

A Glance at State Nationality/EU Citizenship Interaction

(Using the Requirement to Renounce Community Nationality upon
Naturalizing in the Member State of Residence as a Pretext)

Dimitry Kochenov*

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Abstract

The legal analysis of the requirement to renounce one's previous Community nationality upon naturalizing in the Member State of residence provides an excellent pretext to speak about the changing balance between the nationalities of the Member States and the citizenship of the European Union. Amplifying global trends resulting in the fading in importance of state nationalities, the European integration project shaped a legal reality where the importance of particular Member States' nationalities is dwarfed compared with that of EU citizenship. Currently the Member States' nationalities, short of being abolished in the legal sense, mostly serve as access points to the status of EU citizenship. Besides, they provide their owners with a limited number of specific rights in deviation from the general principle of non-discrimination on the basis of nationality and – what is probably more important for the majority of their owners – trigger legalized discrimination in the wholly internal situations. Viewed in this light, the requirement to have only one Community nationality enforced in national law by ten Member States seems totally outdated and misplaced. While it is probably not *per se* illegal, it totally misses the point of European integration and ignores a simple fact that however much they struggle nationalities are unlikely to have a bright future in the EU. Once third country nationals are brought within the scope of this picture, even more pressing questions with regard to the EU citizenship / Member State nationality interaction come to the fore.

* LL.M. (CEU, Budapest), LL.D. (Groningen), Assistant Professor of European Law, Department of European and Economic Law, University of Groningen (The Netherlands), Fellow, Groningen Graduate School of Law. This paper has been written for the bi-annual EUSA conference, Marina del Rey, Los Angeles, April 2009 and the conference on 'Europe and the Making of "the Common"' of the Instituto de Filosofia da Linguagem, Universidade Nova de Lisboa, May 2009.
Comments welcome: d.kochenov@rug.nl

Introduction and the Structure of the Argument

Giving up your previous nationality is an imperative part of the naturalization procedure in several Member States of the European Union (EU). While justifiable from the point of view of national, as well as international law, such a requirement potentially sits uneasily next to the concept of European citizenship and the idea of an ‘ever closer Union’ the Member States are striving to build.¹ Assessment of the requirement to give up your previous Community nationality² when naturalizing in the Member State of residence in the light of the growing importance of European Citizenship is the main focus of this paper. Building on the fast-growing literature analyzing citizenship in the context of globalization, this article will place the requirement of renunciation of the original nationality in the general context of weakening of the legal meaning of ‘thick’ understandings of nationality, amplifying the nonsensical nature of the requirement in question.

The requirement to give up previous Community nationality potentially hinders the integration of European citizens into the society of the Member States other than their own and is a barrier on the way of wider political inclusion of Community national long-term residents benefitting of virtually all other nationality rights on equal footing with those EU citizens who possess the local nationality. While this requirement has an obvious deterrent effect on the naturalization³ of a number of European citizens in a Member State other than their own, it also fails to achieve any identifiable goals. Clearly, European citizens residing in the Member State other than their Member State of nationality are not simply ‘foreigners’. The powers of the Member State of residence to discriminate against such people or deport them have been diminishing at an increasing pace during the last decades:⁴ the Member States and the Court of Justice (ECJ) acting together with other Institutions of the Community shaped a legal reality when the citizenship of the European Union acquired clear and identifiable scope.⁵ This status is usable in practice, changing the legal situation of the individual in possession of it.

In such a context, treating a European citizen as any other ‘foreigner’ for the purposes of naturalization is not only unfair, but also goes against common sense. In the

¹ This article thus sides with Evans (1991), 193 in condemning this requirement. It is surprising that this issue, which is of vital importance for thousands of EU citizens potentially qualifying for naturalisation in their Member State of residence but unwilling to give up their Community nationality has received so little scholarly attention in the recent decades.

² As opposed to the Citizenship of the European Union which is defined in Art. 17 EC, by ‘Community nationality’ is meant the status of national of one (or more) Member States of the European Union.

³ Rubio-Marín, Ruth, ‘Transnational Politics and the Democratic Nation-State: Normative Challenges of Expatriate Voting and Nationality Retention of Emigrants’, 81 *N.Y.U. L. Rev.*, 2006, 117, 138. There is a general consensus in the literature that the requirement to give up previous nationality at naturalisation is an important disincentive.

⁴ Kochenov, Dimity, ‘*Ius Tractum* of Many Faces: European Citizenship and a Difficult Relationship between Status and Rights’, 15 *Colum. J. Eur. L.*, 2009, 169, 193.

⁵ For a very informative analysis of this process see Kostakopoulou, Dora, ‘Ideas, Norms and European Citizenship: Explaining Institutional Change’, 68 *Modern L. Rev.*, 2005, 233, 244–261. See also Elsmore, Matthew J., and Starup, Peter, ‘Union Citizenship – Background, Jurisprudence, and Perspective: The Past, Present, and Future of Law and Policy’, 26 *Ybk. Eur. L.*, 2007, 57; Jacobs, Francis G., ‘Citizenship of the European Union – A Legal Analysis’, 13 *Eur. L.J.*, 2007, 591; Van der Mei, Anne Pieter, ‘Union Citizenship and the “De-Nationalisation” of the Territorial Welfare State’, 7 *European Journal of Migration and Law*, 2005, 210.

light of these considerations, the legislation of the Member States requiring the denunciation of the previous (Community) nationality at naturalization (*e.g.* The Czech Republic, Denmark, Estonia, Hungary, Latvia, Lithuania, The Netherlands, Poland, Slovakia, Slovenia etc.⁶) undermines the fundamental status of European citizenship and underscores the level of integration practically existing between the Member States. It is submitted that even without Community's intervention – as it is potentially not empowered to act in this field⁷ – more and more Member States will follow the German example, applying the renunciation requirement to non-Community nationalities only.⁸

The main aim of this paper not so much consists in finding the legal ways to outlaw the requirement to give up previous Community nationality upon naturalizing in the new Member State of residence, as in demonstrating the outdated logic underlying it, as well its harmful effects.⁹ Of course, the requirement in question is directly connected with other problematic issues pertaining to the potential mine-field of EU citizenship and Member State nationality interactions. Among other such issues is a possibility, under national law of some Member States, to lose your nationality and Community citizenship as a result of military or civil service abroad,¹⁰ automatic loss of your nationality, *ex lege*, upon naturalization abroad,¹¹ or long-term residence abroad (and possession of other nationality)¹² to name just a few.¹³ The loss of the main rights pertaining to nationality such as the right to vote is also possible as a consequence of changing one's Member State.¹⁴

There is a potentially more important side to the story of the requirement to denounce your previous Community nationality. It is rooted in the nascent differences in the ways towards naturalisation in some Member States, depending on whether the applicant already possesses EU citizenship. At present Germany, Italy and Austria are

⁶ Liebich, Vink On the general context of dual nationality in the EU see Howard, Marc Morjé, 'Variation in Dual Citizenship Policies in the Countries of the EU', 39 *Int'l Migration Rev.*, 3005, 697, esp. Table 4, at 713.

⁷ Art. 5(1) EC stipulates that the Community can only act 'within the limits of the powers conferred upon it by [the EC Treaty] and of the objectives assigned therein'.

⁸ de Groot and Vink (2008), 73–75.

⁹ On the legal analysis of dual nationality see Boll, Alfred, M., *Multiple Nationality and International Law*, Leiden: Martinus Nijhoff, 2007; Faist, Thomas, and Kivisto, Peter (eds.), *Dual Citizenship in Global Perspective*, London: Palgrave, 2007; Martin, David A., 'New Rules on Dual Nationality for a Democratizing Globe: Between Rejection and Embrace', 14 *Geo Immigr. L.J.*, 1999, 1; Spiro, Peter J., 'Dual Nationality and the Meaning of Citizenship', 46 *Emory L.J.*, 1997, 1411; Bosniak, Linda, 'Multiple Nationality and the Postnational Transformation of Citizenship', 42 *Va. J. Int'l L.*, 2002, 979.

¹⁰ For an overview in the context of West European countries see de Groot and Vink (2008), 94–97.

¹¹ Such rules are in force in a number of Member States, including Denmark, Estonia, France, Germany, Italy, Lithuania and the Czech Republic. Exceptions apply. See TBN 2007/12 (Tussentijds Bericht Natoinaliteiten), *Staatscourant* 2007/170. See also de Groot and Vink (2008), Table 4.1 at 85. The huge amount of exceptions that applies in the majority of these countries results in a situation when the loss of nationality can be regarded as an exception rather than the rule in the majority of these jurisdictions.

¹² For analysis see de Groot and Vink (2008), 89–94. In the majority of cases such loss of nationality is not automatic.

¹³ For analysis see de Groot, Gerard-René, 'Towards a European Nationality Law', 8 *Eur. J. Const. L.*, 2004; Evans (1992). See also Hall, Stephen, 'Loss of Union Citizenship in Breach of Fundamental Rights', 21 *Eur. L. Rev.*, 1996, 129.

¹⁴ For analysis see Kochenov, Dimitry, 'Free Movement and Participation in the Parliamentary Elections in the Member State of Nationality: An Ignored Link?', 16 *Maastricht J. Eur. & Comp. L.*, 2009 (forthcoming).

among the Member States where naturalisation requirements for EU citizens and third country nationals are different. Only the latter, not the former, are expected to renounce their previous nationality to naturalise in Germany. In Italy and Austria, the length of minimal legal residence in order to qualify for naturalisation is drastically different for the two categories in question: while EU citizens naturalise in four years, third country nationals have to wait six years longer.¹⁵ In the near future, the number of Member States to introduce such differences as well as the reach of the differences themselves is likely to proliferate.

Such developments are easy to predict, given the rise in importance of EU citizenship and the practical richness of the rights it brings to those in possession of it. The situation of EU citizens and third country nationals in any Member State is categorically different,¹⁶ allowing to speak of ‘unfulfilled promise of European citizenship’.¹⁷ Naturalisation in the Member State of residence is already potentially less important for EU citizens than for the third country nationals. This is so since a number of key rights formerly associated with state nationality are granted to EU citizens directly by the Community legal order. Among these are virtually unconditional rights of entry, residence, taking up employment, and, crucially, non-discrimination on the basis of nationality.¹⁸ Objectively, it is evidently so that not so much is left of Member States’ nationalities in the EU. An oft-cited phrase coined by Davies attributes to Article 12 EC the abolition of nationality of the Member States.¹⁹

It takes Member States a long time to awaken to the realization of this state of affairs. Once realized and harkened²⁰ it is bound to have direct influence on their nationalization rules. To pretend that EU citizens are not, potentially at least, quasi-nationals of any of the Member States where they choose to reside, would be to close one’s eyes at the current stand of Community law.

The consequences of differentiating between EU citizens and third country nationals for the purposes of naturalisation are far-reaching indeed. Once EU citizenship,

¹⁵ Legge N. 91/1992; Austrian Nationality Act, *FLG* No. 311/1985.

¹⁶ The Community and the Member States announced on a number of occasions that this difference is bound to be reduced, the third country nationals gradually coming to be treated as EU citizens. However, as Directive 2003/109/EC overwhelmingly demonstrates the differences are there to stay. For the assessment of the legal position of the third country nationals in the EU see e.g. Kochenov (2009) 225–229; Papagianni, Georgia, ‘Free Movement of Third Country Nationals on the Eve of 1 May 2004: Another Missed Deadline?’, in Hanf, Dominik and Muñoz, Rodolphe (eds.), *La libre circulation des personnes: États des lieux et perspectives*, Bruxelles: P.I.E. Peter Lang, 2007, 145; Hedemann-Robinson, Martin, ‘An Overview of Recent Legal Developments at Community Level in Relation to Third country Nationals Resident within the European Union, with Particular Reference to the Case-law of the European Court of Justice’, 38 *Common Mrkt. L. Rev.*, 2001, 525; Staples, Helen, *The Legal Status of Third-country Nationals Resident in the European Union*, The Hague: Kluwer Law International, 1999; Ward, Ian, ‘Law and the Other Europeans’, 35 *J. Common Mrkt. Stud.* 1, 1997, 79; Peers, Steve, ‘Towards Equality: Actual and Potential Rights of Third-Country Nationals in the European Union’, *Common Mrkt. L. Rev.*, 1996, 8.

¹⁷ Maas, Willem, ‘Migrants, States, and EU Citizenship’s Unfulfilled Promise’, 12 *Citizenship Stud.*, 2008, 583.

¹⁸ For critical analysis see Kochenov (2009), 206.

¹⁹ Davies, Gareth, ‘“Any Place I Hang My Hat?” or: Residence is the New Nationality’, 11 *Eur. L.J.* 1, 2005, 43, 55. Evans (1991) put it slightly differently: ‘possession of the nationality of one Member State rather than that of another loses all real significance’ (at. 195).

²⁰ Weiler, Joseph H.H., *The Constitution of Europe: Do the Clothes Have an Emperor?*, Cambridge: Cambridge University Press, 1999, 3.

a *ius tractum* status rooted in the possession of a nationality of one of the Member States²¹ starts to affect the rules of access to this very nationality, the circle is rounded up: the formerly ‘parasitic’²² and ‘cynical’²³ nature of EU citizenship comes to be contested. The proverbial pie lands from the sky on the table,²⁴ leaving no place to other foods.

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This paper is structured as follows. The first part provides a very concise sketch of a world-scale shift away from the doctrine of insoluble allegiance and combating dual (multiple) nationality towards allowing individuals more freedom of choice resulting *inter alia* in a more permissive approach to multiple nationality. As a general consequence of the rise of international human rights and the inevitable replacement of the thick conceptions of nationality with their liberal-minimalist counterparts²⁵ on the one hand and the rise in globalization and international migration on the other, national law on citizenship in the majority of liberal-democratic jurisdictions in the world is evolving in two seemingly opposing directions, moving towards de-ethnicisation and re-ethnicisation at the same time.²⁶ While citizenship is still meaningful, it is certainly not any more exclusive and even less connected with culture and identity (I.).

The paper proceeds looking at the general processes outlined in the first part through the lens of European integration. A perfect example of amplified-globalization, the European integration project successfully created the conditions for overwhelming intensification of the world trends leading to the marginalization of nationality in the context of the borderless internal market, the adoption of the liberal ideals as the guiding stars of integration by the ECJ and the EU Treaty²⁷ and the successful shaping of European citizenship. This section of the paper will build on the groundbreaking work of Davies²⁸ and Tryfonidou,²⁹ overwhelmingly relevant for outlining the vistas of EU citizenship of the near future (II.). The part that follows looks specifically at the requirement to give up previous Community nationality upon naturalisation in the new Member State of residence which is on the books in several Member States. The negative

²¹ Art. 17 EC. Kochenov (2009) 181.

²² Rostek, Karolina and Davies, Gareth, ‘The Impact of Union Citizenship on National Citizenship Policies’, 10 *EloP* 5, 2006, 1, reprinted in 22 *Tul. Euro. Civ. LF*, 2007, 89.

²³ Weiler, Joseph H.H., ‘European Citizenship and Human Rights’, in Winter, Jan A. *et al.* (eds.), *Reforming the Treaty on European Union – The Legal Debate*, The Hague: Kluwer, 1996, 65, 68, speaking of a ‘cynical exercise in public relations on the part of the High Contracting Parties’.

²⁴ Jessurun d’Oliveira, Hans U., ‘Union Citizenship: Pie in the Sky?’, in Rosas, A. and Antola E. (eds.), *A Citizens’ Europe: In Search for a New Order*, London: Sage, 1995, 58.

²⁵ Joppke, Christian, ‘Immigration and the Identity of Citizenship: The Paradox of Universalism’, 12 *Citizenship Stud.*, 2008, 533.

²⁶ Joppke, Christian, ‘Citizenship between De- and Re-Ethnicization (I)’, 44 *Archive européen de sociologie*, 2003, 429.

²⁷ Esp. Arts. 6 and 7 EU.

²⁸ Davies, Gareth, ‘Services, Citizenship and the Country of Origin Principle’, *Mitchell Working Paper Series*, no. 2, 2007.

²⁹ Tryfonidou, Alina, *Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens’ Europe*, 35 *Legal Issues of Econ. Integration*, 2008, 43; Tryfonidou, Alina, *Reverse Discrimination in EC Law*, The Hague: Kluwer Law International, 2009.

impact of such requirement on the process of European integration is assessed in the context of the goals the states introducing it are willing to achieve (III.).

The paper concludes with an outline of the likely future dynamics in the relationship between Member State nationality and European citizenship, as well as informed speculation on the likely evolution of the nature of the latter. The borderless context of internal market amplifying world-wide trends is likely to lead to an overwhelming diminution in the legal importance of nationality of the Member States as meaningful legal statuses. However, given the universality of the trends negatively affecting nationalities, it is clear that EU citizenship, while gaining in importance, should not be expected to become anything more than a thin procedure-driven concept, in line with the liberal credo espoused by the EU.³⁰ To expect *demos*-creation³¹ or the rise in the feeling of belonging from the new status which led to the marginalizing the nationalities of the Member States would not only be unwise – given the world-wide trend towards marginalization of ‘thick’ citizenship – but also unnecessary. Indeed, while the nationalities of the Member States are likely to end up stripped of any legal substance whatsoever, the feeling of belonging attached to them can very well stay, justifying their preservation and making the transfer of such concepts to the Community level unnecessary.

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

A hundred years ago, the prevailing views among lawyers and politicians all over the world ascribed bigger dangers to possessing two nationalities than to possessing two wives. In the words of Bancroft one should ‘as soon tolerate a man with two wives as a man with two countries: as soon bear with polygamy as that state of double allegiance which common sense so repudiates that it has not even coined a word to express it’.³² Ties with a state were seen as absolutely exclusive, and international law reflected this belief.³³ Dual citizens or those who changed their nationality were regarded with suspicion as potential traitors³⁴ and saw their rights limited compared with ‘natural born’ citizens.³⁵

³⁰ Kostakopoulou, Dora, ‘Why Naturalisation?’, 4 *Perspectives on Eur. Politics & Soc’y*, 2003, 85. See also Zilbershats, Yaffa, ‘Reconsidering the Concept of Citizenship’, 36 *Tex. Int’l L.J.*, 2001, 689, 714 (in the potential duty to grant citizenship to a resident of a state).

³¹ For critical assessment see Weiler, Joseph H.H., ‘The State “über alles”: *Demos*, *Telos* and the German Maastricht Decision’, in Due, Ole, Lutter, Marcus and Schwarze, Jürgen (eds.), *Festschrift für Ulrich Everling*, Baden-Baden: Nomos Verlagsgesellschaft, Vol. 2, 1995.

³² Bancroft, George, ‘Letter to Lord Palmerson, Jan. 26, 1849’, reprinted in *Sen. Ex. Docs.* 38, 36th Congress, 1st Session, 1950, as cited in Howard (2005), 700.

³³ For the analysis see Bar-Yaacov, Nissim, *Dual Nationality*, London: Stevens and Sons, 1961. Bar-Yaacov opined that ‘dual nationality is an undesirable phenomenon detrimental both to the friendly relations between nations and the well-being of individuals concerned’ (at 4). Nothing could be less true today.

³⁴ For the remnants of it see *Korematsu v. U.S.* 323 U.S. 214 (1944). The case concerned the internment of all persons of Japanese ethnicity residing in the West Coast of the US in the ‘Relocation Centres’ on military order during the Second World War. It did not matter whether these persons held US citizenship or not.

³⁵ The remnants of this rule are still the law in the US where citizenship by naturalisation brings with it less rights than citizenship by birth: US Constitution, Art. II. For analysis see Herlihy, Sarah P., ‘Amending the

International law generally left it up to the states to decide on the issues of nationality,³⁶ and concentrated on combating double nationality.³⁷ This amplified the romantic vision of a state as a cradle of a nation to which individuals belonged due to ‘blood ties’,³⁸ thus taking a legal fiction very seriously.³⁹ The main activity of modern states⁴⁰ became confined to homogenising, linguistically,⁴¹ culturally, and otherwise, the imagined communities,⁴² to sell them to the citizens as an omnipresent unquestionable given. Patriotic ideals prescribed to be able to sacrifice everything for this fiction, equalling with heroism the loss of dignity and reasoned judgement (like being willing to hate, and, if needed, to kill, those belonging to another nation).⁴³

There could not possibly be any place for multiple nationalities in a world divided into such states. Paradoxically, the freedom of states to decide who their nationals are, one of the holiest emanations of the principle of state sovereignty, necessarily resulted in the multiplication of people with more nationalities than one, whence the attempts of states, in the auspices of international law, to end this erosion of exclusivity.

Although nation states are still ‘built on a rarely materialised idea of one territory and one nation’,⁴⁴ very much has changed in the world of states since then. The times of the reign of the doctrine of insoluble allegiance establishing, in the words of Sir Blackstone ‘a debt of gratitude which cannot be forfeited, cancelled or altered by any

Natural Born Citizen Requirement: Globalization as the Impetus and the Obstacle’, 81 Chi.-Kent L. Rev., 2006, 275. In the context of European citizenship such distinctions are illegal. In *Auer* the ECJ found that ‘there is no provision of the Treaty which, within the field of application of the Treaty, makes possible to treat nationals of a Member State differently according to the time at which or the manner in which they acquired the nationality of that State’: Case 136/78 *Ministère Public v. Auer* [1979] ECR 437, para 28.

³⁶ The 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (L.N. Doc. C 24 M. 13.1931.V.), is unequivocally clear on this issue: ‘it is for each state to determine under its own law who are its nationals’ (Art. 1). Art. 2 stipulates that ‘Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State’. See also Kochenov (2009), 175 *et seq.*

³⁷ E.g. CoE Convention on Reduction of Cases of Multiple Nationality, (1963) ETS no. 43, *entered into force in 1968*; Protocol to this Convention (1977) ETS no. 96. Combating double nationality distracted attention from solving the problem of statelessness, which is still acute. Among the instruments addressing this issue *see* Protocol Relating to a Certain Case of Statelessness (1937-1938) 179 L.N.T.S. 115 (No. 4138); Special Protocol Concerning Statelessness, League of Nations Document C. 227.M.114.1930.V; 1961 Convention on the Reduction of Statelessness, (1975) 989 U.N.T.S. 175 (No. 14458). The document is only ratified by a handful of states. *For analysis see* Chan (1991), 2 *et seq.*, who is critical of the international legal developments in this area.

³⁸ In 1900 there was no *jus soli* in Europe – only *jus sanguinis*. *Jus soli* was reintroduced in order to draft more inhabitants, previously considered as foreigners, to the army: Joppke (2003), 436.

³⁹ Weil has compellingly demonstrated that nationality laws have nothing to do with the reflection of a concept of a nation: Weil, Patrick, *Qu’est-ce qu’un Français?*, Paris: Grasset, 2002, 13.

⁴⁰ Hereafter ‘modern’ is used in its historical sense, not to be confused with ‘contemporary’.

⁴¹ Linguistic homogeneity of the majority of states regarded by many as natural is a very recent product of state-building efforts. E.g. Eco, Umberto, *La ricerca della lingua perfetta nella cultura europea*, Roma: Laterza, 1993, 9.

⁴² Anderson, Benedict, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (2nd ed.), London: Verso, 1991.

⁴³ ‘In August 1914, Australians and Germans, Frenchmen and Englishmen, flooded the enlistment offices, but we would not want to explain their military enthusiasm by reference to the quality of their citizenship [but rather] as a sign of the poverty of their lives and their lack of moral independence’: Walzer, Michael, ‘Civility and Civic Virtue in Contemporary America’, 41 *Social Research* 4, 1974, 593, 596.

⁴⁴ Hammar (1985), 440.

change of time, place or circumstance’⁴⁵ and thus making either acquiring a new nationality or changing the original nationality virtually impossible, are long gone. Naturalisation and the change of nationality are both legally recognised reality. At present ‘there seems to be a general consensus that everyone is entitled to change his nationality’,⁴⁶ as well as possess dual or multiple nationality.

The possibility to do this is a direct consequence of the change that has deeply affected the understanding of the very nature of states and nations. The flourishing of the modern states that led to numerous disasters in the 20th century has been attributed to the poverty of the civil society that ‘lack[ed] the capacity to resist [the state’s] plans’.⁴⁷ The disasters of totalitarianism demonstrated with overwhelming clarity how dangerous states are⁴⁸ and that they should not be given a *carte blanche* in multiplying human misery justified by pursuing highly abstract goals rooted in quasi-religious⁴⁹ and very egoistic conceptions of the good, which would stop at the national boundaries ‘that specify, with dogmatic clarity, the distinction between the political community that is inside and the international anarchy that is outside’.⁵⁰

Post WW II developments leading to the rise of international migration, as well as international marriages producing children directly disproving the dogma of unitary identities and exclusive nationhood,⁵¹ coupled with the global rise of human rights and liberalism⁵² made it impossible for states to remain as they were. The states’ very authority over the nations came to be undermined, as state- and nation-building parted

⁴⁵ Blackstone, William, *Commentaries on the Laws of England*, London, 1884, 117, cited in Rubinstein and Adler (2000), 519, 530. See also Spiro (1997), 1419–1430.

⁴⁶ Chan (1991), 8. For the accounts of this transformation see e.g. Brøndsted Sejersen, Tanja, ‘“I Vow to Thee My Countries” – The Expansion of Dual Citizenship in the 21st Century’, 42 *Int’l Migration Rev.*, 2008, 523; Howard (2005), 700 *et seq.*; Zolberg, Aristide R., ‘The Dawn of Cosmopolitan Denizenship’, 7 *Ind. J. Global Legal Stud.*, 2000, 511; Rubinstein, Kim, ‘Citizenship in a Borderless World’, in Angie, Antony and Sturgess, Garry (eds.), *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry*, The Hague: Kluwer Law International, 1998, 183.

⁴⁷ James Scott, *Seeing Like a State*, New Heaven: Yale University Press, 1998, 89 (quoted in Joppke (2003), 437).

⁴⁸ This realisation is not new, as it is omnipresent in the Federalist papers. See also Sajó, András, *Limiting Government: An Introduction to Constitutionalism*, Budapest: Central European University Press, 1999.

⁴⁹ As admitted in his diary by Justice Frankfurter: ‘perhaps the feelings that underlie religious forms for me run into intensification of my feelings about American citizenship’: Levinson, Sanford, ‘Constituting Communities through Words that Bind: Reflections on Loyalty Oaths’, 84 *Mich. L. Rev.*, 1986, 1440, 1441.

⁵⁰ Falk (2000), 6.

⁵¹ The proliferation of liberal ideology caused similar developments also in other spheres. Just as the dogmatic construct of ‘nation’, the notions of ‘race’ and ‘family’ undergo mutation. Acceptance of dual nationality and multiple identities can thus be compared with the acceptance of interracial marriage, as well as sexual minorities. On the latter two see Ball, Carlos A., ‘The Blurring of the Lines: Children and Bans on Interracial Unions and Same-Sex Marriages’, 76 *Fordham L. Rev.*, 2008, 2733. Ball writes: ‘one of the reasons why same-sex marriage is so threatening to so many is that the raising of children by same-sex couples blurs the boundaries of seemingly preexisting and static sex/gender categories in the same way that the progeny of interracial unions blur seemingly preexisting and static racial categories’ (at 2735). Just in the same vein, the existence of dual nationals undermines the ‘natural’ division of the world into nations and states.

⁵² Rawls, John, *Political liberalism*, New York: Columbia University Press, 1993; Sandel, M., ‘Review of Political Liberalism’, 107 *Harv. L. Rev.*, 1994, 1765. Joppke (2008) provides an excellent summary of the idea applying it to the context of nationality (at 534–536)

ways.⁵³ Liberal ideology made it impossible for the states to continue embracing a clear idea of who their nationals should be, trashing any ‘thick’ conceptions of nationality.⁵⁴ In fact, democratic states effectively lost any legal possibility to imagine themselves as rooted in homogeneous monocultural societies, unable to ask of their own nationals and of the growing numbers of new-comers anything more than mere respect for the liberal ideology. Relying on Habermas⁵⁵ and Rawls⁵⁶ Joppke sketches the essence of this transformation in the following way: ‘in a liberal society the ties that bind can only be thin and procedural, not thick and substantive. Otherwise individuals could not be free’.⁵⁷ Nationality as such came to be stripped of any substantive elements, ‘good’ or ‘bad’.⁵⁸

This is great news, since states do not view themselves in a position anymore to decide how their citizens are supposed to look like, how to behave, and what to think. As long as the state-espoused view that a citizen should be either a hard-working member of the ‘Socialist community’,⁵⁹ or a person ‘of German or kindred blood’,⁶⁰ or someone who ‘by virtue of conscription [...] attain[s] and enjoy[s] the fruits of full citizenship’,⁶¹ or must genuinely believe in the liberal Constitution,⁶² became impossible, nationality itself has no ethno-cultural component to it any more, at least not legally speaking. Nationality has been reinvented in a procedural vein, becoming merely a ‘*Kopplungsbegriff*’⁶³ connecting a state and a person. The old quasi-religious and potentially chauvinistic meaning of nationality is severely undermined.⁶⁴

⁵³ See Falk, Richard, ‘The Decline of Citizenship in an Era of Globalization’, 4 *Citizenship Stud.*, 2000, 5.

⁵⁴ Joppke (2008), 534; Joppke (2003), 437.

⁵⁵ Habermas, Jürgen, ‘Geschichtsbewusstsein und posttraditionale Identität’, in Habermas, Jürgen, *Eine Art Schadensabwicklung*, Frankfurt am Main: Suhrkamp, 1987.

⁵⁶ Rawls (1993); Rawls, John, ‘The Idea of an Overlapping Consensus’, 7 *Oxford J. Legal Stud.*, 1987, 1.

⁵⁷ Joppke (2008), 535.

⁵⁸ This state of affairs coincides with the Kantian view of liberalism, as a liberal polity does not require virtue from its members and can be run well enough by rational devils: Emmanuel Kant, ‘Perpetual Peace’, as cited by Betts, Katharine, ‘Democracy and Dual Citizenship’, 10 *People and Place*, 2002, 57.

⁵⁹ Communist dictatorships remained faithful to a ‘thick’ substantive idea of citizenship until the last days of their existence. The Constitution of the USSR of 1977 listed ‘vospitanie cheloveka kommunisticheskogo obshchestva’ [molding the men of Communist society] as its main fundamental goal (Preamble). See also e.g. Eley, Geoff and Palmowski, Jan, *Citizenship and National Identity in Twentieth-Century Germany*, Stanford: Stanford University Press, 2008, 89. Interestingly, leaving your work-place early or littering in the park could be regarded as acts of dissent, as they contradicted the citizenship ideal espoused by the regime.

⁶⁰ Art. 2(1), The Reich Citizenship Law of September 15, 1935, available at <http://frank.mtsu.edu/~baustin/nurmlaw2.html> (last accessed 15 April 2009).

⁶¹ Murray, Melissa, ‘When War Is Work: The B.I. Bill, Citizenship, and the Civic Generation’, 96 *Cal. L. Rev.*, 2008, 967, 996.

⁶² The German Federal Constitutional Court ruled that citizens are ‘legally not required to personally share the values of the Constitution’: Joppke (2008), 542. To find otherwise would be in contradiction with the very rationale of a contemporary liberal state.

⁶³ de Groot, Gérard-René, *Staatsangehörigkeitsrecht im Wandel*, Cologne: Carl Heymanns Verlag, 1989, 5 (as quoted in Joppke (2003), 433). See also Makarov, Aleksander, *Allgemeine Lehren des Staatsangehörigkeitsrechts*, Stuttgart: Kohlhammer, 1947.

⁶⁴ There is a huge literature on the negative impacts of globalisation on citizenship and the nation state Bosniak, Linda, ‘Citizenship Denationalized’, 7 *Ind. J. Global Legal Stud.*, 2000, 447. See also Kuisma, Mikko, ‘Rights or Privileges? The Challenge of Globalisation to the Values of Citizenship’, 12 *Citizenship Stud.*, 2008, 613; Wolf, Martin, ‘Will the Nation-State Survive Globalisation?’, 81 *Foreign Aff.*, 2001, 178; Falk (2000); Rubinstein, Kim, and Adler, Daniel, ‘International Citizenship: The Future of Nationality in a

Proceduralisation of the idea of nationality means that lacking certain mythical characteristics of a ‘good citizen’ cannot cause either deprivation of nationality or block access to naturalization, as “‘abstract character’ of state membership [...] is decoupled from rights and identity”.⁶⁵ Inescapably connected with the abstract character of contemporary state membership is the idea of fairness of the potential comparisons between citizens by birth and to-be-citizens by naturalisation: asking the latter to be smarter, richer or better looking (as far as the state can judge) while simply embracing the former would not be entirely correct it seems.⁶⁶

As a consequence, when liberal democracies refer to ‘being one of us’, their ‘particularism’ is necessarily bound to stop at the restatement of liberal values: there is no more such thing as differences between ‘Britishness’, ‘Frenchness’, ‘Danishness’ etc.,⁶⁷ as ‘the national particularisms which immigrants and ethnic minorities are asked to accept across European states, are but local versions of the universalistic idiom of liberal democracy’,⁶⁸ making the logic of ‘naturalisation’ for the new-comers somewhat outdated if not totally misplaced.⁶⁹ Once the dream of monocultural national unity was gone, it became impossible to deny the possibility of different co-existing levels of identity in the populace, if not in one person.⁷⁰

As a result of the proliferation of international migration and liberal human rights-oriented states, nationality, besides becoming merely a procedural connection, is getting detached both from the idea of territory and from the idea of culturally and ethnically homogeneous national community – both being necessary components of ‘what a state essentially is’.⁷¹ The mutation of nationality is thus rooted in the binary nature of states: both territorial and *Volk*-based units.⁷² Joppke describes the recent dynamics in terms of simultaneous de- and re-ethnicization of nationality.⁷³ The former refers to the acceptance of naturalisation and immigration which are not based on the idea of assimilation,⁷⁴ resulting in the proliferation of diverse ethnic and cultural communities within states – a situation impossible in the modern world of homogeneous nations.⁷⁵ The latter refers to the increasing willingness of states to confer citizenship on the offspring of nationals who left the territory. In the recent decades the majority of European states moved in both opposing directions described, which resulted in a process of ‘de-territorialisation of politics’,⁷⁶ and, naturally, of states.

Globalised World’, 7 *Ind. J. Global Legal Stud.*, 2000, 519; Lipschutz, Ronnie D., ‘Members Only? Citizenship and Civic Virtue in a Time of Globalisation’, 36 *Int’l Politics*, 1999, 203.

⁶⁵ Joppke (2003), 433.

⁶⁶ Joppke (2003), 441, citing Makarov (1947), 32 and de Groot (1989), 258.

⁶⁷ Joppke (2008), 536–542.

⁶⁸ Joppke (2008), 541.

⁶⁹ For an outstanding account see Kostakopoulou (2003).

⁷⁰ Kymlicka, Will, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Oxford: Clarendon Press, 1995.

⁷¹ Joppke (2003), 431.

⁷² Joppke (2003), 443, 454.

⁷³ Joppke (2003), 430.

⁷⁴ France is the only Western democracy keeping a reference to assimilation on the books: Joppke (2003), 440. See also Lagarde, Paul, *La nationalité française*, Paris: Dalloz, 1997, 131.

⁷⁵ In Europe, even Turkey and Germany are leaning towards less archaic in this regard.

⁷⁶ Council of Europe, ‘Links between Europeans Living abroad and Their Countries of Origin’, Doc. 8339, 1999, 30.

As a direct consequence of nationality's movement in two opposing directions states came to be more tolerant to each-other's nationals naturalizing in their territory and keeping the previous nationality. A truly 'veranderde omgeving'⁷⁷ was created, as the majority of liberal democracies in the world moved towards accepting multiple nationality in one way or another, and the international consensus on this issue has certainly changed compared with the era of exclusivity.⁷⁸ Multiple nationality became 'the norm rather than exception'.⁷⁹ In Europe, the Council of Europe's Convention on the Reduction of the Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality (1963),⁸⁰ which followed the old, now obsolete consensus, as follows already from the name, became a radically different instrument upon the entry into force of the Second Protocol, which normalizes both naturalization in the state of residence and conservation of the nationality of origin.⁸¹ The same permissive liberal trend is to be found in the Council of Europe's Convention on Nationality of 1997.⁸² Indeed, agreeing with Jessurun d'Oliveira, it is clear that 'being coerced to retain only a single nationality is [in]compatible with liberal principles'.⁸³ Differences remain, however, with regard to approaching dual nationality in the context of de-ethnicisation as opposed to re-ethnicisation. New-comers naturalizing in a state are often treated differently compared with outgoing citizens naturalizing elsewhere in the world.⁸⁴

With the growth of international migration in the liberal context where states are bound to exercise self-restraint in nation-building, it became apparent that 'the paradigm of societies organised within the framework of the nation-state inevitably loses contact with reality'.⁸⁵ 'Cosmopolitanism' has clearly lost the formerly exotic appeal of the 19th

⁷⁷ Vink and de Groot (2008), 35.

⁷⁸ Also in the EU the majority of the Member States allow do not prohibit double nationality: de Groot, Gerard-René, and Vink, Maarten, *Meervoudige nationaliteit in Europees perspectief: Een landenvergelijkend overzicht*, The Hague: Adviescommissie voor Vreemdelingenzaken, 2008, esp. Table 3.5 at 72; Horváth (2008), Table 1 at 240, 241; see also Pérez Vera, Elisa, 'Citoyenneté de l'Union européenne, nationalité et condition des étrangers', in *Recueil des cours: Collected Courses of The Hague Academy of International Law*, The Hague /Boston /London: Martinus Nijhoff, 1996, 309–316. In the US dual nationality became possible *de jure* after the Supreme Court ruling in *Afroyim v. Rusk*, 387 U.S. 253; 87 S.Ct. 1660; 18 L. Ed. 2d 757; 1967. For the dynamics in the increase of the countries whose laws allow multiple nationality see Brøndsted Sejersen (2008), esp. Figure 1 at 531 (analyzing the law of 115 countries).

⁷⁹ Boll (2007), xviii.

⁸⁰ ETS No. 43, 1963. Analysed by de Groot and Vink (2008), 24–27.

⁸¹ ETS No. 149, 1993.

⁸² ETS No. 166, 1997, esp. Arts. 14–18. For analysis see de Groot and Vink (2008), 28–31; Hall, Stephen, 'The European Convention on Nationality and the Right to Have Rights', 24 *Eur. L. Rev.*, 1999, 586.

⁸³ Jessurun d'Oliveira, Hans Ulrich, 'Multiple Nationality and International Law by Alfred Boll', 101 *Am. J. Int'l L.*, 2007, 922 (book review).

⁸⁴ Howard (2005) 708: 'The distinction is crucial, particularly for the historical countries of emigration – Germany, Greece, Ireland, Italy, the Netherlands, Portugal, Spain, and the United Kingdom – all of which have allowed and even encouraged their ethnic descendents or diaspora, who are citizens of other countries, to maintain their original citizenship, but only some of which have extended that option to immigrants within their borders'. For the analysis of different approaches see e.g. de Groot and Vink (2008) (analysing Western European states); Liebich, André, 'Plural Citizenship in Post-Communist States', 12 *Int'l J. Refugee L.*, 2000, 97 (for the analysis of Eastern European trends).

⁸⁵ Beck (2000), 80.

century and has become a daily reality,⁸⁶ once a consensus has been reached on a simple fact that numerous identities can overlap⁸⁷ and the legal fiction of belonging to a nation as the measure of all things, loosened. In fact, life simply seems to be returning to normal once states left their citizens alone in peace as they are, instead of attempting to mold them in accordance with the state-sanctioned citizenship ideal.

European citizenship itself, in not repealing but complementing national citizenship as specified in Article 17(1) EC and in the Danish Declaration appended to the Maastricht Treaty,⁸⁸ is also a definitive step in the direction of the legal affirmation of the reality of multiple identities and numerous overlapping allegiances.⁸⁹ Today, the most active part of the world population has lived abroad for a considerable amount of time and is likely to hold more than one passport. For more and more people national borders are genuinely irrelevant. This makes it difficult, if not impossible, wholeheartedly to embrace the fictions taught to our great-grand fathers by the public school systems of the day. School curricular research in the Western world demonstrates that the idea of national glory – the corner stone of the school programmes of the past – is supplanted.⁹⁰

It is possible to envisage a future where ‘container theory of society’ is totally undermined and the dichotomy insider/outsider does not work.⁹¹ The de-territorialisation of states and societies as well as the failing links between nationality on the one hand and particular culture and identity on the other call into question the whole construct of the world as we know it, leading to the ‘second age of modernity’⁹² marked by society and law beyond states.⁹³

II. Nationality in EU Context: Diminishing in Importance Amplified

The normative foreigner-citizen dichotomy questioned at the world scale⁹⁴ is short of being eliminated in the European Union with regard to the nationals of the Member

⁸⁶ Appiah, Kwame Anthony, *Cosmopolitanism: Ethics in a World of Strangers*, New York: W.W.Norton, 2007.

⁸⁷ Kymlicka (1995).

⁸⁸ *OJ C348/4*, 1994.

⁸⁹ However, the combination of European citizenship with the nationality of a Member State clearly does not amount to dual nationality: Jessurun d’Oliveira, Hans U., ‘Europees burgerschap: Dubbele nationaliteit?’, in van Ballegooij, Wouter F.W. (ed.), *Europees Burgerschap*, The Hague: T.M.C. Asser Press, 2004, 91.

⁹⁰ Joppke (2008), 537 (and literature cited therein).

⁹¹ For the analysis of relevant literature see Calavita, Kitty, ‘Law, Citizenship, and the Construction of (Some) Immigrant “Others”’, 30 *Law & Soc. Inquiry*, 2005, 401, 405–409.

⁹² Beck, Ulrich, ‘The Cosmopolitan Perspective: Sociology of the Second Age of Modernity’, 51 *British Journal of Sociology*, 2000, 79.

⁹³ See Allott, Philip, *The Health of Nations: Society and Law beyond the State*, Cambridge: Cambridge University Press, 2002. It is reasonable to agree with Bosniak in this context, who cautions against interpreting the proliferation of multiple nationality as ‘postnationality’: the states, however reinvented and stripped of their former exclusivity, are here to stay: Bosniak, Linda, ‘Multiple Nationality and the Postnational Transformation of Citizenship’, 42 *Va. J. Int’l L.*, 2002, 979.

⁹⁴ Brøndsted Sejersen (2008), 524. The signs to this erosion are not only seen in the equality of legally resident foreigners with citizens in the majority of spheres ranging from non-discrimination to social security. Recent decisions of international tribunals also demonstrated that the international human rights protection regime can stand on the way of the use by states of the previously unconditional right to deport

States. Even before the formal introduction of the concept of European citizenship by the Treaty of Maastricht, the likely depth of influence of the European integration project on the nationalities of the Member States was apparent.⁹⁵ It is now getting constantly amplified.

At present, European citizenship grants individuals in possession of this status a constantly growing amount of rights, some of which were previously associated with state nationalities only. These rights touch upon the core of understanding of citizenship, moving a number of areas of regulation previously considered to belong to the vital core of national sovereignty, away from the jurisdiction of the Member States, handling them over to the Community. These rights concern, first of all, the right to enter state territory and the right to remain, accompanied by the right to work, open a business, and bring in your family of any nationality.⁹⁶ A classical understanding of nationality would reserve this block of rights to the nationals only.⁹⁷ Another, equally important right concerns non-discrimination on the basis of nationality within the material scope of application of Community law established by *lex generalis* Article 12 EC and a number of *lex specialis* instruments.⁹⁸ Just as in the case of the previous example, a classical understanding of nationality would reserve these rights to the nationals only.⁹⁹

Article 19 EC establishes the application of the non-discrimination on the basis of nationality logic also within the sphere of political participation rights, providing for rights to vote and run for office for all EU citizens legally resident in the Member States other than their own on the equal basis with the locals.¹⁰⁰ Two levels of political

an alien. See e.g. ECtHR *Beldjoudi v. France* [1992] Appl. No. 12083/86. *Stewart v. Canada*, U.N. Doc. CCPR/C/58D/538/1993. See also Kochenov (2009), 175–181.

⁹⁵ Cansacchi, G., 'La cittadinanza comunitaria e i diritti fondamentali dell'uomo', in *Studi in onore di G. Sperduti*, Milano: Gioffrè, 1984, 435; Evans, Andrew C., 'European Citizenship', 45 *Mod. L. Rev.* 5, 1982, 497; van den Berghe, Guido and Huber, Christian H., 'European Citizenship', in Bieber, Roland and Nickel, Dietmar (eds.), *Das Europa der zweiten Generation: Gedächtnisschrift für Christoph Sasse*, Vol. II, Kehl am Rhein: N.P. Engel Verlag, 1981, 755; Sica, Mario, *Verso la cittadinanza europea*, Florence: Le Monnier, 1979; Lord Mackenzie Stuart, 'Recent Trends in the Decisions of the European Court: Towards the Creation of a Community Citizenship', 21 *J.L. Soc. Scotland*, 1976, 40.

⁹⁶ For a very concise account see Kochenov (2009), 194–197 (and the literature cited therein).

⁹⁷ Sometimes even the nationals do not enjoy such right: Lester, Anthony (Lord Lester of Herne Hill QC), 'East African Asians Versus the United Kingdom: The Inside Story', lecture of 23 October 2003, available at http://www.blackstonechambers.com/pdfFiles/Blackstone_APL_East%20African%20Asians.pdf (last accessed on 14 April 2009).

⁹⁸ E.g. Art. 39(2) EC; Art. 43 EC. For assessment see Davies (2003).

⁹⁹ In line with the traditionalist reading of the scope of Community law entitlements the ECJ refuses to apply Art. 12 EC to third country nationals notwithstanding the non-restrictive wording of the provision. For criticism see Kochenov (2009), 206–209; Boeles, P., 'Europese burgers en derdelanders: Wat betekent het verbod van discriminatie naar nationaliteit sinds Amsterdam?', *Sociaal-economische wetgeving*, no. 12, 2005, 502; Epiney, Astrid, 'The Scope of Article 12 EC: Some Remarks on the Influence of European Citizenship', 13 *Eur. L.J.*, 2007, 611, esp. fn 4 at page 612, listing the recent case-law of the ECJ most relevant for the interpretation of Art. 12 EC.

¹⁰⁰ Kochenov (2009), 197–205; Shaw (2007); Day, Stephen and Shaw, Jo, 'Implementing Union Citizenship: The Case of Alien Suffrage and the European Union', undated conference paper, available at <http://www.arena.uio.no/events/papers/Shaw.pdf>; Zincone, Giovanna and Ardovino, Simona, 'I diritti elettorali dei migranti nello spazio politico e giuridico europeo', 5 *Le Istituzioni del Federalismo*, 2004, 741; Shaw, Jo, 'Alien Suffrage in the European Union', 12 *The Good Society* 2, 2003, 29; Day, Stephen and Shaw, Jo, 'European Union Electoral Rights and the Political Participation of Migrants in Host Policies', 8 *Int. J. Popul. Geogr.*, 2002, 183.

representation are covered: local elections¹⁰¹ and EP elections.¹⁰² The national, most important, level of political representation is a glaring omission in this context.¹⁰³ Providing access to ‘rights conferred by [EC] Treaty’,¹⁰⁴ EU citizenship effectively takes over the vital substance of rights and entitlements popularly associated with nationality. Viewed in this context, Closa’s opinion that ‘citizenship of the Union adds new rights to those enjoyed by nationals from Member States without this implying currently any meaningful derogation of nationality’¹⁰⁵ does not appear to reflect reality any more. While nationalities are still there, the addition of EU citizenship simply dwarfed them in importance.

The possible limitations of EU citizenship rights are interpreted by the ECJ very strictly.¹⁰⁶ Practically speaking, the Member States are not given any possibility to abuse the grounds for derogations provided for in the Treaty.¹⁰⁷ Moreover, even in the situations where the Member States do not rely on derogations, their possibility to undermine the rights of EU citizens are minimised by the ECJ. The Court made it clear that Article 18 EC, granting EU citizens a general free movement right, although allowing for derogations,¹⁰⁸ cannot give rise to secondary legislation which would, if applied strictly, undermine the provision itself.¹⁰⁹ In practice, it means that the Court interprets the relevant secondary law¹¹⁰ constantly keeping in mind the principles established by Part II EC dealing with European citizenship. This approach has resulted in substantial growth in importance of the status of EU citizenship¹¹¹ and limited the

¹⁰¹ Art. 19(1) EC, Directive 94/80/EC, *OJ* L368/38, 1994, as amended. Analyzed by Shaw (2007), 142–153.

¹⁰² Directive 93/109/EC, *OJ* L329/34, 1993.

¹⁰³ For analysis see Kochenov (2009 Maastricht). Evans (1991) has rightly underlined that this state of affairs is not entirely logical, as the national level elections are the most consequential also for the Community legal order, affecting the formation of the Council (at 194).

¹⁰⁴ Art. 17(1) EC.

¹⁰⁵ Closa, Carlos, ‘Citizenship of the Union and Nationality of Member States’, 32 *Common Mrkt. L. Rev.*, 1995, 487.

¹⁰⁶ E.g. Joined cases C-482 and 493/01 *Georgios Orfanopoulos et al. and Raffaele Oliveri v. Land Baden-Württemberg* [2004] ECR I-5257; Case 149/79 *Commission v. Belgium* [1981] ECR 3881.

¹⁰⁷ Arts. 39(3) and (4); 46(1) EC; 55 EC, and the relevant Secondary law. Among the grounds are public policy, security, health and employment in the public sphere.

¹⁰⁸ Art. 18(1) EC. For the assessment of the clause of Art. 18 EC which allows for the limitations of the right see Davies (2003), 188.

¹⁰⁹ E.g. Case C-456/02 *Michel Trojani v. Centre publique de l’aide sociale de Bruxelles (CPAS)* [2004] ECR I-7573; Case C-209/03 *R. (on the application of Danny Bidar) v. London Borough of Ealing, Secretary of State for Education and Skills* [2005] ECR I-2119; Case C-184/99 *Rudy Grzelczyk v. le Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve* [2001] ECR I-6193. See also Gastaldi, Silvia, ‘L’égalité de traitement au service de la citoyenneté européenne’, in Chappuis, Christine, Foëx, Bénédict and Kadner Graziano, Thomas (eds.), *L’harmonisation internationale du droit*, Zürich: Schulthess, 2007, 326, 342–344; de Waele, H., ‘Europees burgerschap en studiefinanciering: Nieuwe rechten, nieuwe beperkingen na het arrest *Bidar*’, *Nederlands tijdschrift voor Europees recht* no. 6, 2005, 122.

¹¹⁰ Esp. Directive 2004/38/EC, *OJ* 158/77, 2004.

¹¹¹ Jacobs, Francis G., ‘Citizenship of the European Union – A Legal Analysis’, 13 *Eur. L.J.*, 2007, 591; Elsmore and Starup (2007), 77–89; Kokott, Juliane, ‘EU Citizenship – *citoyens sans frontières?*’, Durham European Law Lecture, 2005, (available at http://www.dur.ac.uk/resources/deli/annuallecture/2005_DELI_Lecture.pdf, last accessed on 14 April 2009); Hofstötter, Bernhard, ‘A Cascade of Rights, or Who Shall Care for Little Catherine? Some Reflections on the *Chen Case*’, 30 *Eur. L. Rev.* 4, 2005, 548.

Member States' ability to act in the cases when they seemingly 'enforce the law'.¹¹² Consequently, EU citizens cannot be automatically deported from their new Member State of residence upon failing to demonstrate compliance with the provisions of secondary law;¹¹³ the requirement to have sufficient resources is interpreted in such a way that the Member States are not permitted to actually check how much money EU citizens have;¹¹⁴ permanent banishment of an EU citizen from a particular Member State is prohibited.¹¹⁵ What is even more important, once residence in a new Member State is established,¹¹⁶ non-discrimination on the basis of nationality applies to EU citizens even in the cases when they objectively fail to meet the minimal requirements of secondary law necessary to establish residence at the moment of the dispute.¹¹⁷

The pro-citizenship position embraced by the Court ensured that the Member States are not able, legally, to deprive EU citizens of their rights using either Treaty derogations or 'strict application' of secondary Community law as a pretext. The EU citizenship status can even be used against one's own Member State of nationality as the introduction of obstacles to free movement of persons, even non-discriminatory ones, is prohibited in EC law.¹¹⁸ The goal-oriented reading of the relevant Community law instruments prevails. In practice this means that *de jure* free movement right is basically absolute – to depart from it, the Member States need to be able to demonstrate compelling reasons. All this shaped a legal reality where the Member States lost the ability to decide who will reside and work in their territory, who need to be sent away, and – what is probably more painful for some – find themselves in a situation where privileging their own nationals *vis-à-vis* other EU citizens is illegal.

Given the current state of development of the European Union, a question that naturally arises is what is actually left of the nationalities of the Member States? Davies' answer is clear: 'abolished'.¹¹⁹ And this is the right answer. Agreeing with Vink, 'for Union citizens residing in one of the [...] EU Member States it becomes increasingly irrelevant that they are non-citizens or aliens'.¹²⁰ Yet, possession of a particular Member State's nationality can be important for EU citizens on some occasions.

Possession of a particular Member State's nationality has legal consequences for European citizens mostly in three cases. Firstly, and most importantly, it brings with it an

¹¹² As happened in *Bidar* for instance: Case C-209/03 *Bidar* [2005] ECR I-2119.

¹¹³ Case C-408/03 *Commission v. Belgium* [2006] ECR I-2647, para 72.

¹¹⁴ **Case-law on sufficient resources.**

¹¹⁵ Case C-348/96 *Criminal proceedings against Donatella Calfa* [1999] ECR I-11. Obviously, it would have been a clear violation of Art. 12 to allow the banishment, as the Member States are not free to banish their own citizens from their territory.

¹¹⁶ To which end a residence permit is issued which is not strictly necessary, as the right emerges from the EC Treaty directly: Case 157/79 *R. v. Stanislaus Pieck* [1980] ECR 2171; Joined Cases 389 and 390/87 *G.B.C. Echternach and A. Moritz v. Minister van Onderwijs en Wetenschappen* [1990] ECR 723.

¹¹⁷ E.g. Case C-456/02 *Trojani v. CPAS* [2004] ECR I-7573. The Court underlined that to rely on Art. 12 EC a residence permit is enough (para 43).

¹¹⁸ *K. Tas-Hagen en R.A. Tas v. Raadskamer WUBO van de Pensioen- en Uitkeringsraad* [2006] ECR I-10451. Besides, turning EU citizenship against your Member State of nationality is also possible by EU citizens falling within the scope of Community law: Case C-224/98 *Marie-Nathalie D'Hoop v. Office national d'emploi* [2002] ECR I-1691.

¹¹⁹ Davies (2005), 55.

¹²⁰ Vink, Maarten P., 'Limits of European Citizenship: European Integration and Domestic Immigration Policies', *ConWEB* No. 4/2003, 2003, 2.

entitlement to vote and stand for election at the national level of political representation. Secondly, it allows qualifying for the jobs in public service¹²¹ in derogation from the non-discrimination principle of Article 39 EC.¹²² However, the ECJ interprets this derogation narrowly, meaning that the majority of jobs with the state administration at different levels are not reserved to EU citizens possessing particular nationalities.¹²³ Thirdly, the nationality of a particular Member State theoretically provides the owner of this status with unconditional access to the territory of the Member State in question.¹²⁴ The latter is an almost fictitious right at the moment, as the borders between the Member States do not exist for EU citizens and, in the majority of cases, are not present physically either. Adding to the fictitious character of this right, are the obligations assumed by the Member States under the law of the Third Pillar of the EU. Unconditional access to the territory does not mean, for instance, that a territory of a Member State can become safe haven for a national who committed a crime elsewhere in the Union. The European Arrest Warrant¹²⁵ is yet another sign of the general trend towards erosion of nationality in the Community.

Political inclusion at the national level, civil service employment and the unconditional right to cross a non-existent border are positive rights attached to each Member State's nationality. They potentially empower individuals possessing a particular nationality notwithstanding (and obviously in legalised breach of) the equality principle of Article 12 EC and the spirit of the Treaties.

There is also a possible negative side to possessing a particular Member State's nationality. Member States' nationalities have a potential of undermining the rights of their owners. This paradoxical situation is a direct consequence of one of the main functions of Member States' nationality in Community law: Member State nationality has a potential to activate reverse discrimination. Only those in possession of the nationality of the Member State of residence can legally be discriminated against in the Community, as the possession of the status of EU citizen alone is not enough, according to the ECJ, in order to fall within the scope *ratione materiae* of Community law.¹²⁶ Consequently, while discrimination on the basis of nationality is outlawed in the situations covered by the Treaty,¹²⁷ it is legal outside the Treaty's scope even when EU citizens suffer from it.¹²⁸

The Court has done a lot in order to remedy this drawback inherent in the law in force. At present it is not necessary to cross borders any more, for instance, in order to

¹²¹ Art. 39(4) EC.

¹²² Art. 39(2) EC.

¹²³ For analysis see Beenen, Nanda, *Citizenship, Nationality and Access to Public Service Employment*, Groningen: Europa Law, 2001.

¹²⁴ This is so since the Member States cannot apply EC Treaty derogations referring to public health, security and policy to their own citizens exercising free movement rights.

¹²⁵ Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member, OJ L190/1, 2002.

¹²⁶ Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] ECR I-3171, para 23; Case C-148/02 *Garcia Avello* [2003] ECR I-11613: 'citizenship of the Union, established by Article 17 EC, is not intended to extend the material scope of the Treaty to internal situations which have no link with Community law' (para 26).

¹²⁷ Art. 12 EC.

¹²⁸ E. g. Joined cases C-35/82 *Elestina Esselina Christina Morson v. State of the Netherlands and Head of the Plaatselijke Politie within the meaning of the Vreemdelingenwet* and C-36/82 *Sweradje Jhanjan v. The Netherlands* [1982] ECR 3723.

fall within the scope of Community law and thus benefit from the non-discrimination principle.¹²⁹ Possession of second Community nationality helps.¹³⁰

Geelhoed and other eminent scholars argued that little can be done to outlaw reverse discrimination in the wholly internal situations under the present Treaty regime:¹³¹ those in possession of nationality of the Member State of residence are very much likely to be treated worse than other EU citizens residing in the same Member State also in the future. In fact, it seems that the very logic of market integration in the EU contradicts the ideal of equality inherent in the notion of citizenship,¹³² as the non-discrimination principle of Article 12 EC does not have a self-standing value in connection with the status of EU citizenship and has to be ‘activated’ separately from it.¹³³ Davies made a compelling demonstration of the clash between equality and market freedoms using the Services Directive¹³⁴ as a case study.¹³⁵ Regrettably, this clash covers a wide array of other issues too.¹³⁶

Unlike Geelhoed, who simply takes the future legality of reverse discrimination for granted,¹³⁷ a number of scholars moved towards systemic criticism of the current state of affairs in the nationality non-discrimination law in the EU.¹³⁸ The groundbreaking analysis provided by Tryfonidou¹³⁹ makes a simple but powerful point echoing Davies’ plea for equality among EU citizens and the optimistic Opinions written by the Advocates General at the dawn of the citizenship era in Community law.¹⁴⁰ Agreeing with Tryfonidou, it is indeed so that the reverse discrimination concept, pre-citizenship in

¹²⁹ E.g. Case C-403/03 *Egon Schempp v. Finanzamt München V* [2005] ECR I-6421, para 22: ‘the situation of a national of a Member State who ... has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation’; Case C-60/00 *Carpenter* [2002] ECR I-6279.

¹³⁰ Case C-148/02 *Carlos Garcia Avello v. Belgium* [2003] ECR I-11613.

¹³¹ Geelhoed, L.A., ‘De vrijheid van personenverkeer en de interne situatie: maatschappelijke dynamiek en juridische rafels’, in Manunza, Elisabetta and Senden, Linda (eds.), *De EU: De interstatelijkheid voorbij?*, Nijmegen: Wolf Legal Publishers, 2006, 31.

¹³² In general see Chemerinsky, Erwin, ‘In Defence of Equality: A Reply to Professor Westen’, 81 *Mich. L. Rev.*, 1983, 575 (and the literature cited therein). Fr a US perspective: Karst, Kenneth L., ‘The Supreme Court 1976 Term Foreword: Equal Citizenship under the Fourteenth Amendment’, 91 *Harv. L. Rev.*, 1977, 1.

¹³³ Kochenov (2009), 234.

¹³⁴ Directive 2006/123/EC, *OJ* L376/36, 2006. For analysis see Barnard, Catherine, ‘Unravelling the Services Directive’, 45 *Common Mrkt. L. Rev.*, 2008, 323.

¹³⁵ Davies (2007): ‘an individual who is present in the jurisdiction but not subject to its regulation, and operating under a more beneficial regime, is a direct challenge to the content of citizenship – national or European – and its associated guarantees of equality and privilege’ (at 7).

¹³⁶ Kochenov (2009), 234.

¹³⁷ Geelhoed (2006): ‘nee, het ziet er niet naar uit dat de “zuiver interne situatie” in het vrije verkeer van personen haar relevantie zal verliezen’ (p. 47).

¹³⁸ Tryfonidou (2009); Tryfonidou (2008), Nic Shuibhne, Niamh, ‘Free Movement of Persons and the Wholly Internal Rule: Time to Move on?’, 39 *Common Mrkt. L. Rev.*, 2002, 731.

¹³⁹ Tryfonidou (2008), *passim*.

¹⁴⁰ See e.g. Opinion of A. G. Jacobs in Case C-168/91 *Christos Konstantinidis*, [1993] ECR I-1191, para 46; Opinion of A. G. Léger in Case C-214/94 *Boukhalfa v. Bundesrepublik Deutschland* [1996] ECR I-2253, para 63; Opinion of A.G. Ruiz-Jarabo Colomer in Joined Cases C-65&111/95 *The Queen v. Secretary for the Home Department ex parte Shingara and Radiom* [1997] ECR I-3343, para 34. See also Kochenov, Dimitry, ‘European Citizenship Concept and Enlargement of the Union’, 3 *Romanian J. Pol. Sci.*, 2003, 71, 84–85.

nature, simply does not take EU citizenship status as a legally meaningful construct into account. So while serving well in the context of pure economic integration, in the Union of citizens it is entirely out of place. In fact, the application of the concept effectively comes down to punishing those who do not contribute to the internal market – as they and they alone are worse off as a result of its application.¹⁴¹ Once a *Marktbürger* is replaced with a *citoyen* the same logic is not applicable any more. Equality is bound to come to the fore, should we use the term ‘citizenship’ seriously.¹⁴²

Comparing the number of EU citizens who fall within the scope *ratione personae* of Community law with the number of those who do not, the main function of the Member State nationalities in Community law, connected with the activation of reverse discrimination becomes clear (statistically at least). More EU citizens stay in their own Member States, caught by reverse discrimination by virtue of possessing the nationality of that, not some other Member State. This is a high price for the exclusive access to the ballot.

In the context of the legal assessment of the Member States’ nationalities in the light of Community law it should not be forgotten that EU citizenship draws on the nationalities of the Member States as its separate acquisition is impossible.¹⁴³ Precisely because EU citizenship is ultimately a secondary status the power of the Member States is severely weakened, since while each one of them taken separately can have an illusion that it controls access to EU citizenship, taken together they do not, as long as the naturalisation regimes are not harmonised. Huge disparities between the citizenship laws of all the Member States¹⁴⁴ all lead to the acquisition of the same status of European citizenship which, as has been demonstrated above, has effectively overtaken the majority of the main attributes of nationality from the national level.

In a borderless Union it means that twenty seven approaches to acquiring the same status applicable in all the Member States are in existence.¹⁴⁵ In the light of federalism’s potential to enhance human rights,¹⁴⁶ the discrepancy between nationality legislation in different Member States is highly beneficial for those willing to naturalise. Third country nationals are free to choose the Member State where the access to the nationality is framed in the most permissive terms, in order to move to their ‘dream Member State’ later, in their capacity of EU citizens. Obviously, comparing the amount of rights brought by EU citizenship with that brought by the nationality of a particular Member State it becomes clear that at present ‘for third country nationals residing in the EU it is becoming increasingly irrelevant in which Member State to naturalize’.¹⁴⁷ The main status they are likely to benefit from, in any event, will be EU citizenship, not the particular Member State’s nationality.

¹⁴¹ Tryfonou (2008), 54.

¹⁴² Kochenov (2009), 173.

¹⁴³ Art. 17 EC.

¹⁴⁴ For overviews see *e.g.* de Groot and Vink (2008); Liebich (2000); Bauböck, Rainer, Ersbøll, Eva, Groenendijk, Kees and Waldrauch, Harald (eds.), *Acquisition and Loss of Nationality: Policies and Trends in 15 European States: Comparative Analyses* (Vol. I), Amsterdam: Amsterdam University Press, 2006.

¹⁴⁵ Kochenov (2009), 182–186.

¹⁴⁶ *E.g.* Kreimer, Seith F., ‘Federalism and Freedom’, *Annals AAPSS* No. 574, 2001, 66; McDonnel, Michael, ‘Review: Federalism: Evaluating the Founders’ Design’, 54 *U. Chi. L. Rev.*, 1987, 1484, 1494.

¹⁴⁷ Kochenov (2009), 183.

The legal disorder in the EU citizenship law at the moment, which caused by the lack of Community powers to decide by itself who its citizens are is beneficial for both main stake-holders affected. The Member States are happy to pretend that they regulate the issues of access to EU citizenship, while they are not,¹⁴⁸ and the candidates for inclusion benefit from the differences in regulation of the issue of access to nationality existing between the Member States. Almost nobody seems to suffer from this arrangement. Consequently, it seems that the proposals for harmonisation of Community citizenship law¹⁴⁹ that would lead to the effective loss by the Member States of the capacity to regulate access to their nationalities alone seem to be misplaced, as they are likely to lead to stricter regulation on average in the EU-27 compared with that in place in the most liberal Member States.¹⁵⁰

Besides the inability of the Union to deliver on the promise of equality among citizens inherent in the citizenship status there is another problem plaguing the development of EU citizenship at the moment. This problem is directly related to its uniquely *ius tractum* nature. A great number of third country nationals permanently residing in the Community are excluded from this status, creating a situation where the division between those in possession of EU citizenship and third country nationals is by far more important than that between different Member States' nationalities.¹⁵¹ Third country nationals are largely left within the realm of national law of the Member States. For them, borderless internal market is only a myth, as it does not shape their situation directly. Although limited free movement rights are now granted to this category of residents,¹⁵² all in all the gap between the rights of third country nationals and EU citizens (no matter of which nationality) is enormous. They live in the same Union with EU citizens and equally contribute to its flourishing, yet the legal protections applicable to them in Community law are minimal indeed. Clearly 'where the borders between the Member States are non-existent, preserving them on paper exclusively for third country nationals seems not only impractical but also unjust':¹⁵³ the next challenge of Community citizenship law should be the incorporation of this group.

¹⁴⁸ This is so since while each of them individually does not control access to EU citizenship, co-ordination between them on the issues of nationality is also missing. It is likely that even if the Community does not step in, certain co-ordination among the Member States will arise. As early as in 1983 Evans acknowledged that 'harmonisation of the nationality laws of the Member States may ultimately prove necessary': Evans, A.C., 'Nationality Law and the Free Movement of Persons in the EEC: With Special Reference to the British Nationality Act 1981', 2 *Ybk Eur. L.*, 1982, 173, 189; similarly see Blumann, Claude, 'La citoyenneté de l'Union européenne (bientôt dix ans): Espoir et désillusion', in Epping, Volker, Fischer, Horst and Heintschel von Heinegg, Wolff (eds.), *Brücken Bauen und Begehen: Festschrift für Knut Ipsen zum 65 Geburtstag*, München: Verlag C.H. Beck, 2000, 3, 16. Becker suggested 'harmonisation – or even standardization of national citizenship across the European Union': Becker (2004), 159. See also European Parliament's view on this issue: *OJ C260/100*, 1981.

¹⁴⁹ Becker is one of those who recently suggested 'harmonisation – or even standardization of national citizenship across the European Union': Becker, Michael A., 'Managing Diversity in the European Union: Inclusive European Citizenship and Third-Country Nationals', 7 *Yale Hum. Rts. and Dev. L.J.*, 2004, 132, 159.

¹⁵⁰ In one example, it is unlikely that being appointed a full professor at an institution of higher education would be enough to become a citizen (which is the Austrian case) once the laws of the twenty-seven Member States are harmonised: Art. 25(1) of the Austrian Nationality Act, *FLG No. 311/1985*.

¹⁵¹ E.g. Becker (2004) (and literature cited therein).

¹⁵² Art. 14(1), Directive 2003/109/EC, *OJ L16/44*, 2004.

¹⁵³ Kochenov (2009), 236.

This is where certain powers of the Community in the sphere of direct conferral of Community citizenship might be of great assistance. Almost twenty years ago Evans has compellingly argued for ‘desirable relaxation of the link between possession of the nationality of a Member States and enjoyment of citizenship rights in that Member State’.¹⁵⁴ While it is difficult to disagree with this suggestion, it seems that the Member States will need to proceed in this direction very carefully, as full harmonisation would, like Janus, have double-faced consequences – negative ones. Firstly, the easier ways to naturalisation present in the law of some Member States will be liquidated: virtually any harmonisation means application of stricter requirements, as all the Member States come with their own fears and concerns. Secondly, harmonisation would result in nothing short of the *de jure* abolition of Member States’ nationalities. Although *de facto* they are not legally meaningful already, besides granting access to the EU citizenship status, selling such an arrangement to the member states’ populations would be difficult. As often, a mid-way solution could be an option. Imagine EU citizenship which can be acquired by third country nationals meeting certain Community requirements and, equally, by way of possessing a nationality of one of the Member States.

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

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

III. Exchanging European Citizenship for European Citizenship and the Future of Nationality/EU Citizenship Interaction

At least ten out of twenty-seven Member States of the EU demand that EU citizens willing to naturalise there renounce their previous Community nationality. Given that the states’ competence to decide who their citizens are is respected both in international law and in Community law, this requirement seems legal at the first glance. This is so even in the light of the *obiter dictum* in *Micheletti*¹⁵⁵ that decision on nationality should be taken by the Member States with ‘due regard of Community

¹⁵⁴ Evans, Andrew, ‘Nationality Law and European Integration’, 16 *Eur. L. Rev.*, 1991, 190.

¹⁵⁵ Case C-369/90 *Mario Vicente Micheletti et al. v. Delegación del Gobierno en Cantabria* [1992] ECR I-4239.

law’.¹⁵⁶ At a closer look, however, this requirement is both non-sensical and potentially harmful.

The recent developments in the international and European legal climate described in sections I and II *supra* resulted in the reinvention of the legal essence of nationality in terms of merely a procedural connection between the individual in possession of this status and a state. At this point it would be entirely incorrect to interpret nationality as a legal status which is in direct connection with the idea of a ‘nation’ in socio-cultural terms, as liberal democracies have effectively forfeited their ability to promote any ‘thick’ understandings of nationality among both their own citizenry and the new-comers willing naturalise. Indeed, asking of anything more than the embrace of the liberal-democratic ideals on which all the Member States of the Union are officially based – as well as knowledge of the state language for the convenience of the citizens themselves – would be in blunt violation of the liberal essence of contemporary democracies. Unlike a century ago, all the conditions are potentially being created to accommodate diversity among the citizenry, rather than punish those unable to share the majoritarian ideas. The ‘integration’ policies designed by the Member States for the facilitation of the new-comers’ entry into the body of nationals expectedly came to be stripped of any nation-specific features. The accounts of integration policies provided by the Member States themselves make this point quite clear: there are no differences between ‘Danishness’, ‘Britishness’, ‘Frenchness’ etc. And, for the reasons explained above, there cannot possibly be. The similarities are abundant however, as all the requirements which the newcomers are presented with as ‘nation-specific’ are in fact tailored to reflect the liberal nature of contemporary Western democracies. Consequently, substantive differences between any of the nationalities in the EU do not exist (and cannot), as long as nationality is interpreted in the only legally mandated way: as a procedural connection.

While the similarities between the substances of all the Member States’ nationalities in the EU are thus overwhelming, the differences, if at all decipherable, are negligible. This state of affairs is also reflected in EU law, where Article 6(1) EU provides a clear reference to the whole array of legal principles which are ultimately responsible for the erosion of the modern meaning of nationality. Any departure from the liberal principles which are currently shared by the Member States is also likely to be punished with the use of Article 7 EU. In other words, the EU as such is also able to contribute to the preservation of nationality as a purely procedural connection, since an introduction of far-reaching requirements substantively shaping the citizenry, akin to those employed by the *inter-bellum* autocracies or Communist regimes will be in immediate violation of the core principles the Union is built on. Clearly, the Member States are unable to reverse this trend.

The procedural nature of nationality is not the only important factor substantially influencing its substance. The scope of the rights associated with it is another important factor to be taken into account. Once the effects of the European citizenship on the Member States’ nationalities are analysed, the differences between particular Community nationalities become even tinier. In the world outside the EU – at least as far as liberal democratic states are concerned – the thick meaning of nationality has faded away too. Being Canadian is not different from being American or Mexican in this respect. Yet, the

¹⁵⁶ Case C-369/90 *Micheletti et al.* [1992] ECR I-4239, para 10.

scope of the actual rights the enjoyment of which the possession of the status of each particular nationality brings varies to a great extent. In this respect Canadian and Mexican nationalities are certainly very different. The same is impossible in the EU where the principle of non-discrimination on the basis of nationality is the core element of the Community legal order. As has been demonstrated in Part II *supra*, the actual rights specific to any particular Community nationality are not numerous at all. In this context, the status of EU citizenship – not the nationality one of the Member States – comes to the fore as the main generator of rights in the Union. Notwithstanding the fact that EU citizenship is directly rooted in the possession of a Member State’s nationality for Community law purposes, it is not the nationality itself, but the *ius tractum* legal status at Community level that is responsible for the majority of rights enjoyed by the nationals of the Member States in the EU at the moment.

Since all the nationalities of the Member States provide access to the same single status of EU citizenship from which the rights are then derived, the possibility for one Member State to have a ‘better nationality’ as far as the scope of rights enjoyed in connection with it is concerned, is non-existent, legally speaking at least. Consequently, unable to claim any differences in terms of the ‘essence’ of their nationalities, the Member States also lost a possibility to claim any differences in terms of rights their nationalities bring.¹⁵⁷ Treating a Union citizen not in possession of the local nationality worse than the locals is prohibited by Community law.

Ironically, the Member States are still able to treat some individuals in their territory worse than others based on nationality, as the locals not possessing a nationality of some other Member State fall within the shade of reverse discrimination. All in all, while no nationality in the Community can possibly be ‘better’ or more ‘substantive’ than any other, generally, possessing only the nationality of the state of residence can trigger legalised discrimination. Demonstrating the second Community nationality to the authorities in this respect is an easy way out, as the ECJ has demonstrated in *Garcia Avello*.¹⁵⁸

In a situation where the nationalities of the Member States are unable to trigger differentiation between their owners, the requirement to give up one Community nationality upon receiving another largely means an exchange between identical statuses. Since it is EU citizenship, not the Member States’ nationalities themselves, which is responsible for the essence of the Member States’ nationals’ legal status (once again, reverse discrimination remains a notable exception in this context), swapping Member States’ nationalities *de facto* means exchanging EU citizenship status for EU citizenship status. Article 12 EC ensures that any difference in treatment as a result of such swap is prohibited.

Leaving the activation of reverse discrimination and unconditional access to the territory aside, possession of the nationality of a particular Member State brings with it two meaningful rights in the Community: political representation at the national level and

¹⁵⁷ This statement should be qualified with regard to the legal effects of possession of particular Community nationalities outside the EU, EEA and Switzerland. When EU citizens travel in the third countries their Member State nationality, not EU citizenship is the main status affecting the amount of rights they enjoy. Consequently, differences exist between the attractiveness of different Community nationalities, as different visa regimes apply to different EU passports: travelling with on an Estonian passport is much easier, for instance, than on a Greek one.

¹⁵⁸ Case C-148/02 *Carlos Garcia Avello v. État belge* [2003] ECR I-11613..

access to civil service employment. All other things equal, the requirement of renunciation of one's previous Community nationality should be regarded in the context of access to these two rights. Given the procedural nature of Community nationalities as well as the obvious fact that all the Member States already connect the possession of their nationalities with the acceptance of liberal ideology and democracy, human rights and the rule of law ideals, it is clear that no substantial demands can reasonably be addressed to EU citizens in the context of naturalisation in the Member State of residence. Ability to speak a local language seems to be the only possible exception in this regard.

The requirement to give up one's previous nationality is a strong discouraging factor, preventing the naturalisation of long-term residents. This is particularly so given the lack of any possible obvious reasons behind the requirement: in a situation where the bond between the socio-cultural understanding of a nation and nationality as a legal status does not exist any more, and where EU citizenship gains in importance as the main source of rights for all the nationals of the Member States, to ask for renunciation of the previous nationality is meaningless. Those considering naturalisation need to balance the idea of compliance with a meaningless requirement against the prospect of being granted the two rights which are reserved to the nationals.

While the requirement to give up the previous nationality is discouraging, it is often also the *only* factor playing against naturalisation in one's Member State of residence, since language proficiency is usually not a problem upon completion of several years of residence required for naturalisation. Agreeing with Evans,

The potential for Community nationals to acquire the nationality of a second Member State is already considerable. National authorities tend to rely on immigration control in order to limit access to naturalisation. Since beneficiaries of freedom of movement are not subject to such control, many Community nationals must now be in a position to satisfy the residence condition for naturalisation.¹⁵⁹

Keeping the requirement of renunciation of one's previous nationality achieves only one practical goal: to make sure that EU citizens from other Member States are excluded from the franchise at the national level and that they do not occupy high-standing positions in public service. Such motivation hardly contributes to building an ever closer Union between the peoples of the Member States. In fact, it actually seems to contradict the principles of Article 6(1) EC, especially with regard to democracy. By definition 'in order to make representative government function properly, it must be truly representative of all its constituent groups'.¹⁶⁰ EU citizens enter on the basis of Community law and are treated equally with the locals, thus making part of the society of their Member State of residence: the Member State itself can only accept and is unable to change this reality. Blocking access of such people to franchise comes down to refusing to acknowledge the fact that they make part of the people of the Member State.¹⁶¹ All EU citizens residing in a particular Member State, no matter whether nationals or not, fall within the scope of this notion by virtue of being able to elect MEPs and get elected to

¹⁵⁹ Evans (1991), 193.

¹⁶⁰ Hammar (1985), 439.

¹⁶¹ See Art. 189 EC in this context.

the EP themselves on the quota reserved for the ‘people’ of the Member State where they reside.¹⁶²

The same logic should apply to third country nationals too, especially given that, as Lardy has compellingly demonstrated, the arguments for disenfranchising those residents who are not in possession of the nationality of the state where they reside do not exist.¹⁶³ Largely similar observations apply to the right of access to civil service employment. While to presume that non-nationals cannot cope with such jobs since nationality provides one with some new insight is silly, to assume that a Belgian national judge in Luxembourg would abuse her position in the interests of the country of nationality is not smart either. Given that all the Member States embrace the same ideology and are joined in the EU to achieve the same objectives,¹⁶⁴ such a possibility might never arise.

There are more considerations, however, which enable presenting the renunciation requirement in not so attractive a light. Since states are free to establish rules with regard to acquisition and loss of nationality, some of them opted for making their nationalities non-renounceable, as did Greece, for instance. Should a Greek want to naturalise in Latvia, the renunciation requirement will not apply because such renunciation is impossible. This shows that the Member States which require renunciation are *de facto* unable to control the practical functioning of this requirement, adding to its arbitrariness. This consideration is not only valid in the legal context of Community law and potentially can have a negative impact of the naturalised citizens due to the recurrent attempts to exclude dual nationals from political life in the countries where dual nationality is not accepted. Since the countries not allowing for renunciation of their nationality are well known (such as Morocco), in the majority of cases any policies targeting dual nationals come down to petty nationalism, trying to exclude persons belonging to minorities, even after they naturalise in the country, from being fully-fledged citizens of it.

In the light of the considerations restated above, it is impossible to disagree with Evans’ observation that the ‘relaxation of restrictions on possession of dual nationality seems to be demanded by the spirit, if not the letter of Community law’.¹⁶⁵ Ideally, this should not only concern EU citizens, but also third country nationals, who are equally affected by this requirement which makes no sense.

The Member States are in the position to remedy the current problems in three different ways at least. This can be done either by amending national legislation, by concluding an international agreement¹⁶⁶ or by EC Treaty amendment. All the three possible directions will require active participation of all the Member States, which is logical as all the Member States are potentially affected by any change of naturalisation regimes in the law of their peers. Even those Member States which do not have, or do not enforce the renunciation requirement¹⁶⁷ potentially have a direct interest in its abolition elsewhere, as it directly affects the access of their nationals to political participation in

¹⁶² As established by Art. 190(2) EC

¹⁶³ Lardy

¹⁶⁴ Art. 2 EC; Art. 2 EU.

¹⁶⁵ Evans (1991), 196. See also EP Resolution of May 9, 1985, *OJ C*141/467, 1985

¹⁶⁶ Evans (1991), 193.

¹⁶⁷ As is the case in Spain: de Groot and Vink (2008), 77.

the Member States where they reside. Also the Union's interest in abolition of the renunciation requirements in the Member States should presumably be strong, as such a move would reconfirm the bonds of the Union existing between the Member States and the importance of the status of EU citizenship.

The first and most obvious way to improve the current state of affairs in the inter-Member State naturalisations of EU citizens in the Community is exclusively related to the removal of nonsense requirements from the naturalisation legislation of the Member States by the Member States themselves.¹⁶⁸ The requirement of renunciation of one's previous nationality is the first candidate for removal. In fact, there is a decipherable trend in the naturalisation legislation of the Member States, demonstrating the fading of the popularity of this requirement in the recent decades, as more and more Member States abolish it.¹⁶⁹ Given that, as demonstrated above, this requirement is often the only deterring factor preventing EU citizens from naturalising in their new Member State of residence, the practical consequences of its abolition will increase EU citizens' ability to demand full inclusion in their Member States of residence on genuinely and absolutely equal terms with the locals.

A distinction between two possible approaches to the abolition of the denunciation requirement in the national law of the Member States can be made. Such abolition can apply either to all or only to non-Community nationalities (which is the current German practice). It seems that the latter approach is not at all wise, as by lifting the requirement for the Community nationalities only the Member States are only likely to underline the requirement's illogical nature. Given the lack of principle difference between Community nationalities such a requirement can also be presented as cynical, as the rights of those not in possession of EU citizenship are very much dependent on the prospect of acquiring the latter status, especially given that the gap between the rights of EU citizens and third country nationals in the EU is short of unbridgeable. On the other hand, such a half-way solution can be easier to sell in the Member States which are particularly outdated in their thinking about nationality, citizenship and belonging. It is thus not surprising that Germany adopted precisely this approach.

What is much more important in connection with the German choice, is that it seems to be starting a potentially far-reaching trend in the approaches to nationality in the Member States which is likely to have deep effect on the status of EU citizenship. This trend, to which Italian and Austrian naturalisation requirements equally testify, consists in adopting generally different naturalisation requirements for EU citizens and third country nationals. While it is likely to contribute to the deepening of the legal gap dividing the EU citizens and long term resident third country nationals in the Community, it also signals the rising importance of the distinction between EU citizenship and Member State nationalities. When stricter requirements apply at naturalisation in a Member State to third country nationals only, not to EU citizens, it means that the law on naturalisation evolves towards having two different procedures in place: one designed to become an EU citizen, another, merely a Member State national. This is a logical development in the light of the general convergence of the substance of Community nationalities described above. Observing the current limited moves in this direction big

¹⁶⁸ An obvious alternative, within the same vein is for all the Member States to make their nationalities undenounceable, at least in the cases where their nationals naturalise in other EU Member States.

¹⁶⁹ de Groot and Vink (2008) pppp.

changes in the dynamics of interaction between EU citizenship and Member States' nationalities can be predicted: the legal detachment of the two is on the way, contributing to the importance of the EU citizenship status which the current naturalisation law in the majority of the Member States fails to acknowledge.

While the approach described above can be branded as a Member States-dominated 'bottom – up' change, two other approaches worth mentioning here are more Communitarian in nature.

So the second possible way to deal with the problems of inter-Member State naturalisations of EU citizens in the European Union is not concerned with the naturalisations as such, but with the problems, which such naturalisations are intended to solve. Since naturalisation in the Member State of residence ultimately means access to civil service employment and political participation at the national level in that Member State, amending the EC Treaty with a view to including these rights among EU citizenship rights is actually the most logical way to solve the problems of those EU citizens who are not granted access to these rights since they are deterred from naturalising in the Member State of residence. It is clear that including these rights among EU citizenship rights will annihilate Member States nationalities as legally meaningful concepts.

Middle-house solutions are also possible. The rights which are currently specific to Member States' nationalities can be granted upon meeting a certain residency requirement for instance, introducing a different approach compared with a virtually unconditional non-discrimination right of Article 19 EC.¹⁷⁰

Whatever option is chosen, ultimately, there will remain no possible need for EU citizens to naturalise in their new Member State of residence as such naturalisations will not be bringing them any rights besides those which they already enjoy in their capacity of EU citizens – a direct parallel with the possession of a residence permit in a Member State other than your own can be made.¹⁷¹ while it is probably nice to have it, it does not *per se* grant you any rights. Such development, should Community law move in this direction, can only be welcomed. While there are no losers as a result of such change, since EU citizenship and EC non-discrimination has already successfully challenged any meaningful content of Member States' nationalities, all the EU citizens exercising their free movement rights are likely to be better off.

A somewhat more 'extreme' (from the national sovereign perspective) option is directly connected with the death of nationalities in the EU. Once political participation at the national level and access to civil service employment both become EU citizenship rights attached to the residence of the persons concerned, it makes little sense legally to refer to such persons by underlining their connection with the initial Member State of nationality. Once it is supplanted by residence as a requirement initiating access to full rights in the new Member State, the use of nationality even in the formal legal sense would not have any added value any more, following the approach to citizenship/nationality adopted in the majority of the world's federations. Born as a citizen of Kentucky the US citizen moving to California effectively becomes a citizen of California, as the legal connection with Kentucky, meaningful as long as the citizen

¹⁷⁰ Exceptions under the Directive, literature

¹⁷¹ Evans (1991), 194.

resides their, evaporates with the change of residence.¹⁷² Although this might sound like fantasizing in the EU context, the Union is actually quite close to such reinvention of citizenship. However unlikely, it does not seem unthinkable anymore.

The ways of shaping the legal-political realities described in each of the scenarios vary. The first scenario requires either the amendment of the law of the Member States alone, or an amendment of the law of the Member States accompanied by an international agreement between them which would specify that renunciation requirements (as well as other outright unreasonable obstacles on the way of EU citizens' naturalisation in the Member States of residence) should be prohibited. The second and the third scenarios will without any doubt require EC Treaty amendment. The potentially far-reaching nature of the third scenario would also require an overwhelming reshuffling of national law of all the Member States.

Abolition of Nationalities – To Be Continued (As a Conclusion)

There is no reason to believe that the process of legal marginalisation of the nationalities of the Member States in the EU will stop or be reversed. The contrary seems more likely – the dynamics of legal marginalisation of nationalities is likely to intensify in the near future, as it will be clearer for the Member States authorities and for the EU citizens alike, that the status provided by the Community is potentially and also practically more important for all the individuals in possession of it, than any Member State nationality as such. Whether or not the Member State nationality will survive as a legal status connecting individuals and the European Community, it will certainly mutate to a considerable extent under the international pressures of human rights and liberalism and the Community pressures of the internal market and non-discrimination on the basis of nationality. The result of this mutation will necessarily be a legal status which is substantially different from the nationalities of the Member States today, as it is bound to become more aware of its own limitations. This reinvention of nationality will necessarily result in critical scrutiny of all its attributes which are taken for granted in the law of the Member States today. Irrelevant and antiquarian requirements of naturalisation, for instance, will be bound to go no matter which scenario of future development of nationality is to become operational.

The most imminent development to come is the parting of ways of access to Community nationality and EU citizenship. Those in possession of EU citizenship already are likely to be included much easier compared the third country nationals, who once again, risk to remain excluded. The parting of ways of naturalisation depending on which status is to be acquired – EU citizenship (together with a Member State's nationality) or only a nationality of a Member State, will intensify the binary dynamic of citizenship development outlined by Joppke. Nationalities of the Member States are likely to be de-ethnicised faster upon the introduction of simpler naturalisation requirements for EU citizens in the growing number of Member States. Re-ethnicisation will soon follow in compensation, contributing to the further deterritorialisation of the Member States. With the increase in intensity of de- and re-ethnicisation the ultimate

¹⁷² US literature, Strumia, van der Mei

legal meaning of the Member States' nationalities will be fading away next to the status of EU citizenship. In this context the wholly internal situations will have to be dealt with, depriving the Member State nationalities of one of their most important functions and increasing the rights of EU citizens.

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

In a situation when nationalities are likely to play a merely symbolic role, the likelihood of the proliferation of petty nationalism will be increasing as the discovery that something the majorities in each Member State believe in means virtually nothing and is bound to go and never to come back is certainly a loss, even if an ephemeral one. The Community can moan together with its citizens¹⁷³ and move on.

¹⁷³ Davies, Time to Moan