

SUNICOP



# Working paper

## SUNICOP 7/2012

Presented in Osijek, Croatia

**Contemporary legal challenges:  
EU – Hungary – Croatia  
16-18 February 2012**

This working paper is the draft version of the paper presented in the Conference.

Suggested reference of the working paper:

Ágoston Mohay – Davor Muhvić: The legal nature of EU citizenship: Perspectives from International and EU law. Working paper, SUNICOP 7/2012,

<http://sunicop.eunicop.eu/publications.html>

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## **The legal nature of EU citizenship: Perspectives from International and EU law**

### **I. Introduction**

EU citizenship is a unique concept – never before has an international organization attempted to create a legal status similar to nationality. Even if Union citizenship is an additional status, it deserves attention not only from the point of view of EU law, but from the perspective of public international law as well. Thus in our article, first we aim evaluate EU citizenship from an international law viewpoint, comparing it also with the traditional concept of nationality. Following that we turn our attention to the interpretation of the nature of Union citizenship and the rights associated by the Court of Justice of the European Union (CJEU), with special emphasis on recent developments in its case law.

### **II. Nationality in Public International Law**

The concept of nationality has traditionally been positioned between the internal laws of individual states and public international law. Nationality is primarily an institution of the internal law of each State, particularly its constitutional and administrative law.<sup>1</sup> It is a relationship of mutual rights and obligations of the individual and the state, standardized by state regulations. Therefore, on the basis of nationality, an individual enjoys many rights, such as the right to a passport (which allows him to travel abroad), voting rights or right of employment in certain professions (e.g. in the diplomatic service).<sup>2</sup> On the same basis an individual also has duties, such as compulsory military service. Since the content of the rights and obligations of nationality is in the internal jurisdiction of states, it varies from state to state. State regulations also specify the manner of acquisition and loss of nationality. The role of public international law is in setting the legal framework which internal law should not pass.<sup>3</sup> However, the role of public international law in the context of nationality is not limited to the role of a corrective of internal legislations. According to classic international

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<sup>1</sup> V. Ibler, *Rječnik međunarodnog javnog prava* [Dictionary of International Public Law] (Zagreb, Informator 1987), p. 69.

<sup>2</sup> M. N. Shaw, *International Law*, 6th edn. (New York, Cambridge University Press 2008), p. 659.

<sup>3</sup> Ibler, op. cit. n. 1, at p. 69.

law, under which individuals are not considered to be its subjects, nationality is the link between the individual and international law.<sup>4</sup> Individuals enjoy the benefits of international law only indirectly, through the state whose nationals they are. In case of violation of the rights of nationals of one state abroad it is, in principle, the exclusive right of their country<sup>5</sup> to seek the protection of those individuals at the level of international law (the so-called diplomatic protection).<sup>6</sup> By the development of international legal protection of human rights at the universal and regional levels individuals are, however, gaining more rights in terms of directly appealing to international institutions, but this does not diminish the importance of the institution of nationality, at least not at the present stage of development of the international community. This is supported by The Universal Declaration of Human Rights of 1948.<sup>7</sup> according to which "[e]veryone has the right to a nationality" (art. 15 (1)).<sup>8</sup>

It is necessary at the beginning to clarify some terminological issues. When covering this subject matter it is often with the terms "nationality" (fr. *nationalité*) and "national" (fr. *national*) that we come upon the notions of "citizenship" (fr. *citoyenneté*) and "citizen" (fr. *citoyen*). In most states two given terms are used interchangeably, although many authors today advocate a preference for the term "citizenship". They justify this by the evolution of legal and political understanding of the legal relationship between the government and the individual, in the direction: subject - national (in the sense of belonging to the state) - citizen (as a recipient of the rights and obligations).<sup>9</sup> However, in some countries, these two pairs of terms do not have the same meaning. Here are some examples which are listed in *Oppenheim's International Law*.<sup>10</sup> In some Latin American countries, the term "citizenship" is used as a set of political rights which an individual can lose as a result of sanctions or otherwise and thus may lose even the "citizenship". In situations like this, however, he does not lose the "nationality" as the basis of belonging to that country. In the United States, these terms also have different meanings, though, they are often used interchangeably. Thus, the "citizen" is that individual who enjoys all the personal and political rights, while by the term "national" are regarded individuals who, according to national legislation, do not enjoy all such rights. These are individuals from certain areas that do not make federal units

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<sup>4</sup> R. Jennings and A. Watts, eds., *Oppenheim's International Law*, Vol. 1: Peace, 9th edn. (New York, Oxford University Press 2008), p. 849.

<sup>5</sup> States have a right, but they do not have an obligation to give diplomatic protection to their nationals. See P. Okowa, 'Issues of Admissibility and the Law on International Responsibility', in M. D. Evans, ed., *International Law*, 3rd edn. (New York, Oxford University Press 2011), p. 476-479.

<sup>6</sup> See *The Mavrommatis Palestine Concessions*, Judgement No. 2, 1924, PCIJ, Series A, No. 2, p. 12.

<sup>7</sup> United Nations General Assembly Resolution no. 217 A(III) of 10 December 1948.

<sup>8</sup> International Covenant on Civil and Political Rights of 1966 (*United Nations Treaty Series*, vol. 999, p. 171.), however, does not contain such provision emphasising only that „[e]very child has the right to acquire a nationality“ (art. 24(3)).

<sup>9</sup> See V. Čok, *Pravo na državljanstvo* [The Right to a Nationality] (Beograd, Beogradski centar za ljudska prava, Dosije 1999), p. 255-256. and D. Grubiša, 'Lisabonski ugovor i europsko građanstvo' [Lisbon Treaty and the European Citizenship], 47 *Politička misao* (2010), p. 189-190.

<sup>10</sup> Jennings, Watts, op. cit. n. 4, at p. 856-857.

of the United States. In both these examples for public international law the concept of "nationality" is relevant, as used in those countries.

We have already mentioned that the nationality is primarily an institution of domestic law of the individual states. Under Articles 1 and 2 of the Hague Convention on Certain Questions Relating to the Conflict of Nationality Law of 1930<sup>11</sup> "[i]t is for each State to determine under its own law who are its nationals" and "[a]ny question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of the State". The above stated rules can be regarded as a statement of general customary international law.<sup>12</sup> However, international law, in this regard, nevertheless imposes certain restrictions on the internal legislations. In line with this it is often quoted an excerpt from the advisory opinion of the Permanent Court of International Justice on the *Nationality Decrees Issued in Tunis and Morocco* from 1923:

[t]he question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question ; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain [of the State]. [...] [T]he right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law.<sup>13</sup>

Thus, according to mentioned advisory opinion, nationality is in the internal jurisdiction of states, but it is possible that the state arbitrarily submits to the rules of international law, usually by signing a bilateral or multilateral international treaty. Furthermore, under Article 1 of the aforementioned Hague Convention from 1930 "[t]his law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality". According to this rule, which today can be considered an expression of general customary international law, a significant role is given to public international law in a kind of control of the internal laws. The reason is the possibility of undesirable consequences of the conflict of the substantially different unilateral acts of states at the international level.<sup>14</sup> The question of the role of international law in regulating citizenship was engaged in the 1955 judgment of the International Court of Justice in the case of *Nottebohm*<sup>15</sup>. It was said that "a State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its

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<sup>11</sup> *League of Nations Treaty Series*, vol. 179, p. 89, No. 4137, available at:

<http://www.unhcr.org/refworld/docid/3ae6b3b0.html> (accessed 9 December 2011).

<sup>12</sup> V. Đ. Degan, *Međunarodno pravo* [International Law] (Zagreb, Školska knjiga 2011.), p. 467.

<sup>13</sup> *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion, 1923, PCIJ, Series B, No. 4, p. 24.

<sup>14</sup> Jennings, Watts, op. cit. n. 4, at p. 853.

<sup>15</sup> *Nottebohm Case (second phase)*, Judgement, *I.C.J. Reports* 1955, p. 4.

citizens by means of protection as against other States" (p. 23.). Thereby the Court has defined nationality in this way:

nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. (p. 23.)

In other words, the States are not obliged under public international law to accept the validity of nationality that is given by another state in any case, despite the fact that the legal regulation of nationality is in the internal jurisdiction of the state. However, the judgment in the case of *Nottebohm* and her demand for genuine link should not be taken for granted. It seems that it does not have general support in State practice or in theory.<sup>16</sup> In any case, international law nevertheless plays a role in regulating the institution of nationality, although perhaps a bit narrower than specified in the *Nottebohm* judgment. The extent of control exercised by the international law performed in this context is not specified, but there is a consensus that definitely covers cases of fraudulent conduct, discrimination and violations of generally recognized principles of jurisdiction.<sup>17</sup> It should be emphasized that bringing into question the legal validity of nationality under international law does not affect the legal effects of that nationality in the internal law of the state which granted it.<sup>18</sup> Such a situation only empowers other states not to recognize the nationality acquired in contravention of international legal rules.

Public international law, as we have seen, leaves the regulation of nationality to the internal laws of the states, including the determination of modes of acquiring and losing nationality. These rules can therefore vary from state to state. According to mentioned judgment of the International Court of Justice in the case of *Nottebohm* „the diversity of demographic conditions has thus far made it impossible for any general agreement to be reached on the rules relating to nationality, although the latter by its very nature affects international relations“ (p. 23.). However, in state practice a number of typical modes of acquiring and losing nationality have nevertheless been developed. The most common ways of acquiring nationality are by: birth (known two modalities: *ius sanguinis* and *ius soli*), naturalization, redintegration (return to previous nationality), annexation and cession.<sup>19</sup> The most common ways of losing nationality are: release, deprivation, expiration (by longer stay abroad), renunciation and substitution.<sup>20</sup> The conflict of different rules on the acquisition and loss of nationality at the international level can lead to an individual being a national of

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<sup>16</sup> See Okowa, loc. cit. n. 5, at p. 481-482.

<sup>17</sup> Ibidem, at p. 480.

<sup>18</sup> Jennings, Watts, op. cit. n. 4, at p. 856.

<sup>19</sup> Ibidem, at p. 868-877.

<sup>20</sup> Ibidem, at p. 877-881.

two (dual nationality) or more states, or not being a citizen of any state (statelessness). Such situations can cause some problems both for individuals and for states<sup>21</sup> and they are as such subject of many bilateral and some multilateral international treaties<sup>22</sup>.

### III. The Concept of Nationality and EU Citizenship compared

The institution of "EU citizenship" was introduced into European law by the Treaty on European Union, signed on 7 February 1992 in Maastricht (Maastricht Treaty)<sup>23</sup>. The provisions of "EU citizenship" were laid down in the second part of this Treaty which contained provisions amending the Treaty establishing the European Economic Community (Rome Treaty) of 25 March 1957 (arts. 8-8e). Under Article 8(1) of that Treaty, EU citizenship was given to every individual who was a national of one of the Member States. In subsequent articles there were given specific rights and obligations, in the above manner defined, "citizen" of the European Union, on the territory of any of the Member States: freedom of movement and residence, right to vote and stand as a candidate at the local level, right to vote and stand as a candidate for the European Parliament, right to diplomatic and consular protection and right to submit petitions to the European Parliament and addressing the European Ombudsman. The concept of EU citizenship remained essentially unchanged, with some additions to the content of rights which are guaranteed to the "European citizen", in subsequent amendments to the Treaty on European Union and the Treaty establishing the European Community (hereinafter the Treaties).

This new concept raises the question of the relation between the institution of EU citizenship and the traditional notion of nationality. More precisely, whether the EU citizenship can be equated with the institution of nationality, as it is defined in international law and internal laws of the states. We shall try to answer this question by comparing and analyzing several aspects of the two institutions. The first aspect that we are going to examine is the terminology used by the Treaties - the use of terms "nationality" and "citizenship" in a different context. Secondly, we are going to analyze the subjects of these relationships. Third, we are going to look into the manner of acquisition and loss of these statuses. And fourth, we shall compare the relationship between the content of rights and obligations contained in nationality and EU citizenship.

The Treaties, as we have seen, have been using the terms "nationality" and "citizenship". Without entering into the debate concerning whether or not the two mentioned terms normally relate to the same type of legal relationship or not, the fact is

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<sup>21</sup> See more in J. Andrassy et al., *Međunarodno pravo I* [International Law 1], 2nd edn. (Zagreb, Školska knjiga 2010), p. 354.-358.

<sup>22</sup> See, for example, already mentioned Hague Convention on Certain Questions Relating to the Conflict of Nationality Law of 1930, as well as Convention on the Reduction of Statelessness of 1961 (*United Nations Treaty Series*, vol. 989, p. 175.) and European Convention on Nationality of 1997 (*Council of Europe Treaty Series*, No. 166).

<sup>23</sup> *Official Journal of the European Communities*, C 191, Vol. 35, 29 July 1992.

that the Treaties are using them to emphasize the difference between the two types of legal relations. The term "nationality" in the Treaties is explicitly used as a legal term which means the legal relationship between the individual and a Member State of the European Union. This is the traditional concept of nationality determined by internal law of each State and, to a lesser extent, the rules of public international law, in which the Treaties in its provisions do not enter.<sup>24</sup> On the other hand, the term "citizenship" is used as a legal term which denotes a legal relationship between the individual and the European Union itself, and as such is legally standardized by the Treaties. This terminological distinction does not tell us is in itself nothing about the legal nature of these legal relationships and their eventual difference. However, the fact that the drafters of the Maastricht Treaty have decided to use different terms (which are retained in subsequent amendments to the Treaties) at the very least indicate the existence of some differences.

Another aspect of our analysis are the subjects of legal relationships of nationality and EU citizenship. The subjects of the legal relationship contained in the concept of nationality are an individual on one side and state on the other. With EU citizenship it is a different matter. EU citizenship is a specific legal relationship between the individual and that international organization. The European Union is not, of course, a classic international organization. It has supranational features and seeks to further integration of the Member States<sup>25</sup>, but nevertheless, it still cannot be considered to have crossed the "whole path" of development from international organization to some form of a complex state (e.g. a confederation).<sup>26</sup> Such a stance is supported by the fact that in the Lisbon Treaty from 2007<sup>27</sup> were omitted provisions from the rejected Treaty establishing a Constitution for Europe from 2004<sup>28</sup>, governing the state symbols of the Union: flag, anthem, motto, currency and Europe Day. Any reference to a "European Constitution" was also rejected. In line with this, the issue can also be viewed from the aspect of sovereignty. Since the right to awarding the status of a national of a state belongs exclusively to that state it can be concluded that this right derives from the sovereignty of the state. Despite the fact that European Union Member States are transferring to it a part of their sovereignty, it cannot be said that the European Union as such has sovereignty because, as we said, it (still) has not emerged from supranational international organization into some form of complex state.<sup>29</sup>

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<sup>24</sup> See K. Hailbronner, 'Nationality in Public International Law and European Law', in R. Bauböck et al., eds., *Acquisition and Loss of Nationality, Vol. 1: Comparative Analyses, Policies and Trends in 15 European Countries* (Amsterdam, Amsterdam University Press 2006), p. 89.

<sup>25</sup> Andrassy et al., op. cit. n. 21, at p. 357.

<sup>26</sup> D. Lapaš, *Pravo međunarodnih organizacija* [The Law of International Organizations] (Zagreb, Narodne novine 2008), p. 233. See also M. Herdegen, *Europsko pravo* [European Law] (Rijeka, Pravni fakultet Sveučilišta u Rijeci 2002), p. 54-57.

<sup>27</sup> *Official Journal of the European Union*, C 306, Vol. 50, 17 December 2007. Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, *Official Journal of the European Union*, C 83, Vol. 53, 30 March 2010.

<sup>28</sup> *Official Journal of the European Union*, C 310, Vol. 47, 16 December 2004.

<sup>29</sup> See Čok, op. cit. n. 9, at p. 257.

The Treaties prescribe a specific requirement for the "acquisition" of EU citizenship: every national of any of the European Union Member States is also a citizen of the European Union. It can be said that the EU citizenship is "added to" the existing nationality.<sup>30</sup> The relationship of nationality of a Member State of the European Union and EU citizenship could therefore be labeled as a special case of dual nationality.<sup>31</sup> Consequence of this is that the foreigners in the EU Member States would also be considered foreigners in the broader context of the European Union itself.<sup>32</sup> Since the EU citizenship is automatically linked to the nationality of a Member State, European law does not contain the rules on the acquisition and loss of that status, which are typical for the traditional institution of nationality. Therefore, the acquisition and loss of citizenship of the European Union depends on internal legal rules of Member States on the acquisition and loss of their nationality. However, it seems that, according to the practice of the Court of Justice of the European Union, there are certain limits to Member States in determining these rules.<sup>33</sup>

An important distinction can also be found in the content of nationality and EU citizenship. Nationality provides a broad set of rights and obligations that individual states provide for its nationals in domestic law, while EU citizenship provides only a narrower set of specific (additional) rights and obligations which the European Union provides for its "citizens", through the status of a national of a Member State of the Union.<sup>34</sup> Of course, it is possible that the scope of rights and obligations of citizens of the European Union will increase in the further development of European law. The more important such rights and obligations would be, the more EU citizenship would become more important legal status in relation to the nationality of Member States.<sup>35</sup> With regard to this, it is important to note that the Amsterdam Treaty from 1997<sup>36</sup> supplemented the formula of EU citizenship by saying that "Citizenship of the Union shall complement and not replace national citizenship" (art. 17. of the Treaty establishing the European Community). The expression "shall complement" as used in the Amsterdam Treaty has subsequently been replaced in the Lisbon Treaty from 2007 by the expression "shall be additional" (art. 20 of the Treaty on the Functioning of the European Union).<sup>37</sup> This provision goes further than the terminological distinction between nationality and citizenship in the Treaties, putting it clear that the concept of EU citizenship cannot be compared with the traditional concept of nationality and

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<sup>30</sup> Ibidem, at p. 254.

<sup>31</sup> Andrassy et al., op. cit. n. 21, at p. 357.

<sup>32</sup> Čok, op. cit. n. 9, at p. 258.

<sup>33</sup> See infra, at IV. 1.

<sup>34</sup> See Andrassy et al., op. cit. n. 21, at p. 357. and Čok, op. cit. n. 9, at p. 258-259.

<sup>35</sup> Hailbronner, loc. cit. n. 24, at p. 86.

<sup>36</sup> OJ 1997 C 340

<sup>37</sup> Article 17 of the EC-Treaty used the expression „shall complement and not replace” – a clarifying provision added by the Amsterdam Treaty, as the original wording of the Article introduced by the Maastricht Treaty did not state this explicitly. Currently, owing to the Lisbon Treaty, the provision is contained in Article 20 TFEU, now using the expression „shall be additional to and not replace”. The Hungarian language version of the Treaty used the same expression before and after the Treaty of Lisbon as well (“kiegészíti és nem helyettesíti”).

considered as a step towards the creation of European federation.<sup>38</sup> It seems however that this provision is relativized by the practice of The Court of Justice of the European Union, according to which EU citizenship is destined to be a fundamental legal status of nationals of the Member States.<sup>39</sup> Another argument also suggests that EU citizenship is not to be equated with nationality. Hailbronner notes that the most important rights of citizens of the European Union are not directed against the European Union (like the rights of a national are directed against his state), but against its Member States.<sup>40</sup>

With this brief comparative analysis of several aspects of nationality and EU citizenship, we have shown that there are significant differences between the two institutions. Firstly, EU citizenship is not a legal relationship between the individual and the state. Secondly, European law does not contain its own rules on the acquisition and loss of that status - it depends on the relevant rules on the acquisition and loss of nationality of the Member States. Thirdly, the content of the rights and obligations of the "citizen" of the European Union is specific since he already has certain rights and obligations as a national of a Member State. For these reasons, the EU citizenship cannot be brought under the equal sign with the traditional concept of nationality, although it to a large extent relies on it. It can be said that EU citizenship is a special form of nationality, just like the European Union is a special kind of political community.

#### **IV. The role of the Court of Justice in defining EU citizenship**

As stated above, EU citizenship is a legal status of an additional nature – according to the Treaties, it is a special status “additional to” national citizenship, establishing additional rights and obligations for citizens. The Court of Justice of the European Union has, especially in recent years, handed down a line of judgments of vital importance regarding EU citizenship, providing a quite “dynamic interpretation”<sup>41</sup> of the status and the rights associated with it. In the following we will focus on the CJEU’s findings regarding links between nationality and EU citizenship, and the recent trend of case law in which the CJEU increasingly refers to the status of EU citizenship as an autonomous point of reference.

##### **1. Links between national and European citizenship**

One of the defining characteristics of EU citizenship is that it is only attainable indirectly, as a consequence of national citizenship: every national of a Member State of the Union is an EU

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<sup>38</sup> Hailbronner, loc. cit. n. 24, at p. 86.

<sup>39</sup> See *infra*, at IV. 2.

<sup>40</sup> Hailbronner, loc. cit. n. 24, at p. 95.

<sup>41</sup> E. Szalayné Sándor, ‘A mellőzéstől a dinamikus értelmezésig – gondolatok a bírói gyakorlat szerepéről az „európai polgár” intézménye kapcsán’ [From negligence to dynamic interpretation – thoughts on the role of judicial practice regarding the concept of European citizenship] in Zs. Csapó, ed., *Ünnepi tanulmánykötet Bruhács János professor emeritus 70. születésnapjára* (Pécs, Pécsi Tudományegyetem 2009) p. 334.

citizen, and only Member State nationals can be EU citizens. The status of EU citizenship cannot be acquired or lost independently of national citizenship. As it is up to the Member States alone to determine who their nationals are, they act as the “gatekeepers”<sup>42</sup> of EU citizenship – this status, although undoubtedly a European concept is anchored in the various nationality laws of the Member State.

Determining who its nationals are is a fundamental element of the sovereignty of every state, as nationality represents the unique relationship of solidarity between an individual and a state – this is recognized by public international law as well.<sup>43</sup>

The CJEU has however introduced the requirement that the competences of the Member States regarding nationality – including laying down the conditions for the acquisition and loss of national citizenship – shall be exercised with “due regard” to EU law in situations that have EU law relevance.<sup>44</sup> The discretion of the Member States is thus not unlimited, but the Court has not yet sufficiently clarified the scope of that obligation.<sup>45</sup>

Looking to the case law of the CJEU, we can infer a number of considerations regarding the granting and withdrawal of national citizenship:

- a Member State must not restrict the effects of the grant of the nationality of another Member State by laying down an additional condition for recognition of that nationality with a view to the exercise of a fundamental freedom provided for in the Treaty<sup>46</sup>,
- Member States need to have due regard to EU law in connection with decisions withdrawing naturalisation provided that the withdrawal results in the loss of EU citizenship as well<sup>47</sup>,
- In a situation where an EU citizen has lost this status as the result of the withdrawal of naturalisation, the Member State of which the individual has previously been a national of must also have regard to EU law (and more specifically the principle of proportionality) when considering the possibility of the recovery of the “original” citizenship.<sup>48</sup>

Regard to EU law must thus be had in cases of Union law relevance even regarding granting nationality and withdrawing naturalisation – the decisional freedom of the Member States is thus limited by EU law-related considerations originating from the case law of the Court of Justice.

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<sup>42</sup> D. Kostakopoulou, *The Future Governance of Citizenship* (Cambridge, Cambridge University Press 2008) p. 36.

<sup>43</sup> See for example Article 3 subsection (1) of the European Convention on Nationality (1997) according to which each State shall determine under its own law who its nationals are. The International Court of Justice made a similar declaration in the *Nottebohm case* (*Liechtenstein v. Guatemala* (ICJ Judgment of 6 April 1955, I.C.J. Reports 1955, p. 4., paras. 20-23.).

<sup>44</sup> See *inter alia* the judgment in *Case C-369/90 Micheletti and others v Delegación del Gobierno en Cantabria* [ECR 1992 Page I-04239], paragraph 10.

<sup>45</sup> *Case C-135/08 Janko Rottmann v Freistaat Bayern*. Opinion of Advocate General Poiares Maduro delivered on 30 September 2009, paragraph 21.

<sup>46</sup> *Case C-369/90 Micheletti and others v Delegación del Gobierno en Cantabria* [ECR 1992 Page I-04239], paragraph 10. This is repeated *verbatim* in *Case C-148/02 Carlos Garcia Avello v État belge* [ECR 2003 Page I-11613], paragraph 28 and *Case C-200/02 Kunqian Catherine Zhu and Man Lavette Chen* [ECR 2004 Page I-09925], paragraph 39.

<sup>47</sup> *Case C-135/08 Janko Rottmann v Freistaat Bayern* [ECR 2010 Page ], paragraph 62

<sup>48</sup> *Op. cit.*

On a related note, it has to be stated that EU citizenship does not depend on territorial considerations, as it is defined by primary EU law as being an inseparable corollary of Member State nationality. In the *Eman & Sevinger* case, which concerned the question of whether the limitation of EU citizenship rights (more specifically European Parliament voting rights) is permissible, the Netherlands government submitted *inter alia* that EU citizenship status does not apply regarding its nationals who live in Aruba or the Netherlands Antilles, parts of the Kingdom of the Netherlands which are considered “overseas countries and territories” under EU law<sup>49</sup>, and where EU law does not, in general, apply. The Court of Justice however reaffirmed that as every person holding the nationality of a Member State is a citizen of the Union, it is in this regard totally irrelevant where that national of a Member State resides, be that an “overseas territory” or a third country.<sup>50</sup> In the same case, however it was also stated that European Parliament electoral rights are not conferred unconditionally on the citizens of the Union, and that requirement to reside within national territory to be able to vote is a requirement which is not, in itself, unreasonable or arbitrary and which is justified for several reasons.<sup>51</sup> Thus the possibility to exercise certain political rights emanating from EU citizenship can become detached from Union citizenship as a status, as the only requirement to possess the latter is to hold the nationality of one of the Member States.

## 2. EU citizenship status as an autonomous point of reference

As we have seen, the case law of the Court of Justice of the European Union continuously interprets and shapes the status of Union citizenship. The subject deserves close attention at present too, as a number of judgments recently handed down by the Court of Justice bring forward the question whether EU citizenship can be a decisive point of reference, irrespective of whether the rights associated with this status have already been exercised or not. The cases examined below are chiefly connected to the rights of free movement and residence.

In the earlier stages of European integration, the free movement of persons was above all considered an economic issue: free movement was bound to economic intentions, existing primarily as a necessary element of the free movement of workers, the freedom of establishment and the freedom to provide services. The introduction of the status of EU citizenship with the Treaty of Maastricht has brought about a fundamental change, as nationals of the Member States were given the right to free movement and residence

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<sup>49</sup> See Articles 198-204, Article 355 (2) and Annex II of the TFEU.

<sup>50</sup> Case C-300/04 *M.G. Eman and O.B. Sevinger v College van burgemeester en wethouders van Den Haag* [ECR 2006 Page I-8055], paragraphs 27-29.

<sup>51</sup> Case C-300/04, paragraphs 52-54, with reference to the judgment of the European Court of Human Rights in *Melnichenko v. Ukraine* (no. 17707/02, , ECHR 2004.-X, § 56-57). Such requirements must, however, comply with the principle of equal treatment (Case C-300/04, paragraph 59-61).

independent of economic intentions. Since then, according to primary EU law, Union citizens have the right to move and reside freely within the territory of the Member States (albeit in accordance with the conditions and limits defined by the Treaties and by the measures adopted according to them). Regarding secondary EU law, Directive 2004/38/EC<sup>52</sup> was adopted in the relatively recent past, taking the place of various earlier legal instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons, aiming *inter alia* to achieve a less fragmented regulation of the right of free movement by simplifying and strengthen it at the same time.<sup>53</sup> The directive echoes the sentiments of the Court of Justice as far as it also postulates in its preamble that EU citizenship should be the fundamental status of Member State nationals. However, by stating that it should be the fundamental status of nationals of the Member States *when* they exercise their right of free movement and residence, it adds a requirement that they need to exercise these rights in order for the fundamental character of this status to be invoked. The earlier case law of the Court of Justice has also followed this line of reasoning, and only more recently have changes begun to unfold in this regard.

Union citizenship (and EU law in general) was not meant to be called upon in purely internal situations: Union law relevance is necessary for the application of EU law, thus the situation in question must fall within the scope *ratione materiae* of Union law. This was the reason why 'static' EU citizens who have not made use of their right to free movement could not successfully rely on EU citizenship provisions in legal disputes.<sup>54</sup> European law is not meant to regulate strictly internal situations where no cross-border element exists. In purely internal situations, even unequal treatment can be justified, as that question is up to the national law of a member state and not to European law – a phenomenon usually referred to as reverse discrimination.<sup>55</sup>

Thus, in landmark citizenship cases like *Martinez Sala* or *Metock*, the rationale behind applying EU law was justified by previously exercised free movement and thus residence in another Member State. According to the *Martinez Sala* judgment<sup>56</sup>, all EU citizens lawfully resident in the territory of another Member State are allowed to rely on the principle of non-discrimination in all situations which fall within the scope *ratione materiae* of EU law.<sup>57</sup> In the *Metock* case, the CJEU reaffirmed that a national of a non-member country who is the spouse of an EU citizen residing in a Member State whose nationality he does not possess

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<sup>52</sup> OJ 2004 L 158., p. 77

<sup>53</sup> The Directive amended Regulation 1612/68 (OJ 1968 L 257., p. 475) and repealed Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

<sup>54</sup> J. Lim, 'The Dark Knight: On the role of the ECJ and purely internal situations', *Durham Law Review* (2011), p. 2. ([http://durhamlawreview.co.uk/files/EUIM.JonathanLim.edited\\_1.pdf](http://durhamlawreview.co.uk/files/EUIM.JonathanLim.edited_1.pdf))

<sup>55</sup> The earliest references to the principle of reverse discrimination are to be found in Case 115/78 *Knooks* [ECR 1979, p. 399] and Case 175/78 *Saunders*, [ECR 1979 Page 1129]. Regarding the genesis of the principle see in detail A. Tryfonidu, *Reverse discrimination in EC law*, (Alphen aan den Rijn, Wolters Kluwer 2009), 3-18. o.

<sup>56</sup> Case C-85/96 *Martínez Sala v Freistaat Bayern* [ECR 1998 Page I-02691]

<sup>57</sup> H. de Waele, 'EU Citizenship: Revisiting its Meaning, Place and Potential', *12 European Journal of Migration and Law* (2010), p. 324.

and who accompanies or joins that Union citizen benefits from the provisions of directive 2004/38/EC, irrespective of when and where their marriage took place and of how the national of a non-member country entered the host Member State.<sup>58</sup> In the much discussed Zhu & Chen case, free movement was also involved, although in a quite unique situation: the EU citizen intending to move freely was an infant, who has attained Irish nationality by being born in Ireland as the child of a Chinese couple. The right of residence of the non-EU citizen mother was seen by the CJEU as a necessary accessory without which the EU citizen in question could not have exercised its right of free movement and residence. The right of residence of the child in the UK was based solely on her EU citizenship (then Article 18 of the EC-Treaty).<sup>59</sup> (It is interesting to note that the Court of Justice did not attach any real relevance to the fact that the situation could have been deemed an abuse of rights, as the mother gave birth in Ireland with the sole intention of securing Irish nationality for her offspring, and consequently secure UK residence rights for herself.<sup>60</sup>

A considerable shift in the reasoning came about with the Zambrano judgment, that, once again, involved minor EU citizens. Mr. Zambrano and his wife are Colombian nationals residing in Belgium. They have entered the country originally in 1999 seeking asylum – their claim has been rejected, however, the order included a *non-refoulement* clause stating that they should not be sent back to Colombia in view of the civil war in that country. In 2000, Mr. Zambrano submitted an application to have his situation regularised under the relevant Belgian law, which was also rejected. Even though he had no work permit, Zambrano obtained employment in 2001. His wife gave birth to two children (in 2003 and 2005), both of whom became Belgian nationals. Mr. Zambrano has subsequently lost his employment for economic reasons, his application for unemployment benefits and the couple's renewed submission for the regularization of their status were both rejected. Since the introduction of his action for review of the decision rejecting his application for residence in March 2006, he has held a special residence permit valid for the entire duration of that action. Mr. Zambrano went to court against the decision rejecting his claim for full-time unemployment benefits, and the Belgian court asked for a preliminary ruling from the CJEU, essentially asking (referring to the Zambrano children) whether primary EU law conferred a right of residence upon an EU citizen in the territory of the Member State of which that citizen is a national, irrespective of whether he has previously exercised his right to move within the territory of the Member States.<sup>61</sup>

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<sup>58</sup> Case C-127/08 *Metock and Others v Minister for Justice, Equality and Law Reform* [ECR 2008 Page I-6241], paragraph 99.

<sup>59</sup> Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [ECR 2004 Page I-09925], paragraphs 26-27.

<sup>60</sup> A. Arnall, *The European Union and its Court of Justice* (Oxford, Oxford University Press 2006) p. 531.

<sup>61</sup> Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi* [Judgement of the Court of 8 March 2011, not yet reported], paragraph 35.

Belgium, and all other governments submitting opinions put forward that a situation such as that of Zambrano's Belgian-born children, where those children reside in the Member State of which they are nationals and have never left the territory of that Member State, does not come within the situations envisaged by the freedom of movement and residence guaranteed under European Union law.

Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the *genuine enjoyment* of the substance of the rights conferred by virtue of their status as Union citizens, and that a refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has such an effect.<sup>62</sup> The Court has thus ascertained a right of residence based exclusively on EU citizenship status, and it has done so in a situation that is – from the perspective of EU law fully internal. It is important to note that this reasoning also circumvents the application of the sufficient resources requirement contained in the Directive, requiring EU citizens to demonstrate the availability of adequate resources in order to reside in another Member State for longer than three months: in this respect the CJEU departed from the *Chen* case, where the requirement of having sufficient resources was considered to be applicable to an infant Union citizen, even if it could be satisfied by relying on the resources of the parents.<sup>63</sup> Does this judgment signal the end of the reverse discrimination rule? In her opinion, Advocate General Sharpston suggested that the CJEU rule that Article 18 TFEU does prohibit reverse discrimination too, but *only* in situations where discrimination is caused by the interaction of Article 21 TFEU (free movement and residence) with national law, entails the violation of a fundamental right protected under EU law and in the absence of equivalent protection under national law.<sup>64</sup> Even though the national court asked for guidance regarding this matter as well, the CJEU did not even touch upon this question – though it was probably evident that it would have to do so rather sooner than later.

Indeed, not long afterwards, the judgment of the Court in the *McCarthy* case<sup>65</sup> signalled a reaffirmation and a refinement of the *Zambrano* decision at the same time. Mrs McCarthy, a dual Irish-UK national attempted to rely on EU citizenship rights in order to justify a right of residence for her husband – a Jamaican national – in the UK. She has never resided in another member state, and has never been employed, is not self-sufficient and relies on social welfare benefits. Following her marriage to a Jamaican national with no right of residence in the UK, she applied for and received an Irish passport for the first time, and

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<sup>62</sup> Case C-34/09, paragraphs 42-43.

<sup>63</sup> A. Wiesbrock, 'The *Zambrano* case: Relying on Union citizenship rights in 'internal situations', *EUDO Citizenship Forum* (2011) (<http://eudo-citizenship.eu/citizenship-news/449-the-zambrano-case-relying-on-union-citizenship-rights-in-internal-situations>)

<sup>64</sup> Case C-34/09. Opinion of Advocate General Sharpston delivered on 30 September 2010, paragraph 144.

<sup>65</sup> Case C-434/09 *Shirley McCarthy v. Secretary of State for the Home Department* [Judgment of the Court of 5 May 2011, not yet reported]

relying on her status as an Irish citizen resident in the UK she sought a right of residence in the UK as an EU citizen based on Directive 2004/38/EC for herself and her husband. Mrs McCarthy's request was refused on the grounds that she did not qualify for permanent residence under the Directive neither as a worker, a self-employed person nor a non-economically active person possessing sufficient independent resources. Following appeals by the applicants, the Supreme Court of the United Kingdom requested a preliminary ruling on an interpretation of the Directive from the CJEU.<sup>66</sup> Although the questions were limited to the Directive, the CJEU reformulated them somewhat in order to include a reference to the applicability of Article 21 TFEU as well.

As in *Zambrano*, the applicability of the Directive was quickly dismissed, as its applicability is limited to a right of residence which is linked to the exercise of the freedom of movement for persons. Regarding Article 21 TFEU, the CJEU differentiated the facts of the present case from the *Zambrano* case: in the case of Mrs. McCarthy, the national measure at issue did not have the effect of depriving her of the *genuine enjoyment of the substance of the rights* associated with her status as a Union citizen, or of impeding the exercise of her right to move and reside freely within the territory of the Member States – in such circumstances, there is no factor linking the situation at hand with any of the situations governed by European Union law.<sup>67</sup> The 'genuine enjoyment' concept was echoed in the recent *Dereci* judgment<sup>68</sup> as well, and specified further: the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by EU citizenship refers to "situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole."<sup>69</sup>

The purely internal rule and the previous case law on reverse discrimination are therefore not overturned, only to some extent modified: only if the genuine enjoyment of the substance of rights stemming from EU citizenship is in question, even a situation with no traditional cross-border element may fall within the scope of Union law.<sup>70</sup>

## V. Concluding remarks

As we have seen, there are significant differences between the traditional institution of nationality and EU citizenship. EU citizenship differs from traditional nationality primarily

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<sup>66</sup> S. Coutts: 'Shirley McCarthy v. Secretary of State for the Home Department', *EUDO Citizenship News* 10 May 2011 (<http://eudo-citizenship.eu/citizenship-news/475-case-c-434-09-shirley-mccarthy-v-secretary-of-state-for-the-home-department>)

<sup>67</sup> Case C-434/09, paragraph 49 and 55. In this case, the deciding factor was that Mrs. McCarthy did not depend on her husband in the way that Katherine Chen or the *Zambrano* children relied on their parents.

<sup>68</sup> Case C-256/11 *Dereci et al v Bundesministerium für Inneres* [Judgment of the Court of 15 November 2011, not yet reported]. The case concerned inter alia Mr Dereci, a Turkish national, who wanted to join his spouse and children in Austria, and based a claim for residence on Article 20 TFEU. In paragraph 32 of the judgment, the CJEU stated: „However, unlike the situation in *Ruiz Zambrano*, there is no risk here that the Union citizens concerned may be deprived of their means of subsistence.”

<sup>69</sup> Case C-256/11, paragraph 66.

<sup>70</sup> Coutts, Stephen: loc. cit. n. 66.

because it is not a legal relationship between the individual and a state, but a legal relationship between the individual and a (supranational) international organization. According to the Treaties, the EU citizenship is additional to the nationality of a European Union Member State. Consequently, European law does not have its own rules on the acquisition and loss of EU citizenship, but the acquisition and loss of that status depends on the internal legal rules on the acquisition and loss of nationality of the Member States. EU citizenship differs also from nationality by the content of the rights and obligations it contains. Certain rights and obligations are added to the EU citizen upon those which he already has under domestic legislation as a national of EU Member State. Thus, EU citizenship can not be equated with the traditional institution of citizenship, despite the fact that it to a large extent relies on it. It is a special form of nationality, just as the European Union is a special form of political community. By introducing the concept of EU citizenship, rules of European law are becoming extremely important not only for EU citizenship but also for the nationality of its Member States. The reason for this is the described close connection between EU citizenship and the nationality of Member States. The internal regulations of the Member States on nationality and their use may, in fact, come into conflict with the purpose of the institution of EU citizenship, manifested in the content of the rights it guarantees to EU citizens. In this way, European law necessarily appears in the role of a kind of a corrective for domestic law on nationality of Member States, just like public international law, but only in questions of EU law relevance.

It seems that the status of Union citizenship is in constant flux: not only are the relevant primary and secondary sources of EU law changing, the judgements of the CJEU are also continuously shaping the concept of supranational citizenship and the rights associated therewith. The judgments of the Court regarding EU citizenship can even have a beneficial effect on the situation of third-country nationals residing in EU territory, as demonstrated for example by the *Chen*, *Metock* and *Zambrano* cases.<sup>71</sup>

It is remarkable that EU citizenship is slowly becoming a point of autonomous reference for the CJEU irrespective of the actual (preceding) exercise of the rights conferred by the status, and that even a distant, indirect and even potential connection can be sufficient to classify a legal problem as an issue falling within the scope of EU law. In the *Garcia Avello* case, the Court relied on the fundamental nature of Union citizenship when ruling that a Spanish-German couple should be allowed to decide freely on the composition of the surname of their children.<sup>72</sup> The connection with EU law was in this case quite tenuous,

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<sup>71</sup> With a further example being Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department*, [ECR 2002 Page I-6279], where the Court pronounced that in the light of the fundamental right to respect for family life, Article 49 of the EC Treaty is to be interpreted as precluding (in circumstances such as those in the main proceedings) a refusal, by the Member State of origin of a provider of services established in that Member State who provides services to recipients established in other Member States, of the right to reside in its territory to that provider's spouse, who is a national of a third country.

<sup>72</sup> Case C-148/02 *Carlos Garcia Avello v État belge* [ECR 2003 Page I-11613]. The parents, following Spanish custom, requested the Belgian authorities to change the surname of their children to Garcia Weber, but their

as the Court saw the relevant cross-border dimension in the fact that if the children, in the future were to migrate to Spain, confusion could potentially arise as to the identity of their lawful parents.<sup>73</sup> The link with EU law was also indirect in the Rottmann case, where the situation in question was primarily related not to EU citizenship status or rights conferred by it, but to the loss of the nationality of a Member State by an EU citizen (entailing also the loss of EU citizenship and statelessness for the concerned individual).<sup>74</sup> EU citizenship becoming an autonomous point of reference for the CJEU is not that surprising however in the light of the Court's much repeated mantra that Union citizenship is intended to be the fundamental status of nationals of the Member States, first postulated in the Grzelczyk judgment a decade ago.<sup>75</sup>

It is somewhat questionable whether this interpretation is indeed fully compatible with written primary law, as the Treaties define this status as having an additional nature – a status can be either fundamental or additional, but hardly at the same time. According to Joseph Weiler this statement by the Court could be considered a legal realist prediction, a political desideratum or a statement of judicial intent, but it nevertheless contradicts the express provisions of the Treaties.<sup>76</sup> It wouldn't be the first time for a *contra legem* interpretation by the CJEU<sup>77</sup> either – the question is to what extent this interpretation by the Court of Justice is justified by systematic and teleological considerations: the evolutive definition of EU citizenship rights in primary law, and the ever increasing interconnection of the need for the 'seamless protection of fundamental rights'<sup>78</sup> with the legal status of Union citizenship seem to provide the rationale for the current trend in the case law of the CJEU. It is a difficult question however whether written 'constitutional' guarantees should be circumvented on a case-by-case basis by the judiciary, even if essentially in favour of

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application was refused as contrary to Belgian practice: according to Belgian law, the child takes the surname of their father, while under Spanish law children take the first surname of each of their parents. In the course of the ensuing legal dispute, the Belgian Conseil d'Etat referred a question to the CJEU as to whether the refusal was contrary to Community law.

<sup>73</sup> De Waele, loc. cit. n. 57, at p. 325.

<sup>74</sup> Case C-135/08 Janko Rottmann v Freistaat Bayern [ECR 2010 Page I-01449]. For a detailed analysis of the judgment see *inter alia* Á. Mohay: 'A Rottmann-ügy: újabb adalékok az uniós polgárság és a tagállami állampolgárság összefüggéseihez' [The Rottmann-case: new insights into the correlation between Union citizenship and Member State nationality], 2 *Jogesetek Magyarázata* (2011) pp. 50-58.; G. N. Toggenburg, 'Zur Unionsbürgerschaft: Inwieweit entzieht sich ihr Entzug der Unionskontrolle?' *European Law Reporter* 2010 pp. 165-172; G. R. de Groot and A. Seling, 'The Consequences of the Rottman Judgment on Member State Autonomy - The European Court of Justice's Avant-Gardism in Nationality Matters', 7 *European Constitutional Law Review* (2011) pp. 150-160.

<sup>75</sup> Case C-184/99 Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve [ECR 2001 Page I-06193], paragraph 31.

<sup>76</sup> J. H. H. Weiler, 'Individuals and Rights – The Sour Grapes (Editorial)', 21 *European Journal of International Law* (2010) p. 277.

<sup>77</sup> For the probably most obvious example see Case 294/83 Parti écologiste „Les verts” v Parliament [ECR 1986., p. 1339], concerning the status of the European Parliament as a defendant in annulment proceedings.

<sup>78</sup> Case C-34/09. Opinion of Advocate General Sharpston delivered on 30 September 2010, paragraph 170.

individual rights – a question that would demand increased political and legal attention at the highest level of EU decision- and policy-making.<sup>79</sup>

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<sup>79</sup> For a thought-provoking discussion paper regarding inter alia this problem, see N. Nic Shuibhne, (*Legal Limits to EU Citizenship*, Presented at EUSA Biennial Conference 3-5 March 2011. ([http://euce.org/eusa/2011/papers/6b\\_nicshuibhne.pdf](http://euce.org/eusa/2011/papers/6b_nicshuibhne.pdf)))