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Citizenship at its edge: Towards the principle of progressive inclusion in democracy?

LL.M Law in a European and Global Context

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"The whole mystery of human life resides on the fact that it is spent in the immediate proximity of and even in direct contact with that border...the magical meaning of the circle¹".

¹ Milan Kundera, *Le Livre du rire et de l'oubli* (Gallimard, 1987).

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Introduction

Citizenship is portrayed as the highest democratic aspiration in society. Its underlying axis resides in the desire for inclusion and recognition and is expressed through an active social and political participation within the polity. The discourse of citizenship is the discourse of the *demos*.

With the inflow of migrants' communities in the European Union and the widespread acknowledgment of modes politics of belonging, democratic interactions between citizens and their State and between European citizens and the European Union have become more vibrant. The debate about transnational forms of political organisation and post-national democratic deliberations has challenged the core values of citizenship: the subject, the substance and the reach of redistributive justice' claims.

To what extent does European citizenship as a political culture encompass plurality? Are undocumented migrants entitled to any form of citizenship? Can European citizenship develop beyond the constraints posed by the nation-paradigm? Which kind of democratic interactions can be established between the Others and the Member States?

This thesis seeks to address these concerns and understand the way they shape the relations between Member States and the European Union. These questions are hereby critically analysed from a philosophical perspective.

Words: citizenship, democracy, migration, nationality, politics.

1. European citizenship and the present brought into a critical state: Who is the citizen?

The legal and social narrative underlying citizenship is universal. It comprises the bonds and affiliations between the people and the polity and has always been regarded as a source of legitimacy of the political and public authority vested in the State. With respect to the European Union (hereafter EU), European citizenship has been strenuously criticised. The phenomenon of migration has shed new light on other modalities of social and cultural participation and unravelled the political traits of citizenship. Taking into account the importance of inclusion and the permeability of the political borders and societal structures that form the EU, to what extent does European Citizenship accommodate political, cultural and social diversity?

Citizenship can be defined as an organising principle of political and social life which entails civic responsibility, active participation in society and political allegiance to the State. It is deeply rooted in the values of equality, membership to the community and collective identity. These values entail a bundle of rights and duties concerning the polity, namely the right to belong to a political community and consequent voting rights and the duties to obey the laws of the State and to pay taxes².

The need to foster a closer relationship between the citizens and the polity encouraged the establishment and development of European citizenship. Being firstly introduced in the Treaty of Maastricht in 1992, it was viewed as an ambitious attempt to strengthen the social and political attachment of the nationals of the Member States with the EU.

Until 1992, the notion of membership to the European space was embedded in market concerns and economic entitlements which paved the way to the so-called market citizenship³. Any attachment to the EU would emerge from the need to premise the attribution of social and economic rights on the development of the common market⁴. To compete with this view, the prominent idea was that the process of European integration could only be

² Richard Bellamy, 'Evaluating Union Citizenship: belongs, rights and participation within the EU' (2008) 12 *Citizenship Studies* 597.

³ Dora Kostakopoulou, 'European Union Citizenship: Writing the future', (2007) 13 *European Law Journal* 623; Dora Kostakopoulou, 'Ideas, Norms and European Citizenship: Explaining Institutional Change' (2005) *Modern Law Review* 68.

⁴ Massimo La Torre (ed.) *European Citizenship. An Institutional Challenge* (The Hague, London, Boston: Kluwer Law International Kluwer, 1998); Niamh Nic Shuibhne, 'The resilience of EU market citizenship' (2010) 47 *Common Market Law Review* 1597.

completed with the reinforcement of civic participation and of the icons of subjective identification of the nationals of Member States with Europe.

In accordance with Weiler, the highest source of legitimacy of the *Telos* of European integration was grounded on the strengthening of a deeper sense of belonging capable of surpassing national political boundaries⁵.

The widespread acknowledgment of this human and social nature behind the European architecture motivated the recognition of an original sense of inclusion, which implies neither an absolute dilution of national boundaries nor of the integrity of the States. On the contrary, it portrays the commitment to a set of common values and social affinities. To name a few: democracy, solidarity, respect and protection of fundamental rights and mutual cooperation, among others⁶. In this sense, the strength of European citizenship as a powerful instrument of inclusion and enhancement of the European identity arose as a novelty in the Treaty of Amsterdam, 1999.

A clear understanding of European citizenship as envisaged in the Treaties prompts the analysis of its personal and material scope. Considering the personal scope in the first place, under the view of Article 20 TFEU, every person holding the nationality of a Member State shall be regarded as a citizen of the Union. European Citizenship is directly decoupled from the nationality of Member States. Due to the fact that the definition of the terms and conditions to attribute nationality pertains to the reserved domain of the States as laid down in the Declaration on Nationality of a Member State annexed to the Final Act of the Treaty of the European Union (hereafter TEU)⁷ it is possible to conclude that the content of the status hereby discussed is to a large extent shaped by the States. Hence, nationality gives the form and the “intellectual standing and performance⁸” of citizenship.

This legal and political culture is regarded as posing insurmountable limitations to the autonomous development of European citizenship. This idea is sustained by the argument that

⁵ Joseph H.H Weiler, 'To be a European citizen – Eros and civilisation' (1997) 4 *Journal of European Public Policy* 495; *The Constitution of Europe: 'Do the New Clothes Have an Emperor, and Other Essays on European Integration'* (Cambridge University Press 1999).

⁶ Sandra Mantu, 'Concepts of Time and European Citizenship' (2013) 15 *European Journal of Migration and Law* 44.

⁷ Declaration No 2 on nationality of a Member State, annexed to the Treaty on European Union [1992] OJ C191/98. Hague Convention on Certain Questions Relating to the Conflict of Nationality Law [1930] Treaty Series Vol. 179 No. 4137, 89.

⁸ David Miller, *On Nationality* (Oxford Political Theory 1997)

nationality is firmly entrenched in the sovereignty of the State and intertwined with the loyalty to the principles and traditions enshrined in the State laws. Thus, the status of European citizenship cannot be fully attained unless by the acquisition of State's nationality, to which Member States remain its gatekeepers⁹.

So far, history has contemplated nationality as a fixed, limited and static essence which forms the basis of citizenship and informs the exercise of political rights in a bounded community. Drawing inspiration from international sources, in the United States, the Fourteenth Amendment to the Constitution of 1868 grants citizenship to all persons born or naturalized in its territory¹⁰. By meeting these requirements, individuals become citizens of the United States as a whole and citizens of their own city being hence awarded with national citizenship. In this regard, Section 8 of Article 1 of the Constitution of the United States sets forth the powers of the Congress to establish a uniform rule of naturalisation¹¹. In this case, the notion of citizenship as stemming from a combination of personhood, nationhood and national territorial presence shapes the core rights and responsibilities accorded to citizens.

Citizenship is by definition a national project developed within certain institutional frames in which people can consolidate a secure sense of identity and of shared understanding of a common fate. This classic vision contrasts with this new cosmopolitan society which is highly carved out by an all-encompassing multiculturalism and globalisation that run in parallel with the sharing of a set of values and principles mostly grounded on international Human rights law. In this society the citizen commits himself to an active participation as a citizen of the world. Within this context, the most promising idea is that society and States are no longer self-closed. The State as we know it is today now riddled with a variety of transnational forces that deepen the channels of participation of European citizens in European policies¹².

Citizenship is mirrored in the philosophical statement once voiced by Hannah Arendt –the right to have rights¹³. This need to confine the enjoyment of rights to the precondition of a status seems to be enshrined in the legal foundations of European citizenship. The acquisition of nationality or the fulfilment of the conditions for naturalisation in a given Member State

⁹ Op.cit.6 The Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws Doc. C 24 M. 13.1931.V.

¹⁰ 14th amendment to the U.S. constitution: *U.S Const. amend. XIV*, § 2.

¹¹ Ibid.

¹² Gerard Delanty, *Citizenship in a global age, society, culture and politics* (Open University Press 2000).

¹³ Op.cit. 12, 294.

precedes the attainment and enjoyment of citizenship rights. This same conception becomes nonetheless contentious when confronted with pluralism in contemporary societies¹⁴. It allows a distinction between non-nationals of the Member States also referred as “The Others” and EU nationals or “Us”¹⁵. Third-country nationals (hereafter TCNs) are found in this very same tension where the legal and personal surplus of European citizenship (its personal scope as laid down in Article 20 TFEU) contrasts with the material one.

The relation between citizenship and nationality is very contentious with respect to the influence it may exert over TCNs who aspire to benefit from the possession of European citizenship and be regarded as equal to European citizens¹⁶.

With regards to the scope of rights, European citizenship is thus regarded as a cross-border status combining a set of rights conferred by the EU (EU rights) and by the Member States which are made enforceable by both. The material scope of European citizenship is laid down in Articles 20(2) of the Treaty on the Functioning of the European Union (hereafter TFEU) and Articles 39-46 of the Charter of Fundamental Rights of the EU under Title V, named as Citizens’ rights. These rights encompass the right to vote and stand as a candidate both to the elections to the European Parliament or at municipal elections in the Member State where the person resides under the same conditions as nationals of that State; the right to good administration; the right to access documents; the right to access the European Ombudsman; the right to petition; diplomatic and consular protection and freedom of movement and residence and the right to take legislative initiative provided in Article 225 TFEU. This scope of Citizens’ rights has been broadened in European secondary law as a product of the incremental approach on the part of the legislature and of the Court of Justice of the European Union (hereafter CJEU). Directive 2004/38/EC can be referred as an example¹⁷.

The situation experienced by immigrants challenges the precondition of the status of EU nationals as the precedent that is frequently established as a condition to recognise the Others as part of the community. Hence, with respect to TCNs, two phenomenon collide. On one

¹⁴ Seyla Benhabib, ‘Twilight of Sovereignty or the Emergence of Cosmopolitan Norms? Rethinking citizenship in Volatile Times’ (2007) 19 *Citizenship Studies*.

¹⁵ Seyla Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge: Cambridge University Press 2004).

¹⁶ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 016 , 23.1.2004 , pp. 44-53.

¹⁷ Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77.

hand, European citizenship as a status is enshrined in a centralized legal foundation – nationality. On the other hand, in their case their rights precede the status being those rights clearly with rights stemming from a fully-fledged European citizenship as one shall see along this paper. TCNs are largely protected by EU secondary legislation and benefit from a variable geometry of the so often designated as quasi-citizenship rights¹⁸.

The quasi-citizenship by association is commonly seen in migrants holding a status of permanent security of residence, who enjoy the right to seek employment and work in the State where they reside or in other State and who might be granted with social benefits and political rights according to States' appreciation or EU-Association agreements¹⁹. This “quasi” feature of European citizenship is related to the fact that these TCNs do not need to activate the proxy of nationality and previous naturalisation to enjoy citizenship rights.

Therefore as far as its *materiae* scope is concerned, European citizenship has become a source of rights of its own²⁰.

The legal illustration of the character of European citizenship as comprising a broader scope of nationality-independent rights does thwart the nexus nationality-citizenship²¹. This perspective calls for some criticism concerning the autonomy of European citizenship in relation to the State-paradigm.

Firstly, it is important to clarify what is meant by autonomy when the tonic is placed on European citizenship. Its contours can be analysed from two perspectives. The first view takes into account the importance of *the* status of a European citizen with and without the possession of the nationality of a Member State. The second one is focused on the scope of citizens' rights and their exercise.

With regards to the second approach, there is a continuous extensive fragmentation of the elements that compose citizenship. Seyla Benhabib designates this phenomenon as the disaggregation of citizenship rights²². A number of new political identities have flourished

¹⁸ Dimitry Kochenov, 'IUS TRACTUM OF MANY FACES, European citizenship and the difficult relation between status and rights' (2009) 15 Colombian Journal of European Law 169.

¹⁹ Teresa Pullano, *Citoyenneté européenne: Un espace quasi étatique* (Sciences Po, 2014).

²⁰ Willem Maas 'Migrant, states, and EU citizenship's unfulfilled promise', (2008) Citizenship studies 583.

²¹ Dimitry Kochenov 'EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text' (2012) 37 Eur. L. Rev. 369; 'The Right to Have What Rights? EU Citizenship in Need of Clarification' (2013) 19ELJ.

²² Seyla Benhabib 'Disaggregation of Citizenship Rights' (2005) 11 Citizenship Studies.

from transnational movements and ethnic minorities giving rise to multinational democracies. New modalities of belonging trigger the enjoyment of citizenship rights decoupled from national membership. Disaggregation differs however from devaluation of citizenship and demonstrates that neither democracy is captured by State centric terms nor the civic community and political engagement are conterminous upon State' boundaries²³. This fragmentation is intertwined with the current vibrancy of new cosmopolitan societies experiencing different culture of social and political affiliation²⁴. This acknowledgment of plurality portrayed has altered both the sense of national and European identity. There is now an intense cross-border movement, new patterns of social and cultural belonging dissociated from the nation-state, an increasing values' generalization and standardization and a strong rise of international Human rights law comprising universality principles and equality' rights²⁵. This way, Citizenship would be covered and embedded in Human rights provisions as overarching principles without being premised on States' discourses. This rights-based approach is equally shared by Habermas who steers away from the force of citizenship as a status to focus on the set of rights it generates²⁶. While arguing for a principle of complete inclusion based on the plural nature of Human rights, he draws no distinctions between the inside and the outside²⁷. In his eyes, the European Union stands as a clear example of a self-government polity capable of articulating democratic principles with new cultural and social assumptions of plurality.

European citizenship has an intimate inbuilt integration mechanism being capable of reproducing "unit in diversity". Under this narrative, it would not need to be affiliated with historical roots but with shared-constitutional principles and values among multinational democracies²⁸. The recognition of this reality would go in parallel with the process of transformation of a nationality-based European citizenship into an uncontested and independent citizenship. This process would be grounded on a principle of constitutional

²³Ibid.

²⁴ Jürgen Habermas, 'The Inclusion of the Other: Studies in Political Theory' (ed.) Studies in Contemporary German Social Thought (Ciaran Cronin and Pablo de Greiff Cambridge, Mass: MIT Press, 2000)144.

²⁵ Joseph Carens, *The Ethics of Immigration* (Oxford: Oxford University Press, 2013).

²⁶ Mikko Kuism, 'Rights or privileges? The challenge of globalization to the values of citizenship' (2008) 12 Citizenship Studies 613

²⁷ Jürgen Habermas, *The Postnational Constellation: Political Essays* (The MIT Press, Cambridge Massachusetts 2001).

²⁸ Ibid.

patriotism, through which constitutional principles would be institutionalized as oriented principles in order to create a self-referential European identity²⁹.

This argument sustains the need to uncouple individual, social and political rights from nationality. In the quality of Human rights they can be invoked, protected and exercised by everyone residing within the jurisdiction of a State³⁰. Citizenship would be reduced to non-institutional status that could be activated by denationalized allegiances to the States³¹. Furthermore, through residency, it would evolve to the universal extension of civil and political rights that go in tandem with the spread of international Human rights norms³². To an ultimate extent, it would guarantee a free and equal access to the status. This vision encounters some criticism. It enhances what is named as the paradox of universalism³³. This paradox is known as being embedded in Human rights and in their respective legal frameworks which seek to offer legal protection to the individual as a human being. Human rights are self-referential and do seek to encompass a plural *moral* to humanity. They are inclusive per se whereas, citizenship is exclusive because it relies on a great level of political membership duly ensured by State' structures.

Citizens' rights operate and stem from this bilateral relation between the people and the State. Citizenship solely confined to universal rights lacks an articulation between the discourse of rights and the discourse of transnational governmental structures that should be primarily held accountable and legitimate for their protection³⁴. Indeed, under a practical perspective it is difficult to envisage a constitutional law beyond the State capable of encompassing frames of accountability, external representation and allegiance to the transnational State governance. This would amount to the democratic paradox because citizenship as a powerful instrument of inclusion has necessarily to marry membership rights with a democratic agency that allows their effective exercise³⁵.

²⁹Jürgen Habermas , 'Citizenship and National Identity' (ed.) *The Condition of Citizenship* (V. Staansbergen, B., Sage Publications, London 1994) 20.

³⁰ Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton: Princeton University studies 2006).

³¹ See Gonçalo Matias, *Migrações e Cidadania* (Fundação Francisco Manuel dos Santos 2014) 52.

³² Op.cit.13, 19.

³³ Christian Joppke, 'Immigration and the identity of citizenship: the paradox of universalism' (2008) 12 *Citizenship Studies*.

³⁵ Seyla Benhabib, *The claims of culture. Equality and Diversity in the Global Era* (Princeton University Press., 2002).

Considering now the nexus nationality-citizenship with regards to the concerns placed upon the status itself, it is relevant to bring to light the role played by the “ethics of territoriality”. Under this view, the tonic is placed upon the importance of “being there” by making the residency criterion prevail over nationality³⁶. This new philosophical trend is known as Post nationalism or denizenship³⁷. This trend argues for a “denationalization” based on a top down approach that formulates a radical change on the conditions to acquire citizenship.

This approach is mirrored in residency as a benchmark. The criterion of residency challenges the presumed national citizenry and is regarded as meeting the expectations of different communities of migrants. This way, the icons of identification of citizens with the States are likely to be framed in the possession of permanent residence permits because they ensure the payment of taxes, economic and familiar attachments to the State’s territory and external and representation of different communities³⁸ (the so-called the ethnic territoriality³⁹).

In light of this philosophy, the current contours of a nationality-based European citizenship demonstrate an unsuccessful attempt to “include by excluding⁴⁰”. Its personal scope is seen as representing an exclusive form of political membership that denies the possibility of acquiring self-sufficient citizenship rights and might lead to discriminatory migration policies employed by the States⁴¹. If States define the conditions of acquisition and loss of nationality they have *a priori* the right to define who enters or exits their society and who can become a European citizen in a later stage.

Despite its promising ideal, a denationalized citizenship risks falling into blurred scenarios. If one takes on the philosophical challenge, the absence of the nationality paradigm. One enters into domains of a-legal normative spaces in the sense that there is no substantial pattern on

³⁶Dora Kostakopoulou, 'The evolution of European citizenship' (2008) 7European Political Science 285 (ed.) *'European Citizenship and Member State Nationality: updating or upgrading the link'* (Jo Shaw, Has the European Court of Justice challenged Member States in nationality law EUI Robert Schuman Centre for Advanced Studies 2011).

³⁷ Samantha Besson and Andre Utzinger, 'Introduction: Future Challenges of European Citizenship—Facing a WideOpen Pandora’s Box' - This article was written within the framework of the Project for a European Philosophy of European Law with the support of the Swiss National Science Foundation and (ed), *'European Citizenship across borders'* in A. Epiney, M. Haag and A. Heinenmann *Challenging Boundaries: Festschrift fur Roland Bierber* (Schulthess 2007).

³⁸ Linda Bosniak, 'Being Here: Ethic Territoriality and the Rights of Immigrants' (2007) *Theoretical Inquiries in Law* 389.

³⁹ Ibid.

⁴⁰ Op.cit.26.

⁴¹ Op.cit.35.

which political membership and social standings can be grounded⁴². “Citizenship little means except in the context of a State⁴³”. To some extent, the reverse amounts to the “fault lines” described by Linda Bosniak which occur due to an “unexpected intrusion into our orderly world that sometimes allows us to see beyond what is possible⁴⁴”. The boundaries of a legal order set its normative patterns and of institutional practices. With Arendt, “citizenship is by definition a citizen among citizens of a country among countries; rights and duties defined by the boundaries of the territory⁴⁵”

The nation-state paradigm has still to be viewed as offering a *de minimis* basis to the status. That seems to be the case until reality thwarts this proposition by demonstrating that European citizenship is disentangled from the States ‘domain and combined with a European principle of preference to regulate it. Otherwise, the telos of Europe in this regard can only be partially attained. This means that “sein” or the expression *to be* needs to be informed by “sollen” or *how-to-be*, which is informally and philosophically given by the minimums.

Taking into account the European legal framework, European citizenship is conceived as a complementary citizenship. Article 20 TFEU states that the later shall not replace national citizenship. It is neither aimed at replicating the later at the European level nor at devaluating its importance. It does not aspire to multiply national citizenships either. Undoubtedly, the complementary nature of European citizenship has been signalled as a very disappointing provision grounded on the idea that the EU has done little to make this status an independent and unique attachment to the European identity⁴⁶.

It is nonetheless important to realize that European citizenship has not lost its importance and is indeed an autonomous status. The set of rights it comprises does not depend from the possession of the same rights at the national level. It adds an extra layer to the later. This coexistence and autonomy already reflect a post-national form of citizenship that is built right upon national citizenship⁴⁷. And it is post-national in the sense that it does not reproduce national forms of citizenship. Instead, the legal foundations of national citizenship are

⁴² Linda Bosniak, 'Citizenship Denationalized' (2000) 7 *Indiana Journal of Global Law Studies* 447.

⁴³ Gertrude Himmelfarb, 'The Illusions of Cosmopolitanism' (ed) in Martha Nussbaum, *Patriotism and Cosmopolitanism* (Joshua Cohen, 1996) 72-74.

⁴⁴ *Ibid.* Op.cit. 41 33.

⁴⁵ *Op.cit.* 12, 294.

⁴⁶ *Op.cit.* 1, 597-611.

⁴⁷ Rainer Bauböck, 'Why European Citizenship? Normative Approaches to Supranational Union' (2007) 8 *Theoretical Inquiries in Law* 5.

integrated in a new culture of rights that constitutes a new linkage between the EU and the States. There is a post nationalist collective identity which is defined both by the generalization of values and the possibility on the part of the European citizen of participating in the European legislature. Furthermore, it accomplishes to a modest extent the recognition of a European demos if we consider this one to be “composed of the several demoi of the member states”⁴⁸. In a parallel with Samantha Besson, the European demos is mirrored in a conglomeration of multiple self-governing demoi⁴⁹. With Weiler, “the Union belongs to, is composed of, citizens who by definition do not share the same nationality”⁵⁰.

The question that can be posed is to what extent the claimed autonomy of European citizenship is undermined by the exclusive competence granted to the Member States in nationality matters. On this point, the CJEU has taken an active stance. In *Micheletti* and in *Kaur*, the Court ruled that notwithstanding being the States that lay down the conditions to the acquisition and loss of nationality, such conditions must pay due regard to EU law⁵¹. The discretion of the States in nationality matters is limited due to the need to prevent the violation of public international law and fundamental rights and the violation of the obligation of solidarity⁵². Such violations would occur if the States were free to make unilateral declarations through the extra-ordinary grant of their nationality to the whole population of a non-Member State or part of it⁵³. Another limit concerns the need to prevent any unjustifiable hindrance to the exercise of the right to free movement., for instance if transnational families composed by EU and non-EU nationals move to the EU and are neither treated nor protected as European citizens and face a troublesome naturalisation process over a certain period of time⁵⁴.

⁴⁸ Samantha Besson and Andre Utzinger, “European Citizenship across borders” in A. Epiney, M. Haag and A. Heinenmann (eds), *Challenging Boundaries: Festschrift für Roland Bierber (Schulthess 2007)*.

⁴⁹ Samantha Besson, 'Deliberative Democracy in the European Union: Towards the Deterritorialization of Democracy' (ed), in Samantha Besson and Jose Luis Martí *Deliberative Democracy and its Discontents: National and Post-National Challenges* (Ashgate, 2006).

⁵⁰ See Opinion of Advocate General Miguel Poiares Maduro Case C-135/08 *Rottmann* [2010] ECR I-01449.

⁵¹ Case C-369/90 *Micheletti* [1992] ECR I- 4329; Case C-192/99 *Kaur* [2001] ECR I-1237, para 19.

⁵² Rene de Groot, 'The relationship between the nationality legislation of the Member States of the European Union and European citizenship' (ed.) in Massimo La Torre *European Citizenship. An Institutional Challenge* (The Hague, London, Boston: Kluwer Law International Kluwer, 1998);

⁵³ *Ibid.* Council of Europe, *European Convention on Nationality*, 6 November 1997, ETS 166.

⁵⁴ *Ibid.*

The interdependence between nationality and citizenship was challenged in the Rottmann case⁵⁵. At stake was an Austrian national by birth who acquired German nationality by naturalisation. Such act resulted in the automatic loss of Austrian nationality. Due to the argument that the acquisition of German nationality had been fraudulent Mr. Rottmann lost the later as well. Being deprived from the nationality he had acquired by birth and the nationality acquired by naturalisation, Mr. Rottmann would no longer be considered a national of a Member State and, consequently, a citizen of the Union. The question addressed to the Court concerned the influence of EU law on nationality laws of the Member States and whether the powers of the States regarding that matter could be exercised without any supervision on the part of the EU. Drawing on the conclusions of Baumbast and Grzelczyk stating that European citizenship is intended to be the fundamental status of nationals of the Member States, the CJEU took on the position that any national act engaging or affecting European citizenship is to fall within the ambit of EU law⁵⁶. The Court put forward the principle of proportionality as a limit to the discretion of the States when establishing the conditions for the acquisition and loss of nationality. Due to the direct and serious impact these conditions may have on European citizenship, they must be compatible and in harmony with EU law. What is clear is that there is a relative or conditional autonomy of the States on nationality matters⁵⁷.

In addition to the principle of proportionality, the Advocate General Maduro highlighted the principle of legitimate expectations on the part of EU citizens with respect to the maintenance of such status. He relied on the need to ensure the continuity of the benefits stemming from citizenship rights and proceeded on saying that if the withdrawal of nationality on the part of the State was made impossible because it would entail the automatic loss of European citizenship States would be undesirably constrained and their national identities (Article 6 TEU) undermined.

⁵⁵ Case C-135/08 *Rottmann* [2010], ECR I-01449.

⁵⁶ Case C-184/99 *Grzelczyk* [2001] ECR I-6193 and Case C-413/909 *Baumbast* [2002] ECR I- 07091. See Rene De Groot, Anja Selling 'Decision of 2 March 2010, Case C-135/08, Janko Rottman v. Freistaat Bayern - Case Note II - The consequences of the Rottmann judgement on Member States' autonomy – The European Court of Justice's avant-gardism in nationality matters' (2011)7 *European Constitutional Law Review*150.

⁵⁷ Rene de Groot, Andrew Evans, 'Nationality Law and European Integration', Vol.16 (1991) 16 *European Law Review* 190; 'The relationship between the nationality legislation of the Member States of the European Union and European citizenship' (ed.) in Massimo La Torre *European Citizenship. An Institutional Challenge* (The Hague, London, Boston: Kluwer Law.Internationa Kluwer, 1998);

This argument should be explored. If the complementarity of European citizenship was tantamount to the logic of subordination to State's nationality, that would imply the immediate disappearance of both the status and the nationality in some situations by rendering the person stateless. On the contrary, it can be inferred from the Rottmann ruling that there is an international obligation to prevent statelessness and avoid the forfeiture of European citizenship⁵⁸. The argument is not that Member States are unconditionally prohibited from revoking nationality but they cannot abuse their discretion to trigger automatic losses of nationality if the Union citizen is rendered stateless, which would contravene international law⁵⁹.

In Micheletti for instance, national rules providing for the loss of nationality in the event of a change of residence to another State were viewed as hindering the right to free movement and residence. Potential restrictions to these rights are not entirely left to the devices of the States because their impact on the rights of the citizens can be submitted to the assessment of the CJEU. If European citizenship was aimed at replicating national citizenship at the European level, it would risk becoming a variable geometry easily neglected and shaped by national policies escaping to the considerations of the Court.

As a cross-border status that entails a number of independent rights, there is a major concern to avoid variations of status. On the other hand, the moment the person acquires the nationality of a Member State the person is granted with citizenship rights which are grounded on overarching ideals of inclusion, protection and reciprocal respect. Insofar as these rights complement the rights and duties stemming from the possession of nationality, these rights are autonomous per se. Their exercise calls for an extra layer of protection and respect both on the part of the State and the European Institutions.

European citizenship is a successful attempt in the sense that it overcame the shortcomings of national citizenship by providing for new reciprocal and democratic interaction between citizens and EU and its institutions and by giving voice to transnational concerns. It has made substantial progress by involving EU nationals in the process of construction of the EU but it is not entirely free from the national paradigm. This has an impact on the protection of

⁵⁸ UN General Assembly, *Convention on the Reduction of Statelessness*, 30 August 1961, United Nations, Treaty Series, Vol. 989, p. 175.

⁵⁹ Dora Kostakopoulou, 'The European Court of Justice, Member State Autonomy and European Union Citizenship: Conjunctions and Disjunctions,' (ed.) in Bruno de Witte and Micklitz, Hans *The European Court of Justice and the Autonomy of the Member States* (Oxford: Hart Publishing, 2011).

immigrants' rights and their inclusion in the European identity because they cannot fully participate in the in-built democratic feature of citizenship⁶⁰. To an ultimate extent, citizens' rights have to be necessarily secured by a legal system that finds the appropriate correlations between the protection of those rights and the process of democratic deliberation and legitimisation, which is not yet visible in case of immigrants. This means that the presence of Others unveils the need to rethink the intersections between citizens, non-citizens and democratic/political legitimacy⁶¹.

2. The boundaries of citizenship

The previous chapter shed some light on the question of who is a citizen within the EU by drawing on the intersections between citizenship, democracy and nationality. De facto, politics and life seem to join the question of citizenship at the same time. If immigration covers the move and presence of Others in States' territory and citizenship encompasses the relation between the individual and the State, establishing this nexus implies new reflections on the establishment of new democratic contingencies intercalated with the exercise of citizenship rights, namely quasi-citizenship rights. This chapter seeks to understand to what extent is it possible to conceive the depolitization of citizenship or if such disentanglement would mean that citizenship can simply be diluted into fundamental rights. I will start by describing the legal framework and address these issues from a philosophical view. I will confront such reflections with the situation experienced by irregular/illegal migrants.

New societal narratives portray the energies generated by differences. Pluralism is a process mirrored in multiple attachments and identities grounded on familiar, social or economic reasons, the conglomeration of cultural identities in Member State and the polishing of multi-deliberative features. All in all, resident immigrants, whether legal or illegal, take part in the

⁶⁰ Rainer Bauböck, 'Transnational citizenship. Membership and Rights' (1995) 45 *Revue Francaise de Science Politique*; Kathleen Coll, 'Citizenship acts and immigrant voting rights movements in the US' (2011) 15 *Citizenship Studies* 993. See also Christian Joppke, *Citizenship and Immigration* (Cambridge: Polity 2010).

⁶¹ Gerard Delanty, 'Models of Citizenship: defining European identity and citizenship' (1997) 1 *Citizenship Studies* 228.

society of the host country while benefiting from the same rights and complying with the same duties⁶².

This has not escaped to the EU, which has acknowledged the importance of involving immigrants in the political life of the host country and enhance their role as residents in a society through the exercise of an active citizenship⁶³.

The first move to shape a progressive European framework concerning the integration of immigrants within the EU was highlighted in the 1999 Tampere Conclusions⁶⁴. These conclusions were endorsed by the European Social Economic Committee which stressed the fact immigrants living on a stable and permanent basis within the EU should be entitled to the same rights and duties as EU citizens and treated in the same way⁶⁵. Today, Article 79 TFEU affirms the intention of the EU to develop a common immigration policy capable of ensuring the effective management of migration flows and the fair treatment of TCNs legally residing in the territory of the Member States.

Drawing inspiration from Article 45.2 of the Charter concerning the extension of freedom of movement and residence to TCNs legally resident in the territory of a Member State, the European Commission issued a communication introducing the concept of civic citizenship, which was supported by the European Parliament⁶⁶. The acknowledgment of this concept is viewed as paving the way to the Long-Term Residence Directive 2003/109⁶⁷ whose personal scope has been broadened with Directive 2011/51. With this new Directive, TCNs who legally move to Europe in order to reside in a Member State are not the only the ones entitled to long-term residence but also the beneficiaries of international protection such as asylum seekers.

⁶² Sergio Carrera, *The Nexus between Immigration, Integration and Citizenship in the EU* (2006) Challenge Collective Conference Volume, CEPS, Brussels, April.

⁶³ As opposed to passive citizenship which consists on the concession of rights and not duties. See the Opinion of the European Economic and Social Committee, Access to European Union Citizenship, SOC:141, Brussels, 14 May 2003.

⁶⁴ European Council (1999) Presidency Conclusions of the Tampere European Council, 15 and 16 October 1999.

⁶⁵ Opinion of the European Economic and Social Committee on Immigration, Integration and the Role of Civil Society, SOC/075, CES 365/2002, 21 March 2002, Brussels.

⁶⁶ European Parliament Resolution on the communication from the Commission on immigration, integration and employment [2004], OJ C92E/390.

⁶⁷ Commission Communication on a Community Integration Policy COM (2000) 757; Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents [2003] OJ L 16/44:

The status of civic citizenship comprises a common set of rights and obligations that would be acquired by TCNs over a certain period of residence without compliance with naturalisation processes⁶⁸. In fact, integration is envisaged as a two-way process which involves both the adaptation of the migrant to the host society and the receptiveness of the society itself⁶⁹. Under this Directive, long-term residents acquire a near-equal status to European citizenship which is based on residence. The Directive determines that TCNs who have legally and continuously resided for a period of five years in a Member State and who have maintained a stable association and satisfied the conditions required by the polity will be entitled to long-term residence⁷⁰. These conditions imply in the majority of cases compliance with integration measures and the check on whether the person has stability and financial capacity to reside in the State without becoming a burden on its social assistance system⁷¹. Another impulse to further integration of immigrants can be seen in the Directive 2003/86 on the right to family reunification⁷² and the Directive 2004/38⁷³. Once again; the boundaries surrounding the status of civic citizenship are aligned with an idea of residential citizenship.

Directive 2003/109 encourages the transnational integration of migrants through equality of treatment between long-term residents and EU citizens. It confers upon TCNs who are long-term residents the entitlement to rights concerning social security, health care, education, tax benefits, recognition of diplomas and qualifications, freedom of association and affiliation employment, housing allowances to name a few are completely independent from the possession of the status of European citizenship according to Articles 11(a)-(h) of the Directive. If covered by this Directive, TCNs acquire a non-reversible status which is mutually recognised by all States.

With regards to LTRs, long-term residence has been argued as an alternative to naturalisation by comprising in itself a subsidiary form of post-national citizenship⁷⁴. Long-term residence

⁶⁹ Sergio Carrera, 'Integration' as a process of inclusion for migrants? The case of Long-Term Residents in the EU' (ed) in Hildegard Schneider *Migration, Integration and Citizenship – A Challenge for Europe's Future* (2005) 2 Maastricht: Forum Maastricht 131.

⁷⁰ Recitals 4, 6 and 12 of the Council Directive 2003/109/EC.

⁷¹ Conclusions of the Justice and Home Affairs Council Meeting 2618, 14615/04, 19 November 2004; European Parliament Resolution on the communication from the Commission on immigration, integration and employment [2004], OJ C92E/390.

⁷² Council Directive 2003/86 of 22 September 2003 on the right to family reunification, OJ L 251:12. 3.10.2003.

⁷³ Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member States, OJ L 229/35, 30.4.2004.

⁷⁴ Diogo Acosta Arcaza, 'Civic citizenship reintroduced? The long-term Resident Directive as a post-national form of membership' (2014) *European Law Journal*.

can be included in “integration discourse⁷⁵” proposed by the EU. Yet, it escapes to its own control unless a common approach on the implementation of the Directive and EU supervision policies are implemented. If some Member States such as Austria, Belgium, Denmark, France and Italy do require high integration contracts when TCNs enter into their territory it is also the case that other States such as Spain, Finland and Ireland do not advance with any further condition⁷⁶.

Notwithstanding the fact that the Long-Term Residence Directive enhances an active stance on the part of the EU to integrate TCNs, the framework is clearly submissive to national immigration policies with a scarce level of scrutiny conducted by European bodies. For instance, with regards to the eligibility for the acquisition of the status, it rests with the TCNs to prove that they have stable and regular resources without constituting a burden to the system of social security of the State. Although Article 11 of the Directive is constructed as entitlement to TCNs to equal treatment as compared to EU nationals regarding access to labour market, education, recognition of qualifications, social protection and free movement within the EU, this right is immediately dismantled by the options given to the Member States to derogate from such clauses or to limit their scope as set forth in Article 11(3). With respect to the economic self-sufficiency that is demanded from TCNs who apply for the long-term residence permit, the right to residence is not detached from economic contingencies. In other words, the so-called principle of financial solidarity developed by the CJEU as a means for the State other than the State of nationality to provide financial support on the same grounds as it provides for its nationals is not applicable to TCNs. In this sense, equality considerations can be assimilated to rhetorical constructions drawing inspiration from the concerns and values attached to the old form of market citizenship.

The idea of civic integration is strongly aligned with the demand for integration requirements. They are characterised by civic orientations tests and language requirements as a condition to grant long-term residence and access to social benefits⁷⁷. Some Members States, in particular

⁷⁵ Elseph Guild, 'Cultural and Identity Security: Immigrants and the Legal Expression of National Identity' (ed.) in E. Guild and J. van Selm *International Migration and Security: Opportunities and Challenges*, Routledge Research in Transnationalism (New York: Routledge, 2005).

⁷⁶ Diogo Acosta Arcarazo, 'A Belief in the Purity of the Nation: The Possible Dangers of its Influence on Migration Legislation in Europe' (2010) 10 *Studies in Ethnicity and Nationalism* 234.

⁷⁷ See Op.cit.70, 131.

France⁷⁸, Germany⁷⁹, the Netherlands⁸⁰ and the UK⁸¹ have started requiring the compliance with pre-integration exams which take place abroad. This is very contentious in the sense that they are capable of undermining the essence of subjective rights and the respect for general principles of EU law and Human Rights law by making them subjected to managerial restrictions⁸². For example, the exercise of the right to family reunification and family life as interpreted by the CJEU in the case *Parliament v. Council* as a subjective right conferred upon spouses and minor children that goes even beyond Article 8 European Convention on Human Rights (ECHR) is virtually impaired *ab initio*⁸³. It is not hard to conceive the idea that these restrictions apparently can fail the tests of necessity and adequacy provided that less restrictive alternatives can play a role by providing opportunities to attend integration courses and participate in society on arrival⁸⁴. The channels to control migration flows are pervaded with cross-borders nationalist attempts which risk digging a deep gap between integration and assimilation and which can also be applied in a very discriminatory manner, for instance on the grounds of ethnic origin and fortune.

The CJEU has recently issued a ruling for the first time on integration exams required by the States as a tool for future inclusion of TCNs. The case concerned a TCN protected as a LTR under the correspondent Directive. Under Dutch Law he was required to take pre-integration exams to assess his knowledge about Dutch society and its language. If such exam was not undertaken a fine would be imposed. The Court ruled that substantially high registration fees and costs incurred in the preparation of those exams would deprive the LTR's Directive of its effectiveness. Nevertheless, the requirement to take civic pre-integration exams does not violate EU law and the Directive since it encourages interactions with the future hosting State

⁷⁸ France has introduced a test for family members who wish to enter into the country. The failure does not mean denial of access to the country but a delay in the process. See *Loi no. 2007-1631, 20 novembre 2007 relative à la maîtrise de l'immigration, à l'intégration et à l'asile*, J.O. no. 270, 21 novembre 2007.

⁷⁹ *Gesetz zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäische Union*, BGBl. I, p.1970.

⁸⁰ The Dutch Civic Integration Act (*Wet inburgering*). Kees Groenendijk, 'Integration Tests Abroad as a Condition for Family Reunification in the EU?' in *Immigration Law Practitioners' Association (ILPA) European Update* (2007).

⁸¹ New Labour's Nationality, Immigration and Asylum Act in 2002

⁸² Kees Groenendijk, 'Family Reunification as a Right under Community Law' (2006) 8 *European Journal of Migration and Law* 215.

⁸³ Case C-540/03 *Parliament v. Council* [2006] ECR I- I-05769.

⁸⁴ Kees Groenendijk, 'Recent Developments in EU law on Migration: The Legislative Patchwork and the Court's Approach' (2014) 16 *European Journal of Migration and Law* 313.

from the very beginning and facilitates social integration. The Court also considered irrelevant whether the person was already a LTR or not⁸⁵.

The language of civic integration is a promising language. Nevertheless, it reveals an anatomy punctuated by strategic manoeuvres undertaken by the States which risk no longer offering a solid approach to the plural European society. For instance, in this case, issues concerning the capacity of the Member States to withhold long-term residence upon the failure to comply with those exams or the limits that EU law pose on those requirements remained unaddressed⁸⁶. A common European approach on this issue is thus necessary at the moment.

On the other hand, the phenomenon of illegal⁸⁷ or irregular migration⁸⁸ is one of the most controversial issues at the moment. Due to their undocumented presence in the State, undocumented migrants might be subjected either to exploitation by networks aimed at trafficking and smuggling and to exclusion' policies employed by the States. With regards to their legal status, they are in the limbo. It is still contentious whether they are entitled to any form of citizenship including political rights in the State where they reside. States can easily oppose to naturalisation processes and to the grant of nationality due to their irregular background.

In light of the Return Directive 2008/115, illegal stay can be defined as the presence on the territory of a Member State of a third-country national who does not fulfil or no longer fulfils the conditions of entry, stay or residence in the Member State⁸⁹.

Concerning the conclusions of the Tampere Summit and the extension of EU competences on migration and asylum with the Treaty of Amsterdam, the EU reflected on the need to set up a co-ordination system and a comprehensive set of measures to deal with irregular migration' flows by issuing Communications on policy priorities in the fight against illegal migration⁹⁰. Readmission agreements between the EU and third states and between those and Member

⁸⁵ Case C-579/13 *P and S v Commissie Sociale Zekerheid Breda* [2015].

⁸⁶ Mark Bell, 'Civic citizenship and migrant integration' (2007) 13 *European Public Law*.

⁸⁷ The term 'illegal' is employed in several EU policy documents such as the Stockholm Programme (2009) and the European Pact on Immigration and Asylum (2008).

⁸⁸ The Parliamentary Assembly of the Council of Europe prefers to use the term "irregular migrant" to avoid the stigmatization of the term. See Recommendation 1755 (2006) on the human rights of irregular migrants of the Parliamentary Assembly and Resolution 1509 (2006) *Assembly debate* on 27 June 2006.

⁸⁹ Directive 2008/115/EC of 16 December 2008 of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals OJ L 348, 24.12.2008.

⁹⁰ Communication on a common policy on illegal immigration of 15 November 2001 (COM (2001)672 final) and Policy Priorities in the fight against illegal immigration of third-country nationals (COM (2006) 402 final).

States themselves have been concluded in order to establish conditions prior to the enforcement of a return decision⁹¹. Nevertheless, these agreements do not include provisions on the protection of fundamental rights of returnees⁹². There is a risk that irregular migrants are submitted to a “chain-refoulement”. It means that the requested State may shuttled back the person to the country of origin without him being provided with the possibility of submitting an asylum application or having his claims reviewed by transit States⁹³. This is intertwined with another alarming situation which is the denial of readmission of the country of origin may amount to a de facto expulsion of its national or to the status of statelessness⁹⁴. Therefore, there is a pressing need to regularize the situation of irregular TCNs in the host States and see whether they are entitled to an autonomous status of citizenship.

Concerning fundamental rights and social and economic entitlements, there is a widespread concession of rights laid down in different frameworks. To name a few: the right not to be subjected to torture or degrading treatment; the right to family life; non-discrimination; access to emergency health care; social protection among others. As for political rights, these are subjected to severe restrictions at disposal of the States⁹⁵.

It is on this point that the heart of the problem lies. The recognition of fundamental, social and economic rights to LTRs may be seen as stemming from utilitarian views, neighbouring policies and compliance with EU human rights. On the contrary, the assumption that LTRs (inclusively the undocumented ones) can be entitled to citizenship implies that they can not only derive an automatic right of inclusion on the part of the host State but they are also entitled to duties concerning the polity. The regularisation programmes offered by the States to illegal LTRs in order to legalise their status is a modest way to shape the communication between the immigrant and the State. It does not mean that they are integrated as citizens. Instead, it means that regularization programmes are a vehicle for an inclusion which is defined ab initio. This means that in order to achieve citizenship rights States may demand

⁹¹ Articles 12(4) UN ICCPR and Article 3 (2) Protocol 4 to the ECHR.

⁹² Report | Doc. 12168 | Parliamentary Assembly of the Council of Europe on “Readmission agreements: a mechanism for returning irregular migrants” 17 March 2010.

⁹³ Carole Billet, 'EC Readmission Agreements: A Prime Instrument of the External Dimension of the EU's Fight against Irregular Immigration. An Assessment after Ten Years of Practice' (2010) 12 *European Journal of Migration and Law*.

⁹⁴ *Op. cit.* 95

⁹⁵ Recommendation 1500 (2001), Participation of immigrants and foreign residents in political life in the Member States of the Council of Europe, Doc. 8916, Doc. 8947 and Doc. 8940.

naturalisation processes as a proxy for drawing eligibility for professional licenses, access to court, labour protection, and political participation, among others⁹⁶.

Forced naturalisations ignore two main aspects. Firstly, they disregard that LTRs (whether legal or not) can maintain political and social affiliation with the State of origin. Residence in another State rather than its own can be attributed to major causes such as forced migration grounded on environmental challenges but it does not completely annul the bonds between the immigrant and the State of origin. This is what may be illustrated as external citizenship⁹⁷.

Naturalisation should rely on a deliberate public commitment made by the person towards the State and should take into account the changing nature of national citizenship and how it can no longer be captured by a single set of rights and obligations. Under the heading of autonomous Human rights protection, States may be called to intervene, to protect and even to make progress in the recognition of illegal residences to protect the right to family life⁹⁸. Considering that long-term residence in the case of legal LTRs is viewed as an entitlement to social membership and some political affinities with the State, in the case of illegal LTRs time residence is also a constant element which can create in itself a social form of attachment to the State. In fact, undocumented immigrants can be covered by basic labour and employment protection, they can contribute to the local economy of a given State and be also subject to the rule of law. However they lack the means of enforcement of their rights⁹⁹. Once again, the relation between citizenship rights and citizenship status is revealed.

The question of whether irregular LTRs are entitled to any form of citizenship is the question on whether law and society altogether are capable of shaping a dialogue between the State and the immigrant.

Critically speaking, the contentious point touches precisely upon the apparent (ir)reconciliation between the above-mentioned external citizenship that non-European citizens (per se) do share with their country of origin and the type of democratic interactions they seek to solidify with the Member States and with the EU due to their presence in the

⁹⁶ S. H. Legomsky & C.M. Rodirguéz, *Immigration and refugee law and policy* (University Casebook series 2009)1374.

⁹⁷ Rainer Bauböck, 'The rights and duties of external citizenship' (2009) 13*Citizenship Studies*.

⁹⁸ Daniel Thym, 'Respect for Private and Family Life under Article 8 ECHR in immigration cases: a human rights to regularize illegal stay?' (2008) 57 *International and Comparative Law Quarterly* 87.

⁹⁹ Ludvig Beckmann, 'Irregular migration and democracy: the case for inclusion' (2013) 17*Citizenship Studies* 48.

European territory. In this matter, Baubock notes that both situations are accepted as contingent because it is worth asking whether it is legitimate to presume that “all citizens have an inherent equal right to participation that should be exercised abroad in the same way as it is exercised in their country of origin¹⁰⁰”.

These are the interactions one firstly seeks to comprehend under progressive modes of inclusion: the combination of external citizenship with the political autonomy of the State to enforce its law within its boundaries, which turns out to be the State of residence¹⁰¹.

In the first place, one can eventually wonder about the importance of such interactions concerning immigrants and, in most of the cases, TCNs who may not share the same level of attachment either to the country of residence or to the EU itself. The analysis of the inclusion of immigrants in the political decision-making process of a country rather than or in addition to the one of their origin is important and can eventually generate positive outcomes.

Europe is now stricken by transnational concerns related to the state of democracy and political governance in post-national scenarios. Contemporary migrant-politics cannot be insulated from the channels of trans-state political action; when concretely framed they convey the political and social commitment of people in a global world. It is this political enfranchisement that is now being encouraged. The relation between emigration-citizenship-democracy needs to take into consideration the possible contribution of non-nationals by definition. Sharing the same opinion as Walzer that by living and working within a national community “every immigrant and every resident...a citizen too or at least a potential citizen¹⁰²”.

To offer some factual context to the statement, the focus now is placed upon the delocalization and pluralism as embedded in modes of political deliberation and social participation.

The idea that social membership followed by residence can generate an entitlement to citizenship is an attractive one but does contrast with idea of a democratic norm of inclusion. Certainly, it is hard to conceive that States will easily reconcile the (un)lawfulness of the

¹⁰⁰ Rainer Baubock, 'Stakeholder citizenship and Transnational Political Participation: a Normative Evaluation of External Voting' (2007) 75 Fordham Law Review .

¹⁰¹Rainer Baubock, 'Transnational Citizenship: Membership and Rights in International Migration' in *International Migration* (Edward Elgar Publishing, 1997) 581.

¹⁰² Michael Walzer, *The Distribution of Membership, in Boundaries: National Autonomy and Its Limits* (Peter Brown and Henry Shue, eds., Rowan & Littlefield, 1981) 61.

status of illegal immigrants with the full right to political participation or that they will consider common membership as a sole formal admission to the status of citizenship. All in all the effective exercise of a right is always premised on the recognition of the individual as a right's holder. The "thin and thick" forms of pluralism do seem to contemplate pluralism in its ultimate façade: the demand for equal participation in the polity¹⁰³. It is precisely on this point that one embarks on the thought about potential democratic interactions that can be established between non-European citizens by definition and their claims for membership rights and due protection. This is due to the fact that there seems to be a recent and wide acceptance of a changing constituency of national and European politics.

What is being challenged is the status-quo. New narratives of social and cultural adjustment try and seek to legitimate people's constructed out-group and their status and a claimed actual membership sprung by the coexistence and correlations between the Others and the nationals¹⁰⁴. The materialization of the sense of belonging is nothing more but contingent to civic awareness and to the political linkage shared by citizens with their States.

The same view is taken on the part of the EU. Since 2003 the European Parliament has been advocating for the extension of civic participation for foreign residents meaning electoral rights at the local and European level¹⁰⁵. This position has been endorsed by the Economic and Social Committee concerning integration policies undertaken by the States¹⁰⁶. Principle No. 9 of the 2004 Common Basic Principles for immigrant integration policy in the European Union emphasizes the need to provide for the "participation of immigrants in the democratic process"¹⁰⁷. Regarding the Council of Europe Convention on the Participation of Foreigners in Public Life at Local Level, only 9 EU Member States have signed the Convention among which only five States, namely Denmark, Finland, Italy, Netherlands and Sweden have granted local voting rights to TCNs at the time of the ratification of the Convention on

¹⁰³ 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.

¹⁰⁴ Dora Kostakopoulou, 'Liberalism and Societal Integration in Defence of reciprocity and constructive pluralism' (2014) 43 The Netherlands Journal of Legal Philosophy 127.

¹⁰⁵ Council of Europe, Parliamentary Assembly, Recommendation 1625 (2003), Policies for the integration of immigrants in Council of Europe member states, 30.09.2003.

¹⁰⁶ European Economic and Social Committee, Opinion on Immigration in the EU and integration policies: cooperation between regional and local governments and civil society organizations, SOC/219, 13.09.2006, point. 618.

¹⁰⁷ Council of the European Union, Press release, 2618th Council meeting, Justice and Home Affairs, 14615/04 (Presse 321), 19.11.2004, pp. 19-25.

2007¹⁰⁸. In its Article 6, the Convention sets forth the right to vote and to stand for elections for lawfully non-nationals residents.

Taking into account that electoral rights remain part of the core of European citizenship it is possible to see that a significant number of Member States has embraced a political pluralistic approach by extending domestic voting rights to TCNs who are long-term residents irrespective of their nationality. This is a clear sign of disaggregation of political rights, quasi-citizenship rights as above-mentioned and democratic inclusion, although still much dependent on the unilateral willingness of the States¹⁰⁹. To the moment, Austria Czech Republic, Bulgaria, France, Cyprus, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Poland and Luxembourg do not grant any voting rights non EU-nationals. At the same time, it demonstrates the extent to which this political franchise is keen on the exercise of citizenship and of being a citizen¹¹⁰.

This situation is confirmed in the case *Spain v. UK*, in which the Court ruled that Member States are not precluded from extending these rights to certain persons who not being nationals or citizens of the Union share close links with the State at stake¹¹¹. Currently, most of the Member States allow residents TCNs to participate in local elections provided that they meet different kinds of conditions: duration of residence (Denmark, Estonia, Norway, Portugal; Sweden, Finland, Belgium, Luxembourg and the Netherlands); application or registration (Ireland, United Kingdom and also Belgium); the possession of a permanent residence permit or long-term residence status (Estonia, Hungary, Lithuania, Slovakia and Slovenia) and the reciprocity condition (Czech Republic, Malta, Portugal and Spain)¹¹². For instance, at the moment, in the Netherlands all foreign residents who are TCNs and citizens of countries not EU members obtain the right to vote and can organize their own political parties

¹⁰⁸ Council of Europe Convention on the Participation of Foreigners in Public Life at Local Level, Strasbourg , 5.02.1992.

¹⁰⁹ Jo Shaw, 'Transforming Citizenship? The EU, Electoral Rights and the Restructuring of European Political Space' (2009) 15 Colum. Journal of European Law.

¹¹⁰ Op.cit. 12.

¹¹¹ Case C-145/04 *Spain v. Uk*, [2006] ECR I-6451. Florian Greyer, 'Trends in the EU-27 Regarding Participation of Third-Country Nationals in the Host Country's Political Life' Briefing Paper for the LIBE Commission of the European Parliament", Brussels (2007).

¹¹² Kees Groenendijk, *Local Voting Rights for Non-Nationals in Europe: What We Know and What We Need to Learn* (Washington, DC/ Migration Policy Institute, 2008).

after 5 years of residency. This model is the product of the maintenance of territorial membership with plural representation¹¹³.

Having this changing constituency being materialized, we agreed with Habermas, the expansion of a European political capacity needs to go parallel with the expansion of the basis that offers legitimacy to the European institutions¹¹⁴.

The conclusion that stems from this descriptive legal exposure cannot be another one but that citizenship has always been based on a political construction¹¹⁵. The definition of the *self* seems to imply a delimitation of the frontier in which falls the feasibility of the expression. To an ultimate extent, membership is “irreducibly political freedom otherwise all the subjects would be confronted with a bare life and exposed to violence¹¹⁶”. It is viewed as a symmetrical relationship between political decision-makers and the recipients of such decisions. A perfect reconciliation between a principle of cultural political identity and a principle of democracy flows from such symmetry¹¹⁷. So far, the entitlement to the status has been regarded as an effective condition that must be met in order to fully exercise associated rights and take part in the democratic life of a political community. In particular, the right to vote is regarded as materializing the major expression of participation in the community¹¹⁸. The right to have a say on the politics of the State and on its social texture seems to be originated from the involvement of the person in the community to the extent that the person becomes a member. Furthermore, despite raised voices highlighting that the logic of personhood and sharing of a collective identity by “being there” supersedes the logic of national citizenship by virtue of Human rights, the reasoning does not differ to much from the previously presented¹¹⁹. To refer as an example, in line with Samantha Besson, EU citizens’ rights can be viewed as transnational Human rights located between international Human

¹¹³ Op. cit.

¹¹⁴ Jürgen Habermas, 'Democracy in Europe Why the Development of the European Union into a Transnational Democracy is Necessary and How it is Possible' (2014) , ARENA Working Paper 13/2007) <<http://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/workingpapers2014/wp13-14.pdf>>

¹¹⁵ Judith Butler and Gayatri Chakravorty Spivak *Who sings the nation state. Language, politics and belonging* (Seagull Books, 2007).

¹¹⁶ Walter Benjamin; ‘Zur Kritik der Gewalt’ (*Archiv für Sozialwissenschaft und Sozialpolitik* 1920/21) ‘Critique of Violence’, trans. by Edmund Jephcott, in *One-Way Street and Other Writings* (London: NLB, 1979).

¹¹⁷ David Miller, 'The Boundaries of Transnational Democracy: Alternatives to the All-affected ‘Democracy's Domain' (2009) 37 *Philosophy & Public Affairs* 201.

¹¹⁸ Article 3 to the Protocol to the European Convention on Human Rights.

¹¹⁹ Op.cit. 59, 216.

rights law and municipal rights¹²⁰. Once again, the expression “municipal rights” emancipates citizenship rights from abstract Human rights standards as they reveal a link between the individual and his incidence to the community. It reflects the language established between the citizen and the community. It is plainly hard to understand the same link out of the rubric of citizenship! Citizenship does indeed define one’s legal rights¹²¹. However, at the same time, is much more than a legal status. It comprises identity, inclusion, intervention and participation in the collective group.

Transposing this reasoning to the EU, European citizenship is mirrored in the same pattern-relation between the polity, the institutions and the political legitimacy¹²². It excels itself at its uniqueness because it attempts to combine both citizenship in the city (the State paradigm) with equal participation and representation in transnational institutions. Thus, it makes the value of citizenship much more flexible. However, some examples of the Member States demonstrated along this paper do convey the idea that even political rights can be decentralised. In this sense, how does one rethink these patterns? How to gradually realize the concept of citizenship and democracy?

Citizenship is intertwined with democratic participation. Hence affording a post-national citizenship to LTRs would indeed allow them to contribute to the legitimacy of State policies and of the EU. But is the integration of TCNs in this post-national democracy conditional upon their entitlement to European citizenship? Or is it possible to establish a pre-condition to the formal recognition of citizenship that be designated as the right to a fundamental form of citizenship? On this account, LTRs and migrant communities could struggle for fundamental right to “a” citizenship which should be nothing more but the characterisation of the right to belong complemented by the acknowledgment of a principle of inclusion that should be subjacent to the former. The political community needs to be read in both its constellations of members and not members in the traditional sense of domestic political culture¹²³. However, that is contentious in the sense that the referential concept of self-determination has and might become more and more permeable with the widening of the basis

¹²⁰ Samantha Besson, 'Human Rights and democracy in a global context: decoupling and recoupling' (2011) 4 *Ethics & global politics* 19.

¹²¹ *Op. cit.* 29, 37

¹²² *Op.cit.* 60, 228.

¹²³ *Op.cit.* 1.

of popular participation¹²⁴. As seen, some States allow their newcomers to take part in the decision-making process that affects them. All in all, a *de facto* pluralism demands revisiting solid perceptions about the organisation of democracy going along with usual configurations of nation-state¹²⁵.

David Miller advocates for a normal experience of integration and citizenship as a routinely compliance with the legal norms enacted by the State and with the decisions of a democratic authority¹²⁶. This view can be paradoxical because it implies that immigrants can have a say on national immigration laws that imply their detention or removal as well as on a wide range of norms that regulate everyone's behaviour under the jurisdiction of the State. On the other hand, Baubock accepts the extension of citizenship rights to non-citizens on the grounds of territorial attachments and the principle of affected interests – what affects all shall be approved by all¹²⁷. He proposes the concept of stakeholder citizenship¹²⁸. Political integration derives from expressive membership claims grounded on applications for naturalisation and territorial presence. The burden is placed on the individual to accommodate his own alienation into the State and regularise his situation provided that both the individual and the State are commonly engaged in holistic approach taken by the EU¹²⁹.

In short, Arendt's assertion of citizenship as the right to have rights leads to a legal and social apparatus. It does not offer sufficient protection to immigrants and to the stateless persons. She foresees existing citizenship rights as long as they are exercised but does not characterise the right from which other rights would stem from as a right that already exists in its essence and that should be duly protected and grounded on political and social and political institutions. LTRs continue in a legal transit. To the present, the impossibility to define a stable status or entitlement to "a" concrete citizenship on the part of TCNs is due to the common view under which citizenship and democracy are regarded as one-sized path, whereas a potential separation could in some cases contribute to the integration of the Others

¹²⁴ Jürgen Habermas, 'Beyond the Nation-state? On some consequences of economic globalisation' (ed.) in E.O. Eriksen and J. E. Fossum *Democracy in the European Union – Integration through Deliberation?* (Eds London: Routledge, 2000).

¹²⁵ Hans Lindahl, 'A-Legality: postnationalism and the question of legal boundaries' (2010) 73 *The Modern Law Review*; *The Citizen and the Alien: Dilemmas of Contemporary Membership* (Princeton University Press (2006).

¹²⁶ David Miller, 'Irregular migrants: an alternative perspective' (2008) 2 *Ethics and International affairs* 193.

¹²⁷ Rainer Baubock, 'Expansive citizenship: voting beyond territorial and membership' (2005) 38 *Political Science and Politics* 683.

¹²⁸ *Ibid.*

¹²⁹ Anuscheh Faraht, "We want you! But...Recruiting Migrants and Encouraging Transnational Migration Through Progressive Inclusion" (2009) 15 *European Law Journal* 700.

within the EU. For instance, citizenship could be even portrayed as a fundamental right if its denial leads to statelessness.

The characterisation of an entitlement is crucial to strike the balance between the rights of Others and the rights of exclusion. Otherwise, one is indirectly led to assess the citizenship or any presence of the Others in the European territory as unjust. Such entitlement is the recognition of a principle of inclusion. There is a need for the host State to entitle LTRs to a progressive inclusion in democracy. Such inclusion in the State of residence is what can be characterised as a fundamental form of citizenship and as a right to citizenship in itself. Only this recognition could carve out the way forward the engagement in politics and democracy itself.

3. Brave new world or the principle of a progressive inclusion in democracy?

The third chapter is focused on the relation between “the Others” and European citizens from two different perspectives: the right of inclusion of the Other and the right of exclusion on the part of the States. It proposes a new principle capable of renovating and revitalizing the concept of belonging to the State/ European politics without undermining the nexus citizenship-democracy – the principle of progressive inclusion of LTRs in democracy. This thought calls for three major considerations to which attention and criticism will be devoted. First, there is a need to polish the meaning of progressive inclusion particularly in the case of irregular/ illegal immigrants and TCNs and trace its normative significance. Secondly, the purpose is to understand whether the same is adverse to State’s sovereignty or whether it can be reconciled with that. Drawing on these conclusions, it is relevant to afford to such principle a normative context within the European scenario. Thirdly, the proposed challenge is to embark on the materialization of this principle as such at the national and European level and finally conclude on whether it could reinforce the process of democratic legitimacy of the EU.

In abstract, whereas inclusion comprises in itself a regular longing (a common human wish to be part of a context), membership induces to a political seduction being not immediately read in inclusion for itself.

In order to contextualize such statement, one can take into account the following example: Article 13 of the Universal Declaration of Human Rights provides for the right to emigrate. It explicitly sets forth that “Everyone has the right to freedom of movement and residence within the borders of each State” followed by “Everyone has the right to leave any country, including his own, and to return to his country¹³⁰”. The same content can be found in Article 2 of the Protocol No.4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms¹³¹. The legal content enshrined in these articles does account for a right to emigrate. It is the recognition of Human rights standards to individuals that allows them to avail themselves of the right to leave their country. Nevertheless, this right does not find a correspondent obligation imposed on the host State to grant any form of membership and citizenship to the immigrant. Broadly speaking, if potential migrants can avail themselves of a right to emigrate they can as well be left to the devices of the States. This right to free movement is not followed by any duty not to raise any obstacles capable of hampering its exercise and accommodate social plurality. It also means that a global commitment to Human rights may not provide enough trust and solidarity to sustain a global democratic order because it does not go hand in hand with the responsibility to safeguard the protection of others and frame their dialogues of inclusion in the new community¹³². Without normative guarantees that ensure the effectiveness of the right to emigrate and to be included in the host society, the content of the right itself can lead to nowhere¹³³. In Kant’s words, the law of world citizenship shall be limited to the conditions of universal hospitality¹³⁴. The 1954 Convention on the Rights of Refugees and the principle of non-refoulement it sets forth can be referred as an example¹³⁵.

¹³⁰ The Universal Declaration of Human Rights proclaimed by the United Nations General Assembly in Paris on 10 December 1948 General Assembly resolution 217 A (III)

¹³¹ Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto - [1963] COETS 4 (16 September 1963).

¹³² Andreas Føllesdal, 'Universal Human Rights as a Shared Political Identity: Necessary? Sufficient? Impossible?' (2009) 40 *Metaphilosophy* 77.

¹³³ Sergio Carrera, Marissimo Merlino, 'Assessing EU Policy on Irregular Immigration under the Stockholm Programme' (2010) CEPS Papers Liberty and Security in Europe <https://www.coe.int/t/dghl/monitoring/socialcharter/presentation/AccessHousingUndocumentedMigrantsGS_en.pdf>.

¹³⁴ Immanuel Kant, *On history* (The Bobbs-Merrill Co. 1963) 443.

¹³⁵ Convention relating to the Status of Stateless Persons, adopted on 28 September 1954 which entered into force in 6 June 1960. See the 1967 Protocol relating to the Status of Refugees, approved by the Economic and Social Council in resolution 1186 (XLI) of 18 November 1966 which entered into force in 4 October 1967.

Under the same lines, The International Covenant on Civil and Political Rights (ICCPR) does not recognise the right of Others in entering and residing in a territory of a given State leaving it as a matter of the States to deal with in light of their interests and public security. In fact, Article 12.4 of the ICCPR and Article 13.2 UDHR solely acknowledge the right to leave and enter the country of one's origin. This way, the protection conferred upon the Others is related to the need to accord to them a minimum protection while preventing their arbitrary expulsion without due process.

Freedom of movement is embodied in its own asymmetry. Only citizens of a State have an unconditional right to be admitted into their own State whereas for others such opportunity shyly arises as a product of association and international agreements, family reunification purposes and other perceived interests such as economic investment in a given country.

Hence, a right to progressive inclusion followed by the materialization of the right to leave one's country has to begin by coming to terms with the tensions between inclusion and exclusion. Considering exclusion in the first place, it is relevant to dedicate some attention to what is expected from the States to those who inhabit in their territory. Considering that State' inhabitants are subject to State laws, States owe to them democratic justice as comprising membership rights and equal participation in the community¹³⁶. In relation to immigrants residing in a political community, membership would thus amount to political inclusiveness¹³⁷. However, as previously pointed out, access to citizenship is not clean-cut being exactly this capacity to distribute membership according to the State' values and commitments the exception to political inclusion. To some extent, a potential right of exclusion on the part of the States finds its premises on this idea of restraining political membership, democratic control, of tightening the conditions to acquire nationality and naturalisation and through their own immigration policies¹³⁸. Migration is so "unique" in this aspect that it cannot escape to the vibrant awareness related to the uniqueness of cultural preservation, political values, the safeguard of constitutional democratic principles and other segments¹³⁹.

¹³⁶ Michael Walzer, *Spheres of Justice a defense of pluralism and equality* (New York: Basic Books, 1983).

¹³⁷ Ibid.

¹³⁸ In Walzer's views, borders do play a role.

¹³⁹ Stephen H. Legomsky 'Immigration Policy from Scratch: The Universal and the Unique' (2012) 21 Wm. & Mary Bill Rts. J. 339

That said it is worth noting whether a right of exclusion grounded on States' affronted public morals and national security is legitimate and whether such legitimacy can still be held with the demands for inclusion.

On this point, integration requirements and other demands such as pecuniary requirements can be perceived as contentious. It is not their nature as part of the State policy that is at stake but its employment when accompanied by heavy economic conditions resulting in a commodification or prioritization¹⁴⁰ of status and rights, as if they could be traded under a monopolization of means of movement¹⁴¹. Questions of fairness, effectiveness and lawfulness have been raised to contest these exams and call for a European assessment and common approach¹⁴².

Moving now to inclusion, normatively speaking, the right or the claim for inclusion does not present itself as a claim that finds its immediate correlative in the receptiveness of the States. The right to leave is not a right that "States complete through a duty to admit but a duty to solely guarantee some integration premised on solidarity and reciprocity"¹⁴³.

States bear in mind their own needs in conjunction with humanitarian obligations. Their readiness to open their borders is aligned with three major situations: the duty to admit refugees owed to humanitarian obligations under international Human rights law, family reunification motives and temporary visitors and qualified works under the Blue Card Directive¹⁴⁴. States do try to advance with integration requirements under approaches of "having the capacity to successfully integrate" or "earned access"¹⁴⁵.

Coming back to the clashes between status and rights, by acknowledging that rights can extrapolate the status, this thesis stands for making the access to the status perceptible through a principle of progressive inclusion. The philosophy behind progressive inclusion is devoted

¹⁴⁰ Martti Koskeniemi, *From Apology to Utopia, The structure of international legal argument* (Cambridge University Press 2005) 17.

¹⁴¹ Rainer Bauböck, 'What is wrong with selling citizenship? It corrupts democracy! Should citizenship be for sale?' *Citizenship Forum – European Union Democracy, Observatory for Citizenship, EUI Working Papers. RSCAS 2014/01* <http://cadmus.eui.eu/bitstream/handle/1814/29318/RSCAS_2014_01.pdf?sequence=1>.

¹⁴² Elspeth Guild, Kees Groenendijk and Sergio Carrera, 'Understanding the Contest of Community: Illiberal Practices in the EU?' (ed.) in Elspeth Guild, Kees Groenendijk and Sergio Carrera *Illiberal Liberal States. Immigration, Citizenship and Integration in the EU* (Ashgate Publishing, Ltd., 2009) 28.

¹⁴³ Stanley Hoffmann, 'Duties Beyond Borders: on the Limits and Possibilities of ethical international politics', (1981-1982).14. *N.Y.U. J. Int'l L. & Pol.* 911.

¹⁴⁴ Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment OJ L 155, 18.6.2009, p. 17–29.

¹⁴⁵ *Op. cit.* 136.

to give expression to universal morals premised on the idea that everyone has the right to be a citizen, which Habermas understands by conjuring widening-networks of solidarity¹⁴⁶.

Following these lines, in the view of Joseph Carens, "in a world of open borders people are free to leave their country and settle in another one being only subject to the sort of constraints that bind current citizens in their country"¹⁴⁷. This proposal is based on the maintenance of the citizenship already possessed by migrants due to their attachments with their country of origin – the so-called external citizenship embodying the right to diplomatic protection and political participation. Under his view, when non-European citizens claim for inclusion in other States, they have not totally suffered from rights' deprivation as such. Instead, they may be urging for social protection under the preposition of European or even international neighbouring policies. In this case one draws attention to the attempts to reinvigorate national migration policies in light of Human rights provisions and allow their enforcement at the State's level¹⁴⁸.

There are three prevailing perspectives on integration that should be simultaneously balanced by the EU and the States¹⁴⁹. The first one encompasses an enhancement of integration through equal treatment on the basis of a secure residence status. It implies "supervisory" policies undertaken by the States to assess the legality of LTRs and ultimately regularise their status. The second one approaches integration as a pre-emptive stage through which newcomers should go through before being provided with a legal status. This view accounts for integration methods employed by the States encompassing a priori assessments aligned to an on-going following up process of the creation of bonds of attachment between the Foreign and the State¹⁵⁰. The third one establishes a link between permanent residence status and the consequent demand for naturalisation, but may induce to the relinquishment of prior citizenships as part of the process of naturalisation¹⁵¹. As an alternative, the preservation of

¹⁴⁶ Jurgen Habermas, 'The European Nation-State: On the Past and Future of Sovereignty and Citizenship' (ed.) in *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff. Cambridge, MA: MIT Press 1998).

¹⁴⁷ Joseph Carens, *The Ethics of Immigration* (Oxford:Oxford University Press, 2013) 364.

¹⁴⁸ Olivier Vonk, *Dual nationality on the European Union: a study on Changing Norms in Public and Private International Law and in the Municipal Laws of Four EU Member States in the Series Immigration and Asylum Law and Policy in Europe* (Law, European University Institute, Florence, 2012) 26.

¹⁴⁹ Karin de Vries, 'Integration Requirements in EU Migration Law' (2012) EUI Working Paper MWP 2012/20.

¹⁵⁰ Christian Joppke & Rainer Baubock 'The Inevitable Lightning of Citizenship' (2010) 3 *European Journal of Sociology* 9.

¹⁵¹ Jo Shaw 'Political Rights and Multilevel Citizenship in the EU'. in E Guild, K Groenendijk & S Carrera (eds), *Illiberal Liberal States: Immigration, Citizenship and Integration into the EU* (Ashgate Publishing Ltd. 2009), pp. 29-49.

dual nationality could result in a more successful integration policy¹⁵². The latter allows the expansion of legal ties and attachments and can be even regarded as a step towards post-national conceptions of citizenship if States have a well-defined framework of rights to be exercised under their jurisdiction by those who hold dual nationality.

There is a common pattern underlying these views. The path under which inclusion can be conquered takes place through successive steps. The idea of progression is strenuous when studying the tension between inclusion and exclusion. If one measures such tension in political terms, inclusion in State' politics is conditional upon the State democratic reciprocity to such idea or, at least, to the idea that LTRs that still have national attachments to their country of origin can have a say on the politics of their country of destination and be involved as legitimate decision-makers.

Why taking inclusion to such scenario? It is not the case that inclusion can be drained in the claim to accede to citizenship as a fundamental right. Being that the case, eventual tensions between entitlements to citizenship could be easily resolved through Human rights law. On the contrary, it is profoundly intimate to the argument posed in this work: citizenship is hereby explored as an autonomous political status.

If an answer to such entitlement is to be given, it seems to lay in the principle of progressive inclusion in democracy on the part of LTRs. Why progressive? Equal participation in the polity needs to pay due regard to the status of non-EU nationals, namely to their irregular nature. This way, a progressive inclusion does allow the correction of status' inconsistencies¹⁵³.

Progressive inclusion in democracy does not empty the content of claims over inclusion but gives them context and a stage to play its role. As for the States and for Europe, it seeks to illustrate the level of responsiveness and responsibility towards the Others. Its very starting point (from which legitimacy can be later extracted) is based on the idea of all-affected-interests. To the extent that migrants arrive in a new State and reside for a long period of time

¹⁵² Kim Barry, 'Home and Away: The Construction of Citizenship in an Emigration context' (2006) 81 N.Y.U. L. stretches out this thought and elevates it into the category of extraterritorial citizenship.

¹⁵³ Christian Joppke, 'Why liberal states accept unwanted immigration' (1998) 50 World Politics and Anuscheh Farah Op. Cit. 140.

to be accorded long-term residence, they become stakeholders of the collective decisions that affect their interests¹⁵⁴.

Within the EU, this struggle for a gradual membership would have a slip-over effect. Given the hardships in structuring political life in multinational settings, the idea that democratic interactions between non-citizens and the European Union can be realized through a progressive inclusion in the States and in the European polity show that political identities are not fixed and permanent but are changeable and socially constructed¹⁵⁵. Concurring with Habermas on this subject, there must be a consciousness of a political fate that is both shared and shaped together, thus the European identity is informed by all its dynamics¹⁵⁶. The principle of a progressive inclusion in democracy is not diluted into “nationalizing State policies” which might not mean anything more than assimilation. By contrast, democratic politics highlight inclusive citizenship where all citizens come to a stage where they are accorded equal political rights and participation in the polity.

These democratic interactions concur with the disaggregation of citizenship rights and embody supra-national spaces for democratic attachments¹⁵⁷.

Progressive inclusion must thus be normatively contextualized. If the final goal is the entitlement to citizenship, the answer can be read in the future acquisition of nationality. On the very same point and at the European level, the EU has advocated for a more inclusive citizenship open to immigrants¹⁵⁸. Such approach embarks on the free enablement to dual nationality and more flexible legislative and administrative procedures to access nationality. It draws attention to a possible amendment or treaty reform in order to entitle LTRs to EU citizenship and set “the legal stable residence as a route.”

It is not the case that the answer to the entitlement to TCNs to European citizenship amounts to be other than grounded on citizenship itself¹⁵⁹. The suggestion proposed is to revisit the

¹⁵⁴ Seyla Benhabib, 'Borders, Boundaries and Citizenship' (2005) 38 *Political Science and Politics* 673.

¹⁵⁵ Juan J. Linz and Alfred Stepan, ' "Stateness", Nationalism and Democratization" in *Problems of Democratic Transition and Consolidation, Southern Europe, South America and Post-Communist Europe* (The John Hopkins University Press, Baltimore and London 1996).

¹⁵⁶ Jürgen Habermas and Jacques Derrida, ' What Binds Europeans Together: A Plea for Common Foreign Policy Beginning in the Core of Europe' (2003) 10 *Constellations* 291.

¹⁵⁷ Anuscheh Faraht, 'The Exclusiveness of Inclusion: On the Boundaries of Human Rights in Protecting Transnational and Second Generation Migrants' (2009) 11 *European Journal of Migration and Law*.

¹⁵⁸ Opinion of the European Economic Social Committee on “A more inclusive citizenship open to immigrants”, 2014/ C 67/04, *OJ C 67*, 6.3.2014, p. 16–22.

¹⁵⁹ Neil Walker, 'Denizenship and the Deterritorialization in the EU' (2008) EUI Working Papers Law 008/08.

first manifestation of citizenship, its particular mode and first language and comprehend how it is actually perceived and which kind of influence it can exert on transnational citizenship and democracy altogether. It must be further noted that this proposal following the acknowledgment of a principle of progressive inclusion is the one that mostly favours irregular LTRs. Firstly, it is not the case that this principle excludes them a priori because of the nature of their status leaving them out of any possible attempts to have their status regularised. That is due to the pre-emptive recognition that, in principle, they would be as well entitled to “a” form of citizenship, out of which their rights and duties towards the host society would be exercised. This right to be entitled to “a” citizenship is the legal expression of a right to inclusion as opposed to the right to exclusion¹⁶⁰.

Taking these notes into account, modern democratic governance, of which the EU is deeply a pioneer at the transnational level, is still inevitably linked to the question of “stateness”, meaning to the role played by States, without which no citizenship can exist. Or, in other words “Our contention...is that there can be no complex modern of democracy without voting, no voting without membership, and no official membership in the community of citizens without a State to certify membership”¹⁶¹.

The true is that the conditions to fulfil in order to attain citizenship remain the same conditions to apply for nationality in most of the States. This vision does not sever inclusion and the autonomous values of European citizenship in the narrative of national identity. On the contrary, it offers the notion of time and space to elevate the –a-to-be-citizens to fully-fledged European citizens¹⁶².

Due to the way in which inclusion in democracy is intersected with citizenship, the principle shaping the right to a progressive inclusion on the part of the LTRs can eventually be read in ensuring a fair access to the acquisition of nationality of a Member State. That would mean a priori that a right to a nationality as laid down in Article 15 of the UDHR is safeguarded and unrestrained in a discriminatory way. Hence, there is a need to characterize the content of the

¹⁶⁰ Hans Lindahl, *A right to inclusion and exclusion? Normative Fault Lines of the EU's Area of Freedom, Security and Justice* (Oxford:Hart Publishers 2009) 262.

¹⁶¹ Op. cit. 145, pag. 28 .

¹⁶²Hemme Battjes; Marie-Bénédicte Dembour; Betty de Hart; Anuscheh Farahat;Thomas Spijkerboer and Sarah van Walsum, 'The European Court of Human Rights and Immigration: Limits and Possibilities European Journal of Migration and Law' (2009)11 European Journal of Migration and Law.

right to a nationality in contemporary times and understand how democratic interactions can be protected under this view.

The emancipator thrust of citizenship occurs at the national level and not as a result of the vibrancy of making sense of transnational policies and conglomeration of political identities. Citizenship is not unitary and European citizenship itself portrays a vertical multi-layered citizenship which is primarily formed within the States. For instance, under the UK Nationality law, the British Nationality Act confers the status of a British citizen¹⁶³. The same occurs with the Irish Nationality and Citizenship law¹⁶⁴. In Latvia, it is the term “citizenship” that denotes the nationality of the person.

The importance of premising citizenship on nationality is such that Member States such as Denmark and the UK attached Declarations on the definition of their own nationals for citizenship purposes within the European Union¹⁶⁵. Thus, nationality has a functional dimension for European Union purposes, especially with regard to citizenship and the exercise of citizenship’ rights¹⁶⁶.

National variables represent transnational developments and try to acknowledge them in their further encouragements. Thus, post-national designs of citizenship as an all-encompassing status rely on national grounds. It would be incoherent if TCNs were recognised as European citizens without being acknowledged by the States as such.

¹⁶³ Enacted in 1981, in force since 1 January 1983. See also BNA (Commencement) Order 1982, Statutory Instruments 1982, 933. The BNA 1981 has been amended on several occasions, most recently by the Nationality, Immigration and Asylum Act 2002.

¹⁶⁴ Act of the Oireachtas 1956, 439 (most recently amended by the Irish Nationality and Citizenship Act 2001 (Act 15/2001) of 5 June 2001).

¹⁶⁵ Danish declaration on citizenship of the Union on the occasion of the Danish ratification of the Maastricht Treaty OJ 1992, C 348/1. See The 1982 Declaration by the Government of the United Kingdom of Great Britain and Northern Ireland on the definition of the term nationals was an adaptation of the 1972 Declaration necessitated by the adoption, in 1981, of a new Nationality Act OJ (EC) 1972 L 73/196; BGBI. II, 1410.

¹⁶⁶ Eva Ersboll 'The Right to a Nationality and the European Convention on Human Rights' (ed.) in Stéphanie Lagoutte, Hans-Otto Sano and Peter Scharff *Smith Human Rights in Turmoil. Facing Threats, Consolidating Achievements* (Martinus Nijhoff Publishers 2007) 249.

4. Hard times: Which responsibility towards the Others?

The underlying purpose of this chapter is to understand the future of nationality in two different but nevertheless interrelated contexts. Firstly, it seeks to polish the concept of nationality in the nationality-citizenship nexus as a vector to the exercise of the later which may or not be in crisis. This way, it is important to grasp the symbolism behind nationality and to what extent it has surrendered to emergent “moral outcries” from the international civil society.

Secondly, this chapter intends to illustrate the future of nationality as tantamount as to understand which kind of relations can be democratically exercised between citizens, non-EU citizens and the Member States and the EU to an ultimate extent. The main question concerns the need to understand whether there is any obligation on the part of the States to grant nationality so that democratic interactions and inclusion on the part of LTRs can be established. At last, the role of the European Union and its conceptualization as an attempt to assert an autonomous positions in this matter being it so intimate to the transnational integration of the Others Among Us.

Nationality as entrenched in nationhood is a necessary condition of State existence and sovereignty. There is no statehood without it being previously informed by the nation, by nationhood and by a group of people sharing a collective national identity giving meaning and voice to their States. Nationality was defined in the *Nottebohm* judgment as “a genuine connection of sentiments, together with the existence of reciprocal rights and duties¹⁶⁷”. Hence it is seen in relation to the need to avoid statelessness¹⁶⁸.

The right to a nationality is a fundamental right laid down in several international human rights instruments such as in article 15 of the UDHR¹⁶⁹, Article 5 (iii) of the International

¹⁶⁷ Case *Nottebohm, Liechtenstein v Guatemala* [1955] ICJ Rep 4, ICGJ 185 (ICJ 1955).

¹⁶⁸ Council of Europe, *European Convention on Nationality*, 6 November 1997, ETS 166.

¹⁶⁹ Article 15 of the UDHR sets forth the protection concerning the right to acquire nationality, the right to retain it and the right to change nationality.

Convention on the Elimination of All Forms of Racial Discrimination¹⁷⁰, ICCPR¹⁷¹, Article 7 of the Convention on the Rights of the Child¹⁷², Convention on the Reduction of Statelessness¹⁷³ and the Convention relating to the Status of Stateless Persons¹⁷⁴ and the Convention relating to the Status of Refugees¹⁷⁵.

In the context of international Human rights law, nationality is a crucial aspect of human dignity. It shapes personal identity and gives meaning to the allegiance and interpersonal bonds between the person and the community.

Seyla Benhabib states that in the current crisis of the nation-state and in the rise of multicultural movements there are “outright” contradictions between the commitments of States to respect Human rights and “how States assert their sovereign claims over admission policies based on whom and on what”¹⁷⁶.

With respect to the current crisis of the nation-state and the extent to which it exerts influence on the exercise of citizenship, some remarks need to be made. Progressively, one has been witnessing the decline of the nation-state as a self-standing concept. Large problems with global implications call for solutions of a same nature. That concurs with the interdependence between national, European and international politics calling for inter-state channels of communication. As for national identity and nationhood, these indicators no longer remain self-referential. Instead, with the spread of cultural pluralism and the presence of bounded communities of “Others” in territorial bounded-nations there is a generated perception of a certain “national-engineering¹⁷⁷”. This term captures the sense by which nationhood is the

¹⁷⁰ International Convention on the Elimination of All Forms of Racial Discrimination, Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 entry into force 4 January 1969, in accordance with Article 19.

¹⁷¹ International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49.

¹⁷² Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49.

¹⁷³ UN Convention on the Reduction of Statelessness, New York, 30 August 1961, entered into force 13 December 1975, in accordance with Article 18.

¹⁷⁴ Convention relating to the Status of Stateless Persons Adopted on 28 September 1954 by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 526 A (XVII) of 26 April 1954 Entry into force: 6 June 1960, in accordance with article 39.

¹⁷⁵ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

¹⁷⁶ Op.cit. 197.

¹⁷⁷ Gil Delannoi, 'The odd and the even: nationhood and democracy' (ed.) in *The Politics of Belonging, Nationalism, Liberalism and Pluralism* (Alain Dieckhoff, 2004).

product of both nation-building and nation-shaping in a social and deliberative way. States still retain the legitimacy that rests with the nationhood but territorial boundaries no longer coincide with social and cultural demands. It is not only political governance that has extended itself to transnational realms but also new patterns of nationhood and social integration that are now discernible: the cultural and popular nation, the civic nation, the “genetic” nation, among others¹⁷⁸. Put it simply there are new indicators of belonging.

History shows us that nation-states define the rights of citizens within their own territory. This traditional principle has to be stretched out to welcome the shift in the major organizing principle of membership: from national constellations of democratic participation to transborder circles. Steering principles of self-determination and self-legislation have to be refined instead of being stranded in national institutions anymore.

The acknowledgment of these realities has a rough impact on the role played by nationality as determined by the States. As seen, the exercise of citizenship within the EU results from the possession of Member States' nationality. This way, the exercise of citizenship can be impaired by States policies on these matters. Being that the case, the exercise of citizenship and participatory democracy can be in crisis if not anchored in the holding of nationality.

On this point, arguments have been put forward concerning the move towards a post-national society in parallel with the extension of politics and democratic interactions. Within the EU and for EU citizens such situation does not require a thorough treatment since it is part of daily politics. That is not case for non-EU citizens per se in which the time has come for Member States and for the EU to be clear about the role of nationality' policies on integration and democracy.

Without immediately taking the position of non-EU citizens on board, it seems that if nationality simply falls out of joint, the exercise of citizenship amounts to a de facto conundrum. This is due because the introduction of new modes of political participation and legitimacy towards a new self-steering society will fall under the threads of an “increase abstraction¹⁷⁹”. Post-national societies would only exist in reference to transcendent designs of integration, democratic participation and citizenship would be blurred lines based on legal grounds and on the assumption of States' neutrality concerning that.

¹⁷⁸ Ibid. 35

¹⁷⁹ Op.cit. 23, 137. On a concurring vision see Martha Nussbaum, *For Love of Country: Debating the Limits of Patriotism* (Joshua Cohen Boston: Beacon Press, 1996).

Habermas's proposal seeks to explore the extensions of these processes at the supranational level. In his view, the post-national State takes gradually the shape of a common political coupled with civic solidarity being the ultimate goal the integration of the other. Such achievement would result from bringing together a sense of solidarity and mutual responsibility and defending a principle of the impartiality of the State. In his words, "Legal orders are "ethically imbued"... they interpret the universalistic content of the same constitutional principles that make up a national history...the majority culture must detach itself from its fusion with the general political culture in which all citizens share equally; otherwise it dictates the parameters of political discourses from the outset¹⁸⁰". He does mean that States must remain impartial towards the inclusion of the Other in its society. *In lieu*, such inclusion must be sensitive to the difference represented by the Others.

This type of inclusion which is sensitive to the difference is the inclusion that has been suggested in this thesis under the terms "progressive inclusion". Relying on the same position, it is not enough to point out the nature of the principle without studying its "fair procedure". Without this layer, the contradictions States' commitments towards Human rights and nationality policies remain unaddressed.

These contradictions can be explained with reference to the following example. States accord respect to Human rights and tend to strike a balance of proportionality in case of rights' collusion. As seen, being nationality a Human right States are obliged to respect and protect the right to nationality, which usually takes the form of a negative obligation in order to avoid statelessness or the arbitrary deprivation of nationality. Human rights principles must be taken into account by the States as laid down in Article 5(a) and 18 of the European Convention on Nationality (hereafter ECN). Nevertheless, this simple commitment seems to be deprived of content if States' nationality laws deviate from Human rights commitments.

This way, in order to avoid blatant contradictions, it must be noted that the progressive inclusion of the Other does not necessarily amount to supersede all the core principles of a national and European organised society.

The principle of progressive inclusion is aimed at realizing well-established democratic interactions between the Other and the State of inclusion to the extent it leads to a progressive exercise of citizenship. As noticed, citizenship is not insulated from nationality. If the

¹⁸⁰ Ibid. Pag. 144-146.

understanding of citizenship has been revitalised in order to follow up new developments on democratic interactions at the transnational border there is a consequent need to bring the reading of nationality to a new light.

Despite the existence of two legally known rules governing the acquisition of nationality, namely *jus sanguinis* and *jus solis*, the domestic implementation of these rules and their nuances vary from State to State. This is a sign of State autonomy and considerable leeway on this matter. The conferral of nationality lies within the reserved domain of the States and in accordance with their organs and legislation.

Nonetheless, this lack of uniformity or clear guidelines may impair the full exercise of rights of free movement in the case of LTRs striving after the acquisition of nationality in order to be recognised as nationals and European citizens. It is not crystal-clear which periods of residence need to be taken into account where LTRs exercise their quasi-citizenship rights of free movement or even whether the simple fact of moving abroad within the EU would impair the access to nationality in case. For instance, in light of Dutch nationality legislation, loss of nationality can be grounded on uninterrupted residence abroad (10 years)¹⁸¹. Furthermore, the ECN does not provide anything on Member States considering periods of residence abroad but still within the EU as a meeting requirement for naturalisation neither whether requirements to obtain the status of long-term residence are waived in case of exercise of free movement rights¹⁸².

Even though Treaty provisions do not make a straightforward connection between acquisition and loss of European citizenship and the place of residence, the CJEU has slightly approached this matter in the case *Eman and Sevinger*¹⁸³. At stake was the exercise of political rights by two Dutch nationals resident in Aruba, which does not pertain to the *rationae loci* of EU law. The Court decided that moving within Member States' territories lying out of the territorial scope of EU law does not trigger the loss of European citizenship while drawing attention to the ability of the States to undertake strategic and constructive manoeuvres around the concept of residence in the State's territory for nationality purposes.

¹⁸¹ Article 15 (1) (c) Netherlands Nationality Act.

¹⁸² Conditions for the Acquisition and Loss of Nationality adopted by the Committee of Experts on Nationality on the basis of a draft prepared by Mr Andrew WALMSLEY, Strasbourg 2003.

¹⁸³ Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055.

Indeed, it should not be disregarded by the EU that some nationality legislation may amount to a de facto violation of EU law principles. For instance, when obligations of solidarity imposed on the States are violated and even when domestic rules of private international law on nationality violate international law.

Certainly, this lack of coherence and legal cohesion has far-fetched repercussions on the complete realization of democratic interactions and political participation of the Others in their hosting societies. The absence of hard European law on the allocation of electoral rights to TCNs is compounded by superficial soft legal guidance on the formal extension of political rights to the Others. Such formalistic approach does not take into account any resemblance of a principle of affected-interests but leaves to the States to see the extension of political rights as a reward through the process of integration. Until now, there have only been some reticent experiments that continue between moving backwards and forwards.

In the context of immigration and Europeanization, nationality and citizenship are read as interchangeable terms. It is due to this intertwinement that the main concern must be placed on nationality because it is its possession that triggers the exercise of citizenship. Therefore, if nationality is revitalised in light of the influence of the EU on migration matters and modern politics there is a pathway for cosmopolitan citizenship to evolve.

The access to nationality cannot be read in extreme exclusive terms. In other words: the acquisition of nationality of the State of destination after a considerable time space of residency cannot be elevated to a mandatory process of naturalisation which automatically strips long-term residents of their previous bonds, commitments and political and social attachments to their home state.

It is time for the EU to pave its way into a more serious influence in matters of nationality and hereby citizenship/immigration in Member States. On this point, three considerations must be raised: 1) the presumed antagonism between nationality and Europeanization 2) the role of both elements in shaping a common European migration policy and 3) the consequences for the EU.

Nationalism is regularly envisaged as adverse to the European integration. With the rise of globalization and the surrender of State sovereignty, its absolute and exclusive character no longer exist in the sense of nation-state as before. Nevertheless, it is not the case that its

symbolism has been exhausted on behalf of Europe. Instead, it is slightly engaged in the European construction through the foundations of European citizenship¹⁸⁴. As emphasized in the Nottebohm judgment, the rules governing the acquisition and loss of nationality pertain to the reserved domain of the State and have always been signed as manifestations of State's autonomy. This does not necessarily hold true anymore due to the need to pay due regard to international law and Human rights principles. State autonomy can no longer be developed in the margins of the European path but in parallel with that.

Despite the fact that the determination of a person's nationality is made in accordance with domestic legislation, its effects are felt and perceived at the international level, hence defined and controlled by that. Article 1 (b) of the Hague Convention thus states that the law shall be accepted by other States insofar as in consistency with applicable international conventions, customary international law and the principles of law – Article 1(b) of the Hague Convention of 1930. Customary international law embraces the need to avoid and reduce statelessness, the prohibition of arbitrary deprivation of nationality and the obligation of non-discrimination (Article 5 of the ECN).

With respect to the the progressive inclusion of Others there is some relentlessness in perceiving the role played by the Member States. With regards to the involvement of non-EU citizens in European democracy, some soft law and guidelines have been suggested by the EU. For instance, recently and within the framework of the Global Approach to Migration and Mobility¹⁸⁵, the EU enhanced its external action tackling migration issues with the adoption of the Council Decision on the implementation of such comprehensive approach¹⁸⁶. As a consequence, new legally binding instruments have been issued to inform States' policies, namely Readmission and Visa Facilitation Agreements, Mobility Partnerships and Common Agendas for Migration and Mobility.

¹⁸⁴ Anne Peters, 'Extraterritorial Naturalizations: Between the Human Right to Nationality, State Sovereignty, and Fair Principles of Jurisdiction' (2010) 53 German Yearbook of International Law 623.

¹⁸⁵ Communication from the Commission on the global approach to migration and mobility Brussels, 18.11.2011 COM(2011) 743 final.

¹⁸⁶ Draft Council Conclusions on the implementation of the Global Approach to Migration and Mobility, Brussels, 2 April 2014, 8443/14 available at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/143478.pdf.

It is not possible to extract from such recommendations any views on a future obligation imposed on States to confer nationality on non-EU citizens in order to fulfil their political and social aspirations. Hence, the traits of a principle of progressive inclusion have to be developed alongside European integration and with the involvement of the EU. All in all, “throughout Europe the politics of immigration have become the politics of nationality¹⁸⁷”. Certainly, the coordination of migration schemes at the supranational level poses a great challenge to the autonomy of Member States, so their legislative policies must be in harmony with the EU.

The time has come for the EU to take a more assertive position in the organisation of Member States' nationality laws concerning their outstanding influence in citizenship. Given the very often unquestionable States' prerogatives on the regulation of nationality, national migration policies tend to be tightened up as a shield to be used against the undesirable presence of Others.

Until now, the EU has relied to a great extent in the legal framework of the ECN provided by the Council of Europe. Undoubtedly, this legislative package has some remarkable features with respect to upcoming challenges. As an example, it takes a leap forward the recognition of habitual and permanent residence in a State party as a criterion to assess the grant of nationality and introduces the maximum of ten years residence that States can demand in cases of naturalisation.

Within the EU, however, the domestic implementation of this Convention has not nurtured the expected effects. Firstly and in abstract, different rhythms of signatures and ratifications on the part of the Member States and the EU itself hinders the true effectiveness of the Convention in Europe¹⁸⁸. Secondly, it is not a novelty that there are persistent clashing views between strict nationality laws and common immigration schemes proposed by the EU. Thus, there is an overall apprehension towards the influence of the character of Union citizenship.

Jessurun d'Oliveira concurs with this vision by stating that the EU should set aside any attempt of convergence of nationality laws. In his argumentation he suggests that such

¹⁸⁷ R. Hansen, P Weil, ‘Introduction: Citizenship, Immigration and Nationality: Towards a Convergence in Europe?’ (ed.) in Hansen, R., Weil, P., *Towards a European Nationality. Citizenship Immigration and Nationality Law in the EU*, (New York Palgrave, 2001), p.1.

¹⁸⁸ Member States such as Belgium, Estonia, Lithuania, Slovenia and Spain have not yet ratified the European Convention on Nationality.

interference would generate inter-institutional conflict among EU institutions and highlights that the nationality laws of the States do not need to take into account potential effects on EU law and European citizenship. In his view, citizenship is a dependent variable stemming from nationality. Thus, if the Union insists on achieving the promise of an autonomous European citizenship it must redefine and determine under which circumstances a citizen that loses his nationality remains nevertheless an EU citizen¹⁸⁹. He seems consider the indirect influence of EU law on nationality laws and “Member States’ identity” as an undesirable one in a federalist context. If that is not the case, he considers that Member States have never expressed their willingness to render their nationality laws subject to the interference of the EU through a transfer of powers in the field and have never agreed on Treaty amendments to turn the regulation of nationality into a mixed competence¹⁹⁰.

These arguments can be contested. With regard to scope for European influence, to the extent national acts engage Union citizenship there is room for acknowledging cross-border effects being them direct or indirect. It is relevant to point out that there are situations of an internal nature that can generate some controversy. European citizenship is by nature a non-internal matter but its impact may not always be seen due to the internal contours in which it is invoked. Drawing distinctions between internal and cross border situations for the sake of defining the limits of EU’s influence could amount to a de facto and reverse discrimination even among EU nationals and TCNs. That would be the case if a TCN had acquired nationality of a Member State having previously made use of free movement rights whereas an EU national would run the risk of being stateless without having moved within Europe. It is both the acquisition and loss of nationality that activate the general principles of EU law.

The argument invoked in this thesis underlines the need for the EU to overlook the legislative framework of nationality laws of its Member States and reassess the way they are put in practice.

It is worth emphasizing that the endorsement of such policy would not amount to a full convergence of nationality laws under the shadows of legal engineering. Alternatively, it would allow the EU to control any attempt on the part of the Member States to manipulate their nationality laws and abuse their prerogatives without any sort of inspection or check of

¹⁸⁹ H U. Jessurun d’ Oliveira, 'Case note 1. Decoupling Nationality and Union Citizenship' , (2011) 7 European Constitutional Law Review 139.

¹⁹⁰ Ibid. 147.

compatibility with EU law and international principles. This supervision should be as well aimed at giving substance to the principle of equality among EU nationals in the sense that any legislation on nationality is not unfounded and discriminatory. As a matter of fact, in some Member States such as Belgium, Malta and Lithuania, there are causes other than deprivation of nationality because of fraud committed during the naturalisation procedure that justify loss of nationality. Such potential grounds for a future loss of nationality are targeted at nationals who have acquired nationality through birth¹⁹¹.

Judicial scrutiny undertaken by administrative organs in light of EU law is a necessary starting point to resolve Member States' attempts to restrict their migration policies regardless of EU law and human rights provisions or making them conditional upon unlawful trade agreements. Certainly, the piercing scale of immigration in many (Western) European States has led to an instrumentalisation of citizenship while rendering more and more fluid the boundaries between the deep social-political nature of the status with the market's fibre¹⁹².

Progressively, it would result in a reflexive harmonisation of nationality laws thus contributing to a more cohesive approach on this issue. This proposal goes hand in hand with the claim over the acknowledgment of a general principle of progressive inclusion of the Other. Democratic interactions between the TCNs and the EU start at the bottom being the State's level the main level of political affiliation. Considering the path the EU has walked through in migration issues and European Diplomacy, there are blurred lines of responsibility of the EU that must be revealed and exposed to new light. At the same level the EU foresees a deeper inclusion of the Others within its boundaries, at the same level it designs a future closed to European federalism and more integration, the EU must be also called to its own responsibility towards the Others.

¹⁹¹ Article 23 (1)(2) Belgium Nationality Act; Article 14(2)(b) of the Maltese Nationality Act; Article 21(2) Lithuanian Nationality Act. See also Article 25(1)(b) of the Spanish Civil Code.

¹⁹² A. Shachar, and R. Hirschl 'On Citizenship, States and Markets' (2014) 22 *Journal of Political Philosophy*, 231.

5. Conclusion

Throughout this work, citizenship was confronted with its own limitations in the contemporary European society. First and foremost it is highlighted that its value resides in the fact that it offers political dignity to those who are considered to be citizens.

European citizenship was set as an example to illustrate the nexus citizenship-democracy. Its transnational nature allows EU citizens to accord democratic legitimacy to the European institutions and autonomously exercise its core rights across-borders. The fully-fledged exercise of citizenship rights is nonetheless conditional upon the need to hold the nationality of a Member State hence European citizenship dwells upon a national basis.

Although there is a European recognition of the rights to which the European citizen is entitled, the process of entitlement itself is seen at the State's level. This has a particular impact on the EU with the inflow of new communities of non-EU nationals in the EU. As newcomers in the European realm, they prompt new modes of belonging and engagement with the State in which they reside. The EU has provided them with substantive legal frameworks that comprise their legal situation and quasi-citizenship rights because they resemble the rights that stem from the possession of European citizenship.

On this point, we commented on the phenomenon of disaggregation of citizenship rights to which political rights are not an exception. Most of the rights that were once irrevocable cornerstones of citizenship are perceived today as fragmented and no longer pertain exclusively to the nationals of the States. That said, we explored whether such disaggregation could lead to the replacement of the criterion of nationality by the criterion of residency to attribute citizenship.

In this context, we analysed the autonomy of European citizenship in relation to the fact that it is not yet denationalized. We observed that national policies capable of having an impact on the cross-border exercise of citizenship rights have to be compatible with the EU.

Considering the situation experienced by migrants, they maintain external citizenship towards their State of origin in the sense that their departure does not undermine their bonds of affiliation. However, in the EU, it results in the conditionality of European democracy because democratic development is still built upon the exercise of civil and political rights in

the Member States according to their own requirements. This is more contentious concerning illegal migrants to which the access to European citizenship poses two questions.

The first question refers to whether citizenship can be regarded as a fundamental right. Citizenship is the full exercise of democracy, legitimacy and involvement in society. Thus, with migrants, they mostly exercise quasi-citizenship rights but they cannot fully participate in the State and European democracy. This political dimension does not mean that rethinking citizenship in the case of illegal migrants is non-defensible. Citizenship as the right to have rights is a matter of identity in a bounded community which does not directly pave a way to access European citizenship but to access *a* citizenship.

Considering that citizenship remains linked to democracy, we studied this intersection in times of transition of Others into new political cultures being the goal the establishment of democratic interactions between non-nationals of the Member States and the EU. This transition operates through a principle of progressive inclusion in democracy. The latter entails a gradual involvement in the social life of the State until reaching the surface of electoral equality and membership to the polity.

Facing the fact that European citizenship is a unitary status but there is no uniformed process to access it unless through internal routes, the answer may reside in the very beginning of this process - the access to the nationality of a Member State. This is the process that the EU should take into consideration to explore whether citizenship is becoming a traded service and how the national conditions to access it have become imperatively tightened up to the extent they hinder the access to the status and to the rights it entails. To an ultimate extent, it would result in a reflexive harmonisation on this matter at the EU level and in the beginning of a new path to promote democracy internally and externally.

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