subsequent generations would also learn the language and would like to keep cultural connections with the origin country even if they wouldn’t seek to actually move there. ‘External quasi-citizenship’ can potentially meet these interests by offering second and later generation individuals ‘favourable treatment.’

I would go even further and argue that this favourable treatment should also be offered to emigrants and their children, instead of dual citizenship. There are two main objections against this proposal. According to the first objection, only citizens have the right to return. It is an accepted fact that, over the years, plans change and migrants or their children may decide for various reasons to return to the origin country. If dual citizenship is not accepted and the right to return is a right strictly connected with citizenship, then these individuals would have serious difficulties to return. However, as we have already seen in the four ‘external quasi-citizenship’ regimes treated above, the right to return is one of the first rights attached to each of these regimes. So the first objection fails since it is based on a false premise: that the right to return is reserved only for citizens.

But at this point one may enquire about the difference between ‘external quasi-citizenship’ and a ‘dormant’ citizenship as long as both categories offer the right to return but neither of them the right to vote.<sup>179</sup> I believe there are serious differences that may prove the ‘external quasi-citizenship’ to be the best alternative. I have discussed these reasons above in section 5.3.5., so here I only want to summarize them. Firstly, a ‘dormant’ citizenship (just like dual citizenship) may still generate international conflicts based on diplomatic protection and may also offer states a way to strip their members of this status, as long as they do not remain statelessness. Secondly, suspending political rights by making them dependent on residency raises an equality problem: since equality is a principle situated at the core of citizenship status, suspending political rights of some (in this case, non-resident) citizens while still accepting them as members of the polity would be equal to creating second-class citizens (Spiro 2003: 143-144). Finally, if as we have seen in chapter one citizenship *exclusively* means today having full political rights in a polity (because human, civic and social rights have been decoupled from citizenship in the international system in the last fifty years), then suspending political

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<sup>179</sup> I would like to thank Joseph Carens for drawing me attention on this problem (Joseph Carens, personal communication on file with the author, November 2013).

rights of an emigrant but still considering her a citizen amounts to simply building a meaningless status. If political rights are ‘suspended’ for ‘external’ citizens – just as many other rights dependent on residence are suspended – and if the right to return is not exclusively attached to citizenship status anymore, then it is difficult to understand what this ‘dormant citizenship’ is supposed to mean.

The second objection shows that theories on migration and citizenship generally support the fact that at least first generation migrants should retain full citizenship – including voting rights – in the origin country (Bauböck 2005a: 10-11).<sup>180</sup> However, even their authors underline that for first generation migrants external franchise is *at most permissible*: ‘(e)ven for permanent first-generation expatriates, the external franchise should not be seen as a fundamental individual right but as permissible’ (Bauböck and Perchinig 2009: 487). In order to explain why I disagree, take the following example of a Romanian citizen that moved to United States twenty years ago and has double citizenship: Romanian and American. He comes to Romania once in a while, say every four or five years, just to visit his friends and family. I claim that such a person should not have full Romanian citizenship: more precisely, he should not have political rights in Romania. As I have already explained in the last chapter, in my view *citizenship should be strictly linked with residence*. Since the person lives in the US, he should have US citizenship but *not* Romanian citizenship. Of course, this person has various links with Romania: his parents and some of his friends live there, he may have properties there and many other types of interests we can think of. This is why I believe ‘external quasi-citizenship’ status is important. I think the person should have some rights in Romania – but not all the rights a Romanian citizen enjoys.<sup>181</sup>

There is an obvious critique here. As we have seen in the previous chapter, if first-generation immigrants lack voting rights in the origin country, then they do not have any power to influence political decisions that may seriously affect them – for example, a possible suspension of property rights and the nationalisation of their properties by the state.<sup>182</sup> The rejoinder here proceeds along two different lines. First, it is difficult to understand how such a decision could be implemented in a liberal democratic state. Second, it is difficult to imagine that a democratic state doing such a thing would not seriously breach not only a number of international conventions that it had already signed, but also its

<sup>180</sup> For an opposite view, see Lopez-Guerra (2005).

<sup>181</sup> This is also true for ‘external’ citizens: presently they normally do not have all rights, but only very selected ones – e.g. they do not have rights to social assistance for long-term unemployment, coverage of health costs in a national health service, etc. Most of their civil rights are in no way guaranteed by their state of origin, since this would violate territorial jurisdiction of the state of residence.

<sup>182</sup> Rainer Bauböck, personal communication on file with the author, April 2013.

own laws – for example, laws which design the status of ‘external quasi-citizenship’ and protect individuals from such interventions.

While I accept that such a concern may be seriously raised in connection to authoritarian and dictatorial states, I can see no possible ground for it within the liberal-democratic world. This may probably seem a highly idealised and naïve image of liberal democracies that no real-world state can meet. It is true that there have been quite a number of disputes over properties of foreigners between liberal democracies, and such cases have required diplomatic intervention. More generally, since liberal democracies are likely to privilege the interests of their citizens over those of foreigners, and since international law is not self-enforcing, the protection of human rights under international law needs very often the backing of states that intervene on behalf of their citizens abroad.<sup>183</sup> However, we must not forget that under a residence-based theory of citizenship individuals are citizens of the country they are living in as long-term residents – even though they may be temporarily outside the territory being in that state’s service. If such citizens are also ‘external quasi-citizens’ of another country and, if in an exceptional case, such a country nationalises their property – which would be difficult to imagine, since in our days home states try to improve the links with their diasporas by offering ‘external quasi-citizenship’ regimes – then they can access diplomatic protection of their country of residence/citizenship and the dispute could be solved in international courts.

Besides political and economic problems like international disputes over individual property rights, we must also recognise that the whole concept of an ‘external quasi-citizenship’ regime is to *extend*, rather than limit, the rights<sup>184</sup> of non-resident persons linked in various ways with the origin country. It is difficult to imagine a state that would establish an ‘external quasi-citizenship’ regime (in which, as we have already seen, property rights are among the first rights accorded in each instance analysed here) *and*, at the same time, restrict the rights that had been offered as part of that regime in the first place.

#### **6.5.4. What type of rights ‘external-quasi citizens’ may enjoy?**

Further, we have to ask what type of rights ‘external-quasi citizens’ may enjoy. As we have seen, the Venice Commission accepted rights offered by kin states to kin minorities – and we can arguably add

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<sup>183</sup> Rainer Bauböck, personal communication on file with the author, August 2013.

<sup>184</sup> This ‘extension of rights’ is, of course, in accordance with a residence-based citizenship. It may seem as a *restriction* to a supporter of dual or multiple citizenship, since political participation and diplomatic protection cannot be accessed by ‘external quasi-citizens.’

here rights to migrants and their descendants – only in the fields of culture and education. However, the same Commission also argued that these rights should be offered through bilateral treaties rather than through domestic legislation. But even if this may be the best solution, there are states that would not accept extra-territorial benefits offered by other countries to some of their citizens, even if these would be strictly educational and cultural benefits. *The right to return* – already accepted by all ‘external quasi-citizenship’ regimes discussed in this chapter – seems thus to be normatively justified as the only solution available to avoid in some cases international conflicts.

It is difficult to make a normative assessment regarding which other benefits ‘external quasi-citizens’ may enjoy. As we have already seen, only two situations seem clear: (a) they should not enjoy political rights; (b) they should enjoy at least *the right to return, cultural and educational rights*. I tend to believe that the range of rights between the two extreme points can be decided by each state according to its own interests. Some states like Turkey could offer to first generation emigrants the possibility to retain contribution-based social security rights, while others could offer ‘external quasi-citizens’ a range of rights enjoyed only by full citizens and not by foreigners, like the right to acquire property in the coastal and border zones in Mexico. Still other states try to officialise a relationship with diaspora in order to better address its problems. For example, Hungary decided to semi-officialise the status of the World Federation of Hungarians organisation in order to offer it a possibility to influence decisions regarding Hungarians abroad. Finally, India also offers extensive social rights, such as eligibility for national housing schemes.

The only situation when such an ‘external quasi-citizenship’ regime may prove to be discriminatory seems to be in those cases where the favourable treatment is offered strictly to ‘ethnic kins’ and migrants, but not to all persons that have ties with the home country. This is not happening in India and Mexico – two countries which lack ethnic homogeneity anyway – but it may be a problem for Turkey and Hungary. As we have already seen, in Turkey the pink/blue card is offered only to native-born Turks, but not to those who are Turks by naturalisation. The case of Hungary is even more intriguing. Individuals eligible for its ‘external quasi-citizenship’ regime are only ethnic Hungarians, but not also (to offer just two examples) ethnic Jews and ethnic Roma. Offering favourable treatment only to the first category, but not to the others, would evidently amount to ethnic discrimination.

Kántor considers that in theory they should also qualify for the Hungarian ‘quasi-citizenship’ regime, although he recognises that in practice the attitude of advisory body officials may be very reluctant. He notes that after the Venice Commission’s decision, the Hungarian Standing Committee changed in October 2001 eligibility rules: those persons are eligible for the ‘quasi-citizenship’ regime

who declare themselves to be Hungarian, speak Hungarian, ‘and also fulfil one of the following criteria: 1. are registered as members of any officially recognised Hungarian organization; 2. are registered as Hungarian in a church; 3. are registered as Hungarian on the relevant state’s citizenship roll’ (Kántor 2004: 113). This way, Hungary seemed to solve the ethnic discrimination problem.

### 6.5.5. Is ‘external-quasi citizenship’ discriminatory? For whom?

Finally, I want to move forward and ask whether the ‘external quasi-citizenship’ regime is discriminatory, and for whom it may prove to be so. One suggestion is offered by a theorist who considers that in the Hungarian version of the ‘external quasi-citizenship’ regime there is nothing ‘liberal or morally justified about privileging ethnic Hungarians by granting them free movement rights denied to other citizens of the states where they reside’ (Bauböck 2010c: 38). This evidently applies to all instances of the regime considered in this chapter. Here Bauböck evidently believes that the favourable treatment regarding freedom of movement<sup>185</sup> delivered by one state to a number of citizens of another state is discriminatory towards all the other citizens in the target country who are not eligible to obtain it. I tend to disagree. According to Renate Weber, the United Nations *International Convention on the Elimination of All Forms of Racial Discrimination* clearly shows

‘that for a measure to be considered discriminatory [it] is necessary that it deprives individuals of their universally recognised human rights or the possibility of enjoying them. Accordingly, a measure which grants one group of persons additional rights, even if this is on ethnic grounds, cannot be considered discriminatory against others, as long as they continue to enjoy their own human rights’<sup>186</sup>(Weber 2004: 353)

In consequence discrimination can occur in the host country and may be directed against ‘external quasi-citizens’ of another country: ‘It may be ridiculous to hold and carry a document attesting one’s membership of a national group, but what is ridiculous is not illegitimate as long as it is not used in order to discriminate against the holder’ (Weber 2004: 357-358).

Another slightly different way to put the charge of discrimination is to say that the ‘external quasi-citizenship’ regime of a home state discriminates between different citizens of a host state

<sup>185</sup> It is important to note that Bauböck strictly refers to freedom of movement. He is not claiming that any privileges for co-ethnics are inherently discriminatory (personal communication on file with the author, April 2013).

<sup>186</sup> See article 1(1) of this convention, <http://www2.ohchr.org/english/law/cerd.htm> (accessed 11 May 2012).

according to their ethnicity (Bauböck 2007a: 69). I think this argument is a valid and strong one, but I also believe that quasi-citizenship regimes can be designed in ways that can avoid this charge. As we have already seen, in non-homogeneous ethnic countries such as Mexico and India this charge does not apply. However, it *may* apply for example in Hungary,<sup>187</sup> and the arguments in favour of such interpretation are eccentric, to say the least. For example, some authors build their case on the Aristotelian doctrine of justice as equal treatment of equals, according to which ‘not everybody should be treated in the same way, but only those who are in the same situation’ (Halász, Majtényi et al. 2004: 328). Since ethnic Hungarians living in other countries are nevertheless Hungarians ‘in the same situation’ and they also have to face disadvantages that arise from being in a minority position, the case for positive discrimination amounts to ‘a commitment to the principle of equality’ (Halász, Majtényi et al. 2004: 329). Basing his case on the principle of substantive equality defined as ‘unequal treatment of unequal cases in proportion to their inequality,’ another author believes that since such laws aim ‘to achieve equality between minorities and majorities by assisting in protecting minority identity, [they] cannot be discriminatory’ – on the contrary, they aim to achieve ‘the real equality’ (Varennes 2004: 422).

There are two problems with this way of supporting an ‘ethnizenship’ interpretation of a ‘quasi-citizenship’ regime. Firstly, in international relations every state is responsible – and thus held accountable – for the way it treats its citizens. If an ethnic minority in a specific state faces disadvantages triggered by its minority position, then that country is responsible to eliminate those disadvantages. If the state is not doing this because of a lack of interest or any other cause then it can be pressured by regional and international communities to treat the problem seriously. Indeed, the question of ‘equality as justice’, as well as that of ‘substantive equality’ should fall within the scope of a state’s duties towards all of its citizens, and this has nothing to do with the question of quasi-citizenship regimes. Secondly, ethnicity is by no means a reasonable criterion that can be used as a tool to achieve substantive equality. Turkey cannot normatively defend the fact that the pink/blue card is offered exclusively to native born Turks but not also to naturalised Turks. Mexico cannot normatively defend the fact that native Mexicans qualify for dual nationality while naturalised Mexicans do not. Finally, Hungary cannot normatively defend that ethnic Hungarians qualify for the identity card, while

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<sup>187</sup> It is true that Hungary has officially recognised – even if relatively small – ethnic minorities, including the Roma. However, according to the 2011 census 98.1% of the population is Hungarian and all the other ethnic groups, altogether, reach the percentage of 1.9% (source: Wikipedia, [http://en.wikipedia.org/wiki/Demographics\\_of\\_Hungary#2001-2011](http://en.wikipedia.org/wiki/Demographics_of_Hungary#2001-2011)). This is why I am treating Hungary as an ethnically homogeneous country.

ethnic Roma or ethnic Jews – historically related in the same way to Hungary as ethnic Hungarians from neighbouring states are – do not.

Some may say that by talking about discrimination related to the ‘external quasi-citizenship’ regimes, we completely misapprehend the real target of discrimination: that is, the citizens of the origin state, *not* those of the host/targeted country that do not qualify. The reason is simple: such quasi-citizenship regimes prescribe social and cultural benefits to a group of ‘foreigners’ – from free education in one’s language to eligibility for national housing schemes and medical care – ‘with no reciprocal tax obligations’ (Ieda 2004: 30), while citizens in the origin state have to pay taxes. In consequence, as János Kis writes with regard to the Hungarian quasi-citizenship regime, the justification of the Status Law needs to be directed at Hungarian tax-payers (Kis 2004: 158). This is also underlined by Miroslav Kusý, who agrees that it is hard to justify to the origin state’s citizens why they should spend tax money on non-citizens. Writing about another case of quasi-citizenship regime, he believes that if ‘the Czech government bestows any privileges on Czechs holding Slovak citizenship, this does not imply a disadvantage to other citizens of Slovakia. It may be a case of discrimination against the citizens of the Czech Republic’ (Kusý 2004: 308).<sup>188</sup> Moreover, Kusý believes there is nothing wrong in offering such privileges to non-citizens as long as citizens approve the favourable treatment.<sup>189</sup>

Finally, it is interesting to see that, far from being discriminatory, an ‘external quasi-citizenship’ regime conceived as ‘favourable treatment’ and not as ‘status’ can avoid discrimination in situations in which a dual citizenship regime cannot. Take the following examples. In 2004 Czechs were able to travel in the United Kingdom visa-free, while Slovaks were not. However, because of the Czech dual citizenship regime, Slovak-Czech dual citizens also enjoyed free movement (their fellow Slovak mono-citizens did not). In this case, it is difficult to understand some scholars’ claim that ‘it is wrong to perceive [this situation] as discrimination against non-Czech people in Slovakia’ (Kusý 2004: 308). On a stakeholder account – which supports Kusý’s claim – this depends entirely on whether the special claims of dual citizens to dual citizenship are justified because their relation to these two states differs

<sup>188</sup> It is also important to note here that another relevant form of discrimination is that of ethnic minorities whose co-ethnics abroad are excluded from similar privileges.

<sup>189</sup> ‘(T)he German minority living in Slovakia has for a long time been supported by the German government in an incomparably more generous manner. It subsidises schools from Bratislava to Medzev – amongst others the bilingual grammar school in Poprad – and it sends German instructors and textbooks to these schools. The children belonging to the German minority receive scholarships if they learn German in Slovak schools or if they choose to pursue their studies in the language of their kin-state. In the areas most densely populated by the minority, the German government has purchased two cultural centres and some old folks’ homes; it finances their construction and maintenance, just as it subsidises a whole range of cultural activities, the media and the reconstruction of monuments. On seeing all this nobody started trembling for Slovak independence’ Kusý (2004: 307-308).

from that of mono-citizens. If they have stakes in two states that others don't, then they rightly benefit from the international treaties that either of their states concludes.

Let us explore slightly different examples. In 1992, Germany offered citizenship to Silesian Germans from Poland, and thus 'a part of the population of Poland had received the benefits of European citizenship ahead of their ethnically Polish counterparts who had to wait over a decade to acquire the same status' (Kovács 2007: 95). This is even more discriminatory than the first case because, unlike Slovak-Czechs, German-Poles did not acquire only the right to freely travel to one specific country – that is, to their second country of citizenship – but they also became European citizens, unlike their fellow mono-citizens in their origin country. Thirdly, in a similar case Greece wanted to offer non-resident dual citizenship to ethnic Greeks in Albania, but Albania opposed this proposal because this would have implied creating a class of privileged minority citizens who were also European citizens in a country that is not part of the European Union (Kovács 2007: 95), (Christopoulos 2009).

Unlike a dual citizenship system, the type of 'external quasi-citizenship' regime I have proposed in this article – conceived as 'favourable treatment' and not as 'status' – would offer Slovak-Czechs, German-Poles and Greek-Albanians the right to enter the origin state – and arguably, the right to free movement in the Schengen states if those states are also members of the Schengen agreement – but not all the other rights enjoyed by European citizens. This is also one of the reasons why the recent Hungarian decision of offering dual citizenship to ethnic Hungarians living in neighbouring countries is not normatively defensible. Offering not only Hungarian but also European citizenship to ethnic Hungarians living in countries which are not members of the European Union is not acceptable. Moreover, the Hungarian system of double citizenship introduced in 2010 cannot be supported for all the reasons I have explained in the previous chapter.

## 6.6. Conclusions

In this chapter I have tried to normatively assess the idea of an 'external quasi-citizenship' regime. India (starting with the 1990s programs for PIOs and NRIs), Mexico (from 1997 when nationality was declared 'everlasting' until 2005 when non-resident nationals received the right to vote in presidential elections), Turkey (starting with the 1995 'pink card' program) and Hungary (until the 2010 law on dual citizenship) are all countries that have implemented some sort of 'external quasi-citizenship' regime. The interesting point that needs to be emphasised here is the fact that, for different reasons, all

these four countries built an ‘external quasi-citizenship’ system exactly because they wanted to avoid the offer of dual citizenship, but at the same time they also wanted, for both nationalistic and economic reasons, to keep ties with former citizens and their descendants.

It is important to underline the fact that an ‘external quasi-citizenship’ regime entitles the group of targeted persons to *favourable treatment* and *not* to some internationally accepted *status*. In other words, a state may decide to keep ties with former citizens and their descendants who are presently living in other countries, but the status conferred has no legal character except in the home state. The only possible problem that may appear is within a union of states where freedom of movement is accepted. For example, a state of the European Union and member of the Schengen zone would probably have serious problems in defending an ‘external quasi-citizenship’ regime that would offer to non-communitarian citizens freedom of movement in the other communitarian states. Even if we accept this as a serious problem in my argument for supporting this kind of regime, we have to take into account at least two points: (a) this case is limited only to the European Union and cannot constitute a problem in the rest of the world; (b) even in the case of the European Union, such an ‘external quasi-citizenship’ regime may be a better solution than offering the status of a full European Union citizen – through a hazardous gesture – *en masse* to citizens of other non-European states, as Romania repeatedly did for Moldovan citizens in the last twenty years.

I have also claimed that an ‘external quasi-citizenship’ regime may offer very broad qualifying conditions for the targeted persons – for example, having a citizen of the origin state in the close family or a cultural link may be considered as strong enough qualifying conditions. However, this system should not be reduced to the stricter and normatively dubious form of an ‘*ethnizenship* regime.’ Further, once qualified, an ‘external quasi-citizen’ may enjoy all the rights the origin state accepts to offer her. Of course, since we are talking about ‘favourable treatment,’ maybe the term ‘benefits’ should be used instead of ‘rights.’ In any case, usually the bundle of rights (or benefits) should be situated somewhere between a minimum (the right to return, educational and cultural rights), and a maximum; namely, a whole range of social rights, but no political rights.

I have also tried to show that such a system is accepted by at least the Council of Europe’s Venice Commission, that it is normatively justified, and that it may prove to be a better alternative to a dual citizenship regime. Such an ‘external quasi-citizenship’ proposal understood as ‘favourable treatment’ may be discriminatory only if it is badly conceived, in two senses. In the first place, it may discriminate against the citizens of the state that supports it, since it would offer benefits to persons who do not in turn pay taxes. Since only tax-payers of the state that proposes an ‘external quasi-

citizenship' regime may be discriminated against, they should also be the only ones who decide whether such a 'favourable treatment' should be offered in the first place. Additionally, it may discriminate against internal minorities in the home state, if it does not take their 'external co-ethnics' into account.

## **Chapter 7. A Plea for Residence-Based Citizenship: An Analysis of Legal Provisions on Citizenship in Fifty States**

*'Sweden has increasingly been equalising the rights of citizens and foreigners [...] The principle of domicile thus gained importance, and citizenship correspondingly lost significance [...] the Swedish construction, where focus lies on permanent residence instead of citizenship [...] Belonging to Swedish society through long-term residence is generally believed to create a strong link between the individual and the state'*(Bernitz 2012: 1, 7, 8, 12)

*[...] citizenship is now [in the United Kingdom] a conditional and provisional status [...] the culture changes from one of belonging by residence and participation to one of belonging by entitlement and descent'*(Sawyer and Wray 2012: 1-2, 31)

### **7.1. Introduction**

The last four chapters have tended to converge on the idea of effective citizenship, understood as a ‘residence-based’ membership. We have already seen that there are no serious arguments to deny this status to long-term residents irrespective of their legal standing. In other words, legal long-term residents, temporary workers and irregular immigrants need (as a matter of justice) to be set on the path to full citizenship status. On the other hand, the cases of non-resident dual citizens and of ‘external quasi-citizens’ made obvious the fact that they do not have any moral claim to keep official membership status in a country where they have no longer lived for a long period. This chapter tries to openly address the problem of residence-based citizenship. I want to review this status’ exemplars as they appear in current citizenship laws in the members of the European Union, non-European Union states and a few non-European countries. I will draw on the 47 country reports on citizenship legislation delivered by the EUDO Observatory on Citizenship, plus legislation in three other countries (Canada, the USA, and New Zealand).

Three preliminary notes are important here. Firstly, it is essential to state from the very beginning that my intentions in this chapter are both practical and normative. From the practical point of view, I want to survey actual citizenship legislation in 50 states (or parts of these laws) that come very close to a residence-based theory of citizenship. The empirical information about existing practices of *ius soli* and naturalisation is intended to strengthen the normative arguments delivered so far in supporting a residence-based theory of citizenship. From the normative point of view, I want to

(a) dismiss other naturalisation requirements except residence, and (b) dismiss multiple citizenship as an acceptable status from both national and international relations' points of view.

Secondly, the EUDO country reports unavoidably reflect the legal interpretation and understanding of their authors. Beside the country reports, the EUDO Observatory on Citizenship offers a comparative database regarding modes of acquisition and loss of citizenship,<sup>190</sup> which compares citizenship laws, and their implementation and impact, in Europe. Needless to say, sometimes these two projects offer different legal interpretations, according to their authors' views. For example, I may consider Norway a very liberal country because it fits well with my proposal of residence-based citizenship (citizenship is offered to long-term residents and it is withdrawn from long-term emigrants who apply for another country's citizenship). However, prohibition of dual citizenship may seem to many a non-liberal legal provision, so Norway's numerical indicator in *ACIT/CITLAW* does not link this state with a liberal view on citizenship acquisition.<sup>191</sup> Given this difference in academic understandings, the ways of constructing and comparing indicators, and finally personal opinions, interpretations may vary. As a consequence, in the framework of this chapter I have decided to strictly follow the country reports because of their detailed explanation on current legislation. However, I have also checked the country reports against the modes of acquisition and loss database, and provided a link to it every time when the information seemed relevant. The reader will thus be able to compare different views on citizenship legislation in each country.

Thirdly, it is important to acknowledge that citizenship legislations are different in various states depending on whether a specific country is a state of origin or of destination, depending on particular histories and sociological and economical circumstances, and finally depending on the present situation (whether the migration phenomenon is stable or on the rise). Such historical and sociological considerations are always important, since citizenship provisions do not take place in some abstract normative space. However, the task of discussing each country's context cannot be completed

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<sup>190</sup> The introductory paper written by Jeffers, Honohan and Bauböck (2012) is accessible online at [http://eudo-citizenship.eu/docs/CITLAW\\_explanatory%20text.pdf](http://eudo-citizenship.eu/docs/CITLAW_explanatory%20text.pdf) (last accessed 14 August 2013). The mode of acquisition page can be consulted here: <http://eudo-citizenship.eu/databases/modes-of-acquisition>, while the mode of loss can be consulted here: <http://eudo-citizenship.eu/databases/modes-of-loss>. The CITLAW (EUDO Citizenship Law Indicators) main page can be accessed at the following link: <http://eudo-citizenship.eu/indicators/eudo-citizenship-law-indicators>. The ACIT (Access to Citizenship and its Impact on Immigrant Integration) main page can be accessed at the following link: <http://eudo-citizenship.eu/about/acit>. There is also a special report for each country, and the links are available in the bibliography.

<sup>191</sup> Indeed, a comparison of Norway on the six main ACIT/CITLAW indicators with EU 15 and EU 27 shows that apart from ordinary naturalisation conditions slightly above average, there is little that indicates that Norway is "liberal" [http://ind.eudo-citizenship.eu/acit/printage/prepare/html/study/citlaw/chart/radar/field\\_1/1/field\\_2/58-57-36/field\\_3/1-4-11-18-36-39/group/null](http://ind.eudo-citizenship.eu/acit/printage/prepare/html/study/citlaw/chart/radar/field_1/1/field_2/58-57-36/field_3/1-4-11-18-36-39/group/null) (last accessed 14 august 2013). I want to thank Rainer Bauböck for drawing me attention on this case.

within the framework of this study. But an extensive legal analysis of the context of any single country's immigration and citizenship legislation should take such considerations into account.<sup>192</sup>

Section two discusses acquisition by *ius soli*, and takes notice that an unconditional acquisition under this provision has been abandoned by almost all countries taken into consideration in the 20<sup>th</sup> century in order to avoid both 'accidental citizenship' and 'citizenship tourism'. However, an *ius soli* acquisition based on a simple requirement of previous residence (applied either to parents or to their children) is a liberal provision supported by residence-based citizenship.

Section three is dedicated to naturalisation policies based on residence. In a *first* step I make a distinction between very liberal regimes (which offer citizenship mainly based on a residence requirement) and less liberal ones which add many other conditions. A *second* step discusses these supplementary conditions in detail and tries to dismiss them, and also interprets the principle of 'genuine link' as residence. The *third* sub-section examines the only requirement of a residence-based citizenship theory (i.e., previous residence in the country) and makes a distinction between liberal, normal and conservative conditions required by current legislations. The *fourth* subsection discusses different instances of residence-based naturalisation in present citizenship laws.

Section four attacks the problem of multiple citizenship, in three parts. *Firstly*, I am trying to show that external voting rights cannot be accepted, because they either may decide the result of elections (thus giving non-residents a say in a political process they are not subject to), or they may impose an outcome on a political community where permanent residents represent the majority of the population (thus they do not have a say in a political process they are subject to). *Secondly*, I straightforwardly claim that dual citizenship cannot be accepted. After offering some real world cases of states that repudiate multiple status, I criticise the normative theory of 'stakeholdership,' which accepts it at least for first-generation emigrants and (under some conditions) for the second generation. *Thirdly*, I survey current examples of dual citizenship prohibition in present legislation and underline that in many cases multiple citizenship can and should be avoided because of reasons related to international relations. Moreover, I demonstrate that more than half of the countries under consideration have laws that try either to *limit* or to *prohibit* instances of dual citizenship.

Section five explains the connection between residence-based citizenship and the 'zero option' by discussing the internationally sanctioned provisions in the case of state formation and state

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<sup>192</sup> The country reports offered by EUDO Observatory on Citizenship present a historical analysis of citizenship legislation for every single country. The reports can be consulted online at <http://eudo-citizenship.eu/country-profiles> (last accessed 12 November 2013).

succession. The sixth and last section concludes the debate by arguing against real-world cases that dismiss residence-based citizenship, either by legally sanctioning unacceptable cases of *permanent* partial citizenship, or by offering citizenship without requesting applicants any type of residence in the territory.

## 7.2. Residence-based citizenship: *ius soli*

*Ius soli* simply states that a person born in the territory of a state must acquire that state's citizenship.<sup>193</sup> According to a recent study, Canada and the United States are the only 'advanced states' (Feere 2010) that still practice an *unconditional ius soli*.<sup>194</sup> In Europe, only the Republic of Moldova still implements it.<sup>195</sup> The last instances of such a practice in the European Union were registered in four countries. The first was the United Kingdom, which had unconditional *ius soli* until the 1981 British Nationality Act (which came into force in 1983). The second was Portugal, which had had a very strong tradition of *ius soli* from the 17<sup>th</sup> century until 1981, when *ius sanguinis* became prevalent (Piçarra and Gil 2012: 1). The third was Malta, where from independence (1964) until 1989 the law had the effect that 'persons born in Malta [were] Maltese citizens, no matter whether they [had] foreign parents or not (Buttigieg 2010: 2). The fourth was Ireland from independence until 2004, a period when everyone born in Ireland was automatically considered an Irish citizen (Handoll 2012: 1).

The best normative defence of *unconditional ius soli* has been advanced by Joseph Carens. According to this scholar, 'justice requires that democratic states grant citizenship at birth to the descendants of settled immigrants' (Carens 2014, forthcoming: chapter two). The argument supporting this requirement starts by investigating the crucial importance of birthright citizenship to citizens' children and then claims that every reason for supporting birthright citizenship in this case also applies to settled immigrants' children. Because of their strong ties to the political community they were born

<sup>193</sup> See EUDO Citizenship database on citizenship acquisition based on 'Mode A02a: Birth in country (2<sup>nd</sup> generation)', link: <http://eudo-citizenship.eu/databases/modes-of-acquisition?p=&application=modesAcquisition&search=1&modeby=idmode&idmode=A02a>; see also 'Mode A05: Birth in country (acquisition after birth)', link: <http://eudo-citizenship.eu/databases/modes-of-acquisition?p=&application=&search=1&modeby=idmode&idmode=A05> (last accessed 14 August 2013).

<sup>194</sup> According to Feere's study published online in 2010 by the Center for Immigration Studies (<http://cis.org/birthright-citizenship>), only 30 out of the world's 194 countries grant unconditional *ius soli* (the author was not able to confirm the policy for only 19 countries). Interestingly, almost all countries are situated in North and South America (see table 1 following the above link).

<sup>195</sup> See Legea Nr. 1024 din 02.06.2000 (the Citizenship Law of the Republic of Moldova, No. 1024/2000), art. 11 (1) (c): citizen of the Republic of Moldova shall be the child '(...) born in the territory of the Republic of Moldova, whose parents possess the citizenship of another state, or one of them is stateless and the other one is a foreign citizen' (my translation); source: <http://lex.justice.md/md/311522/> (last accessed on 14 August 2013). Interestingly, Feere disagrees in his 2010 study and lists Moldova among countries that do not practice an unconditional *ius soli*.

in, the latter have even ‘stronger claims to birth-right citizenship than the children of emigrant citizens.’ Moreover, this argument clearly implies that a policy of ‘double *ius soli*’ (automatically granting citizenship only to the third generation) is illiberal and, as Carens claims, ‘unjust.’ However, this scholar does not argue that a more restrictive *ius soli* is impermissible. He only offers a consequentialist argument which presents a contextual defence of unconditional *ius soli* in countries that have historically applied it (e.g. the United States and Canada).

The argument has two steps. Firstly, it shows that the risk of offering citizenship to a child that will not grow up in a state is not particular to the unconditional *ius soli* policy, but also to *ius sanguinis*. Secondly, he considers that well-established rights may be violated through moving from unconditional to conditional *ius soli*. Countries like Canada and the United States see themselves as countries of immigration, and in their legal systems ‘acceptance of the children of immigrants as citizens has never been in doubt’. A change in their citizenship laws would be seen ‘as a repudiation of that basic openness to immigration’ and as ‘a betrayal of a fundamental national ideal.’ This is especially the case in the United States, where the Fourteenth Amendment to the Constitution states: ‘All persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States.’<sup>196</sup> According to Carens, ‘to modify that amendment (...) would be a national tragedy’ (Carens 2014, forthcoming: chapter two).

However, Carens does not claim that anyone born in a state deserves birthright citizenship. The most important thing is the expectation that the child will be raised in the state of birth – or at least that the child will reside in that state for an ‘extended period as a minor.’ This is important, because an *unconditional ius soli* can either ‘lead to accidental citizenship’ (for example, transients giving birth to a child in a country with unconditional *ius soli*), or it can ‘create incentives for citizenship tourism’,<sup>197</sup> (for example, parents travelling to such a country to give birth to a child with the intention of acquiring legal residence in that country as the parents of an EU citizen child) (Dumbrava 2010: 9).<sup>198</sup>

If this is correct, then we have to somehow limit unconditional *ius soli*. In my view, Carens already offered the right answer. The residence criterion is the only one that should be taken into

<sup>196</sup> Source: <http://www.law.cornell.edu/constitution/amendmentxiv> (last accessed on 3 August 2013).

<sup>197</sup> In the United States, children born by parents with the intention to receive citizenship are called ‘anchor babies.’

<sup>198</sup> Only EU law has this effect, whereas irregular immigrants who are care-giving parents of a US born child can be deported. See the ECJ case of Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department, case C-200/02. Catherine Zhu, the child of a Chinese couple working in the UK, has received European citizenship because of the Irish *ius soli*. Since she was an EU citizen, the court decided that she has the right to live in any member state, and since she was minor, the court decided that her mother has the right to reside with her. For a short summary, see <http://www.eucaselaw.info/zhu-and-chen-2004/>; text of the ECJ judgment: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002J0200:EN:HTML>; text of the Advocate General opinion: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62002C0200:EN:HTML> (last accessed: 14 August 2013).

account: in other words, being born on the territory of the state (*ius soli*) and residing for a number of years in that country (residence-based citizenship) should be enough in order to create a *right* to citizenship acquisition.<sup>199</sup> However, even if this seems to be morally acceptable, there will always be a special problem that will cast some shadow on this provision: indeed, whose residence are we talking about? This special problem has been already raised in legal debates in Portugal, and it concerns ‘the influence of the parents’ legal situation on the acquisition of citizenship of children’ (Piçarra and Gil 2012: 22). As these authors rightly argue, ‘according to the pure principles of justice, the legal situation of the parents should not influence the acquisition of citizenship by the children, but only their own acquisition of citizenship.’ However, the cited authors continue that since the only link of new-born children with the community is through their parents, ‘children’s destiny’ cannot be separated from ‘parents’ behaviour’ (Piçarra and Gil 2012: 22-23). Moreover, since according to the Constitution a Portuguese child cannot be alienated from his parents, such a legal separation would directly imply the impossibility to deport irregular migrants with Portuguese children. However, Serbia is the only country which elegantly solved the problem by rightfully deciding that the residence criterion should be applied to the child, not to his parents. According to its law, a child born in the territory to foreigner parents can acquire citizenship after two years of residence<sup>200</sup> (no other condition being required) (Rava 2010: 14).

However, a general residence-based theory of citizenship would imply that *ius soli* should apply either at birth if one parent has resided in the country for a number of years (the first case), or after birth if the child has resided in the country for a number of years after birth (the second case). Portugal is an example for the first case, since it has implemented such a law since 2006. Immigrants of the second generation can acquire citizenship at birth when three requirements are met: (1) ‘one of the parents has lived legally in Portugal for at least five years;’ (2) ‘such parent is not in Portugal serving his or her own state;’ and (3) ‘the child declares [in person or through a legal agent if the person is a minor] his or her wish to be Portuguese’ (Piçarra and Gil 2012: 15). In Ireland (after the abolishment of unconditional *ius soli* in 2004) a child can become an Irish citizen if (according to conditional *ius soli*) one parent has legally resided in Ireland for three out of the last four years.<sup>201</sup> The UK (where the

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<sup>199</sup> As Joseph Carens puts it, ‘The most important consideration from a moral perspective is that, by adopting some sort of *ius soli* law, these states have recognized the principle that the descendants of immigrants deserve birthright citizenship when there is good reason to believe that they will grow up in the state where they were born’ (Carens 2014: chapter two).

<sup>200</sup> Serbia is the only state with such a short residence requirement. Of course France, Belgium, Italy and several other countries also have conditional *ius soli* requiring residence of the target person – but in these cases, there are residence requirements until majority (or somewhat shorter in the French current law).

<sup>201</sup> This is implicit in the ‘entitled to Irish citizenship’ clause, but not clearly so since naturalisation in Ireland is extremely discretionary.

strong tradition of *ius soli* was lost in 1983) also adopted such a liberal law, but only for children of EU citizens: ‘after five years as a lawful resident under the [EU] free movement rules, a parent gains the status of permanent resident and can then pass British citizenship to a child born in the UK’ (Sawyer and Wray 2012: 16). According to the EUDO Observatory on Citizenship, other contemporary and similarly liberal laws of *ius soli* can be found in Belgium (condition: the ‘child is born to noncitizens who have lived in Belgium at least 10 years before the birth of the child and who have filed a citizenship claim for the child before the age of 12 years’), in Greece (condition: the ‘person is born in Greece and both parents have been permanently resident there for five years at time of the person’s birth’), and in Germany (*ius soli* is acquired at birth and the condition is eight years of legal residence of one parent).<sup>202</sup>

In the second case, the residence requirement is somehow extended based on a voluntary decision of her parents or of the child upon reaching the age of maturity; this happens in all cases of *after-birth* acquisition. For example, French law provides that a ‘person born in France whose parents are neither French nor born in France will automatically become French at age eighteen if he or she still resides in France’ unless she explicitly decline French citizenship (Bertossi and Hajjat 2012: 2).<sup>203</sup> A full, updated list concerning acquisition of citizenship after birth in European countries has been delivered by the EUDO Observatory on Citizenship and can be consulted online.<sup>204</sup> The normative problem is whether, in the second case, acquisition should be automatic and non-consensual or rather optional and thus consensual. A residence-based theory of citizenship supports automatic *ius soli* from birth and thus avoids consent for the second generation. This way, a child born in the territory gets citizenship irrespective of her parents’ nationality. From this theory’s point of view, consent is what needs to be offered to first generation immigrants, but not to children born in the country. The risk of over-inclusion for second generations without relevant ties can be taken care of through voluntary renunciation (by parents or later by the child) by those who have also acquired another citizenship.

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<sup>202</sup> See EUDO Citizenship database on citizenship acquisition based on *Mode A02a: Birth in country (2<sup>nd</sup> generation)*, available at: <http://eudo-citizenship.eu/databases/modes-of-acquisition?p=&application=&search=1&modeby=idmode&idmode=A02a> (last accessed 15 August 2013).

<sup>203</sup> More exactly, according to the EUDO Citizenship database on citizenship acquisition, in France citizenship can be accessed by declaration if the person ‘is a minor who was born in France and has been resident there for 5 years since the age of 11 (declaration by child), or the child is under the age of 16 and has been resident in France for 5 years since the age of 8 (declaration by parent)’. Link: <http://eudo-citizenship.eu/databases/modes-of-acquisition?p=&application=modesAcquisition&search=1&modeby=country&country=France> (last accessed 11 September 2013).

<sup>204</sup> See EUDO Citizenship database on citizenship acquisition based on *Mode A05: Birth in country (acquisition after birth)*, available at <http://eudo-citizenship.eu/databases/modes-of-acquisition?p=&application=modesAcquisition&search=1&modeby=idmode&idmode=A05> (last accessed 15 august 2013).

A final important provision is called ‘double *ius soli*.’ Here, an individual born in a country to an alien parent also born in that country becomes (automatically or voluntarily) a citizen of the respective state. Regimes that have *only* double *ius soli* are generally more restrictive than those that have *only ius soli* for the second generation. But this may not be always true if one considers the extremely illiberal second generation provisions in Italy (Zincone and Basili 2010: 2), Austria (Çınar 2010: 15), Slovenia (Medved 2010: 12), etc. What is important is that several countries combine *ius soli* around majority for the second generation with automatic *ius soli* at birth for the third generation. France (Bertossi and Hajjat 2012: 2) and Belgium (Foblets and Yanasmayan 2010: 7) are good examples. This combination is rather inclusive and third-generation *ius soli* compensates to some extent for the delay in inclusion of the second generation.<sup>205</sup> Double *ius soli* laws can be found in France (Bertossi and Hajjat 2012: 4), Luxembourg (Scuto 2010: 1, 11), Morocco (Perrin 2011: 8), Portugal (Piçarra and Gil 2012: 14), and Spain (Rubio Marín, Sobrino et al. 2012: 1). There was a similar law also in the Netherlands between 1953 and 1975 (van Oers, de Hart et al. 2013: 5). However, together with Carens I do believe that generally double *ius soli* cannot be defended as a stand-alone provision since any child born in a country and who is expected to live for a number of years there should have the right to access citizenship through simple *ius soli*.

### **7.3. Residence-based citizenship: naturalisation**

#### **7.3.1. Liberal versus less liberal naturalisation regimes**

Careful attention to the development of citizenship law in the Western world would reveal two tracks. On the one hand, there is a small group of liberal regimes, which tend to reduce most requirements for citizenship acquisition apart from time of residence. Here we have the example of Serbia, Sweden, Norway, Portugal, New Zealand, Canada, the USA, and Belgium (until 2012). On the other hand, we have the ever increasing number of Western countries that are moving further away from the liberal trend and are building strong obstacles against naturalisation. Let us take some examples.

On the liberal side, until 2012 Belgium only required that those who applied for naturalisation be of age and have been resident in Belgium for three years (based on a residence permit of unlimited duration) (Foblets and Yanasmayan 2010: 10). Moreover, after seven years of legal residence, there

<sup>205</sup> Not every scholar agrees with this: as we have already seen, for Carens double *ius soli* is a rather illiberal principle: ‘The phrase “second-generation immigrant” is a contradiction in terms. Those who are born and brought up in a society simply *are* members. They have an unqualified moral claim to citizenship’ (1989: 47; see also 2014: second chapter).

was the ‘possibility to become Belgian by a mere declaration’ (Foblets and Yanasmayan 2010: 1).<sup>206</sup> In New Zealand a person who applies for citizenship must be of age (16 years), have full capacity, must be of good character, must have knowledge of responsibilities and privileges attached to citizenship, sufficient knowledge of English, should intend to have continuing residence in New Zealand and should comply with the rule of three years of residence before the application.<sup>207</sup> Sweden requires as conditions for naturalisation that the applicant prove her identity, be of age, have a residence permit, be of good conduct, and finally have had residence for the last five years in Sweden. There are no requirements regarding proof of means to support oneself, or knowledge of the state language. Moreover, there is no residence requirement for spouses or for partners. It seems there are a limited number of naturalisation refusals, and there are also ‘many possibilities of granting exceptions from the naturalisation requirements’ (Bernitz 2012: 13-14).

Conditions are even less strict in Serbia, where since 2003 the requirements for naturalisation have been an application form, being of age, three years of residence, and a written statement that the applicant accepts the Republic of Serbia as his or her state (Rava 2010: 14). Finally, in Portugal in order to become a citizen the applicant must be of adult age, must have legally resided in Portugal for six years, must have sufficient knowledge of Portuguese language, and must ‘have no convictions for committing crimes which carry a prison sentence of three years or more according to Portuguese law’ (Piçarra and Gil 2012: 20). It is important to note that in the cases cited above, the two countries that require minimal language skills either asses these skills through a simple interview (New Zealand), or provide free language classes sponsored by the state (Portugal). Moreover, it is interesting to note that, unlike the general trend, there is *no administrative discretion*<sup>208</sup> in granting citizenship to those who meet the qualifying criteria in Portugal (Piçarra and Gil 2012: 20), Norway (Brochmann 2010: 9), and Sweden (Bernitz 2012: 1). We can conclude that these countries are a very good example of residence-based naturalisation, since residence is the only (or at least the most important) criterion in order to be accepted as a citizen.

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<sup>206</sup> However the law has been changed and it seems Belgium is drifting away from the liberal residence-based citizenship model I am proposing. According to the new 2012 citizenship law that entered into force on 1 January 2013, Belgium asks for five years of previous residence, knowledge of one of the three national languages, proof of social integration and proof of economic participation – see Belgian Code of Nationality (*Code de la nationalité belge*), 2013-03-17/14, available at [http://www.ejustice.just.fgov.be/cgi\\_loi/loi\\_a1.pl?language=fr&la=F&cn=1984062835&table\\_name=loi&&caller=list&F&fromtab=loi&tri=dd+AS+RANK&rech=1&numero=1&sql=\(text+contains+\(“\)\)#LNK0007](http://www.ejustice.just.fgov.be/cgi_loi/loi_a1.pl?language=fr&la=F&cn=1984062835&table_name=loi&&caller=list&F&fromtab=loi&tri=dd+AS+RANK&rech=1&numero=1&sql=(text+contains+(\) (in French).

<sup>207</sup> New Zealand, Citizenship Act 1977, No. 61, ‘reprint as at 1 July 2013’, art. 8(1), art.8(2), and art. 17 (1-3), available at: <http://www.legislation.govt.nz/act/public/1977/0061/latest/DLM443684.html> (last accessed 30 July 2013).

<sup>208</sup> This is indeed crucial. It is true that regimes with few requirements and strong discretion may be much more illiberal than those with more but clearly stated requirements and subjective entitlements.

Except in the cases cited above, naturalisation seems to be more restrictive (Kostakopoulou 2010: 16) in the rest of fifty countries under scrutiny.<sup>209</sup> In Macedonia for example, in order to apply for citizenship the candidate must be of age, have had legal residence for at least eight years, must have an accommodation, must have a permanent source of subsistence means, must ‘not (...) have been sentenced to imprisonment of minimum duration of one year in the country of his citizenship for acts punishable according to the regulations of Macedonia’, ‘there should (...) be [no] criminal proceedings either in Macedonia [...] or in the country of his or her citizenship’ against him, must be fluent in Macedonian, must have no measure of prohibition of residence in Macedonia against him, he should not pose a threat to the security and defence of the country, he must sign a loyal oath, and must provide ‘a release from the previous citizenship or a proof that it will be provided after the acquisition of Macedonian citizenship’ (Spaskovska 2012: 13).

Other countries add several requirements for naturalisation, which are either dull or simply strange. In Latvia (Krūma 2010: 11) and in Romania (Iordachi 2010: 8) the applicant must prove that she knows the national anthem, even though there are numerous Latvian and Romanian born citizens who do not know it. Moreover, in Switzerland ‘foreigners may be required to be familiar with Swiss, cantonal, and local habits, customs, and traditions (...) The Canton of Lucerne even asks [...] candidates to prove that they have contacts with Swiss citizens, and show an interest in social coexistence in their municipality.’ (Achermann, Achermann et al. 2010: 24). Such requirements are well beyond the realm of the reasonable, since they test formally knowledge of customs that are by definition informal. And again, it is strange to require ‘interest in social coexistence’ and evidence of ‘contact with Swiss citizens’ as long as there are probably enough Swiss born citizens who prefer to live a solitary, reclusive life. Finally, in Lithuania until 2002 there was another curious requirement, according to which the applicant must not be a chronic alcoholic or a drug addict (Swider 2011: 13).

### 7.3.2. Dismissing other naturalisation requirements except residence

Joseph Carens has offered the most elegant argument for citizenship acquisition based exclusively on residence. According to him, ‘people have a moral right to be citizens of any society of which they are members (...) Membership is a social fact, not something that can simply be determined by political authorities’ (Carens 1989: 32). But who is a ‘member’ of a particular society in this sense? What are

<sup>209</sup> See EUDO Citizenship database on citizenship acquisition based on *Mode A06: Ordinary naturalisation*, available at: [http://eudo-citizenship.eu/databases/modes-of-acquisition?p=&application=modesAcquisition&search=1&modeby\\_idmode&idmode=A06](http://eudo-citizenship.eu/databases/modes-of-acquisition?p=&application=modesAcquisition&search=1&modeby_idmode&idmode=A06) (last accessed 12 September 2013).

those features – or ‘social facts’ – that could undeniably assure us that a person is a member of a specific society? According to Carens, *living and working* in a place is enough in order to create a moral claim of belonging: ‘the moral claims of the aliens derive from their social ties to these countries, from the fact that they live and work there’ (Carens 1989: 33). According to this scholar, social membership morally entitles people to citizenship. As a consequence, naturalisation laws should ‘make citizenship available to all long-term residents, requiring *only the passage of time and the meeting of modest, inexpensive formalities* [my emphasis]’ (Carens 1989: 46).

But current citizenship legislation does not always closely observe the requirements of moral and political theory. Today, besides residence, there are four large categories of other substantive requirements and an important procedural question.<sup>210</sup> These are: (a) language and civic knowledge tests; (b) clean criminal record, exclusion of tax evaders; (c) financial requirements; (d) renunciation of previous nationality; and (e) administrative discretion (Swider 2011) (which is the most important procedural aspect).<sup>211</sup> I will set aside for the moment the renunciation of previous nationality, to which I will return later (in section 7.4.3.).

Let us then survey the other requirements and the procedural question, in reverse order. Regarding the latter (naturalisation as administrative discretion), there is hardly any reasonable moral motivation to support it. As we have already seen in the cases of Portugal, Norway and Sweden, there is no administrative discretion in a number of states: if the applicant meets the requested criteria, then naturalisation will be granted. However, in most countries this is not the case. In Poland, for example, naturalisation is highly discretionary: ‘fulfilling the requirements does not guarantee the obtaining of this status’ (Swider 2011: 7). Moreover, in the UK (Sawyer and Wray 2012: 24) and in many other countries there is no legal possibility to appeal against refusal. Such a situation cannot really be defended from a liberal point of view, so administrative discretion should be minimised<sup>212</sup> in the naturalisation procedure.

<sup>210</sup> Another systematic analysis of naturalisation conditions is offered by Goodman (2010b). For an overview of naturalisation requirements, one can access EUDO Citizenship database on citizenship acquisition based on *Mode A06: Ordinary naturalisation*, available at <http://eudo-citizenship.eu/databases/modes-of-acquisition?p=&application=modesAcquisition&search=1&modeby=idmode&idmode=A06> (last accessed 12 September 2013).

<sup>211</sup> Administrative discretion is the most important, but not the *only* procedural aspect. Other procedural aspects are fees (which are different from income requirements), appeal options, waiting times, etc. Results regarding empirical evidence on naturalisation procedures (besides administrative discretion) are briefly summarised in Bauböck et.al. (2013), available at [http://eudo-citizenship.eu/images/acit/acit\\_report\\_eu%20level%20summary.pdf](http://eudo-citizenship.eu/images/acit/acit_report_eu%20level%20summary.pdf) (last accessed 12 September 2013).

<sup>212</sup> Discretion may not be altogether dismissed, since it can also be implicit in criteria that require civil servants to make judgments based on their assessment of a case, such as ‘good moral character’ or ‘cultural assimilation/integration’, ‘loyalty’ etc. – although, as I am trying to argue, these type of assessments should not be accepted as a part of the naturalisation procedure.

Financial requirements<sup>213</sup> are usually linked to stable income, evidence of employment, absence of debts, or dependence on social assistance. Two points can be raised here. On the one hand, in the 21<sup>st</sup> century it is becoming increasingly difficult to find persons who work for all of their lives in the same place: changing workplaces (or even industry) several times is becoming the prevalent pattern. The fact that a candidate for naturalisation can prove evidence of employment, stable income or absence of debts during some period before the application does not mean that the situation could not change on the first day after she becomes a citizen of that country. And, obviously, the longer the past record counts, the harder it is to meet the criteria, since otherwise candidates could simply apply at a point in time when they are employed and have sufficient income. On the other hand, although it is surely easy to understand the state's interest in not having an increase of socially assisted persons overnight, it is hard to morally justify the above condition. A straightforward argument for disconnecting financial requirements from citizenship acquisition is the fact that citizenship has historically become disconnected from social class (Marshall 1949/1997), while the impact of economic requirements is to introduce or maintain social class as an exclusionary criterion for access to citizenship, an attitude rather difficult to defend morally. The argument that membership should not be determined on basis of criteria of social class is perfectly sufficient to refute income as well as educational conditions.

What about clean criminal record and the exclusion of tax evaders? It is easy to understand a state's interest in avoiding naturalising persons who are criminals or would not pay their taxes (suppose, for the sake of the argument, that any state could always acquire such information from the state of previous citizenship). Such legal transgression, however, doesn't seem to have anything to do with citizenship and migration laws. As one author observes, '[i]f an immigrant violates the law, civic and criminal sanctions exist' (Orgad 2010: 22). Firstly, as Swider puts it, 'imperfect tax or health insurance payment is not necessarily a sign of bad will.' Secondly, it depends on what 'criminal law' is supposed to mean in each country. For example, in Ireland 'any traffic violation is considered to be a criminal offense, and naturalisation may be denied to a person purely because of a traffic ticket' (Swider 2011: 9). Thirdly, from a liberal-democratic point of view, 'even denying access to citizenship to serious criminal offenders can be seen as problematic [...] since it results in their exclusion from political participation in a system that criminalises their actions' (Swider 2011: 9-10). Finally, it is important to note that some countries have abandoned this type of requirements for naturalisation, as

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<sup>213</sup> For conditions regarding resources see the comparative report by Goodman (2010b: 40).

Serbia did after 2003 (Rava 2010: 11). For all these reasons, I believe such requirements should not be intermingled with the naturalisation procedure.

Finally, the importance and relevance of language and civic knowledge tests is highly debated. In a recent working paper on this issue, Christian Joppke, for instance, believes that tests investigating knowledge of language and of principles and procedures of liberal democracy are legitimate, and tests investigating cultural knowledge are not unreasonable (Joppke 2010a: 1).<sup>214</sup> Such tests, he argues, are incompatible with liberal norms *only* when ‘beliefs (and not just knowledge) are tested,’ and when ‘behavioural virtuosity is imposed as condition for naturalization’ (Joppke 2010b: 39). However, it is difficult to find a reasonable ground to agree with Joppke. Firstly, language tests for naturalisation deter applicants with lower education and language skills and thus work again as a class barrier in access to citizenship. Secondly, as one commentator underlines, it is hard to believe ‘that the political process in liberal democracies requires members to share *only one* language, or only *this* particular language (of the specific national culture dominant in a given territory)’ (Dumbrava 2010: 11).

As to what constitutes cultural knowledge and cultural preservation, it is hard to understand even what these expressions are meant to mean. On the one hand ‘culture’ is not a fixed object, but a continuously changing phenomenon: over the centuries it can borrow from other cultures, it can intermingle with various, unfamiliar cultural settings, or it can give birth to artistic expressions. On the other hand, it is difficult to understand which ‘culture’ is supposed to be the subject of such a test, since almost no country on earth is the home of only one nationality or ethnic group. A further difficulty is that not even basic social norms are universally accepted in a specific country: for example, recognition of concubinage and homosexuality are in the Dutch curriculum for the cultural test, but ‘not all social and religious groups in the Netherlands do accept these norms.’ Moreover, ‘the acceptance of such norms is not necessary for a liberal democracy’ (Michałowski 2010: 6). Of course, we must distinguish between the acceptance of such norms by the government institutions of a liberal democracy (which may be seen as necessary), and the acceptance by all (actual or in-the-making) citizens, which clearly isn’t necessary since it would interfere with freedom of conscience.

Two rather different social arguments against language and civic knowledge tests have been raised. According to the first, they raise a barrier against naturalisation for ‘lower-educated, less-well-off immigrants’ (Groenendijk and van Oers 2010: 9), creating thus the danger of involuntary

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<sup>214</sup> In another article Joppke compares the citizenship tests in the USA, Australia, and Canada, and he argues that ‘elements of a restrictive turn are noticeable in Australia and Canada, but only at the level of political rhetoric, not of law and policy, which remain liberal and inclusive’ (Joppke 2013: 1).

*'permanent long-term residence'* status, which is another instance of permanent quasi-citizenship. According to the second, disciplining and standardising 'the knowledge, feelings and way of life' in order to create 'the perfect citizen' is not quite a liberal move (Carrera and Guild 2010: 29). As Carens notes, 'integration' becomes a category of discrimination when it is required as a precondition (beyond residence) for granting citizenship. This tends 'to violate the principles of toleration and respect for diversity to which all liberal-democratic states are committed and to call into question the equal status of current citizens who differ from majority' (Carens 1989: 38, 40). At the end of the day, as Orgad notes, if language and cultural and civic tests are considered so important, why not oblige natives to take them at maturity before voting (Orgad 2010: 21). The 'passage of time' thus becomes the only relevant qualifier for citizenship:

'(...) the only relevant social facts are birthplace and residence, the fact that one has been born and brought up in a society. To use measures of "integration" beyond that of time spent in a society is inevitably to invite invidious comparisons among current citizens along related lines. If one moves beyond the passage of time as a requirement for citizenship, one risks imposing demands on new citizens that old ones could not meet and defining the meaning of citizenship in terms of the social and cultural characteristics of the dominant majority. Any such approach threatens to conflict with fundamental liberal democratic principles' (Carens 1989) (42)

What is important to underline is that there are countries which do not have a language requirement for naturalisation, like Sweden, Italy and Ireland (Goodman 2010a: 36). Actually, there is no need for this. In the 21<sup>st</sup> century, because of their education and because they may know other languages besides their native one, people can live well in a country, pay taxes there and have relationships with native born citizens without knowing that specific language. Suppose an American has already lived for seven years in Hungary. His job is there (hence he is paying taxes to the Hungarian state), his children are learning in Hungarian schools, and he has Hungarian friends. As long as the centre of his life is in Hungary because of long-term residence, how can one consider that he cannot manage to live here as a fully-fledged citizen just because, not knowing the language, he is supposed to have different problems, such as problems with the administration?

One counter-argument would state that a 'fully fledged citizen' in democracy presupposes the capacity to follow political debates, to form political opinions and to vote responsibly – and all these require knowledge of the official language(s). But usually in many states there are foreign-language newspapers, agencies, and multi-national companies that disseminate information. Moreover, one

foreign resident may arguably have different native friends that could offer him different insights which may not be more biased than the news presented in mass media are. The conclusion is that this requirement is an unnatural barrier to naturalisation and it must be dispensed with. At the end of the day, the ‘integration test [...] diminishes the relevance of the length of residence in the country of origin as the main factor for the individual to get closer to the formal juridical equality granted by the acquisition of citizenship status’ (Carrera and Guild 2010: 33). It is important to underline that I do not want to imply that states do not need to support education in national language(s) since full citizenship does not presuppose that citizens can communicate in one or a few official language(s). Countries like Sweden, Italy and Ireland, which do not have a language requirement for naturalisation, still support education in national language(s). Such an education should be enhanced through different cultural and financial incentives rather than imposed as a condition for naturalisation.

All these naturalisation requirements are in fact seen as small bits in a bigger and newer process sometimes called ‘naturalisation as the last step of successful integration,’ which seems to be spreading all over the western world. For example, in France the applicant must be ‘culturally assimilated’ (Bertossi and Hajjat 2012: 15); in Denmark one has to *deserve* to become a citizen, since citizenship is seen as ‘a gift offered by the Danish people to those who deserve it’ (Ersbøll 2010: 32). Even in Norway some call for a conception of citizenship which sees it ‘as a reward for successful integration’ (Fagerlund and Brander 2010: 39). In the Netherlands, the relation between immigration and integration has been simply turned on its head: ‘instead of being a means of integration, acquisition of Dutch nationality is [...] seen as the crown on the completed integration process’ (van Oers, de Hart et al. 2013: 1). The same tendency can be spotted in Austria (Çınar 2010: 1) and Germany (Hailbronner 2012: 19).

This type of policy can go even much further on the illiberal path. In the Netherlands the concept of ‘active citizenship’ has been proposed (but not yet transformed in a requirement for naturalisation) in order to ‘re-emphasise the responsibility of each individual for his or her place in society’ (Dumbrava 2010: 14-15); and in the UK the Brown government proposed the notion of ‘probationary citizenship’, according to which ‘provisional citizens’ can be denaturalised if they do not respect UK laws during a probationary period of three years following naturalisation (Dumbrava 2010: 14-15). This proposal, however, was later dropped by the Cameron government. As we have already seen, the most extreme stance is taken by a group of countries like Switzerland, Malta, the Netherlands, and the United Kingdom, which require the applicant to collect ‘testimonies from other (worthy)

citizens' (Dumbrava 2010: 15) regarding the sufficient degree of their social insertion. It seems rather difficult to find a normative defence for such extreme requirements.

Finally, we have to exclude, from a moral point of view, a special type of naturalisation called 'facilitated naturalisation.<sup>215</sup> This is an instance of combining immigration and citizenship laws. Basically, all countries offer less severe conditions for naturalisation to different categories of persons: the underling norms here are related to family ties, individual past ties (former citizens), historical and cultural ties, special services to the country (military service), utility for the state (investment, reputational gains) and reciprocity in bilateral relations.

Facilitated acquisition for all these categories cannot be defended under a residence-based theory of citizenship. This is not because they are impermissible: in fact, they can be easily morally defended by theories largely based on *ius sanguinis*. Moreover, the more severe conditions for naturalisation a country employs, the more defensible facilitated naturalisation for special groups becomes. The reason they cannot be defended by a residence-based proposal is that a theory which sets a low residence condition for ordinary naturalisation (and I have proposed in this study the three-years liberal threshold) matches most reasonable reduced residence provisions for special naturalisation in current laws. As a consequence, to keep the category of 'facilitated naturalisation' for some groups (probably by reducing even more the residence condition of an already very liberal residence-based theory) would run the risk of discriminating between different categories of applicants.

### *Family ties*

The first important category is that of family ties: for spouses and children some countries waived all naturalisation requirements (residence included). For example this happened under the label of 'post-nuptial citizenship' in Ireland between 1956 and 2004 for foreign women marrying Irish husbands (Handoll 2012: 4). But usually the general tendency among countries is only to reduce the required number of residence years, as in France, which bases this decision on the years "of 'common and affective life' after the date of the marriage" (Bertossi and Hajjat 2012: 18). However, it is not clear at all why from the legal point of view family ties can substitute for residence in acquiring citizenship (and it is also important to note that in some cases family ties are considered sufficient without any residence). The residence-based theory I am defending calls for only one requirement for naturalisation

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<sup>215</sup> See EUDO Citizenship database on citizenship acquisition based on different modes of special naturalisation (spousal transfer, filial transfer, etc), available at: <http://eudo-citizenship.eu/databases/modes-of-acquisition> (last accessed 12 September 2013).

– and this is previous residence in the country. If we take the liberal path proposed by countries like Canada, Serbia, New Zealand, and Belgium (the last one, only until 2012), which require only three years of residence before one qualifies for naturalisation,<sup>216</sup> then it is difficult to understand why facilitated naturalisation through shorter (less than three years) residence requirements for spouses (or minor children) of citizens is legitimate. The problem is not that such family ties should not have any moral weight or that such provisions unfairly discriminate against applicants without family ties – the problem is simply that if the only requirement for citizenship acquisition is three years of previous residence in the territory, then this requirement is more liberal than most provisions of ‘facilitated naturalisation’ implemented by most states.

#### *Individual past ties (former citizens)*

A second cluster of categories of individuals who can access facilitated naturalisation is that of former citizens, who are also required to spend fewer years in the country than other applicants – or even have no residence requirements at all, like former citizens subjected to the ‘option procedure’ of acquiring citizenship in Belgium (Foblets and Yanasmayan 2010: 11). However, as in the case of family ties, three years of permanent residence are enough in order to qualify a person for citizenship irrespective of past ties.

#### *Ethnic, historical, and cultural ties*

The third category includes ‘ethnic kins’, who also enjoy a special status. For example, Romania has offered facilitated naturalisation to ‘ethnic kins’ from Moldova (Iordachi 2010), and Hungary to ethnic Hungarians from Romania (Kovács and Tóth 2010). Other cases ‘of external acquisition of citizenship based on ethnic origin can also be found in Croatia, Germany, Italy, Lithuania, Luxembourg, Portugal and Slovenia’ (Dumbrava 2013: 8). The specific problem with co-ethnic preference is that – in contrast with family ties – they generally apply also externally to non-residents. However (apart from the case of former citizens) this is clearly incompatible with a residence-based view of citizenship. As Dumbrava rightly notes, ‘policies of external citizenship based on ethno-national grounds not only jeopardize the democratic integrity in the home country, but also the prospects of welfare and self-government of co-ethnics whom they aim to protect’ (Dumbrava 2013: 14).

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<sup>216</sup> See chapter 3, section 5. See also below in this chapter section 7.3.3.

This category also incorporates persons coming from countries considered to be a part of the same ‘cultural community.’<sup>217</sup> For example, between 1961 and 2006 France required no period of residence for immigrants coming from a former colony or a francophone country (Bertossi and Hajjat 2012: 2). Also, Spain requires only two years of residence instead of the normal requirement of 10 years ‘for those coming from Latin American countries, Andorra, the Philippines, Equatorial Guinea, and Portugal and for Sephardic Jews’ (Rubio Marín, Sobrino et al. 2012: 3). The problem again is not necessarily that all these facilitations are equally impermissible. Some of them may arguably be morally required, like in the case of former citizens who have lost their citizenship due to legal provisions that have in the meantime been changed (for example, in former communist countries). This is, indeed, a difficult case. But it is important to note that under a liberal regime of residence-based citizenship which requires only three years of previous residence for citizenship acquisition, such cases lose their significance. Regarding the difficult problem mentioned above (of former citizens who have lost their citizenship) a tentative answer under a citizenship-based regime would be to offer them either the possibility to return and to become citizens after three years of residence, or the ‘external quasi-citizenship’ status discussed in the last chapter, if they prefer not to return.

#### *Special services (military service)*

The fourth special type of facilitated naturalisation which has to be excluded under a residence-based theory is that of persons with ‘special contributions’<sup>218</sup> to the country. The most important category here is constituted by those enrolled in the country’s military service, as in the United States, Spain or France (Bertossi and Hajjat 2012: 19). However, being enrolled in a country’s military service should not be linked with naturalisation, and the latter must not be seen as some form of currency (as long as the service is already financially rewarded). Of course, this argument applies more straightforwardly in the context of professional armies which tend to be the rule nowadays. It is true that historically this link existed: this was the core citizenship duty, and even in voluntary armies the duty to defend ‘your country’ has always been linked to citizenship. As a consequence, faster access to citizenship for immigrants who serve in the army may be easy to justify at least in the republican tradition. A

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<sup>217</sup> See EUDO Citizenship database on citizenship acquisition based on *Mode A19: Cultural affinity*, available at <http://eudo-citizenship.eu/databases/modes-of-acquisition?p=&application=modesAcquisition&search=1&modeby=idmode&idmode=A19> (last accessed 12 September 2013).

<sup>218</sup> For this category and for the following one (‘utility for the country’) See EUDO Citizenship database on citizenship acquisition based on *Mode A24: Special achievements*, available at <http://eudo-citizenship.eu/databases/modes-of-acquisition?p=&application=modesAcquisition&search=1&modeby=idmode&idmode=A24> (last accessed 12 September 2013.)

residence-based theory that requires for everybody three years of previous residence may be not only morally preferable, but may also offer faster access to citizenship even when compared to this type of facilitated naturalisation, which may in fact be a longer process.

#### *Utility for the country (investment, reputational gains)*

The fifth category generally includes ‘exceptional cases.’ These roles or inputs are typically not clearly mentioned (in order to offer a large margin of discretion to decision makers), but two groups can be easily spotted. On the one hand, there are those who can contribute to the country’s international image as sportsmen, artists, and so on (and almost all the countries surveyed have provisions for such type of naturalisation). On the other hand, there are those who have invested money in the country – in connection to this latter group such a policy has been criticised as a practice of ‘selling citizenship’ for a big sum of money. This practice of investment-based schemes exists in two forms: either as privileged access to citizenship – among others, practiced in Austria, Montenegro, Greece, and Cyprus (Džankic 2012: 15) – or as privileged access to residence permits (Hungary, Canada, USA). The privileged access to citizenship *was* also supported for a period of time by some countries such as Ireland between 1989 and 1998 (Handoll 2012: 5-6). However, offering citizenship to those who are wealthy enough to invest in a country amounts to a commodification of citizenship – that is, it destroys all that citizenship is supposed to mean in the first place (that is, access to all citizenship rights for those *living in* and thus having a strong *connection to* the territory, and the right to have a say in the development of the country their lives are based on).

#### *Reciprocity (EU, Northern countries)*

The sixth category is based on reciprocity in bilateral relations. Examples include a facilitated naturalisation in Nordic countries for citizens coming from other Nordic states (Brochmann 2010: 3-4) and reciprocity among European Union countries. There is nothing morally objectionably here, and it is important to mention that a residence-based citizenship which sets a three-year residence condition for citizenship acquisition may be sometimes a bit more demanding than such agreements – for example in Norway, Sweden, Finland and Denmark a Nordic citizen can apply for citizenship (under the ‘facilitated naturalisation’ clause) after two years of residency (Brochmann 2010: 10), (Bernitz 2012: 5), (Fagerlund and Brander 2010: 7), (Ersbøll 2010: 2), while in Iceland after four years of residence (Jóhannesson, Pétursson et al. 2010: 18). However, in spite of this small difference of plus/minus one

year of residence my proposal may also prove to be more equalitarian, since the three-year requirement applies to everyone.

As a consequence, we are left with residence as the only requirement for citizenship acquisition. As Joseph Carens puts it, ‘as a matter of fundamental democratic principle, people who have been settled in a country for several years are members of society and should be able to participate in the political process governing their society’ (Carens 2010b: 19). Let me then review what we have already seen up to this point, and make some general normative comments. Firstly, regarding immigrants, the only morally acceptable requirement for citizenship qualification is residence in the specific country. Many political theorists believe that in order to be qualified for citizenship in a particular state a person must have a ‘genuine link’ with that country. Moreover, since the 1955 Nottebohm Case, it has been established in the international law that ‘nationality [i.e. citizenship – my note] is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.’<sup>219</sup>

This definition is a bit vague since, of course, ‘interests and sentiments’ are never taken in these days to be a proof of a genuine link – however, what is left here (the ‘social fact of attachment’, the ‘genuine connection of existence’, the ‘legal bound’ and ‘reciprocal rights and duties’) are directly evoking *residency as the special bond which qualifies someone for citizenship*. We can find today such instances of citizenship conceived as residence in the real world. For example, in Belgium ‘filiation to a Belgian parent does not always automatically lead to the acquisition of citizenship.’ The law requires ‘a minimal territorial link with Belgium and thus avoids the possibility of generations of persons who no longer have any genuine link with Belgium passing on their citizenship.’ (Foblets and Yanasmayan 2010: 7). Moreover, from 2000 until 2012 in Belgium ‘citizenship [wa]s closely linked to one’s residence on the territory and not as much to one’s integration into a society [...] the legislation [took] as its point of departure the view that the foreigner [wa]s already integrated solely by virtue of having resided on the state’s territory for a certain number of years’ – in this period Belgium was thus ‘radically opting for a residence-based concept of citizenship’ (Foblets and Yanasmayan 2010: 23).<sup>220</sup> Cyprus is also a case in point here: except the requirement of having a ‘good character,’ intention to

<sup>219</sup> Nottebohm Case (Liechtenstein v. Guatemala) (second phase), Judgement of April 6th, 1955: International Court of Justice Reports 1955. Links: <http://www.unhcr.org/refworld/docid/3ae6b7248.html>; <http://www.icj-cij.org/docket/index.php?sum=215&code=lg&p1=3&p2=3&case=18&k=26&p3=5> (accessed 22 November 2013).

<sup>220</sup> As we have already seen, this is not the case anymore: the new 2012 citizenship law changed this liberal path towards a residence-based conception of citizenship – see note 206 above.

‘reside in the Republic’ (or being at service of Cyprus), and a formal loyalty oath, the applicant for citizenship in Cyprus must satisfy only the residence requirement (which is seven years, and the last twelve months before application of continuous residence in the country) (Trimikliniotis 2010: 12-13).

What we can observe in these liberal cases is a *disconnection of citizenship and nationality*: according to the residence-based notion of citizenship, and according to the definitions I have spelled out in chapters one and five, *citizenship* (the status of being a member of a state and enjoying full rights and duties) is not related anymore to *nationality* (which is conceived in this work as ethnic and national belonging). This is exactly the same distinction as Dumbrava’s between ethnic-cultural rules and civic-territorial rules for citizenship conferral. According to this author, only the latter (seen as a ‘commitment towards a political community defined in terms of territory and common political institutions’) are compatible with a liberal view (Dumbrava 2010: 5). Moreover, these membership rules are based on a link between members that is defined as ‘minimalist politic’ (they are ‘created and maintained with the aim of fostering a political community instrumental for individuals’ interests’ and require ‘only a minimum connection that is sufficient to maintain a functional political community’) and as ‘partly voluntaristic’ (since ‘some may choose voluntarily to join the political community’. It is, however, important to stress that this voluntary decision must be based on ‘the existence of the relevant political link’) (Dumbrava 2010: 3). The relevant political link is only one (as I have tried to argue), and this is residence in the territory.

### **7.3.3. Previous residence years as the only requirement for naturalisation**

As we have seen, there are two main modes of residence-based acquisition of citizenship: (conditional) *ius soli* and naturalisation. Although in most current laws residence is not a sufficient criterion for naturalisation, it is always the most important one. However, the number of years required to be spent in the country before citizenship application varies greatly. The European Convention on Nationality sets a maximum limit of ten years,<sup>221</sup> so there is a great margin of discretion for countries to decide their own policies.

According to some scholarly commentators, the acceptable threshold is five years (Howard 2006), ‘while three years is seen as an ideal of a highly liberal policy’ (Swider 2011: 6). Before offering

<sup>221</sup> ‘Each State Party shall provide in its internal law for the possibility of naturalisation of persons lawfully and habitually resident on its territory. In establishing the conditions for naturalisation, it shall not provide for a period of residence exceeding ten years before the lodging of an application’ (Council of Europe, European Convention on Nationality, Strasbourg, 06.11. 1997, art. 6, para. 3); link: <http://conventions.coe.int/Treaty/en/Treaties/Html/166.htm> (accessed 18 January 2013).

some examples, it is important to mention that for the liberal perspective on residence-based citizenship I am using in this work, I am referring strictly to the minimum number of years of simple legal and factual residence. This is important, since for some countries ‘only residence [...] under *a specific legal status* [my emphasis] counts towards the residency requirement, thus effectively prolonging the factual residence requirement by the number of years necessary to obtain the relevant status (Poland and Bulgaria)’ (Swider 2011: 6). In other words, in this situation – as another scholar notes – for ‘the purpose of counting the legally-relevant period of residence, one must add to the years required for naturalisation the minimum period necessary in order to acquire the relevant residence status (in many cases a status of permanent residence)’ (Dumbrava 2010: 14).<sup>222</sup>

The total period of residence is three years in three cases: Canada,<sup>223</sup> Serbia,<sup>224</sup> and New Zealand<sup>225</sup> (it was the same in Belgium until 2012) and it goes up to four years in the case of Ireland. These are the countries with a ‘highly liberal policy.’ There are also seven countries which set the period of residence to five years: France, Latvia, Malta, the Netherlands, Sweden, the United Kingdom, and the USA.<sup>226</sup> However, Malta and the Netherlands cannot be situated in a liberal category just because of this moderate threshold, since both also request, as we have already seen, many other conditions for naturalisation, among which the requirement that the applicant must collect testimonies from other (worthy) citizens who must testify that the former are well integrated in society. Out of the

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<sup>222</sup> ACIT/CITLAW has calculated an ‘effective residence condition’ that takes into account not only the time needed for acquiring a residence status but also permissible interruptions of residence. See mode ‘ANAT06a – ordinary naturalization – residence conditions’, link: [http://ind.eudo-citizenship.eu/acit/printage/prepare/html/study/citlaw/chart/barmap/field\\_1/field\\_2/59-58-57-56-5-8-10-11-12-13-14-15-17-18-20-21-22-23-24-25-27-29-30-31-32-33-34-35-36-37-38-39-41-42-43-44-46-47-48-49/field\\_3/12/group/null](http://ind.eudo-citizenship.eu/acit/printage/prepare/html/study/citlaw/chart/barmap/field_1/field_2/59-58-57-56-5-8-10-11-12-13-14-15-17-18-20-21-22-23-24-25-27-29-30-31-32-33-34-35-36-37-38-39-41-42-43-44-46-47-48-49/field_3/12/group/null) (last accessed 14 august 2013). For further information, see Jeffers, Honohan and Bauböck (2012: 25-26), accessible at: [http://eudo-citizenship.eu/docs/CITLAW\\_explanatory%20text.pdf](http://eudo-citizenship.eu/docs/CITLAW_explanatory%20text.pdf) (last accessed 17 July 2013).

<sup>223</sup> Link: <http://www.cic.gc.ca/english/citizenship/become-eligibility.asp> (accessed 17 July 2013). It is true that in Canada three years are required only for those admitted as ‘landed immigrants’ (i.e. permanent residents), but the period is longer for those who are admitted in temporary statuses. However, according to the Canadian law a person is eligible for permanent residence if she (a) has ‘an offer of arranged employment’, OR (b) is ‘a foreign national who has been living legally in Canada for one year as a temporary foreign worker or an international student’, OR (c) is ‘a skilled worker who has at least one year of experience in one or more of the occupations listed’ by the government (source: [http://www.sse.gov.on.ca/medt/investinontario/en/Pages/bi\\_corp\\_services\\_perm\\_residence.aspx](http://www.sse.gov.on.ca/medt/investinontario/en/Pages/bi_corp_services_perm_residence.aspx), accessed 17 July 2013). As a consequence, unlike a permanent resident (who can become a Canadian citizen in three years), a temporary resident can become a Canadian citizen in four years (one year needed to get permanent residency plus three years needed for citizenship status). Moreover, according to the governmental website ‘Citizenship and Immigration Canada’, to become a Canadian citizen ‘[one] may be able to count time [one] spent in Canada before [one] became a permanent resident if that time falls within the four-year period’ (source: <http://www.cic.gc.ca/english/citizenship/become-eligibility.asp>, accessed 17 July 2013).

<sup>224</sup> Serbia also requires only two years of residence (and adds no other requirements) for spouses of citizens, under the title ‘citizenship through registration’ (Rava 2010: 14).

<sup>225</sup> New Zealand, Citizenship Act 1977, No. 61, ‘reprint as at 1 July 2013’, available online at <http://www.legislation.govt.nz/act/public/1977/0061/latest/DLM443684.html> (last accessed 30 July 2013).

<sup>226</sup> Link: <http://www.uscitizenship.info/articles/applying-for-american-citizenship-the-essential-qualifications/index.html> (accessed 18 January 2013).

fifty countries analysed, we can consider as liberal (in relation to both the residence period before application and the lack of other complicated requirements besides simple residence) only six states (Canada, Serbia, Sweden, New Zealand, the USA and Belgium until 2012), to which we can add Norway and Portugal, with a six-year residence requirement before application (Fagerlund and Brander 2010: 19). Another country with only a residency requirement is Cyprus, which calls for a period of seven years of residency before the application. However, this seems to be well over the accepted period of five years, so I will not include the country in the liberal category.

All the other states go beyond the five years threshold, and the number of residence years before naturalisation goes as high as ten years for ten European countries (Austria, Bulgaria, the Czech Republic, Greece, Italy, Lithuania, Poland, Slovakia, Slovenia, and Spain) (Dumbrava 2010: 14) and 12 years for Switzerland (Achermann, Achermann et al. 2010: 10).

It is interesting to note that Switzerland seems to be the most conservative country from this point of view. Here ‘regular naturalisation primarily falls under the jurisdiction of the cantons and the municipalities. Cantons and municipalities confer citizenship for their canton or their municipality respectively, whereby the applicant automatically acquires the citizenship of the federal state: Swiss nationality’ (Achermann, Achermann et al. 2010: 17). At a first look this may seem to be very close to the idea of ‘urban citizenship’ promoted by Rainer Bauböck, which disconnects local from national citizenship (Bauböck 2003).<sup>227</sup> In fact, it is exactly the opposite of a disconnected local citizenship model, since the Swiss model connects cantonal and local citizenship to the federal/national level. The latter is derived from the former and cantons and municipalities add further conditions to federal provisions on naturalisation. In this way, naturalisation in Switzerland becomes an even more burdensome process.

#### **7.3.4. Instances of residence-based naturalisation in current laws**

Besides the already mentioned eight liberal states in section (3.1.) above (Canada, Serbia, Sweden, New Zealand, Norway, Portugal, the USA and Belgium until 2012) that are very close to an exclusively residence-based type of citizenship for immigrants, other states also have different provisions regarding specific cases where exemplars of a residence principle are easy to be discovered.

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<sup>227</sup> ‘Urban citizenship’ is a very interesting and promising instance of residence-based citizenship. According to Bauböck, ‘cities should enjoy greater autonomy *vis-à-vis* national and provincial governments’, and this can happen by exempting municipalities ‘from certain aspects of national government monopolies in immigration, trade and foreign policy’ (Bauböck 2003: 149). Moreover, cities can add an ‘automatic *ius domicilii*’ mechanism for citizenship acquisition, besides the three ‘national’ mechanisms of *ius sanguinis*, *ius soli* and naturalisation.

Since these stipulations are incredibly diverse, it is almost impossible to organise them under rigorous normative categories, so in this section I decided to simply list them, in order to provide at least an overview of such provisions.

It is interesting to see that some countries that are not fully liberal democratic nevertheless practice some quite sturdy versions of a residence-based regime. Lebanon, for example, has a pure residence-based regime for citizenship acquisition. The applicant should be of legal age and should have resided five years in the country before submitting the application. These are all the requirements, since this state's nationality laws do not ask for any other condition for naturalisation (el-Khoury and Jaulin 2012: 15). However, we cannot situate this case in the above liberal group of states, since the new citizen is able to enjoy full equal rights and duties only ten years after naturalisation (within these ten years some limitations exist regarding electoral rights, civil service, and practicing some professions). Moreover, the 'effects of naturalization are not automatically extended to the spouse and children' (el-Khoury and Jaulin 2012: 16). Belarus, a country closer to dictatorship than to liberal democracy, does not accept dual citizenship and it strongly relates citizenship to permanent residence. However, the law offers a wide interpretation to this principle:

‘On defining the place of permanent residence one should take into consideration not only the place of the factual staying of a person at this or that moment (in the Republic of Belarus or outside its borders), but his intention to have this place as a place of his permanent residence. The content of this term is determined by the purposes of going out of (leaving) the Republic of Belarus: whether this leaving is temporary or for permanent residence in a different state.’ (Ułasiuk 2011: 4)

As we can see in this 2001 decision of the Constitutional Court, simply residing temporarily in another state does not have any consequence on citizenship status. Indeed, citizenship is lost only when ‘permanent residence’ is intended. On the other hand, when the intention is to permanently reside in Belarus and all the other conditions are fulfilled, citizenship can be accessed.

Setting aside less liberal countries and coming back to the European Union, we can find some very interesting legislation and legislation proposal related to residency. According to Hailbronner, in Germany the Democratic Party and the Greens have been promoting in recent years a ‘republican concept’ of citizenship, according to which ‘to comply with the laws and to respect the basic principles of the Constitution [are] the only prerequisites for acquisition’ of citizenship (Hailbronner 2012: 26-

27). We should not be deceived by this formula: ‘complying with the laws’ still presupposes a period of prior residence before applying for the status.

Residence-based citizenship is also offered in a number of countries to persons who are legally permanent residents and have completed a specific cycle of compulsory education in schools. This is for example the case in Latvia, under the condition that such persons ‘are not nationals of another state or have received an expatriation permit,’ since Latvia does not accept dual citizenship. But it is also the case in Portugal, where minors completing such a cycle can become citizens through a ‘subjective right to naturalisation,’ which means there is no administrative discretion. This has also happened in Norway since 1968, under the label ‘citizenship through notification,’ for persons who ‘had been living in Norway for at least ten years during childhood and adolescence’ (Brochmann 2010: 4). Moreover, the same category of access to citizenship has been offered in Norway since 2006 to Nordic citizens after seven years of residence and with the condition of renouncing any former citizenship, since Norway does not accept dual citizenship (Brochmann 2010: 9).

Poland was until recently a liberal case, since up to August 2012 only ‘the duration and nature of an applicant’s stay in Poland’ (Górny and Pudzianowska 2010: 19) was important for citizenship acquisition under the 1962 Act on Polish Nationality. However, in practice civil servants also took into account the level of integration of that applicant, his family situation, and financial state of affairs (Górny and Pudzianowska 2010: 19). But starting with the aforementioned date, Article 30 of the new citizenship law requires for naturalisation three years of previous residence (based on a permanent residence permit), regular income, a legal title to an apartment, and knowledge of the Polish language.<sup>228</sup>

Also in Britain until 1983 the ‘highest formal status’ and the most important status for key social provisions was residence (that is, settlement), not citizenship. Moreover, in due time (10 years for regular, 14 years for irregular migrants) the settled person was able to access citizenship status. After 1983 things changed. For example, an irregular migrant can now access the same status only after thirty years (Sawyer and Wray 2012: 1-2, 25), and *ius sanguinis* replaced both *ius soli* and residence-based naturalisation.

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<sup>228</sup> Sources: DorotaPudzianowska, *A new citizenship law is due to replace Poland’s law of 1962*, Citizenship News, EUDO Observatory on Citizenship, 25 January 2012 (link: <http://eudo-citizenship.eu/news/citizenship-news/566-a-new-citizenship-law-is-due-to-replace-polands-law-of-1962>, accessed 21 July 2013); Legal Guide to Polish Citizenship (link: <http://polish-citizenship.eu/foreigners.html>, accessed 21 July 2013) and Wikipedia (link: [http://en.wikipedia.org/wiki/Polish\\_nationality\\_law#Citizenship\\_by\\_naturalisation](http://en.wikipedia.org/wiki/Polish_nationality_law#Citizenship_by_naturalisation), accessed 21 July 2013).

However, the clearest instances of residence-based citizenship can be observed in two Nordic countries (Norway and Sweden), where the concept of legal residency or domicile has become in recent years more important than the concept of citizenship (Brochmann 2010: 8), (Bernitz 2012: 1). Moreover, in Sweden one can even say that ‘the principle of domicile [...] gained importance, and citizenship correspondingly lost significance [...] [in] the Swedish construction [...] focus lies on permanent residence instead of citizenship [...] Belonging to Swedish society through long-term residence is generally believed to create a strong link between the individual and the state’ (Bernitz 2012: 7-8). Moreover, unlike the general trend in the Western world, not only does Sweden not require a language exam, it in fact practices the rather contrary so-called ‘home language policy,’ according to which ‘children with immigrant parents are encouraged to preserve linguistic ties with their countries of origin by attending publicly funded language courses where the children learn their native language’ (Bernitz 2012: 18):

‘An alien’s status in Sweden is very similar to that of a Swedish citizen, and to a large extent Swedes and foreigners have the same rights. The development in Sweden as to increasingly giving equal rights to citizens and foreigners reflects a clear change in the view of the core and idea of citizenship. In many contexts the concept of domicile has taken over the role of citizenship.’ (Bernitz 2012: 19)

The same goes for Norway, which has removed from naturalisation requirements the health certificate (1976) and the condition of economic self-support (1985). Moreover, it extended civic and social rights ‘to legal residents through the principle of equal treatment’ – thus, also in this country, ‘the institution of citizenship proper has less value, relatively speaking’ (Brochmann 2010: 6). We could easily add here the former liberal Belgian regime, where until 2013 there was no integration condition except residence. Moreover, if a person did not apply for formal citizenship acquisition after three years, there was a ‘possibility to become Belgian by a mere declaration after seven years of residence’ (Foblets and Yanasmayan 2010: 1). Interestingly enough, and probably surprisingly, we could add Italy to the countries where citizenship is having less value, since ‘all civil rights and nearly all social rights are granted to legal residents as well’ (Zincone and Basili 2010: 3).

In some countries there is a procedure for some categories of immigrants to acquire ‘citizenship through declaration.’ This is the case for ‘foreigners who were born in Belgium [who] can acquire Belgian citizenship without, in principle, having to go through any procedure’ (Foblets and Yanasmayan 2010: 8). Moreover, ‘the procedure also applies to foreigners who have had their main

legal residence in Belgium for at least seven years at the time of declaration and who have been authorized to reside in the country pursuant to the provisions of the law on residence of foreigners of 15 December 1980' (Foblets and Yanasmayan 2010: 9). The same 'citizenship through declaration' category can be found in Poland, for spousal acquisition after five years of residence, and for citizenship reacquisition (Górny and Pudzianowska 2010: 11-12). Finally, it can be also found in Portugal for 'spousal transfer': according to the 2006 law, a spouse or a legal partner can access it after three years of marriage or living together, in case of civil partnerships (Piçarra and Gil 2012: 16). Unfortunately, in contrast to all these liberal developments, other countries are moving down a slippery slope towards an increasingly anti-liberal approach to citizenship acquisition. To take just one example, in the UK and other countries naturalisation is practiced under the 'administrative discretion' principle and 'there is no appeal against refusal' (Sawyer and Wray 2012: 24).<sup>229</sup>

## 7.4. Residence-based citizenship and multiple status

### 7.4.1. Residents, emigrants and voting rights

One of the most interesting problems raised by dual citizenship status concerns external voting rights. On the one hand, some political theorists accept that 'democracies cannot be obliged to grant their expatriates absentee voting rights' (Bauböck 2009a: 17). Indeed, granting such rights would mean offering some group of individuals a say in a political process they are not subject to. In other words, when external voting decides the outcome, resident citizens are obliged to accept a political situation decided by non-residents who are not even subject to the political situation they helped to bring about.<sup>230</sup>

There are real-life instances of this situation. As I have already pointed out in chapter five, in the 2005 regional elections in Galicia (Spain), 'the composition of the autonomous regional government was decided by votes from abroad' (Itzigsohn 2007: 132). Another example is the 2009

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<sup>229</sup> Another example was offered by the Netherlands until 2007 where applicants for permanent residence were requested to take the same exam as applicants for naturalisation. The illiberal flavour was also intensified by the fact that applicants lacked any opportunity to prepare for the test since its content was not published and there was no bibliography. Additionally, the fees were very high (over 600 Euros) (van Oers, de Hart et al. 2013: 24, 26). This clearly revealed the intention to exclude certain categories of immigrants ('the less educated and less well-off groups').

<sup>230</sup> Rainer Bauböck (2007b) disagrees by making a distinction between 'swamping' and 'tipping' scenarios in external voting. I have criticised this view in chapter five on multiple citizens.

presidential elections in Romania, where the diaspora vote decided the new president.<sup>231</sup> And again, overseas absentee voting tipped the balance in the 2000 US presidential election (Spiro 2003: 141). Finally, in 2007 the winning party in Croatia's elections 'won [...] by a tiny margin thanks, in large part, to the votes from the diaspora constituency' (Ragazzi, Štiks et al. 2010: 14).

On the other hand, if there are cases where elections are won because of diaspora votes, we also have cases where more than half of the resident population is excluded from voting. This is the actual case in Luxembourg, where only '45 per cent of the resident population [...] has the right to vote in national elections.' As one author notes, this 'underlines the real problem of the democratic legitimacy of the political decision processes in Luxembourg' (Scuto 2010: 19).<sup>232</sup>

The simple solution to this problem is to award political rights only to the resident population and to exclude long-term emigrants who are permanent residents in (and hence should be citizens of) the host state. Setting aside the countries that terminate citizenship for long-term emigrants (see the following subsection), there are also countries that, although they do not take this route, nevertheless deny voting rights to most emigrant citizens (i.e., to non-residents), such as Albania (Krasniqi 2012a: 20), Denmark (Ersbøll 2010: 3), Malta (Buttigieg 2010: 4), Montenegro (Džankic 2012: 8, note 9), Ireland,<sup>233</sup> Greece (Bauböck 2007b: 2403) and Morocco (with the 1984-1992 exception) (Perrin 2011: 17). Other countries have decided to suspend citizens' voting rights after a specific period of living abroad: 'citizens of New Zealand lose their right to vote after three years abroad, Canadians after five, Australians after six, and UK citizens after 15 years.' The Philippines deny voting rights to dual citizens, and 'Canadian citizens who register to vote also have to declare that they intend to resume their residence in Canada' (Bauböck 2007b: 2424). A thoroughly up-to-date data on external franchise is offered by Arrighi, Bauböck et al. (2013), Dumbrava (2013) and Collyer (2013).

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<sup>231</sup> George Sava, 'Diaspora a decis președintele României' [The Diaspora decided Romania's president], *Pagini românești* [Romanian Pages], 15 December 2009, link: <http://www.paginiromanesti.ca/2009/12/15/diaspora-a-decis-presedintele-romaniei/> (accessed 18 January 2013).

<sup>232</sup> According to Scuto, 'The fact that only 45 per cent of the resident population of Luxembourg has the right to vote in national elections underlines the real problem of the democratic legitimacy of the political decision processes in Luxembourg' (Scuto 2010: 19). However, the relevant number is the share of non-citizens in the adult population (voting age), and the author does not mention expressly whether 45% refers to resident adult population or resident population including minors. He seems to imply the former, since he raises the problem of the democratic legitimacy of the political decision processes.

<sup>233</sup> 'We base our franchise partly on citizenship but also on residency. Irish citizens resident here can vote in all elections. British citizens living here can vote in elections though not in referendums. European citizens can vote in European and local elections. Non-EU citizens can vote only in local elections. Meanwhile, Irish citizens without residency here can't vote at all.' Sarah Carey, 'Votes for emigrants must come with a price', *Irish Times*, 1 January 2011, available at: <http://www.irishtimes.com/newspaper/opinion/2011/0127/1224288402147.html> (accessed February 2011).

On the other hand, the liberal regimes I have identified above already offer political rights to permanent residents. In Norway, immigrants ‘may vote in local elections after three years of legal residency’ (Brochmann 2010: 8). New Zealand ‘grants the right to cast votes (but not eligibility) in national elections to noncitizens after one year of legal residence’. That said, in the same country ‘permanent residents can exercise their voting rights from abroad only during their first year abroad, whereas citizens retain the rights for three years’ (Bauböck 2007b: 2425). And in Portugal immigrants may vote ‘on the condition of reciprocity’ (Piçarra and Gil 2012: 28) based on a political agreement between Portugal and their country of origin. According to Arrighi et al., unlike ‘local voting rights, which besides Brazilian citizens include Cape Verde citizens as well as nationals from countries which have signed a reciprocity agreement with Portugal, regional voting rights are extended to only Brazilian citizens who meet specified residence requirements’ (Arrighi, Bauböck et al. 2013: p. 54, note 11). The specified residence requirements in order to be granted voting rights in national legislative elections for Brazilians in Portugal are ‘three years of residence (...) under the terms of the Treaty of Friendship, Co-operation and Consultation, signed in the year 2000 and ratified in 2004’ (Arrighi, Bauböck et al. 2013: 54).

As a consequence, it is not difficult to accept that voting rights should only be offered to resident citizens. Regarding those living in other countries, only short-term emigrants should have the right to vote in their origin country. Those who are long-term emigrants and already *citizens* of other countries should have the right to vote only in their host state. In other words, we should accept the same time for phasing out the external franchise and acquiring citizenship in the host country.

#### **7.4.2. Residence-based citizenship and life abroad. Exclusion of multiple-citizenship status: examples and a normative argument**

To many scholars, the most frustrating thing about residence-based citizenship is its lack of full sympathy for long-term emigrants. While it offers them, as a matter of right, citizenship in the host country, it can find no reasonable argument to allow keeping the previous citizenship, and thus to accept dual or multiple citizenship. It seems that the more immigrants are equated with citizens with regard to rights and responsibilities in a specific state, the less emigrants are considered as citizens of their origin country.<sup>234</sup> The best real-world example is probably Norway, *which imposes the loss of*

<sup>234</sup> See EUDO Citizenship database on loss of citizenship, especially *Mode L02: Residence abroad*, accessible at <http://eudo-citizenship.eu/databases/modes-of-loss?p=&application=modesLoss&search=1&modeby=idmode&idmode=L02> and *Mode L05: Acquisition of foreign*

*citizenship for living continuously abroad, and elegantly explains this decision as ‘the complement of the acquisition requirement of stable residency for foreigners wanting to naturalise in Norway [my emphasis],*<sup>235</sup> (Brochmann 2010: 11).

Citizenship is also lost in Norway by those persons born abroad who did not reside at least two years in the country or at least seven years in Norway and another Nordic state until the age of 22. There are exceptions to this rule: people may apply for the right to retain citizenship, but they have to prove that they have ‘sufficient ties’ with Norway. Sweden also has a similar requirement: citizens born abroad who have never been domiciled in the country and have ‘never been in Sweden under circumstances that indicate a link with the country’ lose citizenship at the age of 22 (Bernitz 2012: 15-16). As in Norway, people may submit an application to retain citizenship but, unlike Norway, it seems that usually permission is normally granted to the first generation born abroad. Denmark also seems to have a similar law regarding loss of citizenship unless proof is shown of a connection to the state: ‘any person, born abroad and who has never lived in Denmark nor been staying abroad under circumstances indicating some association with the country will lose his or her Danish citizenship on attaining the age of 22’ (Ersbøll 2010: 13).

Until 2000 in the Netherlands the law specified an ‘automatic loss of Dutch citizenship upon spending ten years abroad;’ after this year, the law was changed and this time it says that the emigrant may still keep her citizenship if she applies for it every ten years (van Oers, de Hart et al. 2013: 14, 16-17). The same happens in Luxembourg, where expatriates can lose their citizenship ‘if, after residing for twenty years abroad, they abstain from declaring their wish to retain their Luxembourgish citizenship’ (Scuto 2010: 8). In Greece the law was even harsher until 1998, since it ‘stipulated the withdrawal of citizenship for those leaving Greek soil without intending to return’ (Christopoulos 2009: 14).

A discriminatory practice appears in those countries which impose the loss of citizenship after a period of residence abroad only for naturalised persons, but not for native born citizens. This happens, for example, in Malta. If the naturalised person has been continuously residing in a foreign country for seven years and ‘during this time has neither been at any time in the service of Malta or of an international organisation of which the government of Malta was a member nor given notice in writing

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*citizenship*, accessible at: <http://eudo-citizenship.eu/databases/modes-of-loss?p=&application=modesLoss&search=1&modeby=idmode&idmode=L05> (last accessed: 12 September 2013).

<sup>235</sup> It is important to note that for the purpose I have in mind (i.e., the defence of residence-based citizenship), I consider that any long-term resident is entitled as a matter of right to the citizenship of the host state. Only in this sense I am talking about long-term residents losing their previous citizenship (the citizenship of the previous state), since otherwise they would become, of course, stateless.

to the Minister of his or her intention to retain citizenship of Malta' (Buttigieg 2010: 13), citizenship is lost. In Ireland a person can lose her citizenship if she was naturalised and afterwards resided outside the state for a period of seven years, 'and without reasonable excuse has not during that period registered annually in the prescribed manner his or her name and a declaration of his or her intention to retain Irish citizenship (with an Irish diplomatic mission or consular office or with the Minister)' (Handoll 2012: 15). The same happens in Lebanon: a naturalised person loses her citizenship after an absence of 'five consecutive years' (el-Khoury and Jaulin 2012: 19, note 71).

It is true that the examples offered above go somehow against the trend, which is to keep connection with expatriate individuals by also maintaining their citizenship. However, here the problem is to how many generations should be accorded the right to keep citizenship through *ius sanguinis*? According to a recent study, in the European Union there are no less than thirteen cases of 'unconditional transmission of citizenship to descendants of citizens abroad: Austria, Bulgaria, the Czech Republic, Estonia, Greece, Hungary, Italy, Lithuania, Luxembourg, Malta, the Netherlands, Romania, and Slovakia' (Dumbrava 2010: 8). I agree with the author that this 'is a clear example of an illiberal (ethno-cultural) rule': when a person has no other connection with a state except the fact that she is a descendant of a citizen (or a former citizen), there is no moral ground for the transmission of citizenship status. Then, where can we draw the line?

An interesting answer in political theory is to keep the citizenship status for immigrants, since they are 'stakeholders in both their country of origin and settlement' (Bauböck 2009a: 17) and maybe for the second generation (i.e., first generation born abroad), on the condition that they keep strong connections with their parents' countries (for example, after a period of residence there). Some countries actually implement this in their current laws, like the United Kingdom, which generally sets 'limits on passing citizenship by descent for more than one generation' (Sawyer and Wray 2012: 4-5). However, if the relevant criterion is 'connection with the state,' then are long-term emigrants (that is, first generation immigrants) sufficiently 'connected' anymore? It is hard to understand why they would be considered so. In chapter six (on 'external quasi-citizens') I offered the example of a Romanian who left her country and moved to the United States where she lived for some twenty years. She has dual citizenship, travels to Romania every five years to see her family and friends, and maybe still has properties there. However, in any sense of the word, her centre of life is in the United States, *not* in Romania. Having family relatives, friends and property in another country (even the country of birth) is not enough to claim formal citizenship status. This is why I have proposed, in chapter six, the status of 'external quasi-citizens:' a status that can admit ties other persons than resident citizens may have with

a specific country, but also makes clear that such ties are not strong enough to support a claim to citizenship.

However, Bauböck thinks that in my example the person must keep her citizenship nonetheless. According to him, this is a good policy since an emigrant may change her mind sometime in the future and could come back to her origin country. Moreover, citizens must ‘see each other as belonging to particular intergenerational political communities’ (Bauböck 2012: 595), since this is important for the functioning of a political community at the level of independent states in the current international state system. I am still not convinced. On the one hand, if the person decides to come back to Romania after 20 or 30 years, she can do this as long as she accesses and keeps the quasi-citizenship status I have proposed (and she is free to keep it or not). On the other hand, it is hard to understand what this belonging to a particular intergenerational political community is supposed to mean. Firstly, since her centre of life (her close family, her job) is in the United States, then a long-term immigrant would rather think her intergenerational community is in the US (the country where her children are brought up and where probably they will spend their lives) than in the former country to which she is linked only by her memories.

Indeed, from this point of view permanent residence is more than it seems to be at a first glance. If one considers the matter at length, one sees that the person is living not in the country where she was born by pure luck, but in a state *chosen by* (a reasonable degree of) free will. Moreover, it is a state in which she wants to make a good life and to raise her children, a state in which her children will probably live and have in turn their own children. I claim this is enough for a minimal ‘intergenerational community’ that a liberal democratic state needs in order to function. It is enough for a membership in a liberal-democratic community that should be based on a link between members that is ‘minimalist politic’ and ‘partly voluntaristic’, as Dumbrava claims (Dumbrava 2010: 3).<sup>236</sup> But residence seems to be sufficient for this.<sup>237</sup> We can even make a further (courageous) move and ask: at the end of the day, why do we suppose people need to see themselves as members of intergenerational

<sup>236</sup> Someone may object that I am presupposing here that intergenerational political communities must be mutually exclusive with regard to membership. However, according to this objection this is so only for residential citizenship, not for birthright membership which can quite naturally be plural (Rainer Bauböck, personal communication on file with the author, September 2013). I agree that unlike residence-based citizenship, intergenerational political communities based on birthright membership may be plural *from a legal point of view*. But I doubt that from a *subjective point of view* a person could reasonably see herself as member of several intergenerational communities. And even if this may be possible, we can still ask two questions. Firstly, how many intergenerational communities a person can subjectively really feel she belongs to – two, five, or maybe ten? Secondly, why should such a subjective identification be legally acknowledged through an official citizenship status?

<sup>237</sup> Accepting dual citizenship from a birthright and life-course perspective, Bauböck agrees that long-term residence is enough for acquisition but also considers that long-term residence abroad is not enough for withdrawal (Rainer Bauböck, personal communication on file with the author, April 2013).

communities in the first place? When all's said and done, a simple intention to live in a specific state plus strict liberal-democratic political laws (together with liberal-democratic sanctioned economic laws and international agreements) should be enough to guarantee a community's continuity over generations, maybe even more so than the purely imagined 'intergenerational community' (which ultimately may prove to be simply an old and concealed vestige of the previous glorious but rather dangerous concept of 'nationhood').

Finally, it is interesting to note in passing that there are real-world examples of non liberal-democratic countries where it is simply impossible to renounce or lose citizenship. This happens for example in most Arab states, such as Morocco, where after the post-colonial period the King revived the doctrine of 'personal and perpetual allegiance to the sovereign based on divine right' (Perrin 2011: 1). The state accepts dual citizenship, but if an individual wants to apply for naturalisation in a country which does not accept multiple citizenship, then she has to ask for release from Morocco. In this case, consulates can provide a certificate of loss, but this certificate has absolutely no impact on Moroccan citizenship (Perrin 2011: 17). Such a situation did in fact generate an international conflict with the Netherlands at one time: the Dutch government officially requested Morocco to facilitate loss of citizenship in order to naturalise around 200,000 Moroccans living in the Netherlands. However, Morocco refused, and appealed to the principle of 'perpetual allegiance' (Perrin 2011: 13, 21).

#### **7.4.3. Residence-based citizenship and life abroad. Exclusion of multiple-citizenship status: further examples and motivations based on international relations**

In chapter five on multiple citizens I have explained in detail why dual citizenship should be abandoned. Here I just want to survey real-world reasonable exclusions of this status, different restrictions applied to dual citizens in cases where this status is accepted, and other interesting instances where it is not welcomed. Let me start with the fact that, contrary to the general opinion, 'a consistent approach towards avoiding dual citizenship may not be, at least theoretically, incompatible with a conception of (bounded) liberal-democratic membership' (Dumbrava 2010: 13). Indeed, since in the 20<sup>th</sup> century several countries have replaced *ius soli* with *ius sanguinis* and thus 'ethnicised' citizenship, a policy of returning to residence as the only requirement for citizenship (and thus no support for multiple citizenship) may not be necessarily illiberal.

It is not so, for example, in the Central and Eastern European context, where national feelings are strong and, since nations do not match borders, governments are making continuing efforts to

expand ‘the national community beyond state borders.’ Since armed conflicts can have disastrous consequences, as the Yugoslavian case demonstrated, states have been forced to imagine new ways to make the national community bigger by incorporating ‘ethnic kins’ living in other states. Not surprisingly, dual citizenship (a liberal policy favoured by the West) has been seen as the best instrument to realise such intentions. For example, Romania has been engaged (against the European Commission’s protests) in a process of ‘restoring’ citizenship to ethnic Romanians from Moldova (Iordachi 2004), (Iordachi 2010). Another case is Hungary, which tried to implement the infamous Hungarian Status Law in 2001 in order to incorporate ‘ethnic kins’ living in the region (against Romania’s and Slovakia’s protests).

Since the Venice Commission considered this move as being incompatible with European laws, Hungary moved forward and since 2010 simply offers full citizenship status to Hungarians living in neighbouring states. This raised some concerns since groups of ‘ethnic kins’ (for example, some Hungarians in Romania) are also requesting political autonomy, and coupling political autonomy with dual citizenship could threaten the integrity of the host state. Facing the international political turmoil created by such cases, and trying to find a solution for such political conflicts, some authors have considered that in Central and Eastern European countries there should be a trade-off between transnational citizenship and political autonomy. If ‘ethnic kins’ desire dual citizenship then they should abandon calls for political autonomy in the host state. However, if they desire political autonomy, then dual citizenship is excluded. The best solution in this case would be the rejection of dual citizenship in Eastern Europe and support for political autonomy arrangements (Bauböck 2007a).

Another reason to abandon dual citizenship in Eastern Europe is that, in the countries in which it has been implemented, it has been obviously abused. One type of abuse is to access dual citizenship not because of some real desire to be a citizen of your kin state, but in order to become a European citizen. This abuse is manifest, for example, in the case of Moldovans taking Romanian citizenship (Iordachi 2010) and of Macedonians taking Bulgarian citizenship (Spaskovska 2012: 20). The abuse is clear from the simple fact that applications for Romanian and Bulgarian citizenship (made by Moldovans and Macedonians, respectively) multiplied enormously immediately before and after these countries’ accession to the European Union.

Another type of abuse is made by criminals who are using dual citizenship in order to escape extradition. For example, in Macedonia a ‘former Minister of Health who holds both Macedonian and Bulgarian citizenship and was sought by Macedonian authorities for criminal charges, managed to escape extradition to Macedonia from Poland because of his Bulgarian citizenship’ (Spaskovska 2012:

20, note 42). This is also the case in Bosnia and Herzegovina, where around 500 criminals are using dual citizenship to escape prosecution (Sarajlić 2010: 16). But the security risk seems to threaten dual citizenship all over the world, not only in Eastern Europe. At least one author notes that dual citizenship is not irreversible in the context of terrorism (Kivistö 2007: 280). We should also consider the case of the UK where it is just the other way round. Dual citizenship is not an opportunity for abuse of rights but a liability for terrorist suspects: the UK can deport British terrorist suspects only if they are dual citizens who can be deprived of their British citizenship without becoming stateless.

However, such reasons for abandoning multiple citizenship do not apply only to Eastern Europe, but in fact everywhere. For example, it is difficult to accept the (facilitated) naturalisation of ethno-cultural relatives, which includes giving up not only the residency requirement but also the requirement of renouncing a former citizenship, although this condition applies for the rest of the cases. As one author notes, ‘there is no justification for granting exceptions with regard to taking up residence or the renunciation of dual citizenship (if generally prohibited)’ (Dumbrava 2010: 18). A form of such facilitated naturalisation can be found in Serbia, where Serbians who migrated with the intention to live permanently abroad (and their spouses and descendants) can receive citizenship only by submitting a written statement (there is no residence criterion) (Rava 2010: 16).

Interestingly enough, there are cases where states give ‘ethnic kins’ some ‘co-ethnic rights,’ but clearly refuse to offer them dual citizenship. Greece is an example here: until 2006 it had a ‘strategic choice to absolutely refuse Greek citizenship to Greeks from Albania.’ Since acquisition of Greek citizenship could have resulted in withdrawal of Albanian citizenship, Greece wanted to prevent ‘the definitive historical extinction or statistical death of [...] the Greek minority in Albania’ (Krasniqi 2012a: 18). This also happened in Bulgaria, where the Constituent Assembly of Veliko Turnovo (1879) did not accept a strong *ius sanguinis* since it didn’t want all ethnic Bulgarians to become citizens and thus to create a mass exodus in the region towards Bulgaria. On the contrary, it decided to keep ethnic Bulgarians ‘in adjacent lands as a way of legitimising future territorial expansion.’ Instead, the new state offered them some privileges (Smilov and Jileva 2010: 2, 4). Other countries refused dual citizenship to ‘co-ethnics’ simply because of the fear that possibly great numbers of ‘ethnic kins’ from the region would come to the country and would put a pressure on the job market. Welfare protectionism was, for example, one of the reasons why Hungarians opposed dual citizenship for ‘ethnic kins’ in the 2004 referendum on this topic (Kovács and Tóth 2010: 12). Another example is Poland which officially does not accept dual citizenship, but offers to ‘co-ethnics’ a Polish ethnic card

entitling them to free movement, education, government stipends, and a work permit (Górny and Pudzianowska 2010).

A further reason for opposing dual citizenship is offered by those countries with extremely large minority groups who fear that granting multiple status would result in their politics and internal affairs being decided by ‘outside’ forces . This is the case, for example, in Ukraine, where pro-western forces are, curiously enough, against double citizenship, while pro-Russian forces support it: ‘given the geopolitical realities in Ukraine and the role played by the “Russian factor” in Ukrainian domestic politics, this state of affairs is not really surprising’ (Shevel 2010: 18-19). It also happens in Montenegro, because of the fear that ‘dual citizenship from among the successor states of the former Yugoslavia (most likely Serbia) would have [...] a high impact on the voting population of the country and their electoral choices’ (Džankic 2012: 8).

But not only Eastern European countries avoid multiple citizenship. One example in the western states is Germany, which since 1913 has provided for loss of citizenship upon voluntary acquisition of another citizenship. Moreover, in 2000 Germany also introduced *ius soli* and the option duty, according to which a child who acquires two citizenships by *ius soli* and *ius sanguinis* must ‘decide upon reaching the age of eighteen which nationality to keep and which to renounce’ (Hailbronner 2012: 7). Another interesting case is offered by those countries which do not accept dual citizenship in general, but only in some cases. For example, some countries offer dual citizenship only on the basis of bilateral agreements (or on the basis of reciprocity). This is the case in Bosnia and Herzegovina, which signed such conventions only with Serbia and Sweden (Sarajlić 2010: 10-11, 15); in the Czech Republic, which accepts dual citizenship only with Slovakia (Baršová 2010: 7, 10, 13); in Montenegro, which signed only one agreement with Macedonia (Džankic 2012: 11); in Russia, which signed two conventions, with Tajikistan (1995) and Turkmenistan (1993) (Salenko 2012: 16; 21-22, note 58); and in Slovenia (it requires release from former citizenship for naturalisation, except for citizens of those EU Member States where reciprocity exists) (Medved 2010: 13).

Many other countries have different laws that try to avoid dual citizenship. There are different ways to avoid it, and other ways to practice such avoidance. There are states that practice an absolute and total avoidance of multiple citizenship; Norway (Brochmann 2010: 11) is one. Other countries practice a ‘general avoidance’ (or ‘avoidance in principle’), but have many exceptions. There are also states that avoid it in law but accept it in practice, and so on. Dual citizenship toleration is always a matter of degree, so the list below should be taken *cum grano salis*, since the countries listed practice different forms of toleration or non-toleration. Beside the six countries mentioned in the above

paragraph, there are 22 other countries which practice a form or another of avoiding dual citizenship (so a total of 28 states), and at least six countries which did avoid it in the past but accepted it recently.

The states that do not accept dual citizenship in one form or another (besides those mentioned) are: Albania (Krasniqi 2012a: 14), Austria (Çınar 2010: 1, 9), Belarus (Ulasiuk 2011: 5, 11, 17), Bulgaria (Smilov and Jileva 2010), Croatia (Ragazzi, Štiks et al. 2010: 6, 9), Denmark (Ersbøll 2010: 2, 26), Estonia (Järve and Poleshchuk 2010: 10), Georgia (Gugushvili 2012: 23), Germany (although in 50% of naturalisations exceptions are granted) (Hailbronner 2012: 7, 16), Ireland (Handoll 2012: 15), Latvia (Krūma 2010: 1, 10), Lithuania (Kūris 2010: 3, 21, 29), Macedonia (Spaskovska 2012: 13), Moldova (Gasca 2012: 13-14), Montenegro (Džankic 2012: 2), the Netherlands (although ‘in 63% cases it is allowed to retain former citizenship’) (van Oers, de Hart et al. 2013: 13, 18), Norway (Brochmann 2010: 9, 11), Poland (Górny and Pudzianowska 2010: 14), Slovenia (Medved 2010), and Ukraine (Shevel 2010: 1). Another interesting case here is offered by New Zealand which broadly tolerates dual citizenship. However, according to the present citizenship law, citizenship ‘may’ be terminated in cases of acquisition of another citizenship.<sup>238</sup> Finally, the six cases that until recently did not accept dual citizenship, but now do so are Switzerland (multiple citizenship status accepted since 1992) (Achermann, Achermann et al. 2010: 16), Serbia (since 2000) (Rava 2010: 10), Luxembourg (since January 2009) (Scuto 2010: 9-11), Sweden (since 2001) (Bernitz 2012: 1), and Finland (since 2003) (Fagerlund and Brander 2010: 12). Australia has also accepted dual citizenship since 2002.<sup>239</sup>

It is important to note that, although avoiding dual citizenship is in accordance with liberal democratic principles, there are some countries in the above list whose *practice* of dual citizenship avoidance is not in accordance with such values. One case in point is when states differentiate between citizens by allowing some set of individuals to access dual citizenship while denying the same status to others. For example, there are dozens of countries which accept dual citizenship for birthright individuals, but not for naturalised citizens – among them Moldova (Gasca 2012: 13-14) and Poland (Górny and Pudzianowska 2010: 14). In the same vein, other states accept dual citizenship status for emigrants, but not for immigrants. Examples here are Bulgaria, Poland, and Slovenia (Dumbrava 2010: 13). Conversely, some countries accept dual citizenship for immigrants, but not for emigrants. For example, in Georgia ‘it has been argued that the restriction which prohibits a Georgian citizen from being a citizen of another country applies only to a person who has obtained Georgian citizenship by

<sup>238</sup> New Zealand, Citizenship Act 1977, No. 61, reprint as at 1 July 2013, art. 16, available at: <http://www.legislation.govt.nz/act/public/1977/0061/latest/DLM443684.html> (last accessed 30 July 2013).

<sup>239</sup> I would like to thank Simon Watmough for drawing me attention on the Australian case (personal communication on file with the author, November 2013).

birth or naturalisation, and it does not apply to a citizen of another country who has obtained Georgian citizenship by being granted Georgian citizenship' (Gugushvili 2012: 22). Even more curiously, in Georgia *dual* citizenship is accepted, but *multiple* citizenship is not: 'obtaining additional citizenship after already having had dual citizenship leads to the loss of Georgian citizenship' (Gugushvili 2012: 23).

The second case in point is when states accept dual citizenship but impose some restrictions on those who enjoy this status. For example, the 1995 Georgian Constitution does not accept an individual with multiple citizenship to act as 'Georgia's President, Prime Minister or a Speaker of the Parliament' (Gugushvili 2012: 1). Moldova prohibited for a short period (between 2008 and 2009) even more public positions to be held by dual citizens, among which those of judges, mayors and presidents of local public administration, diplomats, etc. (Gasca 2012: 17). In the same vein, dual citizens in Bulgaria cannot run for parliamentary and presidential elections (Smilov and Jileva 2010: 10-11). Finally, in some states there are restrictions which are not directly related to multiple-citizenship status, but to the fact of being naturalised in that country (hence, not being a natural-born citizen): for example, only a 'natural-born citizen' of the United States can become a president of this country.<sup>240</sup> The same restriction applies for presidency in Portugal (Piçarra and Gil 2012: 24), while in Spain only 'nationals by origin' can be a tutor to the King, have the right not to be deprived of nationality against their will, and can access double citizenship (with a country from the list of states with whom Spain has such agreement) (Rubio Marín, Sobrino et al. 2012: 11). Such restrictions as those listed in the last three paragraphs cannot be accepted by a residence-based citizenship proposal. According to this theory, citizenship is due to residence, and there is no other assumption that could differentiate between different types of citizens.

Sometimes, dual citizenship has been tolerated seemingly not because decision makers really wanted to, but simply 'out of necessity'. This seems to be the case with the Czech-Slovak dual nationality, because of the great number of individuals that feel close to both countries since they were born and grew up in a period when both countries were forced to live under the same federation (Baršová 2010: 22). However, it is hard to understand why dual citizenship is seen as the only possible solution in this case. On the contrary, I believe that the solution I am proposing of one citizenship (based on residence) coupled with multiple nationality (and the benefits derived thereof) is at least a very good contender. This is especially so because both countries are members of the European Union,

<sup>240</sup> US Constitution, Article II, section 1, Clause 5; source: [http://www.usconstitution.net/xconst\\_A2Sec1.html](http://www.usconstitution.net/xconst_A2Sec1.html) (accessed 18 January 2013).

so the benefits of being both a Slovak and Czech citizen are rather weak. Moreover, according to recent studies, Europeans do not feel the need to access another European citizenship anymore: ‘The statistics indicate that there is no substantial need or interest by Union citizens to acquire German nationality, due to the secure residence status and the participatory rights granted by Union citizenship’ (Hailbronner 2012: 24).

There are of course serious objections against prohibiting dual citizenship, and they have to be taken into account. One obvious objection is that a general prohibition on dual citizenship will lead to increased statelessness, which is a major concern in the fields of international relations and human rights. According to a residence-based theory of citizenship a migrant should lose the citizenship of her former state of residence after a period of time (three years, as I have proposed) and should receive the citizenship of her host state. But unless we accept the less liberal proposal of an automatic and unconditional inclusion (Rubio-Marín 2000: 6),<sup>241</sup> we must admit that some people will refuse to accept the new citizenship. And, since according to the residence-based proposal they lose their origin country’s citizenship, then they become stateless. It seems thus that residence-based citizenship can coexist only coupled with a less liberal, non-optimal acquisition of citizenship in the country of residence.

However, as I will try to show in the last chapter (see sections 8.1.3. and 8.2.) this may not be necessarily so. Firstly, it is a sociological truth that the longer the time, the greater the desire to apply for citizenship in the country of residence. Secondly, the onus should be on the state of residence to advertise the importance of citizenship and to offer serious incentives for citizenship acquisition. Finally, if at the end of the day there will be a small number of people that would still refuse to naturalise (no matter the time spent in the host state and the incentives given to them) then I believe their small number would not threaten democratic institutions: in this case, they should be exceptionally allowed to retain the citizenship of their origin country.<sup>242</sup>

A second objection claims that in coerced migrations, such as those resulting from ethnic cleansing in Yugoslavia, states of origin must not have the right to deprive persons that have been forced out of their territory of their citizenship on grounds of residence abroad. According to this objection, dual citizenship in these cases can be an elementary right and also a condition for reversal of ethnic cleansing through a right to return. But under a residence-based regime, there could be other

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<sup>241</sup> For an extensive critique of this view, see the last chapter.

<sup>242</sup> In the last chapter (section 8.2.) I show that a residence-based theory might find difficulties in answering who could claim the exception and under which conditions.

ways of dealing with such cases. For example, the origin state could offer individuals the possibility to return and thus to become once again mono-citizens. Or (in case they do not want to return and lose their origin state's citizenship) the same state can offer them the possibility to access an 'external quasi-citizenship' regime (as outlined in chapter six), which offers them not only the right to return, but also a large variety of rights (except political rights) in the origin state. Dual citizenship is not necessarily the only possible form of compensation in this case.

## 7.5. Residence-based citizenship in state formation or succession

A final interesting feature of residence-based citizenship is its connection with state formation or succession. The initial determination of citizenship at independence is 'structurally analogous to the ongoing determination in migration contexts. In both cases there are primary rules that lead to automatic acquisition (*ius domicilii* or *ius soli/ius sanguinis*) and secondary rules that create individual options: the option right at independence (naturalisation) or renunciation after independence.'<sup>243</sup> Now the 'zero option' is an option made by the state to automatically grant citizenship to all residents, and here we have a case of residence-based citizenship. But against a residence-based citizenship theory, it has been historically generally combined with an individual option to choose another citizenship: individuals are thus offered 'the right to choose' whether they want to become citizens in the new state or they want to acquire the citizenship of an external kin state. This is not acceptable under a residence-based regime, since such an option basically offers the possibility to acquire citizenship according to an ethnic preference. The principle of residence is decisive in deciding a state's initial body of citizens.

According to Ulasiuk,

'The zero option foresees granting citizenship to all people living in a given state territory either at the moment of the declaration of independence or from the date when the corresponding law was adopted. It generally sets out, however, either a period of time within which persons can declare "their belonging to citizenship" (Vasilevich 2003: 282-283), or situations in which the automatic acquisition of citizenship is possible unless a person officially rejects citizenship in a given state.' (Ulasiuk 2011: 3)

It is important to underline the fact that this policy was recently supported by two important international documents. In 1996, the Venice Commission issued 'The Declaration on Consequences of

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<sup>243</sup> Rainer Bauböck, personal communication on file with the author, September 2013.

State Succession for the Nationality of Natural Persons,’ which stated that ‘in all cases of State succession, the successor State shall grant its nationality [citizenship] to all nationals of the predecessor State residing permanently on the transferred territory.’ Similarly, the European Convention on Nationality declares (art. 18) that in the case of succession, states should take into account ‘the genuine and effective link of the person concerned with the State’ and ‘the habitual residence of the person concerned at the time of State succession’ (Ragazzi, Štiks et al. 2010: 1).

The residence criterion was used by the Treaty of Lausanne (1923) to determine ‘the acquisition of Lebanese citizenship’ and it was complemented by the ‘right of option for those abroad to become Lebanese citizens within two years’ (el-Khoury and Jaulin 2012: 3). The residence principle was also the main tool to determine Moroccan citizens in the 1958 Citizenship Code (Perrin 2011: 8). And again, ‘permanent-residence criterion’ in post-Soviet Eurasia and ‘republic-level citizenship criterion’ in Yugoslavia and Czechoslovakia were ‘used to determine the initial body’ of citizens (Baršová 2010: 6).

Other instances of the ‘zero option’ can also be found in Belarus, Armenia, and Ukraine (Ulasiuk 2011: 1-3), Yugoslavia (Sarajlić 2010: 5), Bosnia and Herzegovina (Sarajlić 2010: 6-7), Bulgaria (Smilov and Jileva 2010: 4), Albania (Krasniqi 2012a: 4), Austria and Hungary (Çınar 2010: 2), Kosovo (Krasniqi 2012b: 9), Lithuania (Kūris 2010: 3, 14), Moldova (Gasca 2012: 4), and Montenegro (Džankic 2012: 7).

Concerning state succession, there is one illiberal instance opposed to the ‘zero option,’ understood as a residence criterion. After the fall of communism, in Latvia and Estonia the principle of ‘state continuity’ was preferred to that of the ‘zero option.’ According to the former, the state simply resumes the existence that was terminated with the beginning of the Soviet occupation (Krūma 2010: 2). Both states claimed that citizenship of the pre-Second World War republics was re-established and Soviet citizenship had legally ceased to exist. But this implied that only individuals who had Latvian and Estonian citizenship (at the time of the Soviet occupation) and their descendants had a right to be citizens. As a consequence Soviet-era settlers became (and at this moment, some of them continue to be) ‘non-citizens.’ ‘Non-citizenship’ is a legal category in Latvia’s law, according to which ‘the connection of a non-citizen with the Republic of Latvia is closer than that of a stateless person or a foreign national’ (Krūma 2010: 16). Estonia did the same thing in 1991 in relation to ‘Soviet-era settlers’ (Järve and Poleshchuk 2010: 1). As in the Latvian case, those who had taken up residence under Soviet occupation did not automatically acquire Estonian citizenship at independence. In comparison, the third Baltic state, Lithuania, decided (by a judgment of the Constitutional Court in

2006) that the body of citizens ‘was formed on the basis of permanent residents of Lithuania, irrespective of their nationality’ (Kūris 2010: 8).

## **7.6. Conclusions: laws that defy residency and laws that do not require residency: why they don’t go well with the principles of liberal democracy**

The ‘partial citizenship’ of the Russian minority in Latvia and Estonia (as we have already seen in the last paragraph) is not the only case of *imposed* non-citizen, permanent resident status. Other less liberal countries like Lebanon also enforce partial citizenship status on some individuals, for example for Palestinian refugees, ‘considered as *foreigners of a special category* who do not carry papers issued by their country of origin’ (el-Khoury and Jaulin 2012: 9).

However, in liberal democracies the non-citizen, permanent-resident status has different degrees of voluntariness, and it matches more or less the category of non-citizen, long-term resident. I have already discussed above the huge number of 55 per cent resident population in Luxembourg which can be considered in the state of ‘denizenship,’ since it lacks voting rights (Scuto 2010: 19).<sup>244</sup> In the United Kingdom one can find the legal status of ‘Indefinite Leave to Remain.’ According to Sawyer, this category is similar to the ‘concept of denizenship’ (Sawyer and Wray 2012: 5), guaranteeing individuals the right to stay in the country but not offering them full citizenship rights (Sawyer and Wray 2012: 5). The Netherlands also has two categories of people under the ‘quasi-citizenship’ status. On the one hand, this condition is designed for ‘inhabitants of the Moluccas, one of Indonesia’s archipelagos,’ who have enjoyed since 1976 ‘(almost) equal rights to Dutch citizens’ without being Dutch citizens (van Oers, de Hart et al. 2013: 33-34). On the other hand, the second category of Dutch ‘quasi-citizenship’ resembles the UK’s ‘Indefinite Leave to Remain.’ Since 1990, a foreign citizen cannot be expelled ‘on the grounds of public order’ so long as he has had twenty years of legal residence. Additionally, since 2000 this person’s permanent residence ‘can only be withdrawn on grounds of national security or because the immigrant has taken up residence abroad’ (van Oers, de Hart et al. 2013: 34).

Portugal also has a legal category of ‘quasi-citizenship’, although this may be considered liberal: citizens of Lusophone countries living in Portugal ‘enjoy wide-ranging rights as far as political participation and access to public office are concerned’ (Piçarra and Gil 2012: 2, 27). This is based on

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<sup>244</sup> As already underlined in note 232 (section 7.4.1. above), the author does not mention expressly whether 45% refers to resident adult population or resident population including minors. However he seems to imply the former, since he raises the problem of the democratic legitimacy of the political decision processes in this country.

bilateral treaties, and up to now only one such treaty has been signed with Brazil. However, such citizens are denied access to many public positions in the state, like the presidency, membership of Parliament, diplomatic representatives, officers in the armed forces, etc. (Piçarra and Gil 2012: 27, note 90). Moreover, ‘Lusophone citizenship does not provide any right to entry and permanent residence in Portuguese territory or to diplomatic protection in another country’ (Piçarra and Gil 2012: 28).

On the other hand, in contrast with the countries discussed above which don’t offer long-term residents the possibility to access citizenship, there are other countries which do not require at all residency in the territory as a condition for citizenship. We have already seen that Hungary, for example, has offered citizenship to ‘ethnic kins’ in the region since 2010, but does not impose a residence requirement (Tóth 2010). This is also the case with Serbia, which offers citizenship to emigrants (former citizens) without requiring a minimum residence in the country (Rava 2010: 16). Finally, in the period between 1956 and 2004 Ireland waived all naturalisation requirements (residence included) for spouses of citizens under the *ius connubii* principle (Handoll 2012: 5, 7, 20).

On the one hand keeping a status of *permanent* quasi-citizenship for residents in a state is not recommended from a residence-based theory’s point of view (although, as we will see in the last chapter, it may not be possible to fully exclude it either). On the other hand, a residence-based citizenship theory finds it difficult to accept to offer non-residents full citizenship rights and thus to give them a chance to contribute to making political decisions they will not have to cope with, as long as they are not residents of that country.

Finally, as we have already seen, there are countries, such as Netherlands or United Kingdom, for which ‘long-term residence (...) is no longer considered to imply integration’ (van Oers, de Hart et al. 2013: 41). In contrast, the few countries that are still keeping a very liberal stance are constantly under attack. For example some authors decried the fact that Belgium did not require until the new 2012 citizenship law anything else from a foreigner except long-term residence for citizenship acquisition:<sup>245</sup>

‘Though citizenship cannot have as its sole objective the final evidence of the integration process, one should not fall into the opposite extreme, and reduce it to a mere confirmation of one’s residence. One could legitimately argue that this is, however, what has happened to Belgian citizenship since 2000. Nowhere in Europe are the conditions for the granting of citizenship to foreigners as flexible as in Belgium.’ (Foblets and Yanasmayan 2010: 25)

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<sup>245</sup> As we have already seen, this was the case only until the new 2012 law which entered into force on 1 January 2013 (see note 206 above).

But what is the problem with the liberal stance adopted by Belgium until 2012? The authors seem to believe that such a position goes against the genuine link principle, according to which one is supposed (in these authors' view) to 'seek (...) always to identify at best the core interests of an individual in the specific context within which he or she lives and to ascertain with accuracy the intensity of his/her integration within a social and legal system, before determining which law is applicable in any given case' (Foblets and Yanasmayan 2010: 25). But the fact that a person is clearly a long-term resident in a country is already the best argument that she is already well integrated. It seems difficult to justify policies requiring identification of an individual's 'core interests' of his life or ascertaining *the intensity of her integration*. The fact that the processes of naturalisation and integration go already very well after a short term of residence of only three years in Canada, New Zealand and Serbia (plus Belgium until 2012), or after five years in Sweden and six years in Norway is enough to demonstrate that nothing else is needed. Moreover, as we have already seen in this section, refusing long-term immigrants access to citizenship (just because they did not learn the language well or just because they did not pass a history test or a cultural examination which cannot be passed by many born citizens) is a clearly illiberal stance.

## **Chapter 8. Contenders of Residence-Based Citizenship and Avenues for Further Research**

*'To ignore the millions of persons who at present live in the society, but who are not of it, is to risk the perpetuation of marginality and lack of commitment. It is also to risk creating conditions that will tear at the fabric of the society' (Rist 1978: xiii)*

*'I maintain that if we accept – as perhaps all contemporary democratic theorists do – that long-term residency in a democratic state is what should entitle people to full political rights, regardless of their ethnicity and national origin, then we must also endorse the idea that permanent non-residents should be disenfranchised' (López-Guerra 2005: 216-217)*

### **8.1. Contenders of residence-based citizenship. Critique of alternative views**

In the last chapters we started to visualize what citizenship is from a residence-based point of view: citizenship is a basket of rights every individual should acquire just because she is a long-term resident; she uses this basket of rights in the country of residence in order to fully participate in a self-governing polity. In the liberal view I have proposed here (currently accepted by at least three states: Serbia, Canada, and New Zealand; and formerly accepted by one until 2012: Belgium) three years of residence qualify an individual for citizenship. In the case of irregular migrants, one year of *effective* residence qualifies her for *permanent* residence status, and then she must wait three more years in order to be able to apply for citizenship. The important thing is that, in the residence-based model I am proposing, citizenship is strictly a legal term that offers a basket of rights to residents; it is *absolutely disconnected* from other considerations like national, ethnic, economic, social, emotional, cultural and family ties. One could have – and does have – such type of ties even if one is not a citizen of the countries in which those ties exist.

Clearly, this may seem a revolutionary view on citizenship: a citizen is not someone who has different sort of ties to a political community of residents, but a person that simply lives in – and hence is a part of – that community irrespective of any other consideration. However, when one changes one's residence, one loses this basket of rights in the former state after three years of absence and takes the new one in the new state of residence after three years of living there (because statelessness must be avoided). Once a resident-citizen of a new country, the person should be able to acquire a different basket of rights in the former country of residence – a status called '*external quasi-citizenship*.' I do not claim such a model cannot have its own problems; on the contrary, this is the subject of the present

chapter: a debate about the most important alternative theories, and an honest discussion of the resident-based model's weakest points.

In the first part of this chapter I want to briefly discuss four alternative theories of citizenship which do not easily come to terms with the idea of residence-based membership. All these theories meet specific problems: the ‘stakeholdership’ theory (Rainer Bauböck) may prove to be *over-inclusive*, just as David Owen’s very liberal theory which tries to include all ‘citizens-minus’ and ‘citizens-plus’; the automatic naturalisation model (Ruth Rubio-Marín) sanctions *forced inclusion*; and finally, two rather eccentric views would accept the status quo and the existence of different levels of ‘quasi-citizenship’: they would either sanction a *negotiated exclusion* (Valeria Ottonelli and Tiziana Torresi) or a *forced exclusion* (Daniel A. Bell) of ‘citizens-minus.’

In the second part of this chapter I want to honestly discuss what residence-based citizenship can easily provide for, but also the problems this theory finds difficult to answer. I claim that it can easily (a) solve the problem of partial citizenship, (b) offer an elegant answer to the problem of matching the categories of residents and citizens, (c) solve the problem of marriages of convenience, and most importantly (d) eliminate morally controversial standards of citizenship acquisition. However, the same theory may have problems in accurately answering at least two problems: firstly, regarding irregular migrants, as any other normative theory, it cannot provide a perfectly satisfactory answer to the way they must be treated (indeed, they still remain ‘impossible subjects’). But I will also try to show that a residence-based citizenship may still provide the best available moral solution to this problem. Secondly, the theory I am proposing may find it difficult to explain the difference between dual citizenship and ‘external quasi-citizenship,’ especially if we adopt the attractive proposal of devising multiple citizenship according to the Spanish way of differentiating between ‘active’ and ‘dormant’ official statuses. However, I will try to show that the latter proposal would throw us back to many problems we have encountered in the discussion about multiple citizenship.

The third and last part of the present chapter explains the avenues for further research for each empirical subject discussed in this study – irregular migrants, temporary workers, dual citizens and ‘external quasi-citizens’ – and also for the concept of residence-based citizenship itself. Sociological, political, and especially normative subjects which seem interesting to be further investigated are taken into account.

### 8.1.1. Over-inclusion (1): the ‘stakeholdership principle’

The last three chapters frequently discussed the ‘*stakeholdership*’ theory, according to which an individual has a claim of being a member of a particular polity only if she is a ‘stakeholder.’ And an individual is a stakeholder ‘if the polity is collectively responsible for securing the political conditions for [her] well-being and enjoyment of basic rights and liberties’ (Bauböck 2009a: 15). Interestingly enough, the definition clearly seems to support that ‘*stakeholdership*’ is a form of residence-based theory, since political conditions for one’s well-being and her enjoyment of basic rights are directly related to the territory one is living in. However, Bauböck is interested not only in who has a claim to membership, but also in the stability and proper functionality of a democratic polity. He believes that a state must avoid boundary indeterminacy: democracies cannot work properly if too many people frequently come and go – that is, they do not merely migrate, but also change membership.

In order to have a stable demos, the state-based polity<sup>246</sup> also needs at least two important things. The first is a *legal provision*, which regulates membership: among other conditions, it requires that citizens must have the right to keep the citizenship they acquired by birth or by naturalisation, even if they subsequently become residents of another country. The second is a *psychological constraint*: citizens must ‘see each other as belonging to [a] particular intergenerational political’ community (Bauböck 2009a: 2). These two requirements disconnect the ‘*stakeholdership*’ idea from residence-based citizenship, since it accepts that long-term emigrants must keep their full citizenship in their origin countries.

I believe this theory is over-inclusive, and there are two critiques I want to raise. According to the first one, ‘*stakeholdership*’ cannot reasonably justify the inclusion of long-term emigrants into the demos. It is important to see even from the beginning that this theory is rather indeterminate regarding the *legal* situation of long-term emigrants. On the one hand, as we have already seen in chapter five, full dual citizenship is normatively accepted: Bauböck considers that migrants who ‘retain strong economic, social, cultural and family ties with a sending country have a plausible claim to citizenship’ in both origin and host states (Bauböck 2007a: 72). The reason for this is that they are ‘stakeholders in both their country of origin and settlement’ (Bauböck 2009a: 17). The author refers here only to emigrants and to first generations born abroad, since he correctly considers that later generations

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<sup>246</sup>In Bauböck’s view, birthright membership is a condition for democratic stability only for polities that are states, i.e. members of the international society of states; sub-state and supra-state based polities do not require membership stability secured by birthright (personal communication on file with the author, April 2013).

cannot be presumed to be connected anymore with the origin country in a way that would entail a general right to citizenship there.<sup>247</sup>

So let me take these two cases in turn. Regarding the first generation born abroad, Bauböck accepts their right to full citizenship in the origin country only on the condition that they keep strong connections with their parents' home state. In his view, first generations born abroad should have the right to retain *ius sanguinis* citizenship until the age of majority, after which states of origin *may* but *need not* make retaining it conditional upon a declared intention of future residence or de facto return. However, according to the same author the external franchise *should not* be extended to them at the age of majority *unless they intend or do return*. But citizenship without full political rights (which is justified here by *lack of residency*) could be seen as a status of 'external quasi-citizenship' in the way I have described it. Since I also agree with Bauböck that only residence triggers a right to access full citizenship status, and this scholar accepts that states at least *may* make retaining *ius sanguinis* citizenship at majority dependent on residence, there is no disagreement between us here – although in this case I do not understand why *ius sanguinis* citizenship until the age of majority protects the child better than a residence-based citizenship in the host country (based on *ius soli*) plus the status of 'external quasi-citizen' in his parents' state. However, I argue that further changing the state of permanent residence implies loss of citizenship: in consequence, my disagreement with Rainer Bauböck does not concern the first generation born abroad, but only first generation emigrants – who according to this author should keep their citizen rights, while I claim they shouldn't.

Regarding this category of first-generation emigrants, the question here, asked under the 'stakeholdership' theory's terms, is whether long-term emigrants are still sufficiently 'connected,' since 'connection with the state' is considered the relevant criterion for citizenship status. As we have already seen, the strong ties that make a claim to citizenship plausible are supposed (by the aforementioned author) to be of an 'economic, social, cultural and familial' nature. So is a long-term emigrant sufficiently 'connected' with his origin state? In chapter six I offered the example of a Romanian living in the United States for more than twenty years: she has United States' citizenship, she works, raises her children, and has friends there. Sometimes, maybe every five or six years, she comes to Romania for two weeks to visit some close family members. But are such familial ties sufficient to support a membership claim? Suppose that half of her close family relatives move to

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<sup>247</sup> In individual cases they may of course be so connected: this is why the status of 'external quasi-citizenship' could allow a member of a later generation the right to return and to take up residence there (as we have already seen in chapter 6).

Rwanda – are these family ties enough in order to give her a claim to Rwanda's citizenship? Family ties are surely not enough in order to support such a demand.

What about cultural ties? Suppose the same person would make a claim to Moldova's citizenship because of strong cultural connections – speaking the same language, sharing the same culture. Of course nobody would accept these cultural links as sufficient (by themselves) for supporting a claim to Moldovan citizenship. Social and economic ties are even less plausible as sufficient connections qualifying a person for citizenship acquisition: one may have economic interests and probably many close friends in Mongolia, but – unless we accept the idea of *investment-based citizenship*, which I have criticised in the last chapter – these links are not enough to support a claim to citizenship acquisition in a specific state. It is thus not obvious why Bauböck considers 'economic, social, cultural and familial' ties as supporting a 'plausible claim to citizenship.' Indeed, they may be sufficient enough to offer a claim to an 'external quasi-citizenship' status – as I have proposed in chapter six above – but not for full citizenship. Such a theory is rather over-inclusive, and it devalues the idea of citizenship as a special bond between the individual and the state in which she resides.

On the other hand, sometimes Bauböck does not seem to be convinced that *full* dual citizenship status should be seen as a fundamental individual right in this case. In such moments he considers that emigrants are not *entitled* to political rights: the 'external franchise should not be seen as a fundamental individual right but as permissible' (Bauböck and Perchinig 2009: 487). I readily accept this claim since, as we have already seen in chapter seven above, resident citizens should not be forced to accept a political situation decided by non-residents who are not subjected to the political state of affairs they helped to bring about. However, the problem is that in a world in which economic, social and human rights are increasingly based on international agreements – so they do not depend upon enjoying a citizenship status in a particular polity – political rights are the last stronghold of citizenship. Indeed, as we have already seen in chapter six above, even the right to return is disentangled from citizenship and offered by an increasing number of countries to 'external quasi-citizens'. In this case, losing political rights as a result of taking up permanent residence – hence, according to my theory, citizenship – abroad simply means losing citizenship in the former country of permanent residence. By accepting that external political rights are only 'permissible', Bauböck thus opens a large door for a spectacular return of the *stakeholdership* theory under the residence-based citizenship label.

Regarding the second critique I want to raise, the *stakeholdership* theory is based on a rather perplexing *psychological assumption*: according to it, it is important for the functioning of the political community that citizens 'see each other as belonging to particular intergenerational political

communities' (Bauböck 2012: 595). I have tried to answer this critique in chapter seven above (section 7.4.2.) where I met serious difficulties in understanding what such intergenerational political community is supposed to mean. On the one hand, a double citizen – having both American and Romanian citizenship – who is living for twenty years in the United States has probably the centre of her life in this latter country: her close family, her friends, her job are all there. These are, I maintain, sufficient reasons to see herself as a member of an intergenerational political community, since this is the country for which she made a lot of sacrifices – including the sacrifice of leaving her origin country – where she invested efforts and money, and where her children and grandchildren will probably work and live. On the other hand, the origin country may be the source of deep feelings and cherished memories, and the state where some good old friends and maybe elderly family members still live, but this does not qualify anyone for full citizenship status. I strongly believe simple residence is enough for a membership in a liberal-democratic community based on a link between members that is 'minimalist politic' and 'partly voluntaristic' (Dumbrava 2010: 3).

On the other hand, as I have already asked in chapter seven above, why democracies need their citizens to see themselves as members of intergenerational communities in the first place? And do we have serious academic studies that empirically demonstrate that this requirement is a *sine qua non* condition to guarantee a community's continuity over generations? I am sceptical about this condition: a liberal education regarding law-abiding behaviour and respect for democratic norms as the minimal conditions for one's individual prosperity may prove to be more important than insistence on an idea of 'intergenerational community' which is rather an exemplar of the old concept of nationhood than a real condition for securing the stability of a political community.

However, Bauböck could finally reply using his 'hypermigration model' (Bauböck 2011). According to it, state-based polities need a stable demos: the proper function of liberal democracies would be seriously damaged in a world where people frequently change membership. I fully agree that this is the case in a polity where all citizens are emigrants and all residents are non-citizens. However, in the context of residence-based citizenship – which requires as a matter of right citizenship for residents – it seems that Bauböck may be particularly concerned about both the *number* of persons changing citizenship according to residence, and about the *frequency* of this change. Regarding the *numbers* of immigrants worldwide, as we have already seen in chapters one and three, it is between

three percent and less than four percent of the world population.<sup>248</sup> Even if the number of citizens with immigration background in one specific state can go as high as 16.6% of the total population in Germany in 2006 (Cyrus 2009) or even higher (as in Switzerland, Belgium, and Austria; outside Europe, Canada, Australia, Israel and the Arab Gulf states have even much higher percentages), the numbers are still relatively low to create serious problems for a liberal democracy. It is of course possible that in the future the numbers may grow – but as long as citizenship is based on residence, an immigration background becomes less important no matter how high the percentage is.

So we have to go further to the problem of the *frequency* of people changing citizenship because of a change in residence. As I will try to show later at the end of section 8.1.4., the experience of temporary workers shows that in time they become ‘permanent’: otherwise put, over time most people tend to take roots rather than to move continuously. As one author considers, setting aside a cosmopolitan elite ‘people are generally inclined to set down roots in specific residential habitats (in which they make long-term investments) and to rely on specific institutional, social and cultural frameworks to lead a meaningful existence’ (Rubio-Marín 2000: 17). Finally, even in a situation of ‘hypermigration’ there are democratic methods that could stabilize the demos (like offering serious incentives to stay, as I will show later in section 8.1.3.).

The problem is that, according to Bauböck, in a ‘hypermigration’ scenario the claim to retain birthright citizenship in countries of origin becomes much weaker; in such a scenario only a residence-based citizenship would be defensible. So in his view, the relatively low current stocks and flows of international migration support his claim that birthright citizenship remains feasible and justifiable in the present world, which is not a ‘hypermigration’ world. The ‘hypermigration’ scenario is thus not intended to defeat residence-based citizenship. It is meant to show: (a) why it is not necessarily required in the present world and (b) why maintaining democratic cohesion would be difficult in a world in which citizenship could *only* be derived from residence.<sup>249</sup> I do agree with the first point: in the present world residence-based citizenship is not ‘necessarily *required*’, but what I tried to explain in this study is that in many specific ways it could be, even in the present world, more *desirable*. I strongly disagree with the second point: as I tried to argue, together with Rubio-Marín I believe that in time people are inclined to set down roots, so the risk regarding maintaining democratic cohesion may be exaggerated. Probably this risk would be more serious if Bauböck would also introduce in the

<sup>248</sup> United Nations, Department of Economic and Social Affairs, Population Division, ‘International Migration Report 2006: A Global Assessment’, <[http://www.un.org/esa/population/publications/2006\\_MigrationRep/report.htm](http://www.un.org/esa/population/publications/2006_MigrationRep/report.htm)>, p. xiv (accessed 30 July 2013). See also Abizadeh (2010: 358) and Bauböck (2011: 684).

<sup>249</sup> Rainer Bauböck, personal correspondence on file with the author, April 2013.

‘hypermigration’ model a radical psychological transformation in the sense that all people would not only live in other countries than their origin states, but also that they would not even have the tendency of taking roots anymore, anywhere. This is, I admit, a frightful thought. In consequence, my claim is that neither the *number* of persons changing citizenship according to residence, nor the *frequency* of this change could be seen as serious arguments against a residence-based model of citizenship.

### 8.1.2. Over-inclusion (2): the liberal argument

A very liberal argument is put forward by David Owen, who is defending a concept of ‘transnational citizenship’ which accepts political inclusion of all four categories we have taken into account: irregular migrants, temporary workers, dual citizens and ‘external quasi-citizens’. This argument defends full inclusion as an element ‘of an account of transnational political equality’ (Owen 2010), (Owen 2013) and simply requires the ‘incorporation of *both* immigrants and emigrants into the polity’ (Owen 2011a). I want to criticise this standpoint as suffering of the same deficiency as Bauböck’s: that is, I will claim it is also over-inclusive. I begin by quickly reminding the disagreement presented in chapter one between Owen and López-Guerra over the adequacy of a residence-based citizenship account.

The argument put forward by López-Guerra is rather elegant and simple: he builds on Robert Dahl’s principle of inclusion, according to which ‘all subjected to the laws’ of a political community should have a say in making those laws (Dahl 1989); in consequence, all permanent residents of a state should have political rights – hence, be full citizens – of that state (López-Guerra 2005: 220-221). The reverse is, in this author’s opinion, also true: since long-term or permanent expatriates are no longer subject to the laws of their origin countries, they should lose the right to decide on those laws – that is, they should lose full citizenship status. In other words, if long-term or permanent residency requires as a matter of justice full political rights for all qualified individuals, then long-term or permanent non-residency should imply the disenfranchisement of all such persons (López-Guerra 2005: 216). In consequence it seems that the thrust of the argument lies on whether permanent residents are indeed not subjected to the law of their origin countries.

Owen considers that López-Guerra is wrong: even if we accept Dahl’s criteria of full inclusion into the demos – being of age, being mentally sane, habitually residing in the territory and thus being subject to the laws of that territory’s government (Dahl 1989) – this doesn’t mean that non-residents can be reasonably excluded (Owen 2011a). Indeed, ‘external’ citizens are also subject to some –

arguably, many – of the home state’s laws: for example, they must have a say at least in constitutional referenda and maybe other situations where the nature of their membership is at stake – for example, a referendum on whether the state should ‘institute or abolish expatriate voting’ (Owen 2010), (Owen 2011a). The basic idea seems to be that although residence is a sufficient, it is not also a ‘necessary condition for being subject to the decisions of the state’ – hence long-term non-resident individuals can still be full citizens of their home state (Owen 2011c). Moreover, expatriates should also enjoy voting rights – seen as ‘permissible’ for national legislative and presidential elections, and as ‘required’ for constitutional referenda. This is because the latter expresses the basic rules of a political community, and every member of that community should be entitled to have a say in their design (Owen 2011b).

However I believe this author may miss the point here, since it seems that López-Guerra and Owen are discussing *two different problems* situated at *two different levels*. The first problem is who should be a citizen, and this is the most basic level. López-Guerra answers this question by proposing the residence-based criterion. Only after we offer an answer to this question can we go further and ask, as Owen does, how different categories of citizens – in this case, ‘external’ citizens – should be treated by the home state. López-Guerra’s answer to the first question is that after a period of residence abroad and naturalisation in another country, these individuals are not considered citizens anymore, so there is no point in asking what rights they should have as citizens – however, we could ask indeed what rights can be offered them as ‘*external quasi-citizens*’. But if this is true, then Owen’s critique fails, since we cannot ask what rights a group of individuals must enjoy as citizens of a state as long as we decided that they are not citizens of that state (anymore) in the first place. And notice that this is not to deny that there are laws that apply to non-resident members: on the contrary there are, but they are applying according to my model only to (*mono-*)*citizens* – for example, they are applying to people who work in embassies, or to *temporary* ‘external’ mono-citizens – and not to those who lost their citizenship status because the state deprived them of citizenship according to a possible international legal trend against multiple citizenship. Owen’s reasoning works: (a) only in an international system where dual citizenship is largely accepted, which is our present world (which I have tried to criticise), or (b) in an international system where dual citizenship is not accepted, and immigrants either find it difficult to naturalise or they deliberately choose not to naturalise (for a discussion of the later alternative, see the next section).

Owen could of course reply that if a state takes the basic decision of who should be considered a citizen, then all actual – resident and non-resident – citizens should have a say in such a process (Owen 2010). This takes us back to the problem of who should be a citizen/stakeholder/decision-maker

in the first place and who should decide this. Irrespective of our preferences in answering such a question, we have to understand that all principles advanced by political theorists and philosophers exclude *ab initio* some categories – as non-citizens – in one way or another. For example Bauböck’s ‘stakeholdership’ theory excludes third generation emigrants and beyond (regarding second-generation emigrants without a period of previous residence in the home state, exclusion is limited to franchise and it is not strictly mandatory). So the decision about who is holding a stake is made by the principle itself – and the very principle excludes *ab initio* some categories. In the same vein, a residence-based principle produces its own exclusions: it excludes those who do not permanently reside in the country. I have explained in the last three chapters the reasons why even first generation long-term emigrants should be excluded from political membership and the mechanism of ‘external quasi-citizenship’ which can still offer them other forms of inclusion.

But Owen may still claim that non-residents have a right to citizenship of the origin state since that community is a source of ‘noninstrumental value’ for them. In his own words, he thinks that one general criterion for acquisition of citizenship is ‘an entitlement to a fair opportunity not to suffer the loss of political membership insofar as the political community is a source/site of noninstrumental value for oneself’ (Owen 2011b: 5). But this is rather strange since it is hard to understand what this ‘noninstrumental value’ is supposed to mean, and it is also difficult to imagine why such a value could be considered strong enough to entitle an individual to a citizenship claim. Since in the same paragraph Owen distinguishes between generations and believes that this entitlement is stronger for first generation emigrants and becomes gradually weaker for each of the following generations, it seems that the ‘noninstrumental value’ refers to different family members, friends, and emotions that tie a first-generation emigrant to her origin country. However, as I have already argued in chapters six and seven (and also in the paragraph 8.1.1) above, having such links to one or many countries should not be considered as being enough to support a citizenship claim.

Interestingly, Owen’s theory still seems to be close to my proposal since he makes a distinction between ‘political membership’ and ‘national citizenship’ (Owen 2011c: 12-13), (Owen 2011a). According to him political rights should be linked to the former, and should be *automatically* – that is, mandatorily – offered to long-term residents, while other rights (diplomatic protection, automatic right to re-entry, the right to transmit nationality to children) should be linked to the latter on a *voluntary* basis: ‘we may hold both that there is a compelling argument for the mandated acquisition of full political rights or *political membership* (...), but also that the acquisition of national citizenship itself should involve a voluntary act on the part of the immigrant’ (Owen 2011c: 13). However, this

distinction is dubious: political membership cannot be reduced to political rights, but it should also include diplomatic protection – indeed, it would be curious to have the right to vote abroad as a temporary ‘external’ member of a political community without also enjoying the right to be diplomatically protected for exercising such a right – the right to re-entry and that of transmitting nationality to children. But if this is so, then the only reasonable distinction could be one between ‘political membership’ and ‘national belonging.’ indeed, one could be a member of a state without also being a member of a specific nation – or belonging to a specific ethnicity – of that state. But then the relevance of Owen’s distinction fails in our debate: citizenship rights – political rights included – should be offered based on residence. What other rights one should enjoy as a member of one of the nations or ethnicities that constitute a political association – for example, ‘indigenous rights’ (Kymlicka 2007), (Waldron 2003), (Kingsbury 1998) – is quite another, different subject.

However Owen is still explicitly arguing against citizenship based on pure residence since, according to him, such a proposal cannot meet ‘certain basic standards of sociological and psychological realism;’ moreover, he believes that

‘this proposal could only be a viable principle if one’s identification with, or sense of belonging to, a polity were purely a function of residence combined with automatic mandated political inclusion such that non-residence plus automatic mandated political exclusion would suffice to eliminate one’s identification with the polity of one’s original nationality’ (Owen 2010)

Owen thinks that this is unrealistic on two grounds. Firstly, he considers – together with Rainer Bauböck – that migrants should choose citizenship voluntarily and not have it *imposed* on them. Secondly, in Owen’s view residence-based citizenship overlooks a sociological reality: first generation immigrants ‘typically retain a strong sense of identification with their polity of original nationality, continuing to regard the quality of their own lives as bound to that community of fate’ (Owen 2010). I believe these two reasons for which Owen considers a residence-based model must fail can be easily answered. Regarding the first one, I think this author mistakenly sees – in the above quote – a *sine qua non* link between a residence-based theory and *automatic* acquisition of citizenship; according to him, if (a) citizenship is based on residence, and (b) long-term absence implies loss of origin country’s citizenship, then (c) there must be an *automatic* acquisition of citizenship in order to avoid both statelessness and a high proportion of second-class citizens in the state of residence.

But this is not necessarily true: as I will argue in the following section – and as most political theorists accept – the intention of going back to the origin country fades over time, and since individuals intend to remain in the host state there is no reason they would not apply for full status. An example here is offered by temporary workers in Germany. Rubio Marín claims that ‘as time passes [...] the actual chances and/or intentions to go back diminish’ (2000: 107). However, not everyone agrees. Rainer Bauböck, for example, would point to ‘the well-known pattern that labour migrants intend to stay until the age of retirement and then return to their country of origin.’ According to him, in these cases long-term residence is not an indicator for lack of intention to return. In consequence ‘one should not build a normative argument on a contestable and empirically quite variably assumptions like this one.’<sup>250</sup> I readily agree, but from a liberal democratic point of view we may still ask whether such long-term residence status without citizenship (for a person that entered the host country in search of a job in her mid-twenties and then comes back to the origin country in her mid-sixties) is acceptable (even for EU internal migrants, who might arguably be more reluctant to apply for the host state citizenship). My proposal here (host state citizenship coupled with an ‘external quasi-citizenship’ status in the origin country, which offers both the right to return and the possibility of reacquiring citizenship when the person returns) may still offer a better solution.

Moreover, even if the intention of going back to the origin country may not always fade away over time, the number of new full citizens can be enlarged by the host state, which must offer serious incentives for citizenship acquisition to those who are not yet entirely convinced. And finally, if at the end of the day there still remains a small number of individuals who are consciously and stubbornly refusing the host state’s citizenship, then some balance or compromise between *individual liberty* and *social equality* could be reached even if this would imply an exception to the residence-based citizenship norm.<sup>251</sup> In consequence, a residence-based model of citizenship can still be supported even if we accept that citizenship must be voluntarily acquired.

Regarding the second reason advanced by Owen for the failure of the residence-based model of citizenship, if we accept that generally both links and the intention to return to the origin country fade in time, it is difficult to claim that there is a ‘sociological reality’ according to which migrants ‘typically’ retain a ‘strong’ sense of belonging to the origin country and see themselves ‘bound to that community of fate.’ And even supposing that this is true – even if first generation emigrants have a strong sense of belonging to their country of origin – such a sense is not normatively relevant for a

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<sup>250</sup> Rainer Bauböck, personal communication on file with the author, July 2013.

<sup>251</sup> For an extensive discussion of these three arguments, see section 8.1.3. below.

claim to citizenship; we can still ask what exactly keeping ‘a strong sense of belonging’ and feeling ‘bound to that community of fate’ really mean such that this meaning would be enough to support a citizenship claim. Suppose I have lived in Romania in a town full of German ethnic Romanian citizens. I have learned German, I have German friends, I am crazy in love with German art and philosophy; as a matter of fact, intellectually and psychologically I feel myself closer to German than to Romanian culture. However I am a Romanian ethnic and this did not entitle me (as German ethnicity had entitled my friends after the 1989 Revolution) to apply for German citizenship. In this case, ‘a strong sense of belonging’ and feeling ‘bound to that community of fate’ (to use Owen’s words) didn’t offer me – quite rightly, indeed – a claim to citizenship.

Moreover, as I have already tried to explain in chapter seven above, the presupposition that citizenship and the state are based on a psychological link between citizens it’s a form of nationalism that we should rather dismiss. Indeed, a Romanian supporter of Chelsea’s football team may feel more *psychologically linked* to a Greek supporter of the same team than to another Romanian who is a supporter of whatever rival team. This also functions the other way around: *psychologically*, ‘ethnizens’ may feel themselves as being emotionally linked to another state than their state of residence and citizenship, but this does not *automatically* entitle them to acquire that state’s citizenship. In consequence, turning to *psychology* (to what Owen defines as ‘certain basic standards of... psychological realism’) or to *sociology* cannot be an argument against residence-based citizenship since (a) the psychological attachment to a state does not entitle me from a legal point of view to that state’s citizenship, and (b) the other way around, not having any psychological attachment to my own country does not entitle the state to suspend my citizenship. Finally, I accept that there may be of course many ‘sources of belonging’ that are not based on residence – but it is hard to understand why they could (or should) be seen as entitling one to citizenship acquisition.

### **8.1.3. Forced inclusion: automatic naturalisation**

The third theory is not only over-inclusive – since it accepts multiple citizenship – but it also advocates a form of *forced inclusion*: besides accepting non-resident members of a political community, Ruth Rubio-Marín also requires mechanical inclusion of temporary and irregular migrants through an *automatic naturalisation* after ten years of residence. According to her, inclusion must be ‘automatically [...] and [...] unconditionally’ (Rubio-Marín 2000: 6). It is important to state that in Rubio-Marín’s view automatic residence-based naturalisation is defendable only if dual citizenship is

either permitted or unavoidable; the reason is that the state of residence has no right to force denaturalisation in the state of origin.<sup>252</sup> This idea is extremely interesting, since it promises to be a form of purely residence-based theory: both types of ‘citizens-minus’ (irregular migrants and temporary workers) are supposed to become full citizens after a period of time spent in the host country; moreover, as the author claims, the only requirement of the nationalization procedure should be previous residence: there should be no other conditions. However, my proposal of residence-based citizenship is different from this theory in three important ways.

Firstly, I believe Rubio-Marín doesn’t go all the way: if permanent residence automatically implies acquisition of the host state’s citizenship after a period of time, then logically lack of permanent residency status must also imply loss of any previous citizenship after a period of absence. As we have already seen, this is the way Brochmann explains Norway’s opposition to dual citizenship: the loss of citizenship for living continuously abroad is ‘the complement of the acquisition requirement of stable residency for foreigners wanting to naturalise in Norway’ (Brochmann 2010: 11). So if ‘forced’ automatic naturalisation is the only reasonable policy after ten years of residence, then why not a similar ‘forced’ denaturalisation after taking another citizenship and ten years of residing outside the previous country of citizenship? Moreover, the problem is that the arguments Rubio-Marín is offering in order to defend automatic citizenship based on residence also seem to justify exclusion of dual citizenship. For example, she considers that

‘The claim to automatic incorporation relies, first of all, on the relevance of social membership for defining the bounds of the relevant democratic polity [...] The basic idea is that membership is first, and above all, a social fact, determined by social factors such as living, working or raising a family and participating in the social and cultural life of a community.’ (Rubio-Marín 2000: 21)

But if this is correct and all these social factors – residence, work, family, friends, participating in society’s social and cultural life – support a rightful membership claim, and further if social membership also implies a rightful claim to citizenship, then by the same token a lack of social membership – and not accessing social factors because of residence abroad – in the origin country should imply loss of citizenship. In other words, if ‘developing a set of attachments’ after a long residence period in a *host* state is making that state ‘the centre of their existence in practical terms’

<sup>252</sup> ‘Given that states lack the power to dissolve their resident aliens’ previous nationalities, and that a condition for the valid application of automatic membership is that the person will not be deprived of her prior nationality, the path of automatic membership would lead to an increase in the numbers of dual or multiple citizenship.’ (Rubio-Marín 2000: 126).

(Rubio-Marín 2000: 85), and if this directly supports a claim to citizenship, then the *origin* country is not the centre of migrants' existence anymore. Furthermore, if 'the centre of existence' supports a claim to membership, then the lack of it justifies loss of origin country's citizenship. This is even more the case when, as this author readily accepts, 'as time passes [...] the actual chances and/or intentions to go back diminish' (Rubio-Marín 2000: 107). At the end of the day, if it is true that 'residential stability [...] is a condition for the fully free exercise of [...] rights and freedoms' (Rubio-Marín 2000: 110), then not satisfying the residence condition should normally imply loss of citizenship – but only as long as the host state's citizenship is acquired, in order to prevent statelessness. Finally, it is interesting to note that although the author is much concerned about social equality, she fails to discuss the advantages enjoyed by multiple citizens in comparison with mono-citizens, like the right to exit.<sup>253</sup>

Secondly, I cannot accept the long-term residence of ten years supported by Rubio-Marín. As I have already mentioned in chapter three on irregular migrants, I do believe that the time threshold cannot be decided by a normative theory – it will rather depend on each state's decision. However, it seems reasonable that, since 'our lifetime is limited' (Rubio-Marín 2000: 33), this threshold shouldn't be very demanding. True, the author accepts that individuals could apply for citizenship status after five years of legal residence, so this would not be a problem for temporary workers. But irregular migrants in this case may linger in an illegal status in their country of residence for a very long time period of five years (Rubio-Marín 2000: 23-24): a period during which they cannot make use of their most basic human and social rights because of fears of deportation. It is true that, on the other hand, we cannot accept that once in the territory, they should be accepted as legal migrants since this would subvert a political community's right of regulating migration flows.<sup>254</sup> However, the time period must be reduced, and I have proposed a maximum period of one year, after which an irregular migrant should be able to apply for regularization based on the unique condition of residence. Afterwards he can be set on the path to full citizenship as any other regular migrant, and I have proposed that the residence criterion – which should be the only requirement for accessing citizenship status – should match the practice of very liberal countries (Serbia, Canada, New Zealand and Belgium until 2012) – that is, three years.

Thirdly, a liberal-democratic theory of residence-based citizenship should not transform inclusion into a mandatory and automatic process. This may not be obvious at a first look: on the contrary, since such a theory, on the one hand, does not accept dual citizenship, and on the other hand,

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<sup>253</sup> For a full discussion of such advantages, see chapter five above.

<sup>254</sup> For the rejection of the 'touch the territory and you're in' view, see chapter three above.

it links citizenship with residence, not residing in the origin state for more than three years triggers loss of citizenship. In consequence, in order to prevent statelessness, it seems that the host state citizenship should be necessarily acquired after three years of residence. Moreover, even when – despite international covenants – dual citizenship is accepted, having a class of permanent residents who are not caring about full citizenship status and do not apply for it means accepting a *permanent* second-class citizenship status based on self-exclusion, and this could be very detrimental for a liberal democracy and its values (Rubio-Marín 2000: 102).

There are three ways one could answer this argument. The first one refers to the individual migrant's liberty and freedom of choice, and it has already been proposed by a political theorist who advances a Rawlsian argument based on the worth of liberty to persons. Since immigrants have a larger frame of social ties than permanent residents which are also native-born citizens, in an international system where multiple formal membership is *not* available they should at least have the right to choose their citizenship. This also maximizes the political impact of an immigrant choice:

‘Allowing them to choose between different nominal citizenships does not fully compensate for their political marginalization but this liberty enables them to maximize the political impact of whatever orientation they choose for themselves’ (Bauböck 1994a: 90)

However, Bauböck argues (Bauböck 1994a: 91), and Rubio-Marín agrees (Rubio-Marín 2000: 113–114) that the argument loses its force in an alternative international system where dual citizenship is largely acknowledged: since multiple membership is accepted, there is no need to choose as long as one can keep both formal statuses, and the host state's citizenship can be *automatically* conferred to permanent residents since it does not imply losing the former formal status. However, I have argued in chapter five on multiple citizens that dual citizenship should be abandoned; if my argument holds, then citizenship acquisition should rest – as Bauböck argues – on immigrant's free choice rather than on an automatic conferral.

The second possibility to answer Rubio-Marín's challenge refers to the conditions for securing democratic values of the receiving society. According to this author, when there are large numbers of permanent residents who do not apply for citizenship this situation may have two different negative effects on the host state: on the one hand, it diminishes the level of civic commitment, ‘thus eroding the society's commitment to a free and equal society’ (Rubio-Marín 2000: 116); and, on the other hand, it

creates a second class of citizens which infringes a liberal democracy's commitment to equality. However, we should not overestimate either the number of people or the reasons for which such immigrants would choose not to access full citizenship status. As we have already seen, this author accepts *both* that, as time passes, the intentions to go back diminish (Rubio-Marín 2000: 107), *and* that 'the fewer the conditions on which naturalization is granted, the higher the naturalization rates are' (Rubio-Marín 2000: 111). But in this case the longer the immigrant is residing in a host country where the only naturalisation condition is a (small) number of years of previous residence, the higher the chance that this person would apply for citizenship.<sup>255</sup>

If this is correct, then it is difficult to understand the need for mandatory/automatic naturalisation. As long as the immigrant is well aware of the consequences her choice implies, and as long as the number of permanent residents who consciously decide not to naturalise and keep their former citizenship<sup>256</sup> is low, the problem Rubio-Marín identifies is overrated. True, someone may advance an argument according to which even if only one single immigrant wittingly chooses to remain a permanent resident and the host country accepts, then the state has infringed its own liberal democratic values of social and political equality. However, at the end of the day we could discern a philosophical conflict between different values a liberal democratic theory may cherish: in this case we may have a clash between the interests of an individual and those of a political community – that is, a conflict between *liberty* and *equality*. There is of course no simple and straightforward answer to such highly theoretical debate; however, we may confidently accept that as long as the number of permanent residents who deliberately refuse to apply for citizenship is low, a compromise between individual *liberty* and society's concern for *equality* can be easily accessed without seriously infringing liberal democratic norms.

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<sup>255</sup> Some authors have recently started to question this claim by arguing that naturalisation rates depend not only on residence years and naturalisation conditions in the host state, but also on 'the relationship between country of origin features, individual characteristics and the institutional opportunity structure in which naturalisation take place' (Vink, Prokic and Dronkers 2012: 3). After analysing 16 European countries the authors claim that 'the more accessible citizenship policies matter little for immigrants from highly developed countries, particularly those with fewer years of residence, but matter significantly for immigrants from less developed countries' (Vink, Prokic and Dronkers 2012: 1). However, even in this case the authors claim that *residence matters* irrespective of origin country factors: 'the longer the immigrant resides in a country, the higher the expectation of legal incorporation in the host country community' (Vink, Prokic and Dronkers 2012: 5-6).

<sup>256</sup> As I am trying to explain in section 8.2. (see below), the existence of those who refuse to naturalise in the country of residence and keep their origin country's citizenship creates a problem a liberal residence-based model finds difficult to deal with. Here both states should be able to admit an exception: the state of origin should not deprive them of citizenship, while the host state should not enforce its citizenship on them. Even if this may be 'the exception that proves the rule', this difficulty still raises a serious problem for a residence-based model of citizenship if it wants to keep itself away of a policy of automatic naturalisation.

It is important to ask whether this kind of balancing of competing considerations and discounting of rare events challenges some of the earlier arguments against dual citizenship.<sup>257</sup> I must accept that it might. For example, if we accept (as exception) that some immigrants may be allowed to (conscientiously and in an informed manner) refuse to naturalise as long as their number is low,<sup>258</sup> then we could also accept (as exception) some conflicts of jurisdiction regarding dual citizens. The same argument can be used in cases of conflicts regarding military obligations or regional conflicts determined by troubled histories. So why dual citizenship should not be also accepted? However, two remarks are in order here. The most important one refers, once again, to the very meaning of citizenship, which is the possession of the right to vote and the right to stand for elections. If (as we have already seen in chapter five) possessing voting rights may raise various problems (like double voting or deciding political outcomes whose consequences one does not have to bear) then external voting rights may be prohibited. But if this correct, being a citizen but also lacking the right to vote and the right to stand for elections is meaningless. This is one reason why arguments for accepting a small number of immigrants who do not want to naturalise cannot be also used to support dual citizenship. The second remark is related exactly to the problem of ‘rare events’: compared with the number of immigrants that do not want to naturalize in the host state, dual citizenship is clearly not a ‘rare event’. On the contrary, the number of multiple citizens continue to rise. At the end of the day, Bauböck’s ‘hypermigration’ model, where in every state the majority of citizens would be non-residents and the majority of residents would be non-citizens may prove that a residence-based citizenship theory is the best policy. As the number of people migrating is continuing to increase, this is not such a far-fetched case.

And thus we arrive at the third way in which we can respond to Rubio-Marín’s challenge. If a large number of immigrants refuse to apply for their country of residence’s citizenship, there are two solutions we have to contemplate. As this author suggests, the burden should be carried by the immigrant: she must be set on the path to citizenship and after a residence period she must undergo an automatic naturalisation. But there is a second solution this author does not contemplate: according to it, the burden should not fall on the immigrant who has to naturalise but *on the state to create stimulating incentives* to convince even the most stubborn migrant to become a citizen. According to this solution, the state should ‘aggressively’ promote citizenship acquisition, *both* by continuously

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<sup>257</sup> I would like to thank Joseph Carens for drawing me attention on this point (personal communication on file with the author, November 2013).

<sup>258</sup> The situation is of course different if their number is high, and in such a case mandated naturalisation may prove to be the answer.

advertising through various channels the importance of full citizenship, *and* by offering incentives immigrants could find hard to refuse. A counter-argument here would state that ‘incentive-based solutions cannot guarantee an outcome if there are several independent agents (state of origin and residence) that control the relevant incentives’.<sup>259</sup> However, in my theoretical model a three-year residence requirement and active promotion of citizenship acquisition (in the host state) coupled with the guarantee of an ‘external quasi-citizenship’ regime (in the origin country) may be enough in order to boost naturalisation rates.

Such incentives are already a common practice in the Western world, where states are trying to convince their citizens to act in specific ways which are seen as valuable and contributing to the community’s welfare. For example, in order to ensure intergenerational continuity, many countries are offering financial incentives to young persons to marry and have children: these incentives may take different forms, like the ‘first marriage bonus’,<sup>260</sup> various subsidies when buying for the first time an apartment, and so on. Increasing and enlarging this type of incentives in order to especially target immigrant persons reluctant to become full citizens may be a better alternative than automatic naturalisation. Of course, we can easily imagine some persons that would still refuse to naturalise: however, a large-scale phenomenon of second-class citizenship is unlikely to develop, so accepting some dissenters (i.e. immigrants who refuse to naturalise and keep their origin country citizenship) cannot destroy liberal democratic values.

In conclusion, we may ask ourselves whether this situation of having some – very few – permanent residents that refuse to naturalise even after a long-term residence is worse, from the point of view of liberal democratic values, than implementing a system of mandatory/automatic naturalisation. Which is the lesser evil? Mandatory/automatic naturalisation could enforce a state’s commitment to *democracy*, but surely it could also easily diminish its pledge to *liberalism* and *individual freedom*. As already stated, the interesting theoretical debate on the collision between the two major philosophical concepts of *freedom* and *equality* is likely to continue for a long time ahead; but for our purposes, I consider that accepting a very small number of persons conscientiously refusing to naturalise is better than making naturalisation automatic/mandatory for all permanent residents. The two most important ideas here concern the state – which should vigorously promote naturalisation –

<sup>259</sup> Rainer Bauböck, personal communication on file with the author, July 2013.

<sup>260</sup> In Romania, starting with 2007 young people marrying for the first time were eligible to receive a ‘first marriage bonus’ of 200 Euros. In 2010 this law was repealed because of the economic crisis. Source:

[http://www.avocatnet.ro/content/forum%7CdisplayTopicPage/topicID\\_65355/Acordarea-sumei-de-200-euro-prima-casatorie.html#axzz2MPGjleBl](http://www.avocatnet.ro/content/forum%7CdisplayTopicPage/topicID_65355/Acordarea-sumei-de-200-euro-prima-casatorie.html#axzz2MPGjleBl); <http://www.dlep-iasi.ro/casatorii/informatii-generale-despre-casatoria-civila-1.html> (accessed 12 March 2013).

and the individual – who should be able to make a personal cost-benefit analysis and decide for herself. At the end of the day, such a cost-benefit analysis is a continuous rather than singular act, so if at some moment in the future the permanent resident changes her mind, she can access naturalisation without any difficulty.

#### **8.1.4. Negotiated exclusion and forced exclusion of ‘citizens-minus’**

An interesting argument which accepts that there may be a moral case for letting irregular migrants and temporary workers enjoy *less* rights for an *indefinite* time and not offering them the possibility to access full citizenship is offered by political theorists in two ways. On the one hand, we have seen in chapter four on temporary workers that Torresi and Ottonelli try to explain why temporary migrants are ready to trade some of their rights by making a distinction between the social and the political space: while the latter is that of equal rights and depends on the host state for being provided, the social bases of self-respect are situated in the origin country. The disentanglement of these two spaces – which is not experienced by resident citizens – makes possible a trade-off between enjoying equal rights in the host state where the temporary migrants are residing and improving their condition at home. In other words, temporary migrants accept a lower status in the host state in order to enhance their status in the origin state. However, this creates a problem for Western countries’ liberal democratic standards regarding equal treatment. These authors support a solution that would mediate between the democratic goals of social equality and the plans of migrant workers by advancing a more complex notion of ‘equality based on special status’ (Ottonelli and Torresi 2012). The authors do not go further and do not offer practical examples how this mediation could be designed – however, the basic idea is that a liberal democracy should accept temporary workers’ plans by admitting and designing some ‘partial citizenship’, or ‘citizen-minus’ status, even if this goes against liberal and democratic values. I will call this a ‘negotiated exclusion’.

The same suggestion was offered even before the aforementioned study, based on more empirical arguments, by Daniel A. Bell, who also accepts the idea of *permanent* partial citizenship for temporary migrants. As we have seen in chapter one and four, unlike in the Western states, in Singapore and Hong Kong temporary workers do not have any chance to access equal rights or full citizenship status; the dilemma between rights and numbers has been solved there in favour of numbers. In this political space migrants have more pressuring concerns than their lack of equal or human rights: they protest against plans of limiting daily working hours, against cutting wages in times

of crisis, or against the two-week rule which obliges a worker to return to her origin country if she can't find another job in two weeks after having lost the previous one. Lack of democracy seems to be quite beneficial for this category, since a democratic political space which would offer full voting rights to employers would also make politicians more sympathetic to their constituency rather than to temporary migrants:

‘the relative lack of political democracy in Hong Kong may not be harmful – and may in fact be beneficial – to former domestic workers in the territory [...] If employers can vote for their community's decision makers, they will likely favor policies that work to the detriment of their domestic workers in cases of conflict. Politicians, for their part, may be tempted to pander to the interests of employers’ (Bell 2005: 47).<sup>261</sup>

Even if offering full and equal rights would be the best option, there are still four serious counter-arguments against such a policy. The first concerns migrants' consent: they are agents, they accept less rights for a limited period of time in order to earn more money; for them this is a worthy temporary sacrifice. The second is a public opinion counter-argument: in situations like that of Hong Kong, where because of overcrowding not even citizens can bring in their mainland relatives, offering migrants full rights and full citizenship status would not be welcomed by public opinion. The third counter-argument is exactly the ‘rights versus numbers’ dilemma: from the temporary workers’ point of view, it is better to have access to an economic market and have fewer rights than the other way around. Finally, the fourth argument relates to reduction of global poverty – since such programs appear to help both individuals and sending states. Bell accepts that foreign aid is a better moral alternative (Pogge 1997), but he shows firstly that remittances are much bigger than foreign aid, and secondly that foreign aid in the hands of a corrupt government cannot solve any problem. The conclusion is that a differentiated treatment between temporary migrants and citizens can be accepted – even when this implies *permanent* partial citizenship – if this arrangement (a) is accepted by migrants as working for their benefit; (b) improves the lives of people from poor societies; and (c) there is no other *real* alternative (Bell 2005: 57). I will call this the ‘forced exclusion’ alternative.

So the authors taken into account here believe that, as long as the first best option, that is full equal rights, cannot be a solution – and it cannot be basically because, according to their opinion, such

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<sup>261</sup> In Hong Kong citizens do have voting rights, although they are limited:  
[http://en.wikipedia.org/wiki/Politics\\_of\\_Hong\\_Kong#Political\\_parties\\_and\\_elections](http://en.wikipedia.org/wiki/Politics_of_Hong_Kong#Political_parties_and_elections) (last accessed 10 August 2013).

an option would limit the number of accepted legal migrants and would not help to support world poverty relief – some second best option must be found. In their view, this second best option is some sort of a lesser status than full citizenship for long-term immigrants – a lesser status that may prove to be a *permanent* partial citizenship. Any supporter of residence-based citizenship would disagree with this conclusion, and I tried to offer arguments against such a status in chapters 3 and 4.

But there may be an even deeper normative problem here. Criticising Torresi and Ottoneilli's paper, Rainer Bauböck believes there are more profound implications of the normative disconnection between the social space of self-respect (in the origin state) and the political space of rights (in the host state): on the one hand, there is a worry regarding provision of full citizenship rights to temporary migrants who don't care too much about citizenship anyway; on the other hand, the 'hypermigration' model – as we saw in section 8.1.1. above – shows that a large-scale temporary migration may have large implications on the structure of democratic citizenship (Bauböck 2011: 685). In the aforementioned section I tried to criticise the assumptions of the 'hypermigration' model: indeed, today both the *number* of persons changing citizenship according to residence, and the *frequency* of this change is rather small and cannot have an influence on the democratic citizenship. But even in a situation where the 'hypermigration' model could become real, other methods may be available in order to stabilise the demos: offering incentives to stay – exactly in the sense Western states today are offering incentives to youngsters to create a family and have children<sup>262</sup> – may prove to be a democratic and convincing initiative. Indeed, if people come and go in extremely high numbers without caring about citizenship rights, this may prove to be a crisis of citizenship per se, or of that state's politics. But people are rather conservative and they tend to take roots at some point in their lives – as we have already seen in chapter four, a popular slogan says that 'there is nothing more permanent than temporary foreign workers' (Ruhs 2005: 1). Foreign workers are taking roots; they become parts of the social fabric, as it happened in Germany or the United States. Denying their right to citizenship is transforming them into second-class citizens. In consequence, the best choice here is to offer them citizenship after three years of residence: if they do not care about this citizenship, they will relinquish it after three years of living in yet another country whose citizenship they should acquire (after three years of residence). But if they do care about the place they are leaving in, about the place their

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<sup>262</sup> I am not claiming that such financial incentives for increasing fertility rates are necessarily effective in developed countries. My point is rather that an intelligent plan which combines higher financial incentives with other types of support (in this particular case: employment opportunities for women with children and public childcare services) may prove to be a convincing public policy which could be an example for state initiatives offering people incentives to stay. I would like to thank Rainer Bauböck for drawing me attention on this point (personal communication on file with the author, July 2013).

children will grow up in, then citizenship will be seen as an important asset. Residence-based citizenship is once more the only satisfactory solution.

## **8.2. What residence-based citizenship can and what it cannot solve**

No normative theory can easily explain everything that it sets up to clarify, and this is also the case with residence-based citizenship. But before discussing the problems this proposal finds difficult to answer, let us first review what it is able to provide for – what its main advantages are. Firstly, it can solve without difficulties the theoretical problems raised by partial citizenship status in a liberal democracy: if social equality and individual freedom are values polities intend to uphold, then full legal status – i.e., citizenship – is required for permanent residents. If this is correct, then most of the problems raised by irregular migrants and temporary migrant workers can be easily solved. Regarding the first category, it is true that immigration control functions not only at the borders, but also inside the country, and irregulars can be deported once found. However, I have claimed that after a period of residence this should no longer be possible: I have proposed that after one year of residence some form of legal status must be easily accessed, maybe with the help of the ‘firewall’ mechanism proposed by Carens<sup>263</sup> or through some form of simple rolling regularisation.

Regarding the second category, it is clear that state authorities have only two options: firstly, they can devise temporary worker programs which strictly allow for only a short period of residence – for example, if the requirement for citizenship acquisition is three years then such programs should be strictly designed for a shorter period of time. In this case workers are coming, and after less than three years they must go back to the origin country. Secondly, it is also true that many employers do not want to lose experienced workers – so there may be some pressure on the government for exceptions. In this case, if the residence criterion is met – be it a liberal criterion of three years or the standard one of five years – then access to citizenship status must be provided.

Secondly, the residence-based citizenship proposal can easily offer an answer to a rather difficult problem in political theory: the task of matching the two categories of ‘permanent residents’ and ‘citizens’. As we have seen above in Rainer Bauböck’s ‘hypermigration’ model, a liberal democratic polity as we know it today would be seriously undermined if most residents were non-citizens, and most citizens were non-residents. By offering full formal status to permanent residents and by stripping of citizenship those who leave – offering them instead a status of ‘external quasi-

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<sup>263</sup> See chapter three for an extended discussion of the firewall proposal.

citizenship' – a residence-based theory can easily solve the matching problem. We have already seen in this chapter that the critique according to which such an alternative implies an unstable demos does not hold: the *numbers* of individuals changing permanent residence (hence citizenship) and the *frequency* of this change for the same individuals are rather small. Moreover, migrants usually tend to finally become rooted, to have a family, to raise children and grandchildren. And, as we have already seen, even in a real 'hypermigration' situation states may offer different types of strong incentives for permanent resident status (hence citizenship).

Thirdly, another smaller but real advantage of residence-based citizenship is the solution offered to those states which are seriously concerned about marriages of convenience: simply put, being married or not to a citizen has no consequence on citizenship acquisition and naturalisation procedures as long as residence is the only requirement. Of course, it is true that bogus marriages may still be used as a kind of passport which may provide access to the territory: but this is a problem which is linked to immigration rather than to citizenship acquisition laws, so even the authorities concerned may be very different. In other words, false marriage may offer access to territory, but not direct access to citizenship since the only requirement for citizenship is residence, and being married to a citizen has no legal consequence on citizenship acquisition.

Finally, maybe the most important advantage of residence-based citizenship is a normative one: indeed, it simply destroys the need for various morally debated requirements states usually set up today for citizenship acquisition – like knowledge of the official language, of the local customs and history, and so on. If we set aside cumbersome arguments used in political battles, at the end of the day what matters for qualifying for citizenship is the fact that one is living in the territory and is subjected to the laws governing that territory. I have tried to claim that nothing else should be taken into account.

However, as we have already seen, like any other normative theory residence-based citizenship also meets some serious difficulties. I have already discussed and tried to answer some of them. For example, in the previous chapter (see section 7.4.3.) I have discussed two objections. The first was related to the capacity a residence-based regime supposedly has to increase statelessness. I have answered that the fear of increasing statelessness is unfounded, since immigrants can retain their former citizenship for three years (the time required to qualify for the actual host state citizenship); and even if a small number of immigrants refuse to apply for the new state's citizenship (and are thus allowed to keep their former citizenship), this cannot threaten democratic institutions. But a more difficult problem for a residence-based citizenship proposal related to this issue is the legal construction of such an exception: who could claim the exception, and under which condition? An easy way to

answer would be to say that such a candidate is ‘any long-term resident that refuses to naturalise, under the condition of an expressed statement’. This would create a problem in the European Union, since EU internal immigrants may be the least likely to naturalise and to renounce their origin country’s citizenship. But in this case, such exception would not be in any way ‘exceptional’. How such an exception should be conceived in this unique case should be a subject for further research.

The second objection claimed that in coerced migrations (like those resulting from ethnic cleansing in Yugoslavia) origin states must not have the right to deprive persons they have forced out of their territory of their citizenship on grounds of residence abroad. My answer was that under a residence-based proposal there are many other forms of compensation besides a dual citizenship regime, and my example was a combination between the citizenship of their new country of residence and an ‘external quasi-citizenship’ status in their origin country.

Thirdly, this theory faces problems in approaching the ‘impossible subject’ (Ngai 2004) of illegal migration. In this case, the residence conjecture I tried to defend has troubles in answering the charge raised from the ‘touch the territory and you’re in’ perspective. The challenge is of course not directly faced: since the accent lies on residence, an irregular migrant that simply touched the territory does not thereby have a right to be counted in. However, since the proposed residence requirement is rather liberal – three years of permanent *legal* residence before qualifying for citizenship, but also a maximum of one year of (illegal) residence before applying for the legal status – then touching the territory is an extremely important but also very dangerous ‘contest’ whose reward is legal status in a first phase, and access to full citizenship at a second stage. I readily accept that residence-based citizenship cannot find, as any other normative theory, an entirely decent and flawless answer to the problem of ‘impossible subjects’. However, I also strongly believe that it *does* offer one of the best solutions: if we take into account that (a) border management is not perfect, (b) irregulars will continue to come, and (c) both proposals of ‘irregulars forever’ (no possibility of becoming legal) (Swain 2009) and that of ‘automatic acquisition of citizenship after ten years of residence’ (Rubio-Marín 2000) are unacceptable and do not solve the problem anyway, I believe the solution I have proposed – which accepts expulsion of irregulars within one year of residence but also requires as a matter of justice offering them a legal status after this period and then opening for them the path to full citizenship – is the best alternative we have.

A fourth difficulty faced by a residence-based citizenship theory concerns the difference I have proposed between dual citizenship and ‘external quasi-citizenship’. As we have already seen, a simpler and more elegant solution would be to abandon the ‘external quasi-citizenship’ status and to design

dual citizenship in such a way that it lacks voting rights – or, in other words, to link voting rights to residence. This way we have only one external status instead of two; moreover, residents are not threatened to live under a political situation decided by non-resident citizens. In this sense some may propose the Spanish system of ‘dormant’ and ‘active’ citizenship (Rubio Marín, Sobrino et al. 2012: 23), which implies that the two or more citizenships one individual may have are never active at the same time, because their activation depends on residence. The ‘active’ citizenship is the citizenship of residence, and all other citizenships are ‘dormant’ until the individual enjoying multiple status changes her permanent residence in another country of citizenship: in this case, the citizenship of the new state of residence becomes active, while the former one becomes ‘dormant’.

I do agree that such a theory would not be radically different from my proposal; however, there may be two reasons for rejecting it. Firstly, a ‘dormant citizenship’ is still a ‘full citizenship’ status in some sense, and thus creates many of the problems faced by dual citizenship, as we have seen in chapter five: states can strip unwanted multiple citizens of their citizenship; problems of ‘loyalty’ and ‘identity dilution’ are still present; irredentist politics can still be promoted (as in Eastern Europe); and the principle of citizenship equality is still infringed regarding the welfare state, the exit option, and military considerations.<sup>264</sup> Secondly, presently diplomatic protection is definitely linked to full citizenship status irrespective of whether this is ‘active’ or ‘dormant’, so international conflicts regarding diplomatic protection can still appear. Even though I accept such a proposal may be more elegant than the theory I am trying to defend, I believe that it can still face some difficulties a residence-based citizenship proposal is already shielded against.

### 8.3. Avenues for further research

The prospects for the development of residence-based citizenship laws in Western countries are rather slim: in the last century, and especially in the last thirty years, citizenship legislation has become even more concentrated on *ius sanguinis*, on strongly limiting *ius soli*, and on discouraging immigration and naturalisation of foreigners – coupled with an increased toleration of double citizenship and easy-going regulations regarding ‘external quasi-citizens’, both attitudes being strongly connected with an

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<sup>264</sup> Joseph Carens (personal communication on file with the author, November 2013) asks why these problems don’t also apply to the ‘external quasi-citizenship’ model. I believe they don’t apply since ‘external quasi-citizenship’ is not a ‘legal status’ in international law but only a ‘favourable treatment’ recognised and accepted only in the state that offers it. In consequence, one state cannot strip a person of her citizenship status as long as she is a mono-citizen of this state (even though she may have twenty ‘external quasi-citizenships’ in other states) since she would become statelessness; the same person cannot have the problem of conflicting military conscriptions, and so on.

legislative turn towards ethnicity and communitarianism. The few countries – Serbia, Sweden, Norway, Portugal, New Zealand, Canada, and the USA – that are practicing different instances of a residence-based system of citizenship do not seem to have any chances to be soon followed by others. On the contrary, the economic crisis coupled with an increasing migration – due to affordable means of transportation – may have dramatic consequences in what regards immigration and citizenship legislation even in the aforementioned states, as was the case with Belgium, which tightened naturalisation conditions in 2012. However, the way national legislations will change in the future is an interesting subject of further research; moreover, if the concept of legal residence has lately become in some countries (e.g. Belgium, Norway and Sweden) more important than the concept of citizenship, then it is interesting to normatively research how citizenship will be legally redesigned in order to remain a meaningful legal term. Other specific opportunities for research are offered by each major subject I have taken into account in the previous chapters.

In what concerns illegal migration, at the normative level at least three topics deserve further discussion. Firstly, this study did not approach two additional actors that need to be taken into account. On the one hand, I have concentrated my enquiry only on undocumented persons that *settle* in the host state, setting aside other categories of individuals like *circular* irregular migrants. In their case the normative questions could be entirely different, since this group does not have the intention to remain in the host state. In consequence, receiving countries may not be morally obliged to set them on the path to full citizenship status, but only to offer some form of regularisation which would guarantee a number of social and economic rights. However, in this case a circular migration program (which would offer, for example, the right to enter two months per year in the agricultural season) may prove to be a solution that needs to be taken into account. On the other hand, I have also set aside normative questions related to *transit* states: indeed, not all irregulars settle *immediately* in a specific state; some of them get stuck in or delay leaving the transit country, sometimes even for a long period of time. What are such a state's moral duties towards them? And should other states (probably destination states) share the burden?

Secondly, I have argued that after one year of illegal presence a person should be regularised. But the importance of this claim may touch upon other difficult normative discussions, like the one concerning the right a state has to control both borders and membership. As we have seen, according to Bauböck and Fine, the state has a limited right to control entry (it can restrict immigration only if unrestricted freedom of movement threatens its capacity of maintaining democratic self-government, public order, public health, the welfare state and in case of natural disasters) and no right to control

membership (Bauböck 2010a), (Bauböck 2012), (Fine 2014, forthcoming). But if this is correct, how would the ‘nation-state’ evolve? Could we say that it will become a simple administrator of its territory, with limited rights to control entry – or even no rights, according to Carens (1987) – with no rights to control membership, and no rights to control the future of its specific culture(s)? Thirdly, it is interesting to see what the current ‘battle’ against illegal immigration in the Western world provides for the future, especially whether Western countries would decide to continue the current pattern of ‘fighting’ the phenomenon or whether international financial help and controlled migration – as instances of an increased interest in global justice (Caney 2005), (Pogge 2002), (Sangiovanni 2007)<sup>265</sup> – will take the lead.

The chapter on temporary workers pointed to some normative problems that must be further investigated. Firstly, it is important to try to strike a proper balance in immigration states between the democratic ideal of citizenship equality and individual plans of temporary workers. How such a balance can be achieved and what are the rights temporary workers may be allowed to negotiate should be further researched. Secondly, as we have already seen, the problem of migrant workers’ agency offered a new force to the consent theory in political philosophy. If, as Dumbrava claimed, membership rules should be ‘minimalist politic’ but also – and more important – ‘partly voluntaristic’ since ‘some may choose voluntarily to join the political community’ (Dumbrava 2010: 3), then immigration studies may help consent theory to make a triumphal return as a main theory in the field of political obligation.

Concerning ‘citizens-plus,’ the acceptance of *multiple citizenship* seems to be a strong international trend – but, as we have already seen in chapter seven on present-day citizenship legislation in fifty states, it is a bit premature to claim – as Faist did – that the majority of states acknowledge today one form of multiple citizenship or another (Faist 2007d: 1); for a global count of states tolerating double citizenship in 2008 one can consult the study delivered by Faist and Jürgen (Faist and Jürgen 2008: 4). It is premature at least for the reason that the opposite affirmation seems also true: the majority of states prohibit today one form of multiple citizenship or another – see the same world map offered by Faist and Jürgen. But even if we accept the optimistic view on the trend towards multiple status, it is important to take into account some normative aspects that are not entirely clear.

First of all, even if we decide, contrary to the normative concerns specified in chapter five, that dual citizenship should be accepted, then it is interesting to see where we draw the line: that is, shouldn’t there be a limit to the number of citizenships a person may enjoy? One example offers

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<sup>265</sup> For a different view which argues against thick notions of global justice see Nagel (2005).

obvious reasons of concern: suppose that a university professor who is also a European citizen moves every six years from a European country to another. Given the nature of her job she can probably easily apply for residency in each state: the citizenship legislations in many Member States open the path to full citizenship status after five years of residence.<sup>266</sup> But if this is the case, how many citizenships can such a person obtain in her long academic life? Probably around ten; but then we should ask whether this ‘collection of citizenships’ is not only a rational calculation in pursuit of purely instrumental purposes. In any case, such an example shows that the primary aim of multiple citizenship policy – i.e., acknowledgment and acceptance of multiple ties which are real and important for a specific individual – loses its point: such a status is not desired because of genuine ties a person may have with several political communities (for this, an ‘external quasi-citizenship’ status is enough); it is most probably wished for only because of instrumental benefits it can offer. Further sociological and normative research regarding the way multiple citizens desire and make use of this status could offer interesting findings.

Secondly, it would be also interesting to investigate whether multiple citizenship can really help to spread liberal and democratic norms, as its supporters claim to be the case (Bloemraad 2007: 182).<sup>267</sup> The evidence we have so far is rather inconclusive, since, on the one hand, individuals holding illiberal views do not abandon them by simply taking another citizenship and, on the other hand, dual citizenship can facilitate terrorists’ movement and actions, as it has been the case with different terrorist attacks in the last decades. Thirdly, it would be exciting to explore, from a normative perspective, what would happen in a world in which every individual would enjoy multiple citizenship status. Such a situation would be probably close to the ‘hypermigration’ model imagined by Rainer Bauböck, where every citizen of a state is not at the same time a resident, and every resident is not a citizen: this would imply that states do not have a stable demos, and such a situation would put an end to the liberal-democratic polities as we know and understand them now (Bauböck 2011).

‘External quasi citizenship’ programs are rather difficult to assess at this time. On the one hand, they are new inventions (all cases surveyed in this study materialised fewer than twenty years ago) and,

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<sup>266</sup> As specified in chapter one, in relation to residence-based citizenship my focus is on the simple presence in the territory – which makes an individual a societal member over time; as such the difference between ‘residence’ (simple legal presence in the territory) and ‘permanent residence’ (a legal status offered when specific requirements are fulfilled) is not important in my discussion.

<sup>267</sup> Not all scholars agree with this claim. For example, Rainer Bauböck considers that ‘toleration of dual citizenship is required by liberal norms’, but not *instrumental* for spreading liberal norms. He considers that ‘it might be in certain contexts, where there are “political remittances” from liberal immigration states to illiberal emigration states, but this is a contingent and contextual effect that is not essential for justifying toleration’ (personal communication on file with the author, August 2013).

on the other hand, some of them have been quickly transformed into multiple citizenship statuses. For example, the Hungarian ‘external quasi-citizenship’ status was extensively employed for nine years, from the 2001 Status Law until the 2010 offer of dual citizenship; after 2010 it is accessed only by those who cannot apply for Hungarian citizenship without also losing their home state citizenship (for example, this is the case of Hungarian ethnic Slovak citizens). In Mexico such a pure status existed for an even shorter period: from 1997, when nationality was declared ‘everlasting’, until 2005, when non-residents received the right to vote in presidential elections. However, as long as full political rights are not offered to non-residents, we can still consider this an ‘external quasi-citizenship’ status. Finally, both Turkey and India still support such a program for different reasons: Turkey does not want to lose the relation with its diaspora living in countries that do not accept dual citizenship, while India prefers to offer this status (instead dual citizenship) to Indians abroad but differentiates between poor and rich Indians, and between Indians coming from friendly or unfriendly countries.

So possible subjects for further research include how sustainable such a status may be in the long run, what are the conditions that make it more preferable as a state policy than toleration of dual citizenship, and how it contributes to a transnational space which overrides national borders. However, further research also needs to be done in a normative perspective: since ‘external quasi-citizenship’ programs also incorporate the right to return – a right which was exclusively linked to citizenship status until twenty years ago – how is this restructuring the make-up of citizenship today? What does citizenship amount to anymore (except access to the right to vote and the right to stand for elections) if all other political, social, economic, and human rights – plus finally the right to return – are disconnected from citizenship status? And what does citizenship amount to anymore when even voting rights are disconnected from citizenship status (Arrighi, Bauböck et al. 2013)? A second avenue for further normative research concerns the eligibility criteria for such a status. On the one hand, it seems morally unacceptable to devise it on the basis of ethnicity, as Hungary and Turkey did; in this respect, India and Mexico seem to be more liberal, since their conditions were former citizenship and presence in the territory or being a descendant of a citizen. But on the other hand, the Venice Commission endorsed in 2001 the special bond between kin minorities and kin states, supporting the latter’s right to intervene for minority protection goals.

I have claimed at the beginning of this chapter that citizenship should be strictly a legal term that offers a basket of rights to residents; moreover, in the residence-based theory I am proposing citizenship is *absolutely disconnected* from other considerations like national, ethnic, economic, social, emotional, cultural and family ties. It is difficult to find a good comparison, but sometimes I see

residence-based citizenship as membership in an academic institution. In a university, for example, one finds life-long members (people who work in administration, some professors), many temporary workers (students and most junior professors), dual citizenship is sometimes accepted (professors who leave for one semester each year to teach in another university) and sometimes not (some universities ask academics to dedicate all their professional life to them as long as they are members), and finally ‘external quasi citizens’ (alumni who may sometime return as post-docs or even professors). Being a member of a university’s academic environment offers a basket of rights (similar to citizenship rights) that non-members do not have (the right to use the library’s electronic resources, which those who leave lose; the right to have an email account based on the university’s internet domain; the right to vote for some decisions or to be represented by student representatives, etc.).

But one enjoys this basket of rights only as long as one is a member; when one changes universities one also changes memberships; one loses most of the rights enjoyed at the former university and receives another basket of almost similar rights at the new university. But the lost basket of rights may be taken back as soon as one returns – and the possibility to return (although not a ‘right’, as in the case of citizenship) is always among the possibilities an alumnus has. Of course, the fact that such a membership is disconnected from emotional and ‘family’ ties does not mean that such ties do not exist: many of us have strong sentiments for the university where we have written our PhDs, or for those with whom we have worked for a long time. But such emotions are disconnected from the legal basket of rights.

It is maybe too early for such a ‘radical’ view; but the reason is that we are still influenced by a form of nationalist thinking which was very strong in the last two centuries and unavoidably linked citizenship with belonging. My form of residence-based citizenship tries to destroy this strong link. The time for such a theory may not yet have come, but as long as people continue to move and immigration will keep rising, its chances may improve.

## Annex

**Table 1. Irregular migrants – numbers and percentages out of total population in twelve European Countries, European Union and the USA**

Country	Estimated population	Regular migrants	Estimated number of irregulars	Percentage of irregulars with regard to total population	Trend
Austria	8,300,000 (2007)	826,000 (2007)	36,250 (2008)	(0.4%)	decreasing
France	60,000,000 (1999)	14,000,000 (citizens with immigration background – i.e. having an immigrant parent or grandparent) (1999)	200,000 – 400,000 (1999, 2005)	(0.3% - 0.7 %)	stable
Germany	82,400,000 (2006)	15,100,000 (citizens with migration background – i.e. they or at least one parent were born abroad) (2006)	100,000 – 1,000,000 (2006)	(0.1% - 1.2%)	stable (since 2003)
Greece	11,192,849 (2007)	678,268 (2008)	280,446 (end of 2007)	(2.5%)	decreasing
Hungary	10,080,000 (2006)	166,693 (end of 2007)	30,000 – 50,000 (2007)	(0.3% - 0.5%)	decreasing (but: strong need for more immigrants) (a)
Italy	59,000,000 (2007)	2,940,000 (2007)	349,000 (2007)	(0.6%)	‘rollercoaster’ effect: (i) ‘amnesty effect’ + (Järve and Poleshchuk) ‘recall’ effect (b)
Poland	38,125,479 (end of 2006)	200,000 (end of 2006)	50,000 – 450,000 (2004)	(0.1% - 1.2%)	expected to increase (reason: strong need for immigrants) (a)
The Slovak Republic	5,400,998 (2007)	41,214 (2007)	15,000 – 20,000 (end of 2007)	(0.3% - 0.4%)	expected to increase (reason: need for immigrants + economic development) (a)
Spain	44,000,000 (2007)	5,220,000 (2008)	349,000 (2008)	(0.8%)	decreasing

Country	Estimated population	Regular migrants	Estimated number of irregulars	Percentage of irregulars with regard to total population	Trend
The Czech Republic	10,674,947 (2010) (c)	392,315 (end of 2007)	17,000 – 300,000 (2000s)	(0.1% - 2.8%)	decreasing
The Netherlands	16,660,555 (2011) (c)	1,732,379 (foreign-born citizens) (2007)	100,000 - 200,000 (2000s)	(0.6 % - 1.2%)	stable / decreasing (EU enlargement)
UK	58,789,194 (2001)	4,900,000 (foreign-born citizens) (2001)	430,000 (2001) (d) 670,000 (2005) (e) 1,000,000 (2003) (f)	(0.7%) (1.1%) (1.7%)	?
European Union	497,683,272 (2008) (c)	19,500,000 non-EU27 citizens (2008) (g)	5,500,000 (2007) (h) 10,000,000 (2008) (i)	(1.1% - 2%)	decreasing (EU enlargement, increased border control, etc.)
USA	308,745,538 (2010) (c)	?	11-12,000,000 (2008) (j)	(3.7% - 3.9%)	?

(a) Because of population ageing, negative demographic growth and high level of emigration, there is a need for immigrants in Hungarian and Polish economy. Plans have been proposed in order to attract immigrants from third countries (immigrants from China for Hungary and from India, Bangladesh or Pakistan for Poland). These plans have not been implemented because of two main reasons: (a) the fear that immigrants would use these programs to go further West; (b) the fear of reproducing Western Europe's difficult experiences with multiculturalism ('distant cultural' background) (Futo 2008: 16), (Iglicka and Gmaj 2008: 39)

(b) The "rollercoaster" trend has two different effects: '1) the "amnesty effect": the reduction in the number of undocumented migrants caused by the regularization process; 2) the "recall effect": the increase in unauthorized inflows in the periods preceding the amnesties, 'since more potential irregular migrants may be attracted by the opportunity of obtaining legal status' (Fasani 2009: 32)

(c) No data in the *Clandestino* country report; the number for the Czech Republic represents an estimate for 2010 (source: Wikipedia, [http://en.wikipedia.org/wiki/Czech\\_republic](http://en.wikipedia.org/wiki/Czech_republic), retrieved 10 January 2011); the number for the Netherlands is an estimate for 2011 (source: 'Netherlands Official Population Clock', <http://www.cbs.nl/en-GB/menu/themas/bevolking/cijfers/extra/bevolkingsteller.htm>, retrieved 10 January 2011); the number for the European Union is for 2008 (source: Eurostat, <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&language=en&pcode=tps00001&tableSelection=1&footnotes=yes&labeling=labels&plugin=1>, retrieved 10 January 2011); the number for the USA represents the 2010 census (source: United States Census Bureau, <http://2010.census.gov/2010census/data/apportionment-dens-text.php>, retrieved 10 January 2011)

(d) See (Woodbridge 2005) for a central estimate for 2001; see also (Vollmer 2009: 27)

(e) Migration Watch UK (think-tank close to conservatives), estimate for 2005 (central estimate) (Vollmer 2009)

(f) International Organization for Migration (2003), citing UK Immigration Service Union (ideologically-imbued association of Immigration Officers) (Vollmer 2009)

(g) Source: Eurostat, [http://epp.eurostat.ec.europa.eu/cache/ITY\\_PUBLIC/3-16122009-BP/EN/3-16122009-BP-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-16122009-BP/EN/3-16122009-BP-EN.PDF), accessed 10 January 2011

(h) Source: Council of Europe, *Regularisation programmes for irregular migrants*, Resolution 1568 (2007), available at <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta07/eres1568.htm> (consulted 9 January 2011)

(i) (Divinský 2008: 3)

(j) (Massey 2009), (Fasani 2009: 74)

? = no data

*Source: author's calculation after Clandestino's twelve country reports and other sources mentioned above*

**Table 2. Collective regularisations (amnesties) in twelve European Countries**

Country	Collective (extraordinary) regularisations	Notes
Austria	1990s: 30,000 2007-2008: ? (no data)	1990s: “Sanierungsaktion”, implemented in 1990: irregularly employed migrants could obtain work permits regularised the residence status of applicants 2007-2008: amnesty for illegally employed care workers
France	1982: 150,000 1997-1998: 90,000 (out of 130,000 applications) 2006: 6,000	-
Germany	no collective regularisation	-
Greece	1998: 219,024 (applications) 2001: 361,110 (regularised individuals) 2005: ? (no data)	incomplete data in the report!
Hungary	2004: 1,128 (out of 1,406 applications)	-
Italy	1986: 105,000 1990: 217,626 1995: 244,492 1998: 217,124 2002: 702,156	‘rollercoaster’ effect: (a) ‘amnesty effect’ + (b) ‘recall’ effect*
Poland	[2003: ‘small’ amnesty: 282]  2003: ‘big’ amnesty: 2,747 (out of 3,512 applications)  2007: 554 until 14 July 2008 (out of 2,028 applications)	‘2003 small’ amnesty = irregular immigrants who wish to leave Poland without registration on the list of unwanted foreigners 2003 ‘big’ amnesty (regularisation) = for irregulars who came to Poland before 1997; (proof of 5 years of residence) 2007: also for irregular who came to Poland before 1997; this time, proof of 10 years of residence
The Slovak Republic	no collective regularisation	-
Spain	(1) 1985-1986: 23,000 (out of 44,000 applications) (mostly affected Moroccans in the Spanish African towns of Ceuta and Melilla) (2) 1991: 110,000 (out of 130,000 applications) (3) 1996: 22,000 (out of 25,000 applications) (4) 2000-2001: 2000: 152,207 (out of 244,327 applications) 2000 Reexamination: 36,013 (out of 57,616 applications) 2001 Ecuadorians: 24,352 (out of 24,884 applications) 2001 Rootedness: 157,883 (out of 338,680 applications) (5) 2005 Normalisation: 578,375 (out of 691,655 applications)	5 collective regularisations, 1,103,830 regularised persons (out of 1,506,032 applications)  + ordinary regularisation due to settlement or rootedness (‘arraigo’) (conditions: 3 years of stay + work contract OR 2 years of stay + 12 months’ work) (2007: 28,314 ordinary regularisations)
The Czech Republic	no collective regularisation	-
The Netherlands	1975: 15,000 1979: 1,800 1991: 2,000 1999: 1,800 2007: 27,500	five regularisations extremely limited in scope; 1975-2000: roughly 20,000 regularised irregular immigrants “The outcome of these regularisations has not been substantial on the pool of irregular migrants” 2007: for the asylum applicants rejected before the 2000 Aliens Act

Country	Collective (extraordinary) regularisations	Notes
UK	1974-1978: for Commonwealth citizens 2003: ‘family amnesty’ → 16,870 families 2004: ‘humanitarian grounds’ → 4,080 individuals	only three small & special regularisations 2003: amnesty ‘granted to all asylum seekers who had a dependant minor regardless of the status of their case’ + case-by-case regularizations on ‘compassionate grounds’ + ‘after 14 years of stay in the country irrespective from the legal status, persons can apply for leave to remain under the so-called 14-years-concession’

\* the “rollercoaster” trend has two different effects: ‘1) the “amnesty effect”: the reduction in the number of undocumented migrants caused by the regularization process; 2) the “recall effect”: the increase in unauthorized inflows in the periods preceding the amnesties, since more potential irregular migrants may be attracted by the opportunity of obtaining legal status’ (Fasani 2009: 32)

*Source: author’s compilation after Clandestino’s twelve country reports*

**Table 3. Age composition of irregular migrants in twelve European Countries**

Country	Age composition of irregular migrants
Austria	19-50 years: 76,5-89% [19-30 years: 48%]
France	20-50 years: the majority
Germany	20-40 years: the majority (70% of persons apprehended by the police for illegal entry)
Greece	15-50 years: 89% [15-30 years: 48%; 31-50 years: 41%]
Hungary	active age: 83,3% [ 20-59 years: 90-95%; 2008: 70 % of asylum applicants are in the age group of 18-34]
Italy	15-39 years: 82% [15-29 years: 52%; 30-39 years: 30%] > 40 years: 18% [‘undocumented migrants are significantly younger than their documented counterpart’]
Poland	20-55 years: 75%
The Slovak Republic	20-34 years: 44% [15-64: 90-95%]
Spain	16-39 years: 79% [16-24 years: 18%; 25-39 years: 61%]
The Czech Republic	20-49 years: 72%
The Netherlands	<40 years: 80%
UK	20-35 years: 70%

*Source: author’s compilation after Clandestino’s twelve country reports*

**Table 4. ‘External quasi-citizenship’ and dual citizenship regimes in India, Mexico, Turkey and Hungary. Comparative perspective**

	<i>‘External quasi-citizenship’ regime</i>	<i>Dual Citizenship(DC) regime</i>	<i>Important rights and /or facilities enjoyed by ‘external quasi-citizens</i>	<i>Important rights NOT enjoyed by targeted persons</i>
<i>India</i>	1999 onwards (green card for PIOs)	Abolished in 1955	<ul style="list-style-type: none"> <li>• right to return</li> <li>• citizenship can be re-acquired by returning to territory</li> <li>• right to buy and own property</li> <li>• right to invest and live in India</li> <li>• admittance to educational institutions</li> <li>• eligibility for national housing schemes</li> </ul>	Political rights, some social rights
<i>Mexico</i>	1997-2005 (Mexican nationality cannot be lost)	No: dual nationality is accepted while dual citizenship (DC) is not	<ul style="list-style-type: none"> <li>• right to return</li> <li>• full citizenship rights can be re-acquired by returning to territory</li> <li>• right to acquire property in the coastal and border zones</li> </ul>	Political rights, peacetime military service
<i>Turkey</i>	-	Yes, since 1981. But: (a) the Turkish person must obtain Turkish authorities' approval for DC status (b) immigrants in Turkey do not enjoy the same DC status as emigrants	<ul style="list-style-type: none"> <li>• the right to return</li> <li>• social rights</li> </ul>	External voting rights (until writing this study)
	<i>The pink card</i> (1995-2004)  <i>The blue card</i> (2004 onwards)  [‘privileged non-citizen status’]	-	<p>rights offered by the pink/blue cards (excluding rights offered by DC):</p> <ul style="list-style-type: none"> <li>• right to return</li> <li>• rights that foreigners do not enjoy: free movement, property rights, residence, the right to work and to invest in the country, practicing certain professions, buying land in the villages or in security sensitive areas, eligibility for inheritance ; the funeral of a foreigner in Turkey requires special permission</li> <li>• children of ‘external quasi-citizens’ also acquire the above rights</li> <li>• retention of attained social security rights</li> </ul>	no voting rights; no right to be employed in the public sector
<i>Hungary</i>	(a) 1920-1947	-	<p>Elements of an ‘external quasi-citizenship’ regime (but not a proper status):</p> <ul style="list-style-type: none"> <li>• right to return</li> <li>• subsidies for ethnic Hungarian educational, cultural, and media institutions</li> <li>• political support to Hungarian political organisations in their new states</li> <li>• collection of economic and demographic data about Hungarian ethnic communities in order to support</li> </ul>	No important social rights; no political rights

			claims for border revisionism	
(b) Status Law (2001-2011)	-		<p>‘External quasi-citizenship’ regime (2) (Status Law, 2001-2011) (most important benefits):</p> <ul style="list-style-type: none"> <li>• right to return</li> <li>• subsidies to public transportation</li> <li>• free access to Hungarian Universities and other educational benefits (extended to everyone learning Hungarian in the 2003 revision of the Status Law)</li> <li>• work permit valid 3 months/year (withdrawn in the 2003 revision of the Status Law)</li> <li>• benefits from the state health-care and welfare systems from those who worked 3 months /year (withdrawn in the 2003 revision of the Status Law)</li> <li>• subsidies in the country of residence for educational, cultural and entrepreneurial projects</li> <li>• symbolic value of identity cards: official acceptance of holder’s membership in the Hungarian nation free movement in Hungary to non-EU citizens</li> </ul>	No important social rights; no political rights
-	Yes (2010 onwards)		<p>DC regime for ethnic Hungarians (2010 onwards):</p> <ul style="list-style-type: none"> <li>• <i>First phase</i> (2010-2011): DC without political rights</li> <li>• <i>Second phase</i> (2011 onwards): DC with some special form of voting rights</li> </ul>	-

*Source: author’s compilation*

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