

# Double Nationality in the EU: An Argument for Tolerance

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**Abstract:** 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the requirement to have only one Member State's nationality enforced in national law by ten Member States seems totally outdated and misplaced. This paper focuses on the legal analysis of this controversial requirement.

## I. Introduction

Giving up your previous nationality is an imperative part of the naturalization procedure in ten Member States of the European Union (EU).<sup>1</sup> While justifiable

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<sup>1</sup> These are The Czech Republic, Denmark, Estonia, Hungary, Latvia, Lithuania, The Netherlands, Poland, Slovakia, Slovenia. See the materials available at the EUDO citizenship project page, including detailed country by country reports: <<http://eudo-citizenship.eu/>>. See also Gerard-René de Groot, and Maarten Vink, *Meervoudige nationaliteit in Europees perspectief: Een landenvergelijkend overzicht* (Adviescommissie voor Vreemdelingenzaken, 2008); Maarten Vink and Gerard-René de

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.<sup>2</sup> Assessment of the requirement to give up one's previous Member State nationality when naturalizing in the Member State of residence in the light of the growing importance of European Citizenship provides an excellent context to address a broader issue of EU citizenship – Member State nationalities interaction.<sup>3</sup>

Building on the fast-growing literature analyzing citizenship in the context of globalization,<sup>4</sup> this article will place the requirement of renunciation of the original nationality in the general context of the weakening of the legal meaning of 'thick' understandings of nationality, which amplifies the nonsensical nature of the requirement in question. Addressing the problems inherent in the renunciation requirement, this paper will illustrate the general process of the rise to prominence of EU citizenship and the relative decline in importance of the nationalities of the Member States, which is likely to change Europe fundamentally in the near future. It is high time to acknowledge, fully, that 'single market [has] an effect on the lives of the people',<sup>5</sup> and try to solve the problems arising in this context in a just and fair manner.

The requirement to give up previous Member State's 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 EU citizens benefitting from virtually all other nationality rights on equal footing with

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Groot, 'Citizenship Attribution in Western Europe: International Framework and Domestic Trends', forthcoming in (2010) *Journal of Ethnic & Migration Studies* (for an overview of citizenship laws in Western European states). André Liebich, 'Plural Citizenship in Post-Communist States', (2000) 12 *International Journal of Refugee Law* 97 (for an overview of the situation in Eastern Europe). On the general context of dual nationality in the EU see Marc Morjé Howard, 'Variation in Dual Citizenship Policies in the Countries of the EU', (2005) 39 *International Migration Review* 697, esp. Table 4, at 713. Virtually in all the countries listed certain exceptions apply, providing fractions of newly-naturalised citizens with a possibility to retain their previous nationality.

<sup>2</sup> This article thus sides with Evans in condemning this requirement: Andrew Evans, 'Nationality Law and European Integration', (1991) 16 *European Law Review* 190, at 193. It is surprising that this important issue has received so little scholarly attention in the recent decades.

<sup>3</sup> For analysis see Dimitry Kochenov, 'Rounding up the Circle: The Mutation of Member States' Nationalities under Pressure from EU Citizenship', (2010) Robert Schuman Centre for Advanced Studies Working Paper RSCAS 2010/23.

<sup>4</sup> Linda Bosniak, 'Citizenship Denationalized', (2000) 7 *Indiana Journal of Global Legal Studies* 447. See also Mikko Kuisma, 'Rights or Privileges? The Challenge of Globalization to the Values of Citizenship', (2008) 12 *Citizenship Studies* 613; Martin Wolf, 'Will the Nation-State Survive Globalization?', (2001) 81 *Foreign Affairs* 178; Kim Rubinstein and Daniel Adler, 'International Citizenship: The Future of Nationality in a Globalised World', (2000) 7 *Indiana Journal of Global Legal Studies* 519; Ronnie D. Lipschutz, 'Members Only? Citizenship and Civic Virtue in a Time of Globalization', (1999) 36 *International Politics* 203.

<sup>5</sup> Gordon Slynn, *Introducing a European Legal Order* (Stevens and Sons and Maxwell, 1992) 85.

those EU citizens who possess the local nationality. While this requirement has an obvious deterrent effect on the naturalization,<sup>6</sup> it also fails to achieve any identifiable goals. 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: the Member States and the Court of Justice (ECJ) acting together with other Institutions of the EU gave EU citizenship a clear and identifiable scope.<sup>7</sup> This status is usable in practice, changing the legal situation of the individual in possession of it.

In the light of these considerations, the legislation of the Member States requiring the denunciation of the previous Member State’s nationality at naturalization 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 EU’s intervention – as it is potentially not empowered to act in this field<sup>8</sup> – more and more Member States keeping the requirement on the books will either abolish this requirement altogether, or follow the German<sup>9</sup> and Slovenian<sup>10</sup> example, applying the renunciation requirement to third countries’ nationalities only.

The main aim of this article consists not so much in finding the legal ways to outlaw the requirement to give up previous Member State’s nationality upon

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<sup>6</sup> Ruth Rubio-Marín, ‘Transnational Politics and the Democratic Nation-State: Normative Challenges of Expatriate Voting and Nationality Retention of Emigrants’, (2006) 81 *NYU Law Review* 117, at 138. There is a general consensus in the literature that the requirement to give up previous nationality at naturalisation is an important disincentive.

<sup>7</sup> For a very informative analysis of this process see Gareth Davies, ‘EU Citizenship’, in Damian Chalmers, Gareth Davies and Georgio Monti, *European Union Law: Text and Materials* (Cambridge University Press, 2010), 439; Dimitry Kochenov, ‘*Ius Tractum* of Many Faces: European Citizenship and a Difficult Relationship between Status and Rights’, (2009) 15 *Columbia Journal of European Law* 169, at 193; Dora Kostakopoulou, ‘Ideas, Norms and European Citizenship: Explaining Institutional Change’, (2005) 68 *Modern Law Review* 233, at 244–261. See also Matthew J. Elsmore and Peter Starup, ‘Union Citizenship – Background, Jurisprudence, and Perspective: The Past, Present, and Future of Law and Policy’, (2007) 26 *Yearbook of European Law* 57; Francis G. Jacobs, ‘Citizenship of the European Union – A Legal Analysis’, (2007) 13 *European Law Journal* 591; Stefan Kadelbach, ‘Union Citizenship’, in Armin von Bogdandy and Jürgen Bast (eds.), *Principles of European Constitutional Law*, (Hart, 2006), 453; Anne Pieter van der Mei, ‘Union Citizenship and the “De-Nationalisation” of the Territorial Welfare State’, (2005) 7 *European Journal of Migration and Law* 210.

<sup>8</sup> See eg Opinion of Poiares Maduro, AG in Case C-135/08 *Janko Rottmann v. Freistaat Bayern* [2009] ECR 0000, para 17: ‘la détermination des conditions d’acquisition et de perte de la nationalité, – et donc de la citoyenneté de l’Union –, relève de la compétence exclusive des États membres’.

<sup>9</sup> de Groot and Vink, *Meervoudige nationaliteit in Europees perspectief*, *op cit* n 1 *supra*, at 73–75.

<sup>10</sup> Felicita Medved, ‘Country Report: Slovenia’, (2009) EUDO Citizenship Observatory RSCAS Paper, 12. Unlike Germany, Slovenia only waives the requirement for EU citizens only in cases of reciprocity.

naturalizing in the new Member State of residence, as in demonstrating the outdated logic underlying it, as well its harmful effects.<sup>11</sup> 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 EU citizenship as a result of military or civil service abroad,<sup>12</sup> automatic loss of your nationality, *ex lege*, upon naturalization abroad,<sup>13</sup> or long-term residence abroad (coupled with the possession of other nationality)<sup>14</sup> to name just a few.<sup>15</sup> 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 of residence.<sup>16</sup> The analysis of the denunciation requirement contained *infra* should thus be viewed as a starting point for tackling a broader array of issues pertaining to the interaction between Member States' nationalities and European citizenship in the EU.

The paper is structured as follows. Upon providing a short outline of the recent developments which led to the toleration of multiple nationalities by the majority of liberal-democratic jurisdictions in the world (II.) it provides an overview of EU citizenship's influence on the nationalities of the Member States

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<sup>11</sup> On the legal analysis of dual nationality see Alfred M. Boll, *Multiple Nationality and International Law*, (Martinus Nijhoff, 2007); Thomas Faist and Peter Kivisto (eds.), *Dual Citizenship in Global Perspective*, (Palgrave, 2007); Randall Hansen and Patrick Weil (eds.), *Dual Nationality, Social Rights and Federal Citizenship in the U.S. and Europe*, (Randall Books, 2002); David A. Martin, 'New Rules on Dual Nationality for a Democratizing Globe: Between Rejection and Embrace', (1999) 14 *Georgia Immigration. Law Journal* 1; Peter J. Spiro, 'Dual Nationality and the Meaning of Citizenship', (1997) 46 *Emory Law Journal* 1411; Linda Bosniak, 'Multiple Nationality and the Postnational Transformation of Citizenship', (2002) 42 *Virginia Journal of International Law* 979.

<sup>12</sup> For an overview in the context of West European countries see de Groot and Vink, *Meervoudige nationaliteit in Europees perspectief, op cit n 1 supra*, at 94–97.

<sup>13</sup> 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, *Meervoudige nationaliteit in Europees perspectief, op cit n 1 supra*, 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.

<sup>14</sup> For analysis see de Groot and Vink, *Meervoudige nationaliteit in Europees perspectief, op cit n 1 supra*, at 89–94. In the majority of cases such loss of nationality is not automatic. See for the analysis in the context of EU law Evans, 'Nationality Law and European Integration', *op cit n 2 supra*, at 190.

<sup>15</sup> For analysis see Gerard-René de Groot, 'Towards a European Nationality Law', (2004) 8 *European Journal of Constitutional Law* 1; Evans 'Nationality Law and European Integration', *op cit n 2 supra*. See also Stephen Hall, 'Loss of Union Citizenship in Breach of Fundamental Rights', (1996) 21 *European Law Review* 129.

<sup>16</sup> For analysis see Dimitry Kochenov, 'Free Movement and Participation in the Parliamentary Elections in the Member State of Nationality: An Ignored Link?', (2009) 16 *Maastricht Journal of European & Comparative Law* 197.

(III.) to apply the findings of these two sections to the analysis of the functioning of the denunciation requirement in the context of European integration also taking the legal position of third country nationals into account (IV.). The section that follows outlines the ways to deal with the negative consequences of the application of the denunciation requirement in EU context (V.). The paper concludes that the denunciation requirement has no future in the EU.

## II. From Insoluble Allegiance to Multiple Nationality Toleration

In the words of Bancroft, writing a century and a half ago, one should ‘as soon tolerate a man with two wives as a man with two countries: as soon bear with polygamy as that state of double allegiance which common sense so repudiates that it has not even coined a word to express it’.<sup>17</sup> Back then, ties with a state were seen as absolutely exclusive, and international law reflected this belief.<sup>18</sup> Dual citizens or those who changed their nationality were regarded with suspicion as potential traitors<sup>19</sup> and saw their rights limited compared with ‘natural born’ citizens.<sup>20</sup>

International law generally left it up to the states to decide on the issues of nationality,<sup>21</sup> and concentrated on combating double nationality.<sup>22</sup> This amplified

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<sup>17</sup> George Bancroft, ‘Letter to Lord Palmerson, 26 January 1849’, reprinted in *Sen. Ex. Docs.* 38, 36<sup>th</sup> Congress, 1<sup>st</sup> Session, 1950, as cited in Howard, ‘Variation in Dual Citizenship Policies in the Countries of the EU’, *op cit n 1 supra*, at 700.

<sup>18</sup> For the analysis see Nissim Bar-Yaacov, *Dual Nationality*, (Stevens and Sons, 1961). Bar-Yaacov opined that ‘dual nationality is an undesirable phenomenon detrimental both to the friendly relations between nations and the well-being of individuals concerned’ (at 4). Nothing could be less true today.

<sup>19</sup> 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.

<sup>20</sup> The remnants of this rule are still the law in a number of countries where citizenship by naturalisation brings with it fewer rights than citizenship by birth. So naturalised US citizens cannot run for the office of the President (US Constitution, Art. II) and naturalised Spaniards cannot act in the capacity of King’s tutor (Spanish Constitution, Art. 60.1.). For analysis of the US situation see eg Sarah P. Herlihy, ‘Amending the Natural Born Citizen Requirement: Globalization as the Impetus and the Obstacle’, (2006) 81 *Chicago-Kent Law Review* 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.

<sup>21</sup> The 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (L.N. Doc. C 24 M. 13.1931.V.), is unequivocally clear on this issue: ‘it is for each state to determine under its own law who are its nationals’ (Art. 1). Art. 2 stipulates that ‘Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with

the romantic vision of a state as a cradle of a nation to which individuals belonged due to ‘blood ties’,<sup>23</sup> thus taking a legal fiction very seriously.<sup>24</sup> The main activity of modern states<sup>25</sup> became confined to homogenising, linguistically,<sup>26</sup> culturally,<sup>27</sup> and otherwise, the imagined communities.<sup>28</sup>

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. Post WW II developments leading to the rise of international migration, as well as international marriages producing children directly disproving the dogma of unitary identities and exclusive nationhood,<sup>29</sup> coupled

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<sup>22</sup> Eg 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 LNTS 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* Johannes M. M. Chan, ‘The Right to a Nationality as a Human Right: The Current Trend towards Recognition’, (1991) 12 *Human Rights Law Journal* 1, at 2 et seq, who is critical of the international legal developments in this area.

<sup>23</sup> 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: Christian Joppke, ‘Citizenship between De- and Re-Ethnicization (I)’, (2003) 44 *Archive européenne de sociologie*, 436, at 436.

<sup>24</sup> Weil has compellingly demonstrated that nationality laws have nothing to do with the reflection of a concept of a nation: Patrick Weil, *Qu’est-ce qu’un Français?* (Grasset, 2002).

<sup>25</sup> Hereafter ‘modern’ is used in its historical sense, not to be confused with ‘contemporary’.

<sup>26</sup> Linguistic homogeneity of the majority of states regarded by many as natural is a very recent product of state-building efforts. Eg Umberto Eco, *La ricerca della lingua perfetta nella cultura europea*, (Laterza, 1993), at 9.

<sup>27</sup> James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, (Cambridge University Press, 1995), at 87: ‘Most of the modern theorists did not believe that cultural diversity would disappear solely by the unintended consequences of progress. They also held that it is the duty of a modern constitutional government to assist the process with an unhidden hand and ensure in practice the consequences they predicted in theory’.

<sup>28</sup> Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (2<sup>nd</sup> ed.) (Verso, 1991). See also Anthony D. Smith, *The Ethnic Origin of Nations* (Oxford University Press, 1986).

<sup>29</sup> 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 Carlos A. Ball, ‘The Blurring of the Lines: Children and Bans on Interracial Unions and Same-Sex Marriages’, (2008) 76 *Fordham Law Review* 2733. Ball writes: ‘one of the reasons why same-sex marriage is so threatening to so many is

with the global rise of human rights and liberalism<sup>30</sup> made it impossible for states to remain as they were.<sup>31</sup> The states' very authority over the nations came to be undermined, as state- and nation-building parted ways.<sup>32</sup> 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.<sup>33</sup> 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. It is true, that 'societies that lack or suppress [...] other affiliations, allowing only allegiance to the nation-state, are rightly condemned as totalitarian'.<sup>34</sup>

Relying on Habermas<sup>35</sup> and Rawls,<sup>36</sup> Joppke sketches the essence of this transformation in the following way: 'in a liberal society the ties that bind can only

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that the raising of children by same-sex couples blurs the boundaries of seemingly preexisting and static sex/gender categories in the same way that the progeny of interracial unions blur seemingly preexisting and static racial categories' (at 2735). Just in the same vein, the existence of dual nationals undermines the 'natural' division of the world into nations and states.

<sup>30</sup> John Rawls, *Political Liberalism* (Columbia University Press, 1993); M. Sandel, 'Review of Political Liberalism', (1994) 107 *Harvard Law Review* 1765. Joppke provides an excellent summary of the idea applying it to the context of nationality: Christian Joppke, 'Immigration and the Identity of Citizenship: The Paradox of Universalism', (2008) 12 *Citizenship Studies*, 533, at 534–536.

<sup>31</sup> Chan, 'The Right to a Nationality as a Human Right: The Current Trend towards Recognition', *op cit n 22 supra*, at 8. For the accounts of this transformation see eg Tanja Brøndsted Sejersen, "'I Vow to Thee My Countries'" – The Expansion of Dual Citizenship in the 21<sup>st</sup> Century', (2008) 42 *International Migration Review* 523; Saskia Sassen, 'The Repositioning of Citizenship and Alienage: Emergent Subjects and Spaces for Politics', in Michal Y. Bodeman, and Gökçe Yurdakul (eds.), *Migration, Citizenship, Ethnos* (Palgrave Macmillan, 2006), at 13; Howard, 'Variation in Dual Citizenship Policies in the Countries of the EU', *op cit n 1 supra*, at 700 et seq; Randall Hansen and Patrick Weil, 'Dual Citizenship in the Changed World: Immigration, Gender and Social Rights', in Randall Hansen and Patrick Weil (eds.), *Dual Nationality, Social Rights and Federal Citizenship in the U.S. and Europe* (Berghahn Books, 2002), at 1; Aristide R. Zolberg, 'The Dawn of Cosmopolitan Denizenship', (2000) 7 *Indiana Journal of Global Legal Studies* 511; Kim Rubinstein, 'Citizenship in a Borderless World', in Antony Angie and Garry Sturgess (eds.), *Legal Visions of the 21<sup>st</sup> Century: Essays in Honour of Judge Christopher Weeramantry* (Kluwer Law International, 1998), at 183.

<sup>32</sup> See Richard Falk, 'The Decline of Citizenship in an Era of Globalization', (2000) 4 *Citizenship Studies*, 5.

<sup>33</sup> Joppke, 'Immigration and the Identity of Citizenship', *op cit n 30 supra* at 534; Joppke, 'Citizenship between De- and Re-Ethnicisation (I)', *op cit n 23 supra* at 437.

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

<sup>35</sup> Jürgen Habermas, 'Geschichtsbewusstsein und posttraditionale Identität', in Jürgen Habermas, *Eine Art Schadensabwicklung* (Suhrkamp, 1987).

<sup>36</sup> Rawls, *Political Liberalism*, *op cit n 30 supra*; John Rawls, 'The Idea of an Overlapping Consensus', (1987) 7 *Oxford Journal of Legal Studies* 1.

be thin and procedural, not thick and substantive. Otherwise individuals could not be free'.<sup>37</sup> Nationality as such came to be stripped of any substantive elements, 'good' or 'bad'.<sup>38</sup>

As long as the state-espoused view that a citizen should be either a hard-working member of the 'Socialist community',<sup>39</sup> or a person 'of German or kindred blood',<sup>40</sup> or must genuinely believe in the liberal Constitution,<sup>41</sup> became impossible, nationality itself has no ethno-cultural component to it any more, at least not legally speaking. It has been reinvented in a procedural vein, becoming merely a '*Kopplungsbegriff*'<sup>42</sup> connecting a state and a person.

Consequently, 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, legally speaking, as differences between 'Britishness', 'Frenchness', 'Danishness' etc.,<sup>43</sup> as 'the national particularisms which immigrants and ethnic minorities are asked to accept across European states, are but local versions of the universalistic idiom of liberal democracy'.<sup>44</sup>

As a merely procedural connection, nationality 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

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<sup>37</sup> Joppke, 'Immigration and the Identity of Citizenship', *op cit* n 30 *supra* at 535.

<sup>38</sup> 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 Katharine Betts, Katharine, 'Democracy and Dual Citizenship', (2002) 10 *People and Place* 57.

<sup>39</sup> Communist dictatorships remained faithful to a 'thick' substantive idea of citizenship until the last days of their existence. The Constitution of the USSR of 1977 listed 'vospitanie cheloveka kommunisticheskogo obshchestva' [molding the men of Communist society] as its main fundamental goal (Preamble). See also Eley Geoff and Jan Palmowski, *Citizenship and National Identity in Twentieth-Century Germany*, (Stanford University Press, 2008), at 89. Interestingly, leaving your work-place early or littering in the park could be regarded as acts of dissent, as they contradicted the citizenship ideal espoused by the regime.

<sup>40</sup> Art. 2(1), The Reich Citizenship Law of September 15, 1935, available at <<http://frank.mtsu.edu/~baustin/nurmlaw2.html>>.

<sup>41</sup> The German Federal Constitutional Court ruled that citizens are 'legally not required to personally share the values of the Constitution': Joppke, 'Immigration and the Identity of Citizenship', *op cit* n 30 *supra* at 542. To find otherwise would be in contradiction with the very rationale of a contemporary liberal state.

<sup>42</sup> Gérard-Réne de Groot, *Staatsangehörigkeitsrecht im Wandel* (Carl Heymanns Verlag, 1989), at 5 (as quoted in Joppke, 'Citizenship between De- and Re-Ethnicisation (I)', *op cit* n 23 *supra* at 433). See also Aleksander Makarov, *Allgemeine Lehren des Staatsangehörigkeitsrechts* (Kohlhammer, 1947).

<sup>43</sup> Joppke, 'Immigration and the Identity of Citizenship', *op cit* n 30 *supra* at 536–542.

<sup>44</sup> *ibid.*, at 541.



state essentially is'.<sup>45</sup> According to Joppke, the mutation of nationality consists in simultaneous de- and re-ethnicization<sup>46</sup> and is thus directly rooted in the binary nature of states: both territorial and *Volk*-based units.

De-ethnicisation refers to the acceptance of naturalisation and immigration which are not based on the idea of assimilation,<sup>47</sup> resulting in the proliferation of diverse ethnic and cultural communities within states – a situation impossible in the modern world of homogeneous nations.<sup>48</sup> Re-ethnicisation 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',<sup>49</sup> and, naturally, of states.

A truly 'veranderde omgeving'<sup>50</sup> 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.<sup>51</sup> Multiple nationality became 'the norm rather than exception'.<sup>52</sup>

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),<sup>53</sup> which followed the old, now obsolete consensus, as follows

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<sup>45</sup> Joppke, 'Citizenship between De- and Re-Ethnicisation (I)', *op cit* n 23 *supra* at 431.

<sup>46</sup> *ibid.*, at 430.

<sup>47</sup> France is the only Western democracy keeping a reference to assimilation on the books: Joppke, 'Citizenship between De- and Re-Ethnicisation (I)', *op cit* n 23 *supra* at 440. See also Paul Lagarde, *La nationalité française* (Dalloz, 1997), at 131.

<sup>48</sup> In Europe, even Turkey and Germany are leaning towards being less archaic in this regard.

<sup>49</sup> Council of Europe, 'Links between Europeans Living abroad and Their Countries of Origin', Doc. 8339, 1999, at 30.

<sup>50</sup> de Groot and Vink, *Meervoudige nationaliteit in Europees perspectief*, *op cit* n 1 *supra*, at 35.

<sup>51</sup> Also in the EU the majority of the Member States allow double nationality: de Groot, and Vink, *Meervoudige nationaliteit in Europees perspectief*, *op cit* n 1 *supra*, esp. Table 3.5 at 72; Enikő Horváth, *Mandating Identity: Citizenship, Kinship Laws and Plural Nationality in the European Union* (Kluwer Law International, 2008), Table 1 at 240, 241; Elisa Pérez Vera, 'Citoyenneté de l'Union européenne, nationalité et condition des étrangers', in *Recueil des cours: Collected Courses of The Hague Academy of International Law* (Martinus Nijhoff, 1996), at 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, "I Vow to Thee My Countries" – The Expansion of Dual Citizenship in the 21<sup>st</sup> Century', *op cit* n 31 *supra*, esp. Figure 1 at 531 (analyzing the law of 115 countries).

<sup>52</sup> Boll, *Multiple Nationality and International Law*, *op cit* n 11 *supra*, at xviii.

<sup>53</sup> ETS No. 43, 1963. Analysed by de Groot and Vink, *Meervoudige nationaliteit in Europees perspectief*, *op cit* n 1 *supra*, at 24–27.

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.<sup>54</sup> The same permissive liberal trend is to be found in the Council of Europe's Convention on Nationality of 1997.<sup>55</sup> Indeed, agreeing with Jessurun d'Oliveira, it is clear that 'being coerced to retain only a single nationality is [in]compatible with liberal principles'.<sup>56</sup>

With the growth of international migration in the liberal context where states are bound to exercise self-restraint in nation-building, it became apparent that 'the paradigm of societies organised within the framework of the nation-state inevitably loses contact with reality'.<sup>57</sup> In this context, it has compellingly been demonstrated that arguments against multiple citizenship simply do not exist.<sup>58</sup>

It is possible to envisage a future where the 'container theory of society'<sup>59</sup> is totally undermined and the dichotomy insider/outsider does not work.<sup>60</sup> 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'<sup>61</sup> marked by society and law beyond states.<sup>62</sup> In this context

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<sup>54</sup> ETS No. 149, 1993.

<sup>55</sup> ETS No. 166, 1997, esp. Arts. 14–18. For analysis see de Groot and Vink, *Meervoudige nationaliteit in Europees perspectief*, *op cit* n 1 *supra*, at 28–31; Stephen Hall, 'The European Convention on Nationality and the Right to Have Rights', (1999) 24 *European Law Review* 586.

<sup>56</sup> Jessurun d'Oliveira and Hans Ulrich, 'Multiple Nationality and International Law by Alfred Boll', (2007) 101 *American Journal of International Law* 922.

<sup>57</sup> Ulrich Beck, 'The Cosmopolitan Perspective: Sociology of the Second Age of Modernity', (2000) 51 *British Journal of Sociology* 79, at 80.

<sup>58</sup> Peter J. Spiro, 'Embracing Dual Nationality', in Randall Hansen and Patrick Weil (eds.), *Dual Nationality, Social Rights and Federal Citizenship in the U.S. and Europe* (Randall Books, 2002), at 19, 20–26.

<sup>59</sup> For an excellent explanation of the differences in internal and external functioning of States leading to the separation between 'societies' see Philip Allott, 'The European Community is not the True European Community', (1991) 100 *Yale Law Journal* 2485, at 2491: '[There was] an internal life of society which, put in ideal theoretical terms, could be labelled a rationalist-progressive pursuit of ever-increasing well-being for all the people in accordance with a given society's highest values. And there also was an external life of society, seeking the well-being of the state by any means and at anyone's expense. And the reality of the relation of the European states over recent centuries reflected the theoretical structure: intrinsically unstable and conflicting, occasionally life-threatening on a very grand scale'.

<sup>60</sup> For the analysis of relevant literature see Kitty Calavita, 'Law, Citizenship, and the Construction of (Some) Immigrant "Others"', (2005) 30 *Law & Society Inquiry* 401, at 405–409. See also Peter H. Schuck, *Citizens, Strangers, and In-betweens: Essays on Immigration and Citizenship* (Westview Press, 2000).

<sup>61</sup> Beck, 'The Cosmopolitan Perspective: Sociology of the Second Age of Modernity', *op cit* n 57 *supra*, at 79.

simply tolerating multiple nationalities does not seem to be sufficient. Agreeing with Spiro, ‘complete toleration should now move towards encouraging the status’,<sup>63</sup>

### III. Nationality in EU Context: Main Functions

European integration moved 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 EU, by associating a number of vital rights with the status of EU citizenship. These include 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,<sup>64</sup> as well as the right not to be discriminated against on the basis of nationality.<sup>65</sup> The logic of non-discrimination applies 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<sup>66</sup> in local<sup>67</sup> and EP elections.<sup>68</sup> The national level of political representation is a glaring

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<sup>62</sup> See Philip Allott, *The Health of Nations: Society and Law beyond the State* (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: Linda Bosniak, ‘Multiple Nationality and the Postnational Transformation of Citizenship’, (2002) 42 *Virginia Journal of International Law*, 979.

<sup>63</sup> Spiro, ‘Dual Nationality and the Meaning of Citizenship’, *op cit* n 58 *supra* at 19.

<sup>64</sup> For a very concise account see Kochenov, ‘*Ius Tractum*’, *op cit* n 7 *supra*, at 194–197 (and the literature cited therein). See also Saïd Hammamoun and Nannette Neuwahl, ‘Le droit de séjour du conjoint non communautaire d’un citoyen de l’Union dans le cadre de la directive 2004/38’, (2009) 45 *Revue trimestrielle de droit européen* 99; Dimitry Kochenov, ‘On Options of Citizens and Moral Choices of States: Gays and European Federalism’, (2009) 33 *Fordham Journal International Law* 156.

<sup>65</sup> Art. 18 TFEU and *lex specialis* instruments, such as Art. 45(2) TFEU [39(2) EC]; Art. 49 TFEU [43 EC]. For assessment see Gareth Davies, *Nationality Discrimination in the European Internal Market* (Kluwer Law International, 2003).

<sup>66</sup> Jo Shaw, *The Transformation of Citizenship in the European Union*, (Cambridge University Press, 2007). See also Kochenov, ‘*Ius Tractum*’, *op cit* n 7 *supra*, at 197–205; Stephen Day and Jo Shaw, ‘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>; Giovanna Zincone and Simona Ardivino, ‘I diritti elettorali dei migranti nello spazio politico e giuridico europeo’, (2004) 5 *Le Istituzioni del Federalismo* 741; Jo Shaw, ‘Alien Suffrage in the European Union’, (2003) 12 *The Good Society* 2 29; Stephen Day and Jo Shaw, ‘European Union Electoral Rights and the Political Participation of Migrants in Host Policies’, (2002) 8 *International Journal of Population Geography* 183.

<sup>67</sup> Art. 22(1) TFEU [19(1) EC], Dir. 94/80/EC, OJ L368/38, 1994, as amended. Analyzed by Shaw, *The Transformation of Citizenship in the European Union*, *op cit* n 66 *supra* at 142–153.

<sup>68</sup> Dir. 93/109/EC, OJ L329/34, 1993.

omission in this context.<sup>69</sup> Providing access to ‘rights [...] provided for in the Treaties’,<sup>70</sup> EU citizenship thus effectively takes over the vital substance of a number of key rights and entitlements popularly associated with nationality.

The Member States are not given any possibility to abuse the grounds for derogations provided for in the Treaty,<sup>71</sup> as the ECJ interprets possible limitations of citizenship rights very strictly.<sup>72</sup> Also in the situations where the Member States do not rely on derogations, their possibility to limit the rights of EU citizens is minimised by the ECJ, which resulted in substantial growth in importance of the status of EU citizenship<sup>73</sup> and limited the Member States’ ability to act in the cases when they seemingly ‘enforce the law’.<sup>74</sup> Consequently, EU citizens cannot be automatically deported from their new Member State of residence upon failing to demonstrate compliance with the provisions of secondary law;<sup>75</sup> the requirement to have sufficient resources is interpreted in such a way that the Member States are not permitted to actually check how much money EU citizens have;<sup>76</sup> permanent banishment of an EU citizen from a particular Member State is prohibited;<sup>77</sup> non-

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<sup>69</sup> For analysis see Kochenov, ‘Free Movement and Participation in the Parliamentary Elections in the Member State of Nationality: An Ignored Link?’, *op cit* n 16 *supra* at 197; Evans, ‘Nationality Law and European Integration’, *op cit* n 2 *supra* has rightly underlined that this state of affairs is not entirely logical, as the national level elections are the most consequential also for the EU legal order, affecting the formation of the Council (at 194).

<sup>70</sup> Art. 20(2) TFEU [17(1) EC].

<sup>71</sup> Arts. 45(3) and (4) TFEU [39(3) and (4)]; 52(1) TFEU [46(1) EC]; 62 TFEU [55 EC], and the relevant Secondary law. Among the grounds are public policy, security, health and employment in the public sphere.

<sup>72</sup> Eg Joined cases C-482 and 493/01 *Georgios Orfanopoulos et al. and Raffaele Oliveri v. Land Baden-Württemberg* [2004] ECR I-5257; Case 149/79 *Commission v. Belgium* [1981] ECR 3881.

<sup>73</sup> Jacobs, ‘Citizenship of the European Union – A Legal Analysis’, *op cit* n 7 *supra*, at 591; Elsmore and Starup, ‘Union Citizenship – Background, Jurisprudence, and Perspective: The Past, Present, and Future of Law and Policy’, *op cit* n 7 *supra* at 77–89; Juliane Kokott, ‘EU Citizenship – *citoyens sans frontières?*’, Durham European Law Lecture, 2005, (available at:

[http://www.dur.ac.uk/resources/deli/annuallecture/2005\\_DELI\\_Lecture.pdf](http://www.dur.ac.uk/resources/deli/annuallecture/2005_DELI_Lecture.pdf)).

<sup>74</sup> As happened in *Bidar* for instance: 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. See also Case C-456/02 *Michel Trojani v. Centre publique de l’aide sociale de Bruxelles (CPAS)* [2004] ECR I-7573; Case C-184/99 *Rudy Grzelczyk v. le Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve* [2001] ECR I-6193. See also Silvia Gastaldi, ‘L’égalité de traitement au service de la citoyenneté européenne’, in Christine Chappuis, Benedict Foëx and Thomas Kadner Graziano (eds.), *L’harmonisation internationale du droit* (Schulthess, 2007), 326, at 342–344.

<sup>75</sup> Case C-408/03 *Commission v. Belgium* [2006] ECR I-2647, para 72.

<sup>76</sup> Art. 8(4) Directive 2004/38; Case C-408/03 *Commission v. Belgium* [2006] ECR I-2647.

<sup>77</sup> 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.

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: a residence permit is enough.<sup>78</sup> The EU citizenship status can also 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 EU law.<sup>79</sup>

The Member States lost the ability to decide who will reside and work in their territory, who needs 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. Besides proclaiming their 'abolition' (should we follow Davies),<sup>80</sup> what can be said about the nationalities of the Member States in the EU law context? Even though, 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',<sup>81</sup> possession of a particular Member State's nationality can have both positive and negative consequences for the legal position of each individual.

Positive legal consequences can be observed in three cases. Particular Member State's nationality brings an entitlement to vote and stand for election at the national level of political representation; it allows qualifying for the jobs in public service;<sup>82</sup> and entitles to unconditional access to the territory of the Member State in question.<sup>83</sup> 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

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<sup>78</sup> Eg Case C-456/02 *Trojani v. CPAS* [2004] ECR I-7573. The Court underlined that to rely on Art. 12 EC [now 18 TFEU] a residence permit is enough (para 43).

<sup>79</sup> Case C-192/05 *K. Tas-Hagen en R.A. Tas v. Raadskamer WUBO van de Pensioen- en Uitkeringsraad* [2006] ECR I-10451. Besides, turning EU citizenship against your Member State of nationality is also possible by EU citizens falling within the scope of EU law: Case C-224/98 *Marie-Nathalie D'Hoop v. Office national d'emploi* [2002] ECR I-1691; Case C-353/06 *Stefan Grunkin and Dorothee Regina Paul* [2008] ECR 0000.

<sup>80</sup> Gareth Davies, "'Any Place I Hang My Hat?'" or: Residence is the New Nationality', (2005) 11 *European Law Journal* 43, at 55.

<sup>81</sup> Maarten P. Vink, 'Limits of European Citizenship: European Integration and Domestic Immigration Policies', (2003) *ConWEB* 4/2003, 2.

<sup>82</sup> Art. 45(4) TFEU [39(4) EC] (in derogation from the non-discrimination principle of Art. 45(2) TFEU [39(2) EC]). Given that the ECJ interprets this derogation narrowly, the majority of jobs with the state administration at different levels are not reserved to EU citizens possessing particular nationalities. See eg Case 149/79 *Commission v. Belgium* [1980] ECR 3881 (interim judgement) and [1982] ECR 1845; Case 307/84 *Commission v. France* [1986] ECR 1725; Case 225/85 *Commission v. Italy* [1987] ECR 2625. For analysis see Nanda Beenen, *Citizenship, Nationality and Access to Public Service Employment* (Europa Law, 2001).

<sup>83</sup> This is so since the Member States cannot apply Treaty derogations referring to public health, security and policy to their own citizens exercising free movement rights.

majority of cases, are not present physically either.<sup>84</sup> Moreover, unconditional access to the territory does not mean, for instance, that a territory of a Member State can become a safe haven for a national who committed a serious crime elsewhere in the Union. The European Arrest Warrant<sup>85</sup> is thus yet another sign of the general trend towards erosion of nationality in the EU.

Particular Member States' nationalities equally can undermine the rights of their owners. This paradoxical situation is a direct consequence of one of the main functions of Member States' nationality in EU law: the activation of reverse discrimination,<sup>86</sup> since the possession of the status of EU citizen alone is not enough, according to the ECJ, in order to fall within the scope *ratione materiae* of EU law.<sup>87</sup> Consequently, while discrimination on the basis of nationality is

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<sup>84</sup> Even where the border is present, the officers are not even entitled to ask EU citizens any question with regard to the purpose and anticipated length of their stay: Case C-68/89 *Commission v. The Netherlands* [1991] ECR I-2637, para 16.

<sup>85</sup> Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member, *OJ* L190/1, 2002. See also Oreste Pollicino, 'European Arrest Warrant and Constitutional Principles of the Member States: A Case Law-Based Outline in the Attempt to Strike the Right Balance between Interacting Legal Systems', (2008) 9 *German Law Journal* 1313.

<sup>86</sup> For a notable early criticism of this state of affairs see David M. W. Pickup, 'Reverse Discrimination and Freedom of Movement of Workers', (1986) 23 *Common Market Law Review* 135. Pickup concludes that 'The just and common sense principle must be that the nationals of *all* Member States are entitled to the same treatment by any given Member State. To say otherwise is to promote discrimination which is, in effect, based upon the difference in nationality of the victim' (at 156). This argument has been repeated a number of times with slight variations. See also Alina Tryfonidou, 'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe', (2008) 35 *Legal Issues of Economic Integration* 43; Peter Van Elsuwege, and Stanislas Adam, 'Situations purement internes, discriminations à rebours et collectivités autonomes après l'arrêt sur l'*Assurances soins flamande*', (2008) *Cahiers de droit européen*, 655, at 662–678; Niamh Nic Shuibhne, 'Free Movement of Persons and the Wholly Internal Rule: Time to Move on?', (2002) 39 *Common Market Law Review* 731; Rébecca-Emmanuèla Papadopoulou, 'Situations purement internes et droit communautaire: Un instrument jurisprudentiel à double fonction ou une arme à double tranchant?', (2002) *Cahiers de droit européen* 95; Miguel Poiaras Maduro, 'The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination', in Calire Kilpatrick, Tonia Novitz and Paul Skidmore (eds.), *The Future of Remedies in Europe* (Hart, 2000), at 117; Giorgo Gaja, 'Les discriminations à rebours: Un revirement souhaitable', in *Mélanges en Hommage de Michel Waelbroeck* (Bruylant, 1999) 993, at 997–998; Enzo Cannizzaro, 'Producing Reverse Discrimination through the Exercise of EC Competences', (1997) 17 *Yearbook European Law* 29; Robin A. C. White, 'A Fresh Look at Reverse Discrimination?', (1993) 18 *European Law Review* 527;

<sup>87</sup> Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] ECR I-3171, para 23; Case C-148/02 *Garcia Avello* [2003] ECR I-11613: 'citizenship of the Union, established by Article 17 EC [now 20 TFEU], is not intended to extend the material scope of the Treaty to internal situations which have no link with Community law' (para 26). For a compelling analysis of the material scope of EU law in the context of EU citizenship see Eleanor Spaventa, 'Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects', (2008) 45 *Common Market Law Review* 13.

outlawed in the situations covered by the Treaty,<sup>88</sup> it is legal outside the Treaty's scope even when EU citizens suffer from it.<sup>89</sup> Although the Court has done a lot in order to remedy this drawback inherent in the law in force,<sup>90</sup> the problem remains. The logic of reverse discrimination seems to be inherent in the interaction between different legal orders in Europe,<sup>91</sup> as the non-discrimination principle of Article 18 TFEU [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.<sup>92</sup>

Davies made a compelling demonstration of the clash between equality and market freedoms using the Services Directive<sup>93</sup> as a case study.<sup>94</sup> Regrettably, this clash covers a wide array of other issues too.<sup>95</sup> To remedy the inconsistencies that reverse discrimination brings with it, a number of scholars moved towards systemic criticism of the current state of affairs in the nationality non-discrimination law in the EU, which goes well beyond the limited approach espoused by the Court, which merely consists in trying to move more individual situations into the realm *ratione materiae* of EU law.<sup>96</sup> Nic Shuibhne and

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<sup>88</sup> Art. 18 TFEU [12 EC].

<sup>89</sup> Eg Joined cases C-35/82 *Elestina Esselina Christina Morson v. State of the Netherlands and Head of the Plaatselijke Politie within the meaning of the Vreemdelingenwet* and C-36/82 *Sweradje Jhanjan v. The Netherlands* [1982] ECR 3723.

<sup>90</sup> At present it is not necessary to cross borders any more, for instance, in order to fall within the scope of EU law and thus benefit from the non-discrimination principle: eg 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. Possession of the second Member State's nationality also helps: Case C-148/02 *Carlos Garcia Avello v. Belgium* [2003] ECR I-11613.

<sup>91</sup> L.A. Geelhoed, 'De vrijheid van personenverkeer en de interne situatie: maatschappelijke dynamiek en juridische rafels', in Elisabette Manunza and Linda Senden (eds.), *De EU: De interstatelijkheid voorbij?* (Wolf Legal Publishers, 2006), at 31; Slynn, *Introducing a European Legal Order*, *op cit* n 5 *supra* at 99. This position has also been accepted by the ECJ on numerous occasions, eg Case C-132/93 *Volker Steen* [1994] ECR I-2715.

<sup>92</sup> Kochenov, '*Ius Tractum*', *op cit* n 7 *supra* at 234.

<sup>93</sup> Dir. 2006/123/EC, OJ L376/36, 2006. For analysis see Catherine Barnard, 'Unravelling the Services Directive', (2008) 45 *Common Market Law Review* 323.

<sup>94</sup> Davies (2007): 'an individual who is present in the jurisdiction but not subject to its regulation, and operating under a more beneficial regime, is a direct challenge to the content of citizenship – national or European – and its associated guarantees of equality and privilege' (at 7).

<sup>95</sup> Kochenov, '*Ius Tractum*', *op cit* n 7 *supra*, at 234.

<sup>96</sup> Alina Tryfonidou, *Reverse Discrimination in EC Law* (Kluwer Law International, 2009); Tryfonidou, 'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe', *op cit* n 86 *supra*, Niamh Nic Shuibhne, 'Free Movement of Persons and the Wholly Internal Rule: Time to Move on?', (2002) 39 *Common Market Law Review* 731.

Tryfonidou<sup>97</sup> made 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 EU law,<sup>98</sup> by arguing that the concept of reverse discrimination, which is pre-citizenship in nature, simply does not take EU citizenship status as a legally meaningful construct into account.<sup>99</sup> Once a *Marktbürger* is replaced with a *citoyen* a paradigmatic change has occurred: the law cannot any more punish EU citizens who do not directly contribute to the internal market.<sup>100</sup> Equality is bound to come to the fore, should we use the term 'citizenship' seriously.<sup>101</sup>

Another way to argue against reverse discrimination has to do with the concept of the 'properly functioning internal market'.<sup>102</sup> If the borders between the Member States do not exist anymore within such a market, how can it logically be argued that some situations within it are 'internal' while others are not?<sup>103</sup> The ECJ has accepted this argument in a number of cases,<sup>104</sup> making Tryfonidou argue that 'one thing is certain: reverse discrimination is, indeed, a problem that falls within the scope of EC law'.<sup>105</sup>

Nevertheless the law as it stands today makes it clear that possessing the nationality of the Member State of residence can make one worse off. Moreover, since more EU citizens stay at home than use EU rights, activation of reverse

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<sup>97</sup> Tryfonidou, 'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe', *op cit* n 86 *supra*, at *passim*.

<sup>98</sup> See eg Opinion of A. G. Jacobs in Case C-168/91 *Christos Konstantinidis v Stadt Altensteig - Standesamt and Landratsamt Calw - Ordnungsamt*, [1993] ECR I-1191, para 46; Opinion of AG Léger in Case C-214/94 *Boukhalfa v. Bundesrepublik Deutschland* [1996] ECR I-2253, para 63; Opinion of AG Ruiz-Jarabo Colomer in Joined Cases C-65&111/95 *The Queen v. Secretary for the Home Department ex parte Shingara and Radiom* [1997] ECR I-3343, para 34. See also Dimitry Kochenov, 'European Citizenship Concept and Enlargement of the Union', (2003) 3 *Romanian Journal of Political Science* 71, at 84–85.

<sup>99</sup> Tryfonidou, *Reverse Discrimination in EC Law*, *op cit* n 96 *supra* at 129–166.

<sup>100</sup> Tryfonidou, 'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe', *op cit* n 86 *supra*, at 54.

<sup>101</sup> Kochenov, '*Ius Tractum*', *op cit* n 7 *supra*, at 173.

<sup>102</sup> Tryfonidou, *Reverse Discrimination in EC Law*, *op cit* n 96 *supra* at 199.

<sup>103</sup> *Id.*, 178. Tryfonidou's argument echoes that of Kamiel Mortelmans, 'The Common Market, the Internal Market and the Single Market, What's in a Market?', (1998) 35 *Common Market Law Review* 101, at 136.

<sup>104</sup> See eg. Case C-293/02 *Jersey Potatoes Marketing Organisation Ltd. v. States of Jersey and Jersey Potato Export Marketing Board* [2005] ECR I-9543; Joined cases C-363/93, C-407/93, C-409/93 and C-411/93 *Lancry SA v. Direction générale des douanes* [1994] ECR I-3957. For analysis of the new approach of the Court see Tryfonidou, *Reverse Discrimination in EC Law*, *op cit* n 96 *supra* at 64–126.

<sup>105</sup> Tryfonidou, *Reverse Discrimination in EC Law*, *op cit* n 96 *supra* at 232.



discrimination in the wholly internal situations is currently one of the main functions of the Member States' nationalities.

The second most important function of Member State nationalities in EU context is related to providing access to the EU citizenship status, as its separate acquisition is impossible.<sup>106</sup> In a borderless Union it means that more than twenty seven approaches to acquiring the same status applicable in all the Member States are in existence.<sup>107</sup> Precisely because EU citizenship is ultimately a secondary status the power of the Member States is severely weakened, since while each one of them taken separately can have an illusion that it controls access to EU citizenship, taken together they do not, as long as the naturalisation regimes are not harmonised. Huge disparities between the citizenship laws of all the Member States<sup>108</sup> 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 failing to regulate the issue of access to EU citizenship effectively, the Member States opted for illusion of control rather than solution of outstanding problems.

In the light of federalism's potential to enhance human rights,<sup>109</sup> 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 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'.<sup>110</sup> Nevertheless, a

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<sup>106</sup> Art. 20 TFEU [17 EC]. Whether losing a Member State nationality *without* losing EU citizenship is possible is debated in the literature. See eg Dora Kostakopoulou, 'The European Court of Justice, Member State Autonomy and European Union Citizenship: Conjunctions and Disjunctions', in Bruno de Witte and Hans Micklitz (eds.), *The European Court of Justice and the Autonomy of the Member States* (forthcoming). The ECJ did not outline such a possibility in its case law, most notably *Rottmann*: Case C-135/08 *Janko Rottmann* [2009] ECR 0000.

<sup>107</sup> Kochenov, '*Ius Tractum*', *op cit* n 7 *supra*, at 182–186.

<sup>108</sup> For overviews see eg de Groot and Vink, *Meervoudige nationaliteit in Europees perspectief*, *op cit* n 1 *supra*; Liebich, 'Plural Citizenship in Post-Communist States', *op cit* n 1 *supra*; Rainer Bauböck, Eva Ersbøll, Kees Groenendijk and Harald Waldrauch (eds.), *Acquisition and Loss of Nationality: Policies and Trends in 15 European States: Comparative Analyses* (Vol. I) (Amsterdam University Press, 2006).

<sup>109</sup> Eg Seith F. Kreimer, 'Federalism and Freedom', (2001) *Annals AAPSS* No. 574 66; Michael McDonnell, 'Review: Federalism: Evaluating the Founders' Design', (1987) 54 *University of Chicago Law Review* 1484, at 1494. Applied to the context of the EU, see Kochenov, 'On Options of Citizens and Moral Choices of States: Gays and European Federalism', *op cit* n 64 *supra*.

<sup>110</sup> Kochenov, '*Ius Tractum*', *op cit* n 7 *supra*, at 183.

great number of third country nationals permanently residing in the EU are excluded from EU citizenship status, being largely left within the realm of national law of the Member States and 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.<sup>111</sup> For third country nationals residing in the EU the borderless internal market is only a mirage, as it does not shape their situation directly, although omnipresent in their daily lives,<sup>112</sup> allowing Balibar to speak of 'apartheid européen'.<sup>113</sup>

This is where certain powers of the EU in the sphere of direct conferral of EU 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 State and enjoyment of citizenship rights in that Member State'.<sup>114</sup> While it is difficult to disagree with this suggestion, it seems that the Member States will need to proceed in this direction very carefully, as full harmonisation would eliminate easier ways to naturalisation present in the law of some Member States,<sup>115</sup> as well as result in nothing short of the *de jure* abolition of Member States' nationalities. Although *de facto* they are not legally meaningful already, should we believe Davies, 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 EU requirements and, equally, by way of possessing a nationality of one of the Member States.

#### **IV. Exchanging European Citizenship for European Citizenship**

At least ten out of twenty-seven Member States of the EU demand that EU citizens willing to naturalise there renounce their previous Member State's nationality. Given that the states' competence to decide who their citizens are is respected both in international law and in EU law, this requirement seems legal at the first glance.

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<sup>111</sup> Eg Michael A. Becker, 'Managing Diversity in the European Union: Inclusive European Citizenship and Third-Country Nationals', (2004) 7 *Yale Human Rights and Development Law Journal* 132 (and literature cited therein).

<sup>112</sup> Dir. 2003/109/EC (OJ L16/44, 2004) does not solve any of the outstanding problems in this regard. For critique see eg Kochenov, '*Ius Tractum*', *op cit* n 7 *supra* at 225–229.

<sup>113</sup> Étienne Balibar, *Nous, citoyens d'Europe? Les frontières l'État, le peuple* (La découverte, 2001) 191.

<sup>114</sup> Evans, 'Nationality Law and European Integration', *op cit* n 2 *supra* at 190.

<sup>115</sup> Virtually any harmonisation means application of stricter requirements, as all the Member States come with their own fears and concerns. The Schengen visa list can serve an illustration of this point: the list is longer than the individual visa lists of the participating countries in force before their accession to the Schengen system.

This is so even in the light of the *obiter dictum* in *Micheletti*<sup>116</sup> that decision on nationality should be taken by the Member States with ‘due regard of Community law’,<sup>117</sup> and in the light of *Rottmann* that in the context nationality rules proportionality applies.<sup>118</sup> 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 II and III *supra* resulted in the reinvention of the legal essence of nationality in terms of a merely procedural connection between the individual in possession of this status and a state. 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, skin colour, or religious tastes.

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 liberal legal principles which are ultimately responsible for the erosion of the modern meaning of nationality. Any departure from them is 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.

The procedural nature of nationality is not the only important factor substantially influencing its substance. The scope of the rights associated with it should also be taken into account. Once the effects of the European citizenship on the Member States’ nationalities are analysed, the differences between particular EU 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 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-

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<sup>116</sup> Case C-369/90 *Mario Vicente Micheletti et al. v. Delegación del Gobierno en Cantabria* [1992] ECR I-4239.

<sup>117</sup> Case C-369/90 *Micheletti et al.*, *ibid.* [1992] ECR I-4239, para 10.

<sup>118</sup> Case C-135/08 *Janko Rottmann* [2009] ECR 0000, para 58. For criticism see Dimitry Kochenov, ‘Two Sovereign States vs. a Human Being: ECJ as a Guardian of Arbitrariness in Citizenship Matters’, in Jo Shaw (ed.), ‘Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?’, (2010) RSCAS Working Paper, EUI (forthcoming).

discrimination on the basis of nationality is the core element of the EU legal order. As has been demonstrated in Part II *supra*, the actual rights specific to any particular Member State's nationality are not numerous at all. In this context, the status of EU citizenship – not the nationality one of the Member States – comes to the fore as the main generator of rights in the Union.

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.<sup>119</sup> Treating a Union citizen not in possession of the local nationality worse than the locals is prohibited by EU law.

In a situation where the nationalities of the Member States are legally unable to trigger differentiation between their owners, the requirement to give up one Member State's nationality upon receiving another one seems to indicate an exchange between identical statuses. At the same time, it is a strong discouraging factor, preventing the naturalisation of long-term residents.<sup>120</sup> This is particularly so given the lack of any 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 one's 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,

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<sup>119</sup> This statement should be qualified with regard to the legal effects of possession of particular Member State's nationalities outside the EU, EEA and Switzerland. When EU citizens travel in 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 Member States' nationalities, as different visa regimes apply to different EU passports: travelling with an Estonian passport is much easier, for instance, than on a Greek one.

<sup>120</sup> Rubio-Marín, 'Transnational Politics and the Democratic Nation-State: Normative Challenges of Expatriate Voting and Nationality Retention of Emigrants', *op cit n 6 supra* at 138.

The potential for Community nationals to acquire the nationality of a second Member State is already considerable. National authorities tend to rely on immigration control in order to limit access to naturalisation. Since beneficiaries of freedom of movement are not subject to such control, many Community nationals must now be in a position to satisfy the residence condition for naturalisation.<sup>121</sup>

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 EU: political representation at the national level and access to civil service employment. All other things equal, the requirement of renunciation of one's previous Member State's nationality should be regarded in the context of access to these two rights.

Consequently, 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 EU, especially with regard to democracy. By definition in order to make representative government function properly, it must be truly representative of all its constituent groups. EU citizens enter on the basis of EU 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. 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 Luxembourgian judge of Belgian nationality would abuse her position in the interests of the country of nationality is not smart either. Given that all the Member States embrace the same ideology and are joined in the EU to achieve the same objectives,<sup>122</sup> 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

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<sup>121</sup> Evans, 'Nationality Law and European Integration', *op cit* n 2 *supra* at 193.

<sup>122</sup> Art. 3 EU [2 EC; 2 EU].

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 EU 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'.<sup>123</sup> Ideally, this should not only concern EU citizens, but also third country nationals, who are equally affected by this requirement which makes no sense.

## V. The Ways Forward

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 agreement<sup>124</sup> or by amending the Treaties. 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,<sup>125</sup> or do not enforce the renunciation requirement<sup>126</sup> potentially have a direct interest in its abolition elsewhere, as it directly affects the access of their nationals to political participation in 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 only 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 Union is exclusively related to the removal of gibberish requirements from the naturalisation legislation

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<sup>123</sup> Evans, 'Nationality Law and European Integration', *op cit n 2 supra*, at 196. See also EP Resolution of May 9, 1985, *OJ C141/467*, 1985.

<sup>124</sup> Evans, 'Nationality Law and European Integration', *op cit n 2 supra*, at 193.

<sup>125</sup> Eg the UK, France, Italy.

<sup>126</sup> As is the case in Spain: de Groot and Vink, *Meervoudige nationaliteit in Europees perspectief*, *op cit n 1 supra* at 77.

of the Member States by the Member States themselves.<sup>127</sup> 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.<sup>128</sup> 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 include an 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-EU nationalities (which is the current German and Slovenian practice). It seems that the latter approach is not at all wise, as by lifting the requirement for the EU nationalities only the Member States are only likely to underline the requirement's illogical nature. Given the lack of principled difference between EU 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 orthodox in their thinking about nationality, citizenship and belonging. It is thus not surprising that Germany and Slovenia 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 Austrian,<sup>129</sup> Hungarian,<sup>130</sup> Italian and<sup>131</sup> Romanian<sup>132</sup> naturalisation requirements equally testify<sup>133</sup> (as EU citizens

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<sup>127</sup> An obvious alternative, within the same vein is for all the Member States to make their nationalities unrenounceable, at least in the cases where their nationals naturalise in other EU Member States.

<sup>128</sup> de Groot and Vink, *Meervoudige nationaliteit in Europees perspectief*, *op cit* n 1 *supra*.

<sup>129</sup> Dilek Çinar, 'Country Report: Austria', (2009) EUDO Citizenship Observatory Paper RSCAS, at 8.

<sup>130</sup> Mária Kovács and Judith Tóth, 'Country Report: Hungary', (2009) EUDO Citizenship Observatory Paper RSCAS at 3.

<sup>131</sup> Giovanna Zincone and Marzia Basili, 'Country Report: Italy', (2009) EUDO Citizenship Observatory Paper RSCAS, at 13.

<sup>132</sup> Constantin Iordachi, 'Country Report: Hungary', (2009) EUDO Citizenship Observatory Paper RSCAS, at 8.

naturalise much easier in these countries, than third country nationals), 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 predictable development, when viewed in the light of the general convergence of the substance of Member States' nationalities described above. Observing the current limited moves in this direction, important 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.

The second possible way to deal with the problems of inter-Member State naturalisations of EU citizens in the 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 Treaties with a view to including these rights among EU citizenship rights is actually the most logical way to solve the problems of those EU citizens who are not 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 22 TFEU [19 EC].

Whichever option is chosen, ultimately, there will remain no possible need for EU citizens to naturalise in their new Member State of residence as such

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<sup>133</sup> For analysis see Kochenov, 'Rounding up the Circle: The Mutation of Member States' Nationalities under Pressure from EU Citizenship', *op cit n 3 supra*.



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:<sup>134</sup> while it is probably nice to have it, it does not *per se* grant you any rights. Such development, should EU law move in this direction, can only be welcomed. While there are no losers as a result of such change, since EU citizenship and non-discrimination has already successfully challenged any meaningful legal content of Member States' nationalities, all the EU citizens exercising their free movement rights are likely to be better off as a result of the move described.

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 – 'the new nationality'<sup>135</sup> – 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.<sup>136</sup> Born as a citizen of Kentucky a US citizen moving to California effectively becomes a citizen of California, as the legal connection with Kentucky, meaningful as long as the citizen resides there, evaporates with the change of residence.<sup>137</sup> 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 – as in any other federation, 'the only true form of nationality [in the EU] is that of dual nationality'.<sup>138</sup>

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

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<sup>134</sup> Evans, 'Nationality Law and European Integration', *op cit* n 2 *supra*, at 194.

<sup>135</sup> Davies, "Any Place I Hang My Hat?", *op cit* n 80 *supra* at 43.

<sup>136</sup> See on this issue: Olivier Beaud, 'The Question of Nationality within a Federation: A Neglected Issue in Nationality Law', in Randall Hansen and Patrick Weil (eds.), *Dual Nationality, Social Rights and Federal Citizenship in the U.S. and Europe* (Randall Books, 200), 314.

<sup>137</sup> On parallels between EU and US citizenships see Francesca Strumia, 'Citizenship and Free Movement: European and American Features of a Judicial Formula of Increased Comity', (2006) 12 *Columbia Journal European Law* 714; Anne Pieter van der Mei, 'Freedom of Movement for Indigents: A Comparative Analysis of American Constitutional Law and European Community Law', (2002) 19 *Arizona Journal of International & Comparative Law*, at 803.

<sup>138</sup> Beaud, 'The Question of Nationality within a Federation: A Neglected Issue in Nationality Law', *op cit* n 136 *supra* at 317.

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 the amendment of the Treaties. The potentially far-reaching nature of the third scenario would also require an overwhelming reshuffling of national law of all the Member States. The likely extent of the reforms required to implement any of the scenarios discussed should not discourage scholars from trying to escape the sin of inability to make mid- to long-term predictions of the likely dynamics of EU legal developments.

## **VI. Conclusion**

There is no reason to believe that the process of the legal marginalisation of the nationalities of the Member States in the EU will stop or be reversed. On the contrary, it will be clearer for the Member States authorities and for the EU citizens alike, that the status provided by the EU is potentially and also practically more important for all the individuals in possession of it, than any Member State nationality as such. Whether or not the Member State nationality will survive as a legal status connecting individuals and the EU, it will certainly mutate to a considerable extent under the international pressures of human rights and liberalism and the Union pressures of the internal market and non-discrimination on the basis of nationality, to say nothing of EU citizenship. The result of this mutation will necessarily be a legal status which is substantially different from the nationalities of the Member States today, as it is bound to become more aware of its own limitations. 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 renunciation requirement is the first on the list for removal.