CEPS Paper in
LIBERTY and SECURITY in Europe

Citizenship Deprivation
A Normative Analysis

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No. 82/March 2015

Abstract

Most critical analyses assess citizenship-deprivation policies against international human rights and domestic rule of law standards, such as prevention of statelessness, non-arbitrariness with regard to justifications and judicial remedies, or non-discrimination between different categories of citizens. This report considers instead from a political theory perspective how deprivation policies reflect specific conceptions of political community. We distinguish four normative conceptions of the grounds of membership in a political community that apply to decisions on acquisition and loss of citizenship status: i) a 'State discretion' view, according to which governments should be as free as possible in pursuing State interests when determining citizenship status; ii) an 'individual choice' view, according to which individuals should be as free as possible in choosing their citizenship status; iii) an 'ascriptive community' view, according to which both State and individual choices should be minimised through automatic determination of membership based on objective criteria such as the circumstances of birth; and iv) a 'genuine link' view, according to which the ties of individuals to particular States determine their claims to inclusion and against deprivation while providing at the same time objections against including individuals without genuine links. We argue that most citizenship laws combine these four normative views in different ways, but that from a democratic perspective the 'genuine link' view is normatively preferable to the others. The report subsequently examines five general grounds for citizenship withdrawal – threats to public security, non-compliance with citizenship duties, flawed acquisition, derivative loss and loss of genuine links – and considers how the four normative views apply to withdrawal provision motivated by these concerns. The final section of the report examines whether EU citizenship provides additional reasons for protection against Member States' powers of citizenship deprivation. We suggest that, in addition to fundamental rights protection through EU law and protection of free movement rights, three further arguments could be invoked: toleration of dual citizenship in a political union, prevention of unequal conditions for loss among EU citizens, and the salience of genuine links to the EU itself rather than merely to one of its Member States.

ISBN 978-94-6138-451-5
Available for free downloading from the CEPS website (www.ceps.eu)

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This paper was prepared in the context of the ILEC project (Involuntary Loss of European Citizenship: Exchanging Knowledge and Identifying Guidelines for Europe), which aims to establish a framework for debate on international norms on involuntary loss of nationality. For more information visit: www.ilecproject.eu.

ILEC is a research project co-funded by the European Commission's DG Justice, Citizenship and Fundamental Rights.

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Introduction

The main goal of this report is to provide an overview of political theory arguments regarding citizenship deprivation and to suggest normative standards for evaluating laws and State practices in this area derived from conceptions of citizenship in democratic States.

This approach complements the discussion of external constraints on States' self-determination rights in matters of nationality through international or European legal norms. These constraints are extensively elaborated in the other ILEC reports and policy briefs.[1] A comprehensive political theory perspective needs to combine a domestic focus on internal standards of democratic citizenship with standards of justice in international relations. Both of these sets of norms generally go beyond positive legal norms.

We argue that political theory approaches face surprising problems in defending a general prohibition to deprive citizens of their status. In the end, we propose that a combination of a universal right to nationality, of presumptive stability of citizenship based on a genuine link between individuals and States, and of reciprocal duties in relations between States are sufficient to ground a strong presumption against deprivation powers. This presumption can, however, be defeated in a narrow class of cases in which involuntary loss of citizenship seems justifiable. Defending this stance requires resisting a broader trend towards instrumental uses of citizenship by States and individuals, which paves the way not only for over-inclusion, but also for enhanced State powers of deprivation.

In section 1 of the report we examine contemporary contexts of citizenship deprivation. Section 2 proposes a terminological and conceptual framework for analysing the variety of deprivation provisions. Section 3 analyses political theory perspectives and outlines the general normative principles that we propose for evaluating deprivation policies. Section 4 discusses five material grounds for citizenship deprivation that we identify as the dominant reasons underlying current legislation. Section 5 considers whether EU citizenship adds anything to the general presumption against deprivation powers of States. Section 6 concludes the report.

1. A return of citizenship deprivation

Hannah Arendt famously argued that citizenship is "the right to have rights", whereas "the Rights of Man" proved to be inadequate to actually protect "abstract" human beings who were no longer recognised by "their state". Only belonging to "one's own people" could ensure protection of supposedly inalienable and universal human rights.[2]

Despite the momentous development of the international system for protection of human rights since her time, the citizenship of a person remains pivotal for her treatment by this system; the rights people effectively have

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[1] For the ILEC (Involuntary Loss of European Citizenship) project see www.ilecproject.eu. All findings and recommendations of the project are available under "Publications" on the project website.

[2] H. Arendt (2004), *The Origins of Totalitarianism*, New York: Schocken Books, 370. She notes further that "the very phrase 'human rights' became for all concerned – victims, persecutors, and onlookers alike – the evidence of hopeless idealism or fumbling feeble-minded hypocrisy" (344). Given the several millions of refugees from Syria, only a few thousand of whom are allowed to enter the EU, things seem to have not changed much since. According to Arendt, the right of asylum is the only one that stands for "the Rights of Man" in international relations (356).

are still generally determined with a reference to the country they belong to. The conventions against statelessness[3] aim to assure that no one will remain outside the international system. Thus they maintain it as a system of States rather than transforming it into a cosmopolitan direction. We are, and seem bound to always remain, 'citizens of X'. Nevertheless, the impact of the enhanced protection of democracy and human rights within Western States in the second part of the 20th century on citizenship was profound and seemed to transform it from a privilege bestowed by a sovereign government on those who were worthy of it, into an entitlement of the sovereign citizen, whose status as such cannot be altered by the government.[4]

In the new millennium, the expectation that 'the right to have rights' would eventually be secured by depriving liberal democratic governments of the power of citizenship deprivation has once again been challenged, in several contexts. First, in the context of the relationship between public security and citizenship, the most obvious challenge is global terrorism and the wide use of extralegal means in fighting it.[5] Ironically, turning citizens suspected of terrorism into deportable aliens means that governments are exporting security threats to the international community and are thus failing in the very task of providing security through prosecuting and punishing those citizens who have turned to violence. Another irony is that this practice initially often targeted naturalised citizens only – their differentiated treatment in security matters is an example of prejudice officialised in law – but is now increasingly extended also to birthright citizens to avoid discrimination.[6] The prudential rationale is – of course – that terrorism is also 'home-grown' in Western democracies. We shall return to the relationship between public security and citizenship when discussing grounds for deprivation in section 4.

The second challenge concerns the linkage between citizenship and migration. Whether citizenship properly belongs to those who have a permanent interest in membership of the political community,[7] or reflects the depth of social relationships brought about by residence,[8] political theorists generally regard it as a secure status that must not depend on the government of the day and its political goals. However, States increasingly use citizenship instrumentally to control immigration, e.g. in order to prevent family reunification, to reward special integration efforts and to attract human capital or financial investment by granting citizenship to particular high-value candidates who have little or no personal ties to the relevant polity. Examples of the last are provided by achievement-based admissions, e.g. in Austria, and faster access to citizenship for foreign investors, e.g. in Cyprus and Malta.[9]

An even more blatant instrumental use of citizenship exploits its link with the franchise. Voting rights in national elections are nearly universally reserved for citizens and a large majority of democracies has recently granted them also to citizens residing abroad. It is therefore tempting for incumbent governments to extend citizenship to, or to withhold it from, emigrant populations or kin minorities in neighbouring States in order to manipulate electoral results. Notoriously, the Hungarian government of Viktor Orbán handed out passports to more than 500,000 ethnic Hungarians who had been citizens and residents of neighbouring countries since the

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[3] Convention on the Reduction of Statelessness, 30 August 1961, New York; Convention Relating to the Status of Stateless Persons, 1954, New York.

[4] For this development in the US, see P. Weil (2013), *The Sovereign Citizen: Denaturalisation and the Origin of the American Republic*, Philadelphia: University of Pennsylvania Press.

[5] See for example P.J. Spiro (2014), "Expatriating Terrorists", *Fordham Law Review*, 82:2169.

[6] The European Convention on Nationality prohibits such discrimination but is binding only for the signatories (the UK is not among them) and presently there is no general norm in international law to prohibit such discrimination.

[7] R. Bauböck (2007), "Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting" *Fordham Law Review*, 75; A. Shachar (2009), *The Birthright Lottery: Citizenship and Global Inequality*, Cambridge: Cambridge University Press.

[8] J.H. Carens (2013), *The Ethics of Immigration*, Oxford: Oxford University Press.

[9] See J. Dzankic (2012), "The Pros and Cons of Ius Pecuniae: Investor Citizenship in Comparative Perspective", EUI Working Paper RSCAS 2012/14, Florence; R. Bauböck & A. Shachar (eds) (2014), "Should Citizenship Be for Sale?", EUI Working Paper RSCAS 2014/01, Florence; and S. Carrera (2014), "How Much Does EU Citizenship Cost? The Maltese Citizenship-for-Sale Affair: A Breakthrough for Sincere Cooperation in Citizenship of the Union ?", CEPS Paper in Liberty and Security in Europe, 64, April, Brussels.

end of the First World War, and these returned the favour by voting overwhelmingly for him in the 2014 elections.[10]

From a citizenship perspective the biggest problem of such purposes shaping new legislation and policies is that citizenship no longer adequately identifies those who have a claim to membership of the polity (though it may adequately indicate the success or failure of the respective policy).[11] Another major problem with the instrumental awards of citizenship for the benefit of a current government is that they may be regarded as illegitimate and also politically undesirable by a successor government.[12] In fact, the Maltese opposition has announced that they would challenge the legitimacy of investor citizenship when coming to power.[13] The effect would not only be that instrumental expansions of citizenship lead to subsequent retractions, but that citizenship may come to be seen less and less as a secure and equal status independently of the way it has been acquired. In other words, citizenship awarded for temporary and instrumental reasons may also become exposed to deprivation for similar reasons.

The final context that helps to explain the rise of involuntary deprivation of citizenship is the proliferation of multiple citizenship. The main reasons for increasing toleration of multiple nationality are norms of gender equality in *ius sanguinis* transmission, the strengthening of *ius soli* and naturalisation entitlements in countries that want to promote immigrant integration, and the transnational turn in major countries of emigration that want to make better use of their expatriates and 'diasporas' as an economic, cultural and political resource.[14] The obvious link between this global trend and the strengthening of deprivation powers is that multiple nationality allows States to withdraw citizenship without creating statelessness. As international law aims to proscribe deprivation when the person concerned has no other citizenship, the new powers of deprivation generally apply to dual nationals only.[15] However, the dramatic increase in numbers of dual citizens among migrant origin populations makes deprivation once again attractive for governments, even if they cannot apply it to those who do not possess another nationality.

In the past, dual citizenship used to be regarded as an evil for States but also for individuals because of cumulative duties that States could impose on dual citizens such as tax and military service obligations. Over the last 50 years, dual citizenship has come to be regarded as less of a problem for States and as beneficial for individuals, especially because of the additional mobility rights that it conveys. We may be entering a third stage in which dual citizenship can once again become also a liability if States strengthen their powers of citizenship deprivation while still respecting their duties to prevent statelessness. Singular citizens would then be more secure in their membership status than dual nationals. Targeting dual citizens for deprivation has, however, deeply perverse effects even for the States engaging in these policies. As Audrey Macklin points out, if both States of which a multiple citizen suspected of terrorist activities is a national adopt such laws, then each State has an incentive to pre-empt deprivation by the other State as quickly as possible. Citizenship

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[10] See K.L. Sheppele, "Hungary: An Election in Question", *The New York Times Blog* (http://krugman.blogs.nytimes.com/2014/02/28/hungary-an-election-in-question-part-1/).

[11] Note that even if citizenship is used only instrumentally, the rule of law still requires abstaining from arbitrary acts, including arbitrary removal of citizenship. However, non-arbitrariness can be easily satisfied by some form of impact assessment or cost-benefit analysis and thus does not provide a robust standard for protection against deprivation.

[12] We discuss this possibility more extensively in section 4.3.4 below.

[13] The opposition filed a motion in court that whenever it is elected to power it will revoke the citizenship of any such investor, see "Opposition warns buyers: Citizenship scheme is temporary - Judicial protest filed", *Times of Malta*, 28 January 2014 (www.timesofmalta.com/articles/view/20140127/local/opposition-warns-buyers-citizenship-scheme-is-temporary-judicial-protest-filed.504355).

[14] T. Hammar (1990), *Democracy and the Nation State: Aliens, Denizens and Citizens in a World of International Migration*, Aldershot: Avebury; P.J. Spiro (2010), "Dual Citizenship as a Human Right", *International Journal of Constitutional Law*, 8:111; T. Faist & P. Kivisto (2007), *Dual Citizenship in Global Perspective*, New York and Basingstoke: Palgrave Macmillan; K. Hailbronner & D. Martin (eds) (2003), *Rights and Duties of Dual Nationals: Evolution and Prospects*, The Hague: Kluwer; J.K. Blatter, S. Erdmann & K. Schwanke (2009), "Acceptance of Dual Citizenship: Empirical Data and Political Contexts", Institute of Political Science at the University of Lucerne, Glocal Governance and Democracy Working Papers Series, no. 2.

[15] The 2014 UK law provides a notable exception by allowing for deprivation also in cases where the government reasonably believes that another nationality could be obtained. See C. Sawyer & H. Wray (2014), "Country Report: United Kingdom", EUDO Citizenship Observatory (www.eudo-citizenship.eu).

deprivation becomes then a game of 'passing the buck' in which standards of judicial review and scrutiny are very likely to be eroded for the sake of swift action in order to avoid becoming the dumping ground for the other State's terrorist suspects.[16]

We must, however, not forget that public security threats or political motives are not the only reasons why States deprive citizens of their status. There are other justifications for deprivation, such as fraud in naturalisation, loss of citizenship by a relevant anchor person (spouse or parent), expiry of citizenship after long-term residence abroad or loss in case of acquisition of a foreign nationality. Except for the last of these justifications, there is no clear international trend and we have seen a number of countries in which changes have happened in either direction.[17]

In contrast to most recent discussions by legal scholars and political theorists, we will therefore not confine ourselves to analysing normative objections to deprivation in public security contexts. It seems at least prima facie puzzling to provide strong defences of citizenship status of those who threaten public order in a fundamental way while granting States the power to turn long-term resident citizens into stateless persons because of some flaw in the naturalisation procedure or to deprive their first generation emigrants of citizenship on grounds of acquisition of a foreign nationality. Solving this puzzle requires examining the underlying conceptions of membership in the political community, some of which may reject the threat to public order as a reason for deprivation but accept the rest. Although each of these reasons for deprivation is permissible under international law, we want to scrutinise them critically from normative political theory perspectives in order to arrive at a more solid as well as nuanced defence of citizenship status against the State's deprivation powers.

2. Basic concepts: grounds and procedures for loss

A normative evaluation of involuntary loss of citizenship needs to examine both the grounds for deprivation and the procedures that bring about such loss. Before doing so, we must distinguish involuntary loss from voluntary renunciation. Since we will argue in section 4 in favour of a strong presumption of stability of citizenship, we need to explain initially under which conditions restrictions on voluntary loss are permissible or even necessary for the sake of strengthening citizenship as a durable link between an individual and a State.

Distinctions between the different grounds and procedures for loss are not always entirely obvious. In fact, as we will show, the basic conceptual distinction between voluntary and involuntary loss depends heavily on normative premises. Before we address this important point, we start with a few purely terminological differentiations that we will presuppose in the rest of this paper.

We use the terms *deprivation* and *denationalisation* as synonyms for all provisions of involuntary loss of citizenship/nationality. The term *withdrawal* can also be used in this way, but we want to reserve it for indicating a specific procedure of deprivation.[18] We think that deprivation works better as a generic synonym for involuntary loss since such loss results in a person being deprived of the status, whereas withdrawal applies more plausibly to the State action of taking away the status. In the case of *ex lege* loss, for which we use the term *lapse*, the outcome is still that the person is deprived, although the status has not been actively withdrawn through a decision of State authorities. *Denaturalisation* refers to the subset of cases where denationalisation provisions aim at reversing an acquisition through naturalisation rather than through birthright.

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[16] See A. Macklin (2014), "Citizenship Revocation: The Privilege to Have Rights and the Production of the Alien", *Queen's Law Journal*, 40:1.

[17] While many European States have recently amended their laws to tolerate multiple citizenships, since 2010 Slovakia withdraws citizenship from persons who have voluntarily acquired another nationality and since 2014 Russia fines those who fail to disclose that they possess another citizenship. Since 2014 Canadian legislation requires declaration of intent for long-term residence as a condition for naturalisation, which could potentially provide a ground for deprivation if the person takes residence abroad.

[18] Art. 15 of the Universal Declaration of Human Rights uses the term "deprivation" in as broad a sense as we do. By contrast, the 1961 Convention on the Prevention of Statelessness uses the term "loss" generically and "deprivation" when referring to withdrawal procedures. The 1997 European Convention of Nationality does not employ either of these terms and uses only the general concept of loss of nationality. We thank Gerard-René de Groot for alerting us to these terminological differences in core documents of international law.

Involuntary loss can be distinguished from voluntary loss by identifying the agent that initiates a process resulting in a loss of citizenship with the intention of bringing about this result. According to our definition, loss of citizenship is voluntary only if intended and initiated by the individual concerned. If the laws prescribe automatic loss in case an individual performs certain actions or no longer meets certain conditions, or if government authorities or courts take a decision to deprive the individual of citizenship, then such loss is involuntary. This definition is not normatively neutral. It is based on an assumption that the burden of justification for the loss of citizenship by an individual lies with the State. In this view, an action that an individual undertakes that is sanctioned by loss of citizenship cannot be regarded as voluntary renunciation even if the individual is aware of this possible consequence. In matters of citizenship loss, only an explicit request by an individual can qualify a loss of citizenship as voluntary.

The distinction between voluntary and involuntary loss is systematically blurred by the US doctrine of *expatriation*, according to which certain actions, such as service in a foreign army or return of naturalised citizens to their country of origin, indicate intent to relinquish citizenship that leads to the consequence of loss.[19] The Supreme Court judgements in *Nishikawa v. Dulles*[20] and *Afroyim v. Rusk*[21] effectively restricted the scope of this doctrine in such a way that today nothing short of an explicit renunciation by the individual counts as sufficient proof of intent to relinquish US citizenship. The strong protection against deprivation enjoyed by US citizens has thus come about through judicial and administrative decisions without overturning the basic doctrine of expatriation. In contrast with this view, our conception of democratic citizenship outlined in section 3 does not allow for 'tacit consent' either in naturalisation or in loss of citizenship. Just as naturalisation requires an explicit declaration or application by the individual, so does renunciation. If a State deems an action of an individual as indicating an intention of self-expatriation, this should be considered as deprivation rather than as voluntary renunciation in order to clarify that the burden of justification for the loss lies fully with the State.

The doctrine of expatriation is unacceptable because it considers loss as voluntary even if it is not based on consent. The opposite view, which is just as implausible, considers loss as involuntary as soon as individuals are not fully free to choose between citizenship retention and renunciation. Restrictions of free choice are of two kinds: they can be imposed either by the State whose citizenship is lost or by another State whose citizenship is acquired or already held. Let us consider first conditions for renunciation imposed by the State of citizenship. These make some individuals ineligible for renunciation but do not thereby make the choice exercised by eligible individuals involuntary. Conditions for renunciation or release create thus a potential for involuntary retention rather than involuntary loss. Whether involuntary retention is justifiable depends on the underlying normative conception of citizenship.[22] All liberal States must allow for voluntary loss under some conditions. A doctrine of perpetual allegiance under which a State never releases its citizens, which is common in the Arab States, is fundamentally illiberal. By contrast, if a State imposes conditions such as residence abroad and prior acquisition of a foreign nationality in order to prevent citizens residing in the country from opting out of citizenship duties or citizens abroad from becoming stateless, then such conditions can be regarded as fair under most normative conceptions. To our knowledge, no current State allows for completely unconstrained renunciation. A more complex question is whether renunciation can still be considered voluntary when it is a condition imposed by another State for acquisition of this State's citizenship or for access to public office that is reserved to singular citizens. We can remain agnostic about whether such restrictions make individual decisions about naturalisation involuntary, because we are here concerned only with the relation between citizens and the State whose citizenship is lost, which remains a voluntary decision as long as that State does not either deprive individuals of their citizenship against their will or deny them the right to renounce it under fair conditions.

The next step in a conceptual analysis consists of identifying grounds for citizenship loss. The European Union Democracy Observatory on Citizenship (EUDO Citizenship) uses an inductive typology of 15 grounds for loss to compare citizenship laws. Voluntary renunciation forms in this respect a single "mode of loss", since the

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[19] See T.A. Aleinikoff (1986), "Theories of Loss of Citizenship," *Michigan Law Review*, 84, no. 4: 1471; Weil, op. cit.; Spiro (2014), op. cit., pp. 2172-3.

[20] *Nishikawa v. Dulles*, 356 U.S. 129 (1958).

[21] *Afroyim v. Rusk*, 387 U.S. 253 (1967).

[22] See A. Macklin (2014), "Sticky Citizenship", November draft, unpublished manuscript on file with the authors.

material ground is always the intention of the individual as manifested through a declaration or request. For the sake of our normative analysis of material grounds for loss we group the 14 empirical grounds for withdrawal (excluding the residual category "other reasons") into five broader categories based on the assumed underlying justifications. These are public security, non-compliance (with citizenship duties), flawed acquisition, derivative loss (as a consequence of loss incurred by an anchor person) and loss of genuine link. Table 2 in the annex shows how we connect the EUDO Citizenship modes of loss to our five grounds for loss.

Classifying deprivation provisions in citizenship laws according to these grounds for loss does not always lead to unambiguous results, since there is significant overlap between the categories. For example, acquisition of a foreign nationality may be considered as indicating a loss of genuine link or as non-compliance with a duty of loyalty. It could also be interpreted as a threat to public security if the foreign nationality is that of a hostile State. We discuss this mode mainly under loss of genuine link, since this seems to us the strongest and also the most widespread justification for restrictions on dual citizenship after the demise of illiberal ideas about perpetual allegiance and duties of loyalty.

There is one ground for loss that could be considered in addition to those listed above. This is loss of conditional citizenship, which results in lapse or withdrawal if the condition is not met. We can distinguish three manifestations of conditional citizenship:

a) Preliminary or probationary citizenship: a status acquired some time before full citizenship is granted depending on additional conditions that must be met during that period, e.g. uninterrupted residence, clean criminal record, performance of civic duties. In the UK the government of Gordon Brown had proposed a probationary citizenship status of this kind, but the proposal was later shelved by the current coalition. Since our focus is on acquisition and loss of a citizenship status that is also recognised as nationality under international law, probationary citizenship must be considered as merely an additional naturalisation requirement. A failure to acquire full citizenship would thus not be included in our discussion of loss of citizenship status.

b) Temporary citizenship: a status of full citizenship that needs to be reconfirmed at a later point in time, with additional conditions that must be met in order to retain the status. The legislation adopted in 1999 in Germany that introduced a duty for *ius soli* children to renounce an inherited foreign citizenship before age 23 if they did not want to lose their German citizenship illustrates such conditionality. This law was modified in 2014 by exempting *ius soli* children who have resided in Germany for eight years or have attended school for six years. Under the amended law this provision can now be interpreted as deprivation on the ground of loss of genuine link. In other States, such as Austria, a much shorter period of temporary citizenship exists for certain naturalisation applicants who are granted citizenship under the condition that they prove renunciation of a foreign citizenship within a certain time. There are also provisions for temporary *ius sanguinis* in several European States requiring that children born abroad to citizen parents must return or request retention of citizenship after reaching the age of majority. These latter provisions are clearly motivated by a genuine link concern and will be discussed by us under this heading.

c) Citizenship in jeopardy: a status of full citizenship is granted without any time limit, but citizenship acquired in this way is subject to specific grounds for deprivation that are not applied to other citizens. The main example in European States is discrimination against naturalised citizens in Cyprus, Ireland and Malta by threatening them with deprivation if they take up permanent residence abroad, whereas no such jeopardy exists for birthright citizens. This conditionality can be interpreted as motivated by concerns about loyalty or genuine links.

One may wonder why the five grounds for deprivation are the only ones that are fairly common in democratic States. Why does no country deprive citizens of their status for, say, murder or other acts more heinous than fraud or foreign public service? Even treason is in many countries no ground for deprivation – in the US one must be a citizen to be convicted for treason.[23] In Canada, Nazi criminals who immigrated after 1945 have been deprived of Canadian citizenship but on grounds of naturalisation fraud because they concealed their crimes. It is interesting that deprivation provisions are not proportionate to the moral blameworthiness of conduct that triggers the loss. Although denationalisation can be a very severe penalty, the primary purpose of

[23] Spiro (2014), op. cit.

all provisions is not criminal punishment but the preservation of conditions for membership. We must therefore evaluate the grounds for deprivation against the background of a normative theory of membership in liberal democratic States. Where secondary purposes become the drivers of deprivation policies, as we have argued is the case when deprivation is used as an instrument for removing citizens who are terrorist suspects, this affects indirectly the underlying conception of membership. Yet in spite of the apparent "return of banishment" in such contexts, deprivation no longer serves the purposes of criminal justice that had been at the forefront in earlier periods of history not least because of a lack of capacity for imprisonment as an alternative to banishment.[24]

The final step is a categorisation of loss procedures. In order to reduce complexity, we do not take into account at this stage important procedural aspects such as administrative process or the availability of judicial review or remedies.[25] Instead we consider merely how actions by the State and the individual relate to each other in determining the outcome.

In voluntary renunciation it is always the individual that initiates the loss. Yet this initiative need not be sufficient to bring about the desired result. We can thus distinguish two procedures for renunciation: by declaration or by release. These mirror a similar distinction between naturalisation by declaration or discretionary administrative decision. In the former case, it is the individual who has the sole power to bring about the loss, whereas in the latter case the government needs to agree to a citizen's request or application to be released. The distinction between these two procedures can become blurred to a certain extent through material conditions for renunciation where these include not only long-term residence abroad and access to or possession of another citizenship, but also completion of military service, absence of tax or private debts and pending criminal charges. However, at least in European States, we are not aware of cases where release is actually discretionary[26] so that it can be refused to citizens who fulfil the material conditions. This is a fundamental protection provided by the rule of law that is likely to be absent in authoritarian States and that is stronger for voluntary renunciation than for ordinary naturalisation, which remains more strongly discretionary in most liberal democracies.

With regard to deprivation there are three distinct legal procedures: it can occur automatically as a direct effect of a legal provision (*ex lege*), it can be the result of a decision taken by State authorities (who are empowered by law to take this decision), or it can be the effect of declaring a prior acquisition of citizenship invalid. We follow the EUDO Citizenship terminology and identify these three procedures of deprivation as *lapse*, *withdrawal* and *nullification*.

Nullification is today nearly exclusively applied in cases where the acquisition is seen to be flawed, but it is not the dominant procedure for this ground for loss. A majority of European States use withdrawal procedures instead. Nullification often means that citizenship is invalidated retroactively (*ex tunc*), but it may also take effect only *ex nunc*, in which case the State does not deny that citizenship acquisition has had legal effect even where the acquisition was flawed. Flawed acquisition can occur for different reasons: through errors committed by the authorities that award citizenship, through errors committed by the person acquiring citizenship (or other persons, such as parents and spouses, applying for citizenship on the person's behalf), or through fraud, i.e. intentional non-compliance with the conditions or procedures for citizenship acquisition by the person acquiring citizenship or others acting on her behalf. We also consider abusive award of citizenship by public authorities as instances of flawed acquisition. These distinctions matter and will be discussed further in section 4 because the determination of loss in a liberal citizenship regime needs to take moral culpability into account, even if withdrawal does not serve the primary purpose of punishment.

Among the remaining four grounds – public security, non-compliance, derivative loss and loss of genuine link – we hardly find any nullification procedures in the laws of the States monitored by EUDO Citizenship.

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[24] See B. Gray (2011), "From Exile of Citizens to Deportation of Non-Citizens: Ancient Greece as a Mirror to Illuminate a Modern Transition", *Citizenship Studies*, 15:565; M.J. Gibney (2013), "Should Citizenship Be Conditional? The Ethics of Denationalization", *The Journal of Politics*,75:646.

[25] See G.-R. de Groot & M. Vink (2014), "Best Practices in Involuntary Loss of Nationality in the EU", CEPS Paper in Liberty and Security in Europe, no. 73, November, Brussels.

[26] See the comparative database on voluntary renunciation at www.eudo-citizenship.eu/databases/modes-of-loss?p=&application=modesLoss&search=1&modeby=idmode&idmode=L01.

However, in the first half of 20th century US history it was common to regard naturalisation as based on a character judgement about future behaviour and loyalty, so that withdrawal for reasons of public security, e.g. in case of 'Anti-American' political activities, or loss of genuine links, e.g. in case of long-term residence abroad, was considered as evidence that the State committed an error of judgement when deeming such persons as worthy of American citizenship. Deprivation was in such cases often argued as similar to nullification, which corrected this error and in some cases even had retroactive effect.[27] Potentially, nullification procedures could be applied to any reason for denationalisation, including derivative loss, e.g. if it turns out that *ius sanguinis* citizenship had been wrongly derived from a parent who acquired citizenship by fraud, or loss of conditional citizenship, e.g. if there is a condition of later renunciation of a foreign citizenship but the originally acquired citizenship is nullified due to fraud.

While nullification has become rare except in the case of fraud in naturalisation, lapse or withdrawal procedures of loss are fairly evenly distributed among other grounds for deprivation across European States. It is possible for States to declare either that citizenship will be lost automatically if one of these reasons apply or to establish a procedure under which authorities must look into each case and take individual decisions. In the EUDO Citizenship database we find States that apply deprivation by either withdrawal or lapse for each of these grounds for loss. In our normative discussion we will argue that a strong presumption against the power of States to deprive citizens of their status implies that, where there are justified reasons for deprivation, the procedure should generally be withdrawal rather than lapse. However, we will consider for each ground for loss whether there are special reasons that make lapse procedures acceptable.

Table 1 in the appendix summarises the conceptual distinctions that we have discussed in this section and could be used for the purposes of descriptive comparative analysis by filling the cells for specific national citizenship laws and identifying clusters of countries with similarly structured provisions on citizenship loss. A more refined instrument for comparison of a larger set of countries is available in the Citizenship Law (CITLAW) indicators that have been coded for 36 European States and most modes of voluntary and involuntary loss of citizenship for the end of 2011.[28]

3. Normative conceptions of citizenship and their implications for deprivation

The political theory literature on citizenship has overwhelmingly focused on naturalisation of immigrants. Acquisition by birth through *ius sanguinis* or *ius soli* has received comparatively little attention – except insofar as these two modes of birthright acquisition have come to be associated with ethnic and civic types of nationalism respectively – and the loss of citizenship through renunciation or deprivation even less. This selective consideration may be due to the fact that political theorists tend to reflect on issues of public concern in the societies where they live and these are today mostly countries of immigration.[29] But ignoring birthright and citizenship loss also shows that political theorists tend to take for granted that citizenship is a stable lifelong membership for individuals and is automatically reproduced across generations through birthright. This assumption is specifically challenged when States deprive citizens of their status without consent.

Hannah Arendt's seminal argument about the predicament of statelessness and citizenship as 'the right to have rights' has been widely quoted approvingly but was at the same time put in perspective by pointing out that her pessimistic view of the 'paradox of human rights' failed to acknowledge the ongoing 'human rights revolution' in international law at the time of her writing of *The Origins of Totalitarianism*. Specifically, Arendt did not consider or discuss the inclusion of a human right to nationality and the prohibition of arbitrary deprivation in Article 15 of the Universal Declaration of Human Rights.

As discussed in section 1, the contemporary revival of interest among normative legal and political theorists in citizenship deprivation has been triggered by Western democratic States' policies in response to home-grown terrorism. Most authors' method of analysis consists of assessing deprivation policies against

[27] Weil, op. cit.

[28] See EUDO Citizenship Law Indicators (www.eudo-citizenship.eu/indicators/eudo-citizenship-law-indicators).

[29] R. Bauböck (2003), "Towards a Political Theory of Migrant Transnationalism", *International Migration Review*, 37:700.

international human rights and domestic rule of law standards, such as prevention of statelessness, non-arbitrariness with regard to justifications and judicial remedies, or non-discrimination between different categories of citizens.[30] Some also point out a lack of proportionality by casting doubt on the effectiveness of deprivation in achieving the proclaimed goals of averting terrorist threats to public security.[31]

Shai Lavi takes a different route by suggesting that deprivation policies are rooted in national conceptions of citizenship.[32] He distinguishes a British security-based approach from a U.S. American one of citizenship as a social contract and an Israeli approach to citizenship as an ethnonational bond. We have some doubts about a 'national models' approach to the comparative study of citizenship because it tends to ignore the multiple purposes of citizenship laws and the multiple domestic and international drivers of citizenship reforms.[33] We agree, however, with Lavi that deprivation should be normatively assessed against a conception of citizenship that can be defended from within broader theories of justice and democracy. Such a conception would have to be sufficiently general to be applicable to different national contexts and acceptable to different constitutional traditions.

Lavi himself suggests such a conception of citizenship as a horizontal relation of civic allegiance within a self-governing polity as a fourth alternative to the three models he identifies. We propose also a fourfold typology of basic conceptions of citizenship that is not so closely associated with national models. Instead we think of these as alternative logics that can be, and frequently are, instantiated by different provisions in citizenship laws either simultaneously or in changes over time.

These four types emerge from distinguishing, on one dimension, whether State or individual interests dominate in the attribution or change of citizenship status and, on the second dimension, whether citizenship is based on a generic or special relation between the individual and the State. Of course citizenship status, once established, always entails a special relation of rights and duties between a State and an individual. What we want to capture with our distinction is whether a special relation between an individual and a State provides *the reason* for attributing citizenship status. This is the case where citizenship is derived from birth in the territory or parental citizenship or where naturalisation depends on prior residence in the State territory. It is also the case where individuals are awarded citizenship for special services, such as serving in the army or for exceptional contributions to the State. If there is no such special relation that provides a ground for citizenship attribution, then the relation is generic in the sense that States are more or less free to select individuals as citizens or that individuals are more or less free to select States they want to become citizens of. The "more or less" clause is necessary because States will always define conditions for the acquisition of citizenship. Conditions such as minimum age, financial resources or payments, minimum education or special skills constrain eligibility for citizenship but do not refer to a special relation between the individual and the State *before* the acquisition of citizenship.

If citizenship is grounded in a pre-existing special relation, it is more likely to be regarded as intrinsically valuable as an expression of a bond between the individual and polity. In other words, individuals will be regarded as having an interest in membership itself. If the relation is instead considered generic, then

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[30] See M.J. Gibney (2013), "A Very Transcendental Power: Denaturalisation and the Liberalisation of Citizenship in the United Kingdom", *Political Studies*, 61:637; R. Thwaites (2014), "The Security of Citizenship? Finnis in the Context of the United Kingdom's Citizenship Stripping Provisions", in F. Jenkins, M. Nolan & K. Rubenstein (eds), *Allegiance and Identity in a Globalised World*, Cambridge: Cambridge University Press; Macklin, "Citizenship Revocation", op. cit., for an exemplary normative critiques of UK and Canadian deprivation policies along these lines.

[31] See A. Macklin (2014), "The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?", EUDO Citizenship Forum Debate (http://eudo-citizenship.eu/commentaries/citizenship-forum/1268-the-return-of-banishment-do-the-new-denationalisation-policies-weaken-citizenship).

[32] S. Lavi (2010), "Punishment and the Revocation of Citizenship in the United Kingdom, United States, and Israel", *New Criminal Law Review: An International and Interdisciplinary Journal*, 13:404.

[33] For critiques see M. Vink & R. Bauböck (2013), "Citizenship Configurations: Analysing the Multiple Purposes of Citizenship Regimes in Europe", *Comparative European Politics*, 11:621; J.W. Duyvendak et al. (2013), "Mysterious Multiculturalism: The Risks of Using Model-Based Indices for Making Meaningful Comparisons", *Comparative European Politics*, 11:599.

citizenship will have primarily instrumental value in the pursuit of other interests.[34] For example, States may use naturalisation rules as an immigration policy tool in order to select economically desirable immigrants or restrict family reunification, while individuals may change citizenship in order to gain additional mobility rights or to escape legal duties of taxation and military service.

The four conceptions of citizenship that result from combining these binary distinctions on the two dimensions can be identified as 'State discretion' versus 'individual choice' if the relation is conceptualised as generic, and 'ascriptive community' versus 'genuine link' if it is conceptualised as special. We will discuss below only versions of these conceptions that can be regarded as liberal and democratic in a broad sense and that apply to contemporary States and the international State system. We exclude thus, for example, racist and theocratic versions of ascriptive community or libertarian utopias of the individual choice view as well as authoritarian versions of the State discretion conception.

In table 3 in the annex, the horizontal distinction between State and individual interests is conceptualized as a scale rather than as a dichotomy. As explained above, acquisition and loss of citizenship always involve the interests of both States and individuals and every liberal conception must allow for individuals to exercise choice with regard to naturalisation and renunciation. The difference is thus one between the predominance of either actor in the citizenship relation. Our substantive hypothesis is that the distance between normative conceptions in which State or individual interests predominate is greater if the citizenship relation is generic and smaller if it is special. A special relation implies not only that those involved mutually affect each other's interests, but also that they have special duties to consider each other's interests. We assume therefore that State discretion and individual choice conceptions tend to be more strongly oriented towards either State or individual interests, whereas ascriptive community and genuine link conceptions represent mixed-interest approaches and share thus more common traits. We briefly characterise now each of these ideal-typical and normative models and consider their general implications for the loss of citizenship.

(1) *State discretion*: The first conception regards the sovereign power of States to determine their own citizens not merely as a principle of international law that applies in relations with other States, but also as an element of their internal democratic self-determination. State discretion means therefore primarily legislative discretion: a democratically legitimate legislature should be broadly free to set the rules not only for citizenship acquisition but also for deprivation in accordance with its political goals and in a way that it considers conducive to the public good, within constraints of constitutional and international law that the legislature has itself freely accepted. Executive and administrative discretion will often, but not always, enhance the freedom of State representatives in pursuing what they perceive as State interests. The UK, with its lack of a written constitution and the principle of parliamentary sovereignty, provides the best setting for this conception, but the normative idea that citizenship policies should primarily serve the goals of the State represented by a democratically legitimate government is strongly present in public debates in many other countries too. State discretion can be used to offer citizenship to persons whose admission is deemed to be in the public interest but who have no particular ties to the political community. It is also widely used in naturalisation procedures in order to retain State power to reject candidates for citizenship that would otherwise be eligible. Frequently, discretion is exercised indirectly through administrative procedures that delay access or deter eligible persons from applying.[35] With regard to involuntary loss, as we will argue in section 4.1 below, public security grounds for deprivation can be most easily supported from within a State discretion view of the citizenship relation. These grounds serve to justify both wide legislative and administrative discretion. The other material grounds for deprivation are less suitable for justifying *administrative* discretion, since they refer mostly to facts that can be established objectively. However, a view that State powers in determining their citizens should be constrained as little as possible generates the widest scope for *legislative* discretion and the greatest insecurity of citizenship status overall and can thus also be invoked in justifying extensive loss provisions on any of these other grounds.

[34] As A. Macklin has pointed out to us, instrumental and non-instrumental reasons for membership policies are often mixed and hard to separate. Our claim here is merely that special relations conceptions will give primacy to non-instrumental reasons.

[35] See T. Huddleston (2013), "The Naturalisation Procedure: Measuring the Ordinary Obstacles and Opportunities for Immigrants to Become Citizens", EUI Policy Paper RSCAS PP 2013/16, Florence.

(2) *Individual choice*: The second conception represents a contrasting view. It considers citizenship as an individual entitlement that is held against the State and that does not leave much scope for deprivation powers. The underlying normative view is to think of citizenship as a foundation of individual autonomy analogous to individual property that the State must protect and of which it cannot deprive its citizens without losing legitimacy. This essentially Lockean conception of citizenship underlies the judgements of the U.S. Supreme Court that made it practically impossible for the US government to strip citizens of their membership status. Again, the idea that citizenship is an individual right held against the State is widespread also in other contexts. It is closely associated with a *de-lege-ferenda* interpretation of Article 15 of the Universal Declaration as establishing a positive right to nationality and also with views that individuals have a right to choose their own identities that implies an option to acquire multiple citizenships.[36]

Obviously, in the current world, individuals cannot pick and choose the citizenship of any State they are interested in. There are still four practical implications of an individual choice view. First, under this conception State discretion ought to be limited both in the sense that citizenship laws should be minimally selective on grounds of special relations and in the sense that administrations should have as little discretion as possible in rejecting applicants. Citizenship acquisition becomes then an entitlement for anybody who is interested and eligible, but it should never be imposed on adult individuals without their consent. Second, States should not merely tolerate dual citizenship but allow the widest feasible choices for combining different citizenships. Third, unless they become stateless, individuals should be free to renounce their citizenships whenever they want without being constrained by having to abandon their residence in the country or other conditions. Fourth, States should have minimal powers to strip individuals of their citizenship against their will.

While an individual choice conception provides strong conceptual reasons for minimising the deprivation powers of States, it cannot fully ignore the interests of States. Even under this conception it would be difficult to argue that citizenship cannot be withdrawn if it has been acquired unlawfully. There may also be reasons for accepting in some cases involuntary loss of citizenship. For example, if a State offers citizenship to non-residents who choose to invest in the country, would it not be entitled to withdraw citizenship if a promised investment fails to materialise? If a State sells its citizenship for a certain price, could it not also take it away under conditions that are similar to those for legitimate expropriation, i.e. if there is a sufficiently strong public interest and the persons concerned are compensated by receiving back their initial payment? These questions highlight that thinking of citizenship by analogy with property and contract based on mutual interest rather than as a special relation may inadvertently open the door to deprivation in cases where a special-relation view would bar acquisition in the first place but could also raise objections to deprivation if a sufficiently strong relation has developed over time.

(3) *Ascriptive community*: The third and fourth conceptions consider citizenship based on a special relation between individuals and States. An ascriptive relation is one in which neither side exercises much choice. Citizenship is attributed to individuals by the State but based on objective criteria. The most obvious illustration is provided by the two modes of acquisition by birth, i.e. *ius sanguinis* and *ius soli* that generally lead to *ex lege* attribution. Individuals may have marginal opportunities of choice with regard to birthright citizenship, for example whether to register a child born abroad as a citizen by descent, and States may exercise some administrative discretion by facilitating or hindering certification of birthright citizenship. It is also possible to construct residence-based naturalisation as ascription through automatic *ius domicilii*. In fact, involuntary attribution of nationality after some time of residence was not uncommon until the mid-19th century when many States considered foreign residents subjects over whom they claimed full sovereign powers against countries of origin.[37] A strictly ascriptive conception of loss would imply that birthright citizenship can never be withdrawn or renounced whereas automatic residential citizenship would lead to automatic loss as an effect of permanent emigration. Among contemporary democratic States, there is no more automatic *ius domicilii* and birthright citizenship is complemented by individual opportunities to change citizenship status through

[36] See T.M. Frank (1999), *The Empowered Self: Law and Society in the Age of Individualism*, Oxford: Oxford University Press; Spiro (2010), op. cit.; D. Kochenov (2014), "EU Citizenship without Duties", *European Law Journal*, 20:482.

[37] For example, in Austria automatic naturalisation of foreigners after 10 years of residence was abolished only in 1833. See J. Stern & G. Valchars (2013), "Country Report: Austria", EUDO Citizenship Observatory, 28, p. 4 (http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=2013-28-Austria.pdf).

naturalisation and renunciation. In this context, ascription becomes a feature of ethno-national conceptions of citizenship, but not only of these. In fact, an ascriptive conception is deeply ingrained in all modern citizenship laws that invariably attribute citizenship automatically at birth.

There are two normative justifications for automatic citizenship attribution. First, it is better able to prevent statelessness than the other conceptions, since it removes the determination of status as far as possible from self-interested choices of States and individuals. Second, birthright ascription secures the continuity of the citizenry across generations, which may be a critical condition for democratic stability and social solidarity among citizens.[38]

The implications of an ascriptive view for citizenship deprivation are somewhat ambiguous. Ascriptive citizenship communities can be based on immutable identity features, such as descent or birthplace; on beliefs that can in principle be changed but are generally transmitted across generations, such as religion or secular values; or on situational features, such as shared residence. In a strictly ascriptive model, the question would not arise since neither the State nor the individual would be able to directly change a citizenship status, though this could come about indirectly in belief-based and situational communities as an effect of a change of individual beliefs or residence. In current liberal democracies, however, persons can change their citizenship status directly and voluntarily through naturalisation and renunciation. In this context, it is no longer obvious whether a State that aims to strengthen ascriptive membership should preserve the integrity of the community through stripping those who do not fit of their citizenship. One the one hand, if the community is value-based, it may want to expel those whose actions violate these values in a way that seriously jeopardises them. On the other hand, if it is based on birthright or residence, then it would be inconsistent to strip citizens of their status because of their value-threatening behaviour. Moreover, for a community based on liberal values, not expelling those who betray these through their actions may in fact be necessary precisely for the sake of upholding these values and assuming responsibility for punishing those who violate them.[39]

The most plausible implication of an ascriptive conception of citizenship is therefore that it lends itself to justifying distinctions between citizens by ascription and by choice and allows for deprivation powers applied to the latter in cases where their actions demonstrate disloyalty or seriously threaten public interests. Since all current citizenship laws are based on birthright ascription, this amounts to a distinction between citizens by birth and by naturalisation with regard to conditions for involuntary loss, which undermines equality of the status itself and is prohibited by Article 5(2) of the European Convention on Nationality.

(4) *Genuine link*: The fourth conception starts from the interests of individuals, as does the individual choice view, but it considers citizenship grounded in a special relation, as does the ascriptive view. In this view, citizenship is based on a 'genuine link', as famously asserted in the 1955 *Nottebohm* judgement of the International Court of Justice.[40] The ICJ was mainly concerned with avoiding conflicts between States resulting from abusive naturalisations,[41] and refrained from establishing a positive duty to award citizenship to persons who had genuine links to the State. Such a positive interpretation has, however, been suggested by liberal political theorists[42] and it can be frequently found in public debates on immigrants' claims to naturalisation. Recently, a genuine link conception has even been invoked as an objection against abusive attribution by the European Parliament and Commission in criticising schemes that would put citizenship in EU Member States, and thus also EU citizenship itself, up for sale (see section 5 below).

Normative arguments for a genuine link conception point out that democratic citizenship should be neither under-inclusive nor over-inclusive. In a neo-republican interpretation individuals are subject to arbitrary political domination if they have genuine links to the political community but remain involuntarily excluded

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[38] See R. Bauböck (2011), "Boundaries and Birthright: Bosniak's and Shachar's Critiques of Liberal Citizenship", *Issues in Legal Scholarship*, vol. 9, no. 1, Art. 3.

[39] See Rainer Bauböck (2014), "Whose bad guys are terrorists?", in Macklin, "The Return of Banishment", op. cit.

[40] *Liechtenstein v. Guatemala (Nottebohm)*, I.C.J. 1955, I.C.J., 4 (1955).

[41] See R. Sloane (2009), "Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality", *Harvard International Law Journal*, 50:1.

[42] See e.g. Carens, op. cit.

from citizenship, whereas including outsiders who do not have any genuine link introduces a collective form of domination by undermining the capacity of the citizens to govern themselves.[43]

A genuine link conception is implied in many of the conditions for citizenship acquisition – most obviously in residence conditions for ordinary naturalisation, in conditional *ius soli* that requires either parental residence status or becomes effective only after a certain time of residence of the child, and in restrictions on *iure sanguinis* transmission of citizenship to third or later generations born abroad. In a genuine link conception, renunciation of citizenship will be conditional upon residence abroad (in addition to access to another citizenship) and involuntary deprivation will be generally justified on the basis of loss of a genuine link while all other grounds will be considered suspect.

Our normative assessment of the material grounds for deprivation is generally grounded in a genuine link conception of citizenship. However, in order to apply to nationality as a legal status in the international system of States, such a conception needs to be interpreted broadly in a way that takes into account some basic and normatively justifiable features of this system. Among these we count birthright attribution of citizenship, individual consent in naturalisation and renunciation, the prevention of statelessness and normative commitments to peaceful and friendly international relations.

In mobile societies, being born in a State territory or to citizen parents are highly imperfect indicators for a genuine link, since children may leave their country of birth or never take up residence in their parents' country of citizenship. However, without birthright attribution, the nature of the political community would change radically. Birthright is thus not so much justified as an approximation of genuine link[44] but as a stabilising mechanism for the political community whose members consider each other connected through citizenship links that they acquire automatically at birth, that they do not lose when they take up residence abroad and that they can retain over a whole life. Ascriptive citizenship can in this way be reconciled with a genuine link conception if it is qualified by conditions that prevent over- and under-inclusiveness.

Since a genuine link conception starts from claims of individuals to membership, it can also provide qualified support for some implications of an individual choice view. Automatic attribution to adults without their consent would be contrary to democracy as collective self-government authorised by autonomous individuals. Naturalisation must thus remain a choice exercised by individuals who are entitled to claim membership because of their genuine links.[45] Similarly, those who are no longer subject to the territorial jurisdiction of a State but remain presumptively lifelong citizens should not be deprived automatically but should be free to renounce their citizenship of origin.

The prevention of statelessness is normatively important not only from a human rights perspective but also from a neo-republican one, because statelessness remains an extremely precarious position that exposes individuals to arbitrary domination and interference with their fundamental rights. This reason is strong enough to justify the award of citizenship to individuals who may not have prior strong ties to a State. From a genuine link perspective, the prevention of statelessness is, however, not sufficient for justifying State discretion in citizenship deprivation. In other words, in this view citizenships are not fungible so that they could easily substitute for each other.[46] If citizenship is based on a special relation, then it is not enough to assign responsibilities for the protection of fundamental human rights to one or the other State. No State to which an individual is connected through genuine links should be able to shift that responsibility to another State, even if the individual also has relevant ties to that State.

Finally, a genuine link perspective also provides arguments for why States should not be permitted to externalise security risks by banishing criminal or terrorist citizens to other States through depriving them of their citizenship status. This practice does not only violate standards of friendly relations between States but

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[43] See R. Bauböck (2009), "The Rights and Duties of External Citizenship", *Citizenship Studies*, 13:475.

[44] See for this view Carens, op. cit., chapter 2.

[45] Ruth Rubio-Marín defends the contrasting view that the collective interest of a democratic polity in including long-term residents as citizens overrides the right of immigrants to choose. See R. Rubio-Marín (2000), *Immigration as a Democratic Challenge: Citizenship and Inclusion in Germany and the United States*, Cambridge: Cambridge University Press.

[46] See Macklin, "Citizenship Revocation", op. cit.

also undermines the genuine link principle itself by imposing the State's responsibility for its own bad citizens on other States.

We conclude this section by considering how the four normative conceptions would evaluate the three deprivation procedures, i.e. lapse, withdrawal and nullification. As discussed above, the legislative choice of procedure depends to a certain degree, but not completely, on the prior choice of material grounds for deprivation. The underlying conception of citizenship could thus make a difference also for the prevalence of a certain procedure across several modes of deprivation. This makes it possible and useful to consider the effects of deprivation procedures on the relation between the citizen and the State from a normative perspective.

Intuitively, one could think that lapse is the most favoured procedure under an ascriptive conception, since it most strongly limits discretion, while withdrawal is more appropriate from a State discretion view, since it requires State authorities to decide whether to take action. Yet this is a too formalistic interpretation. Assuming a given set of legally specified material conditions, discretionary naturalisation enhances the powers of administrative authorities to reject eligible applicants. With regard to deprivation, the opposite is true. Withdrawal procedures strengthen the position of the citizen faced with a deprivation threat for two reasons. First, only a positive action by the authority can bring about the loss of citizenship and the authority may be unwilling or lack the resources to take such action. Second, even if the authority decides to withdraw, the person concerned is more likely to find legal remedies against withdrawal compared to a situation where the same conditions lead to *ex lege* loss.

An extensive use of lapse procedures is therefore especially problematic from an individual choice perspective since it disempowers the citizen as an agent in decisions about his or her status whereas it might be somewhat paradoxically preferred under a State discretion view. The paradox can be dissolved if we remember that our definition of State discretion refers primarily to the freedom of legislatures to determine who are the citizens of the State. Democratic legislators have greater power in this matter if they are free to lay down conditions in the law that will automatically entail a loss of citizenship compared to a situation where public administrations and courts may have the last word on how a withdrawal procedure should be implemented in a particular case.

As discussed above, ascriptive conceptions of citizenship should be generally averse to deprivation except if citizenship has been acquired by naturalisation. On the ascriptive view, there should be broad discretion in naturalisation procedures in order to assess properly the degree of individual assimilation into the birthright community. This makes it more likely that vague legislation that allows for broad executive as well as administrative discretion will also be used in denaturalisation.

The implications of a genuine link conception on the choice of procedure are less obvious. On the one hand, there are good reasons not to entrust State authorities with exclusive power to define the criteria that indicate a loss of genuine link. In contrast with ascriptive membership, genuine links may be confirmed through individual actions. As an illustration we can consider the Finnish, Swedish and Danish laws which all foresee that citizens born abroad who have never resided in these countries under circumstances that indicate a special tie will lose their inherited nationality at age 22 unless they take up residence or make a request for retention before that age. The procedure is in all three cases formally a lapse of citizenship. The Swedish practice seems to be, however, much more like withdrawal in its effect, since it is more generous in exercising discretion in favour of granting such requests and interpreting stays as indicating special ties than Danish practice and many more external Danish citizens are deprived as a result. Finland moreover provides for an opportunity of reacquisition based on effective links for those who have lost their citizenship at age 22.[47] One might consider the Danish practice more in line with a genuine link conception since it prevents over-inclusiveness through automatic deprivation in cases where there is no presumption of a genuine link. One could, however, also support the Swedish and Finnish practice by pointing out that the very act of making a request for retention provides some, even if not sufficient, evidence for a genuine link. Second generations born abroad who are also citizens of their native country may or may not be connected to their parents' country of origin. A request for retention after the age of majority may be a good self-selection device indicating the strength of their links

[47] Oral communication by Eva Ersbøll, October 2014, see S. Brander & J. Fagerlund (2013), "Country Report: Finland", EUDO Citizenship Observatory, p. 28.

and an opportunity of reacquisition will help to avoid unfair exclusion of those who decide to return only at a later age.

A normative evaluation of nullification procedures should vary much less across the four conceptions of citizenship if we consider only their liberal versions. From a liberal perspective, nullification cannot be justified for any other reason than unlawful acquisition. Moreover, the grounds for declaring acquisition unlawful must be specified narrowly and clearly in the law. For example, concealing a criminal record may lead to declaring the naturalisation of an applicant unlawful if a clean criminal record was a condition laid down in the law. By contrast, taking an oath of loyalty in a naturalisation ceremony should not lead to nullification on grounds of later actions that are regarded as proof of disloyalty, since liberal States cannot determine whether such an oath was taken sincerely at the time and should not make a ceremonial oath a criterion for whether acquisition of citizenship was lawful. In the case of acquisition that is found to be unlawful based on facts that are established after the award, there do not seem to be any obvious objections against nullification from the State discretion, the individual choice and the ascriptive views. The genuine link view, however, provides one strong qualification. Unlawful acquisition will often lead to *de facto* citizenship, i.e. a situation in which both the individual and the State are engaged in an ongoing citizenship relation and exercise their respective rights and duties. If such a situation lasts for a sufficiently long time, it creates a genuine link that amounts to *de facto* membership in the political community in spite of its legally tainted origin. In such cases, the genuine link view still does not provide an argument against an objectively established fact of unlawful acquisition, but it does provide a strong reason against nullifying the legal effects of subsequent *de facto* citizenship. The proper procedure in this case is therefore at most a threat of withdrawal that does not entail loss *ex tunc*, that can be legally fought by the individual and that provides for permanent residence status with an option of newly acquiring full citizenship.[48] This should be combined with a statute of limitations that automatically recognises even unlawfully acquired citizenship after a certain number of years.

4. Grounds for deprivation

We turn now to the individual grounds for deprivation identified in the framework of the ILEC project as common for most of the EU Member States, which we shall analyse in light of the normative conceptions set out in the preceding sections. As we have already argued that the normatively recommended procedure is withdrawal (rather than lapse or nullification), we consider the substantive grounds on the assumption that they are applied by legislative authorisation but discretionarily, with due account of the circumstances of each individual case. With regard to some of the grounds we still discuss the possible justification for lapse.

4.1 Public security

Most European countries have some provisions for citizenship withdrawal from persons who have acted or intended to act against the security of *their* State. Obviously, this is easy to justify on the State discretion account – indeed, this was precisely the argument of the British government in its push for new powers of the Home Secretary to deprive of citizenship even native-born Britons. By contrast, public security is not an acceptable ground for deprivation for the individual choice conception. The State has a duty to prosecute and punish those citizens who have gravely endangered its security, but cannot sever the link it has with those citizens, so they should remain its citizens, no matter how bad they are. Similarly, under both special relationship conceptions, citizens should remain citizens. If citizenship is grounded in a pre-existing special relation, this relation is not broken when a citizen becomes a public security threat. The ascriptive community view will, however, allow for wide deprivation powers towards naturalised citizens, since their membership status can be regarded as undeserved if they become a threat to public security. Their deprivation could then be constructed as a nullification of naturalisation rather than as loss of a previously valid membership in a birthright community.

We have already laid out our objections to the instrumentalisation of citizenship which its reconceptualisation as a privilege entails and these objections apply fully to public security grounds. Ironically, if we allow instrumental reasons to govern citizenship, additional arguments against deprivation may emerge. Since

[48] G.-R. de Groot & P. Wautelet (2014), "Reflections on Quasi-Loss of Nationality in Comparative, International and European Perspective", CEPS Paper in Liberty and Security in Europe, 66, August, Brussels.

offences against public security are also covered by criminal law, often regardless of whether perpetrated by a citizen or not, deprivation appears to be redundant as a policy tool. Moreover, the provision of security is the core function of the State and it has a duty to prosecute and *convict* those who jeopardise it. By excommunicating them without conviction, the British government is shirking this duty. Deprivation is questionable even if conceived as a risk management tool because, in a globally interconnected world, removing a potential security threat from Britain and the reach of its security services may trigger its return back home with a vengeance.[49] In any event, it is difficult to see how the deprivation of citizenship of the accused person can fulfil the deterrent function of valid punishment or meet requirements of due process; at best, it can be considered neutral in this regard. It is more likely, however, to create new hurdles in the trial of a person suddenly turned into a foreigner or stateless.

On the other hand, public security may qualify the conditions for individual choice of the citizens. No right is absolute, and in the *Hamdi* case the U.S. Supreme Court found that grave threats to public security can justify significant limitations of the right to due process of American citizens.[50] It would not be inconsistent for the Court to sustain abridgement of their right to citizenship on the same grounds too.[51] Still, this is a road not (yet) taken, and the American government has not stepped beyond quasi-deprivation in such cases.[52] Both special relationship conceptions do not sustain such qualifications in the case of birthright citizens, even an 'accidental' one like Hamdi, as long as birthright remains supported by the law. However, an ascriptive community view may allow deprivation through the back door for those who appear as less than 'real' members of the community. Naturalised and minority citizens are the obvious – and very vulnerable – targets of deprivation on this account, but history and present statements show that no one is insulated from becoming 'so-called', especially when he or she presents a security threat.

Shai Lavi's understanding of citizenship as based on a duty of civic allegiance is particularly interesting in the context of public security reasons for deprivation. According to him, "[t]he civic duty of citizens is their commitment to self-government. Citizenship can only be revoked as a sanction for the violation of this duty."[53] Thus he claims that terrorists who attack the foundations of self-government can be deprived of their citizenship. Prima facie this seems to account for our normative concerns quite well. Its advantage is that it both justifies deprivation in some cases where it looks intuitively plausible, while at the same time limiting governmental discretion to a very narrow class of cases (which can be judicially reviewed). The disadvantage is that, just like the instrumental view, it ignores the effect of deprivation of citizenship as a status in the international order, potentially exposing other countries to the security threat that the excommunicated citizen presents. However, this might be moot insofar as deprivation on this account will come only together with criminal conviction so that the deprivee will remain in custody for a very long time. More important, Lavi's approach does not adequately account for the genuine link between a citizen and a political community, which is at the heart of our understanding.

There are two final issues that need to be taken into account if deprivation is to be administered on public security grounds or, in Lavi's more limited version, as a punishment for violent offences against self-government. The first is conformity with the proportionality principle. Citizenship is a meta-right, so its withdrawal places all rights in the balance.[54] This not only increases the justificatory burden on the authority that seeks to administer it, but makes the deprivation aleatory – it is difficult to predict *how much* the act will affect each of the host of rights that depend on citizenship. This might be possible if deprivation is administered by the criminal justice system that has developed precisely to address such considerations. The courts will have to establish the existing legal relationships of the person concerned with the depriving State to estimate the magnitude of the consequences on her rights in case of denationalisation. However, if due account is taken

[49] Obviously, it also creates security risks for the other countries, which counts as a separate reason against deprivation.

[50] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

[51] This is not to say that the authors agree with the plurality opinion in the *Hamdi* case.

[52] See P. Weil (2014), "Citizenship, Passports, and the Legal Identity of Americans: Edward Snowden and Others Have a Case in the Courts", *The Yale Law Journal Forum*, 123:565, on the current policy of withholding passports of undesirable citizens.

[53] Lavi, op. cit., p. 423.

[54] See Macklin, "The Return of Banishment", op. cit.

of the proportionality principle, deprivation would become especially inept as a risk management measure – people who have strong connections and much to lose but present moderate risks will find themselves better protected than those who present low risk but are more weakly connected.[55]

The second point is the *non bis in idem* principle (no double jeopardy), which universally governs the administration of all kinds of punishment for all violations of law. In general, the fact that punishment for certain crimes against public security consists of denationalisation *and* a prison term does not violate *non bis in idem* if such punishment is prescribed by criminal law (just as the law may provide both a prison term and a prohibition to assume public office for a single crime). However, in most States deprivation is administered by the executive with wide discretion, while the prison term is awarded by a court of law, following stricter standards. As a consequence the two will cumulate or alternate randomly and therefore they cannot be conceived as a single punishment, so their accumulation will violate the principle.

In sum, it seems that it is difficult to justify citizenship deprivation on public security grounds under any conception of citizenship apart from a State discretion view. Deprivation seems much more appropriate on the other grounds that we consider below, which may be surprising given that the security grounds are the almost exclusive focus of the debate – in academia and in the public sphere – today. It may appear paradoxical that we argue against citizenship deprivation for sometimes outrageous crimes, but have fewer objections against deprivation on the ground of certain misdemeanours. Yet once we manage to step out of the retributive discourse, the paradox disappears.

4.2 Non-compliance with citizenship duties

The second ground for deprivation is non-compliance with citizenship duties. We consider here only generic duties that apply to all citizens and not specific ones that are attributed only to certain categories, such as naturalised citizens, *ius soli* citizens, or citizens with long-term residence abroad. These cases are covered by other grounds for deprivation that we will discuss below.

Strictly speaking, since obeying the laws is the most basic duty of citizens, any violation of the law implies non-compliance with citizenship duties, yet it does not follow that any such non-compliance is a sufficient reason for a loss of status. If this were the case, it would imply an underlying perfectionism, which does not sit easily with liberalism and equality before the law, let alone with a genuine link conception. That is why this ground for deprivation can apply only to serious and quite particular failures (which are not already covered by public security grounds). The underlying rationale for the grounds for deprivation that we group under the heading of non-compliance with citizenship duties is a duty of loyalty.

Typical examples are service in a foreign army, or other service for a foreign State, in cases where the host State is not a designated enemy and therefore does not raise public security concerns. This ground is problematic on any of the considered accounts, again with the possible exception of the discretionary one. Service in a foreign army was a problem for the home State in the ages when *every* other State was a potential enemy. This is difficult to sustain today when all States, at least in theory, are committed to friendly relations and peaceful cooperation.[56] In such circumstances deprivation seems too arbitrary even under the State discretion concept. Insofar as service for a foreign corporation providing 'security services' is not a ground for deprivation, service for a foreign public authority should not be either.

A possible objection that one cannot swear allegiance to a second master without betraying the first makes sense only on the assumption that the two masters are hostile to each other, or at least are likely to issue conflicting orders. As long as citizens are free to migrate to a different country, to find work and to establish families there without breaking their obligations to the home State, there is no reasonable ground to treat one

[55] The Danish courts actually apply the proportionality principle in decisions on deprivation of terrorist suspects. In one recent case the person was convicted to seven years of imprisonment, but was not stripped of Danish citizenship on account of his links (family and residence) to Denmark and the risk of injury if deported to the country of his other nationality. In another case the balance was also tipped by residence in Denmark and the risk of injury in the other country. We are grateful to Eva Ersbøll for this example.

[56] UN Charter, Art. 1.

particular occupation – serving in the military – as a ground for deprivation.[57] It is possible to justify, however, a specific proscription of service in the armies of particular States, on grounds of their particularly aggressive or totalitarian nature – North Korea provides a case in point. This State is unlikely to constitute a security threat to European States of the kind covered under the previous heading, yet the loyalty of a citizen of a Western democracy who has voluntarily pledged allegiance to regimes so alien to Western values may be reasonably questioned. A discretionary deprivation regime may wish to make a point of banishing such citizens. The individual choice conception obviously requires the State to tolerate service for a foreign State, unless the State in question does constitute a threat to the home country, but this will be a public security rather than a non-compliance ground. Citizens by ascription should be out of reach in such cases, however unpalatable their behaviour appears. As long as they do not attempt to violently overturn the institutions of self-governance of their home country, it should not matter that they have participated in another polity that rejects the values of the former.[58] Similarly, on the genuine link conception servicemen in a foreign army shall remain citizens, unless the service has amounted to a loss of link, which, depending on the circumstances of the case, may or may not be the case.

Employment in the public service of a foreign country is even less justifiable on any of the four accounts. The only rationale for this ground seems to be the idea of exclusive duties of loyalty, i.e. that it is impossible to serve two masters. Yet the idea that liberal States can probe loyalty as a condition for citizenship independent of other reasons, such as public security concerns, seems incompatible with basic tenets of liberalism for which personal convictions are off limits for the State. As a general rule, convictions start to matter only when they lead to certain behaviour that is itself justifiably disapproved by the State. Inasmuch as the service rendered to the foreign country itself does not prejudice the interests of the home State, and as long as the home State does not punish its citizens for their beliefs and affections, the lack of loyalty that the service to the foreign country may indicate cannot be a sufficient ground for deprivation.

This still leaves space for instrumental deprivation in case the service to a foreign country does affect its vital interests. However, while the State may have an interest to restrict foreign (or even dual) citizens from access to its own high public offices, it is very difficult to imagine what interests would be protected by a prohibition for the citizens to take up public service in the country if the latter does not mind their foreign citizenship. A French citizen who has become director of the central bank of Norway, or even North Korea, in no way prejudices the interests of France. Finance, even if highly competitive, is not considered *hostile* activity and even if the policies such a person may pursue for the benefit of the host country may not be particularly friendly to the home State it would still be difficult to justify such a grave retaliation. Deprivation might be justifiable in the rare case where a citizen takes up high public office in a country under international sanctions – indeed, if France is prohibiting its companies from trading with Iran, it should be able to prohibit its citizens from taking public office in that country too. It is not very likely that a country under international sanctions would be willing to award high office to a citizen of a sanctioning country, but it is not impossible if the person in question is a citizen of both and the appointing country does not consider his other citizenship to be prejudicial to his loyalty.

Just for the sake of completeness we can consider whether the possible rationale for this ground for deprivation is not perceived lack of loyalty but prevention of a brain drain. Indeed, historically, most States have considered their subjects a valuable resource, and this is a plausible hypothesis for the emergence of this ground. But this reasoning fails to treat citizens as autonomous agents and cannot be justified on the individual choice and genuine link conceptions, while the very idea of depriving a birthright member for utilitarian reasons is incompatible with the ascriptive view of political community.

In the case of other duties that States impose on citizens, such as military service or – in the case of the US – paying taxes on income earned abroad, it is in the interest of the State to preserve rather than sever the link

[57] This objection and its refutation are parallel to the arguments against toleration of multiple citizenship (which sometimes also entail a second oath of allegiance), which are difficult to sustain in the contemporary world. For the global trend towards toleration of dual citizenship see M.P. Vink, A.H. Schakel, D. Reichel, G.-R. de Groot & N.C. Luk (2014), "The International Diffusion of Expatriate Dual Citizenship", November, draft on file with the authors.

[58] One could, however, imagine the case of a South Korean scientist who contributes to North Korea's nuclear armament programme that is directed against South Korea, in which case citizenship deprivation would be justified on all accounts.

with the citizen who wants to shirk the duty. This explains why non-compliance with citizenship duties is more often used as a reason for restrictions on voluntary renunciation than as a reason for deprivation. Whether these reasons can be accepted for the former purpose is beyond the scope of our paper.

4.3 Flawed acquisition and loss of *de facto* citizenship

Flaws in the process of acquisition of citizenship constitute a ground for deprivation generally only in case of naturalisation.[59] It is a major ground for loss and its justification seems temptingly evident. Still, normative analysis needs to distinguish four possible causes of flawed acquisition that create hurdles of unequal height to deprivation. Before turning to the substantive grounds, we should briefly take note that there are two common procedures by which flaws in acquisition may result in a loss of citizenship. The first is denaturalisation by virtue of a special act of the competent public authority that has effect for the future and is no different from deprivation on other grounds. The second is *ex tunc* nullification where, due to certain flaws in the naturalisation process, citizenship is deemed to have never been acquired. De Groot & Wautelet note that the second is just a different interpretation that only makes sense from the perspective of the State; from the perspective of the individuals concerned nullification is not different from deprivation. The conclusion of their analysis of the types of such 'quasi-loss' in light of international and European law is that quasi-loss should be treated as actual loss.[60] We have already explained in section 2 why nullification is generally problematic as a procedure; in this section we will pay special attention to each of the substantive grounds of flawed acquisition that we propose to distinguish. Note that, as explained in section 2, even flawed acquisition can lead to *de facto* citizenship and deprivation needs then to balance the flawed attribution of legal status against the lawful exercise of subsequent citizenship rights and duties.

4.3.1 Error by authorities

Errors by the administration are generally dealt with by administrative law, and the latter is geared to protect the individuals. In particular, the principle of protection of legitimate expectations common throughout Europe would serve to insulate the acquired citizenship from subsequent discovery of flaws.[61] There are obvious normative objections against deprivation when the flaw is an error committed by the public authorities involved in the process with no fault on the side of the citizen. Yet the issue is a little more complicated. If substantive material conditions for naturalisation have not been fulfilled, it is in principle still justified to revoke the naturalisation, since otherwise the existence of the condition is put in question. Further, sometimes the authorities themselves may, negligently or even deliberately, commit errors and revert to legitimate protection if this is discovered. For example, within the framework of a policy of mass naturalisation of persons of Bulgarian origin resident in neighbouring countries, the administration was extremely lax about verifying origin, with many allegations of outright corruption.[62] We shall discuss abuse by the authorities separately below, but the example shows that the principles of administrative law may not always be sufficient to adequately deal with errors in the process of citizenship acquisition. We need to take into account the same normative considerations as with the other grounds for deprivation.

First of all, we should be able to distinguish the importance of the conditions that have not been fulfilled – inaccurate payment of the application fee should not entail the same consequences as an insufficient number of years of residence in the country or ineligibility for facilitated naturalisation. But even if the flaw is significant, there are many other circumstances that ought to be taken into account. If the person has renounced her original citizenship in view of her naturalisation, the new citizenship can be revoked only if she can reacquire her original one. This follows from the protection against statelessness in international law as well

[59] With the notable exception of the case of a birthright citizen whose parent loses citizenship because of flawed prior acquisition, which will be discussed under derivative loss below.

[60] de Groot & Wautelet, op. cit.

[61] German and Austrian law specifically provide that in such cases the person is deemed to have acquired citizenship under the procedure that was applied incorrectly by the authorities. However, in the case of Austria, the time of 15 years required for this effect is extremely long.

[62] Recently there have been allegations of lack of control and investigations for corruption, see V. Paskalev (2014), "Facilitated naturalisation of ethnic Bulgarians seems very lucrative business", EUDO Citizenship Observatory, 4 November.

as the understanding of citizenship as a meta-right. Another relevant consideration is the time since naturalisation as well as the actual relationships the purported citizen can demonstrate to have established with the country. Both of these claims follow from the genuine link principle. Less straightforward are the implications of the State treating the apparent citizen as possessing the legal status – by issuing a passport, registering her for elections, or collecting citizenship-specific payments. If the various State institutions have treated the person as a citizen and imposed certain obligations on her in good faith, this by itself need not preclude deprivation. However, to the extent that this treatment did create links, such as entitlement to a public pension or holding of a public office, these links should be taken into account. To allow for such considerations, the procedure must be withdrawal; lapse can never be justified in such cases. Denaturalisation cannot be retroactive either, because some of the relationships created in the meantime might otherwise be legally jeopardised. For example, if the putative citizen has purchased real estate in a country where only citizens may legally own and her citizenship is revoked retroactively, the purchase itself may become void as violating property law.

4.3.2 Error by individual

The case is similar when the error was committed by the individual rather than the authorities, where the individuals or persons acting on their behalf are unaware of facts that would lead to non-acquisition if they had been known to the authorities. One example is the case of a child who obtains citizenship *iure sanguinis* by virtue of recognition by a man who thinks he is the father and it turns out later that the actual father is a foreign national. Another example can be persons whose naturalisation is facilitated on grounds of their origin that turn out to be mistaken. On the one hand, in order not to stimulate future applicants to act negligently, the relevant authority is likely to balance the relevant considerations in a manner that is less favourable to them. On the other hand, the legitimate expectations principle weighs in favour of persons who have genuinely believed they have acquired citizenship.[63] Obviously, this weight increases over time and at a certain point should preclude revocation.

4.3.3 Fraud committed by the individual

More interesting and certainly more controversial is the case when the applicant has not merely erred but deliberately deceived the authorities in order to acquire citizenship. The revocation of such naturalisation seems to follow from the principle that no one should benefit from his own illegal behaviour, but it also can be treated as a breach of loyalty by the citizen-to-be.[64] We agree that if the fraud is not trivial, this is the most obviously justified ground for deprivation. Indeed, there is a good moral reason to deprive the perpetrator from what was fraudulently obtained, although, as we shall see below, several limitations apply even in this case. But we must consider one possible objection first. In this case, as in the case of public security, this ground for deprivation also constitutes a crime, which is punishable under criminal law. This raises the question whether criminal law *alone* is not the more appropriate way to deal with such cases. This is an especially pertinent question, given the aleatory nature of the deprivation.[65] Furthermore, the offence of the person in question in this case is by far less dangerous for the political community than in the case of a public security threat. In many cases the fraud would consist of non-disclosure of another citizenship or of a conviction for a petty crime in the home country; in an extreme example a person who has emigrated from an authoritarian country may have concealed from the naturalisation authorities of the host State that she has a conviction for her stance against the regime, and her deeds may be lawful and even actively encouraged by the law of the host State. It is tempting to argue that the discovery of the fraud should not constitute an independent ground for deprivation at all, but only a reason to reopen and reconsider the naturalisation case on its merits.

However, somewhat paradoxically, the higher protection that the criminal system provides to the person concerned is a reason not to leave the case to it alone. Precisely because the fraud in such cases may often be too small an offence to trigger full-scale prosecution, it may be better to deal with the matter within the realm

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[63] See Ibid.

[64] In *Rottmann v. Bayern* (C-135/08) both the European Court of Justice, and the Advocate General mentioned only the second rationale, which in our view is somewhat weaker than the first one.

[65] See the discussion in section 4.1 above.

of citizenship law. Otherwise, workload, statutes of limitation or prevention policy considerations may allow the fraudsters to get away with the citizenship that they got, and encourage others to give it a try too. Criminal law is a system with its own dynamics, and even though it may be intentionally employed to preserve the conditions for naturalisation, for these reasons it may often fail to do so. On the other hand, adequate administrative process allows for a fraudulent deed to be reliably ascertained, with sufficient guarantees that the rights of the alleged perpetrator are observed and the relevant circumstances are taken into account.[66] Merely reopening the case upon discovery of fraud will not do – if there are no untoward consequences for the perpetrators, they will be always tempted to try. In order to deter the applicants for naturalisation from cheating in cases where criminal law cannot be fully relied upon, citizenship law must provide for its own sanction. It can go even further than revocation, if a greater need for prevention requires this, and persons who have committed serious fraud that is immediately discovered may not only lose their new citizenship but also be barred from naturalisation for a certain period. Note that this ground is justifiable according to each of the four conceptions of citizenship. Its rationale is instrumental, but its aim is to ensure the integrity of citizenship itself and of the procedures under which it is awarded rather than the success of other governmental policies. That is why the earlier criticism against instrumental uses of deprivation does not apply to this case. Still, similar constraints on the power of deprivation are pertinent to this ground and to these we turn now.

The ultimate decision for revocation of naturalisation on the ground of fraud should depend on weighing the following considerations:[67]

(1) *Severity of the fraud*: Even though we have argued that deprivation in case of fraud is an independent sanction belonging to citizenship law, there is no reason why the general principles developed in criminal law should not apply as well. Thus the sanction should be commensurate with the severity of the threat to the legal order that the fraud presents. Not reporting on past receipt of welfare where this is ground for exclusion from naturalisation should be treated differently from bribing the civil servants who are responsible for the decision. Although revocation is a binary matter, in the balancing procedure different degrees of severity can be matched against degrees of attachment to the country. In the same vein, the decision should consider the general preventive effect – in cases where bribery of the officials is rampant, the authorities may wish to weight such fraud more heavily than in cases where the perpetrator has forged certain documents, or vice versa.

(2) *Length of time* over which the person has held citizenship and was treated as a citizen (*de facto* citizenship) by the authorities: This consideration may be controversial because eventually it would make fraudulent naturalisation a *fait accompli*, yet its justification is similar to that of the statutes of limitation that universally apply to all crimes (save crimes against humanity), including fraud. If the sanction is deprivation of citizenship, the status of the latter, as we conceive it, suggests that the power of the State to withdraw a status not rightfully acquired is initially indisputable but becomes weaker over time if the person acquires in the meantime independent grounds for retaining citizenship status.[68]

(3) *Genuine links developed by the person as a result of having enjoyed citizenship*: The rationale for this constraint is very similar to the previous one (as well as the objections against it). It requires due consideration of circumstances, other than the time period. These can include continuity of residence, establishment of personal relationships, acquisition of property, political participation, holding public office, etc. Taking all of these into account, the deprivation authority must consider whether the person would qualify for acquisition of citizenship *now*. Note that on a genuine link account, the acquisition of citizenship and the establishment of relationships with the polity mutually presuppose each other and this remains so even if the acquisition is fraudulent. So circularity should not constitute a problem – if the naturalisation allowed someone to acquire some rights reserved for citizens, e.g. election to public office, the subsequent discovery of a fraud should *not* nullify both. On the contrary, the acquired public office would be a genuine link to be considered *against* deprivation. (We set aside the possibility that the naturalisation fraud amounts also to electoral fraud, or that the person is jailed for the former and on this ground her term of office is terminated.)

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[66] Note however, that in many European States no such guarantees are provided and in Bulgaria, for example, the deprivees would not even be formally notified of the deprivation procedures against them.

[67] Note that the first two of these constraints were made explicit in the *Rottmann* judgement (para 56), so for the EU States they are also a matter of law. We shall revisit this case in section 5 below.

[68] This is most obvious for fraudulently acquired citizenship transferred to innocent family members.

(4) *Harmful effects of deprivation*: Finally, the decision to revoke a fraudulent acquisition should account for the future consequences for the persons concerned. Although international law does *not* prohibit deprivation in case of fraudulent acquisition if the person would become stateless,[69] the authority should also consider whether the persons concerned are liable to be deported to a State where they face persecution. In the latter case they may wish to limit the consequences to a loss of citizenship status while granting the person a long-term residence permit as a foreign national that protects her other interests. More generally, deprivation should not automatically result in a status that foresees or permits deportation. Instead, the consequences of deportation need to be considered independently of those justifying withdrawal.

Denmark provides a good example of applying such a proportionality test. The Danish courts recently decided nine cases of fraudulent acquisition, ordering deprivation in four of them. In the other five, the judgements were favourable to the persons, on the basis of a proportionality test weighing seriousness of the fraud against the consequences of deprivation. Three considerations were pivotal – the length of residence in Denmark, the family and work conditions, and the context of the fraud.[70]

In most cases, these considerations can be taken into account only in a withdrawal procedure. But automatic lapse may be justifiable where the fraud is severe, where the time elapsed is short and where there are no genuine links and no harmful effects, i.e. where no *de facto* citizenship has emerged. Retroactivity, however, requires a justification of its own, so the presumption for withdrawal remains strong.

4.3.4 Abuse by authorities

The sovereignty of States in matters of nationality is legally constrained by their own constitutions, international law and by EU law for EU Member States, as well as by general duties of mutual respect and consideration. When a government does not respect these constraints in awarding citizenships, it is abusing its power. This raises the question of whether the courts or successor governments should have the power to reverse such decisions by nullifying the award? A recent example of such abuse was the investor citizenship scheme introduced in 2014 by Malta, whereby Maltese nationality would be awarded to anyone willing to pay a contribution to a State fund in the amount of €650,000, without ever setting foot in the country.[71] Another example is provided by the ethnoculturally over-inclusive citizenship policies of the Orbán government in Hungary that we have mentioned before.

While there seem to be good reasons for the authorities to reverse the effect of such policies, the revocation of acquired rights is always problematic. Notwithstanding the justification of the general policy, with regard to each person concerned remedial deprivation is still deprivation – the usual burden of justification applies and nullification should not be permitted. Would it still be permissible for subsequent legislation to introduce new conditions for the retaining of citizenships that have been abusively awarded as an exercise in damage control? There are three principles that may guide the design of a remedy: genuine links, complicity of the persons affected and the harmful consequences for these persons. Thus it might be easier to revoke the naturalisation of investors who were merely interested in another passport than the citizenship of ethnic Hungarians who do consider themselves as belonging to Hungary. In the same vein, it will be more difficult to justify the revocation of the Maltese citizenship of an investor who did settle in Malta. On the other hand, an investor who already carries several passports would not be harmed much if she loses Maltese citizenship and a Hungarian living for generations in Slovakia will not suffer from the loss of her recently acquired Hungarian passport as much as from being deprived of Slovakian citizenship.[72] By contrast, an ethnic Hungarian from Serbia would additionally suffer loss of EU citizenship.

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[69] See ECN Art. 7(3).

[70] We are especially indebted to Eva Ersbøll for this example.

[71] The sum was later increased to €1 million and a *pro forma* residency condition was added. See details in Carrera, op. cit., and also Bauböck & Shachar, op. cit.

[72] In response to the Hungarian policy, Slovakia prohibited voluntary acquisition of another citizenship, on pain of deprivation. See R. Bauböck (ed.) (2010), "Dual Citizenship for Transborder Minorities? How to Respond to the Hungarian-Slovak Tit-for-Tat", EUI Working Paper RSCAS 2010/75, Florence.

The problem is that for any remedy to be non-arbitrary, it must be applied to individuals on a case-by-case basis, while the mass scale of the abuse in the Hungarian case requires a solution for a whole class of citizens. Yet, if goodwill is available, the remedial law may be tailored with opt-ins and opt-outs to accommodate individual situations. One example could be the introduction of a genuine link condition for retaining citizenship that would lead to lapse if these citizens fail to take up residence. Such corrective legislation would certainly discriminate between the various groups of citizens abroad with regard to the circumstances of the acquisition of their citizenship status, but different treatment of cases that are sufficiently dissimilar can be justified. The least problematic response, which unfortunately has no short-term effect, is to adopt a general limitation of intergenerational transmission among groups without genuine link.

In this section we have considered the various possible flaws in naturalisation only. However, it is not impossible for birthright acquisition to be flawed too – for example, when parents have committed fraud in their naturalisation and their citizenship is nullified retroactively and this has consequences for the citizenship of their child. We will discuss such cases in the following subsection. But it is worth noting here that while naturalisation is potentially reversible upon discovery of certain flaws, as discussed above, flawed birthright acquisition must be considered with regard to the best interest of the child, which makes it generally irreversible. Thus the principle of the best interest of the child creates an interesting exception to the general prohibition of discrimination between citizens by birth and by naturalisation,[73] protecting the status of the former, while that of the latter is sometimes revocable on the grounds discussed above.

4.4 Derivative loss

Derivative loss can be interpreted in two ways. First, a person may lose citizenship status as a consequence of being deprived of another citizenship. This is a purely hypothetical possibility when the two citizenships involved are those of independent States. However, it becomes a life issue and problem in the context of the European Union. Derivative loss of EU citizenship occurs if a person is deprived of Member State nationality and is not also a national of another Member State. We will discuss this form of derivative loss in section 6 below.

Second, derivative loss occurs if a person has acquired citizenship derivatively because of her relations with another person and that person loses her citizenship. In this case, there is only one polity involved, but the derivation occurs through original transfer or extension of citizenship from an anchor person to another one. This mode of loss applies practically only to close family members, i.e. spouses and natural or adopted children.

Nowadays, the understanding that all members of the family need to have the same nationality and therefore the citizenship of wives and children must follow that of the male head of the family has been abandoned in Western States.[74] There is a general tendency to strengthen the independence of each individual family member so that they will not be automatically affected by a change of status of the others. The normative reasons for this are too obvious to need elaboration. Yet there are still two instances when change of family status or change of citizenship of a family member may be relevant for the continued citizenship of the others. The first is when the change of citizenship of the anchor person is the result of a loss of genuine link, and this *may* then be the case for the other family member too. Still, the link of each family member ought to be considered individually. The second case is when the acquisition of citizenship of one family member is related to the citizenship of another. We shall discuss in turn how these arguments apply to children, spouses and adoptive children.

Involuntary derivative loss may be a consequence both of deprivation of the anchor person or of voluntary renunciation by that person. For example, if a parent renounces citizenship, then a minor child may lose it derivatively without her consent. The normative principles applying to the dependent citizenship holder are the same in case of voluntary and involuntary loss by the anchor person, so we will not discuss such cases separately.

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[73] See the 1957 UN Convention on the Nationality of Married Women, CEDAW Art. 9, ECN, Art. 5 (1).

[74] See G.-R. de Groot (2013), "Survey on Rules on Loss of Nationality in International Treaties and Case Law", CEPS Paper in Liberty and Security in Europe, 57, 30 August, Brussels.

4.4.1 Children

In States without general *ius soli*, the nationality of children historically followed automatically that of their parents, especially that of their father. Today, the dominant normative principle in dealing with children is the best interest of the child.[75]

A literal reading of 'best interest' would prohibit any derivative loss for children, since having an additional citizenship that has been lost by her parents will generally not be a disadvantage for a minor child who is not yet subjected to citizenship duties such as military service. Even if the child has another citizenship and statelessness is not an issue, she would hardly be disadvantaged from having one citizenship too many and might gain additional mobility and residence rights, which is clearly in her interest.[76] Both in case of the parent losing citizenship and of the child losing the relationship with the parent, the child should therefore not lose the citizenship acquired from that parent.

Such a strong interpretation of 'best interest' is most easily defended from an individual choice perspective and is likely to collide with the State discretion view. On the other hand, State authorities in the EU might argue that protecting children from derivative loss in *ius sanguinis* countries might provide incentives for parents to commit fraud in naturalisation in order to gain secure citizenship for their children and be thus protected in their residence rights as primary caregivers of the child.[77] Although this seems rather far-fetched, such arguments are common in the Eurosceptic tabloids and the discretionary understanding may thus support a weaker interpretation of the child's best interests.

A third alternative would provide a robust but still limited interpretation of 'best interest'. Instead of *maximising* the interest of the children, the best interest condition may be satisfied if children are assured a *sufficiently* stable status. This would entail that derivative citizenship cannot be withdrawn after a certain time of residence of the child in the country and that below this threshold the authorities must assure that the child has another citizenship, will not be separated from the parent and will not be deported to a country where she would not be provided with reasonable levels of security, health care, education, etc. If the conditions in the latter State are acceptable, deprivation and alignment with the nationality of the parent may be in the best interest of a child who has not been a long-term resident. A clear set of such criteria that limit administrative discretion may be preferable to an open-ended interpretation of the 'best interest' principle.[78]

Such an argument would be difficult to accept under the State discretion and individual choice views, but could be sustained by the two special relationship conceptions, which are mindful of the ties between a person.

4.4.2 Spouses

When derivative loss of citizenship by spouses is questioned, the leading consideration is not their best interests, but their autonomy, both for normative reasons and as a matter of international law. Again, neither the dissolution of the marriage, per se, nor loss of the citizenship of a spouse need to automatically entail loss for the other, yet the status of the latter may be reconsidered if the circumstances of acquisition were related in the first place. Such is the case with facilitated naturalisation. If the spouse has benefited from a shorter residence requirement by virtue of being married to a citizen, there is a potential reason to revoke her

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[75] See Convention on the Rights of the Child, Art. 3 (1): "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

[76] The only conceivable disadvantage is if at a latter point in life she is suspected of terrorism – in such cases the availability of a second citizenship may expose her to deprivation, while potential statelessness may protect her from losing her preferred citizenship. However, the probability that same person is exposed to potential derivative loss as a child *and* threatened with deprivation on security grounds as an adult seems extremely low.

[77] The right of residence of primary care-giving parents of EU citizen children has been established through the CJEU judgements in Case C-200/02 *Zhu and Chen v. Secretary of State for the Home Department* [2004]; CJEU Case C-34/09 *Gerardo Ruiz Zambrano v. Office national de l'emploi* [2011].

[78] According to Audrey Macklin, the 'best interest of the child' has been invoked as a reason for deportation in Canadian immigration contexts, whereas Australia uses a presumption of genuine link on the basis of the years the child has been resident in the country (personal communication with the authors, 3 January 2015).

citizenship if the citizenship of the former has been revoked. However, the justification of the derivative loss will vary according to the grounds for loss of the anchor person. If the latter is denaturalised on public security grounds, there is no reason for this to affect any innocent member of her family. On the other hand, if the acquisition was flawed, and the person is considered to have never been a citizen, her spouse could not have acquired that status either. If the reason is loss of genuine link (to be discussed below) of the anchor person, this can at most open the case for reconsideration of the status of the family members, to assess if their own link has changed. In any event, in case of derivative loss the relevant circumstances to be reconsidered include, on the one hand, those related to the deprivation – complicity, good faith, etc. – and, on the other hand, circumstances that are specific for the dependent spouse – genuine link, legitimate expectations, availability of other citizenship, etc. For example, if a person has benefited from a shorter residence requirement for spouses of citizens, the additional time of residence as a naturalised citizen must be taken into account when considering whether the dependent spouse should also lose citizenship in case the anchor person is being deprived. Persons who are deprived of citizenship in such circumstances must at least be given a fresh opportunity for application, counting all years of residence. None of the four conceptions of deprivation could justify sending them back to the starting line.

Divorce is a particularly interesting ground for deprivation, as in some circumstances the general independence rule may have to be relaxed to prevent citizenship acquisitions via marriage of convenience. It is difficult, and also inappropriate for a liberal State, to investigate what the real motives for the marriage were, but a prompt divorce immediately after naturalisation is certainly suspect. The obvious solution is to prescribe a certain minimal 'holding period' after marriage within which revocation of naturalisation is possible. Yet, it is not so rare for a genuine marriage to quickly fall apart and therefore any naturalisation regime must be extremely restrained when considering revocation on such grounds. Furthermore, there is a serious danger that vulnerable spouses will choose to sustain a failing marriage, and even suffer domestic violence for fear that they may lose their citizenship if they divorce. To avoid creating such perverse incentives, citizenship law, whatever its underlying conception, must try to protect the status of the person concerned even if this would result in over-inclusion. One way to balance the need to deter marriages of convenience on the one hand and the protection of vulnerable spouses on the other is to revoke in case of prompt divorce any naturalisations that were facilitated by the marriage but to guarantee a residence permit to the divorcee.

4.4.3 Adoption

The case of adoption is interesting in that the automatic change of nationality upon change of family status – a common rule for marrying women in times past – can be justified. In case of full adoption of children from a different nationality they may justifiably lose their original citizenship automatically. The reason is that the need to create links with the adoptive parents as if they were natural ones is more important than the possible gains from an extra citizenship. In other words, in case of adoption the best interest of the child need not trump concerns for unity of citizenship within the family. Obviously, in cases of 'open adoptions' or 'partial adoptions', when the link between the adopted children and biological parents is preserved, the opposite logic will apply and the original citizenship should not be lost. Even in full adoption, when the child does not acquire the citizenship of the adoptive parent automatically but after some period of residence, the original citizenship should not be lost, at least until the new citizenship is actually acquired. In most other respects the case is analogous to that of natural children whose parent is losing citizenship. In cases when the adoption itself is revoked – if this is at all possible – the analogy may be with divorce.

4.5 Loss of genuine link

Genuine link is our preferred normative principle for determining citizenship status, which in our view should also guide decisions in case of deprivation. So far we have considered genuine link as a constraint on other grounds for deprivation. But the loss of link may itself constitute a ground for deprivation in the absence of other grounds. It is worth bearing in mind that, according to our understanding of citizenship, the States must avoid not only under-inclusion but also over-inclusion. While a State discretion view holds that governments should have deprivation powers on this ground which they *may* use, a genuine link conception *requires* that they do so in order to prevent the inclusion of persons without sufficiently strong claims to citizenship.

As explained in section 3, this power should still be narrowly construed so that permanent residence abroad is not regarded as entailing a loss of genuine links. Historically, residence abroad was among the most common

grounds for deprivation. Residence abroad still exists as a reason for lapse or withdrawal in a significant number of European States, but never as a sufficient one. It is always qualified by the prevention of statelessness, so that the person must first have access to another nationality. Among the countries compared on EUDO Citizenship, the Netherlands stands out as the one where the only additional condition is third-country nationality. Dutch citizenship is lost through lapse after 10 years of uninterrupted residence in a non-EU State if the person does not become stateless and unless she works in the Dutch diplomatic service or an international organisation.

In other States, additional conditions aim either at exempting first-generation emigrants and their minor children (deprivation applied only to persons born abroad who have never resided in their parents' country of citizenship and only after the age of majority) or, to the contrary, targeting first-generation emigrants by depriving only naturalised citizens in case of residence abroad.

These contrasting attitudes clearly illustrate the difference between the genuine link and ascriptive community conceptions. The latter is primarily concerned with ensuring that naturalised persons fit into a predefined birthright community and less concerned about subsequent generations who acquire an ancestral citizenship by birth abroad. While birthright citizens obtain their status unconditionally and for life, the citizenship of naturalised persons is made conditional upon permanent residence. It is interesting that such discrimination of naturalised citizens applies primarily in common law countries (Cyprus, Ireland and Malta). Most recently, the Strengthening Canadian Citizenship Act of 2014 has introduced a commitment to reside permanently in Canada as a condition for naturalisation. A genuine link view may share a concern about purely instrumental naturalisations for the sake of obtaining a passport that permits the new citizen to settle in a third country. Yet this concern cannot justify discrimination between naturalised and birthright citizens. The problem of instrumental abuses of naturalisation should therefore be addressed by applying genuine link conditions retrospectively but never prospectively. The years of residence required for naturalisation define a threshold for a presumptive genuine link. Just as birthright citizens, those who have passed the threshold should be able to keep their new citizenship for life and take it abroad without any further conditions.

The same view justifies the second set of conditions that aim at stopping the proliferation of extraterritorial *ius sanguinis*. First-generation emigrants should be exempted from deprivation due to residence abroad, because there is a reasonable presumption that many or most of them retain genuine links to their country of origin. Even the transatlantic migration of around 1900 included a high percentage of circular and return migration, and today's travel and communication technologies allow migrants to maintain intense relationships with home countries. This is adequately accounted for by conceiving of citizenship as a stable *lifelong* relationship between the individual and the State. Thus, unless the persons themselves decide to sever the link through renunciation, in our view it generally survives the loss of residence. This may or may not be the case for the subsequent generations born abroad. While in some cases they preserve a link to their parents' homeland(s), in others they may be completely disconnected and identify *exclusively* with the host country. That is why instead of blanket deprivation of foreign-born citizens after the age of majority withdrawal procedures that allow for some form of self-selection are preferable, to account for the individual differences. Yet in order to prevent over-inclusion and associated inequality of citizens, the States of origin should introduce some limits to intergenerational transmission of citizenship, as discussed in section 3.

Other limitations may also be necessary. Since citizenship of the wealthy Western countries is associated with freedom to travel, it is tempting for many people from the rest of the world to dig very deep into their family history to find evidence for their European origins. Guido Tintori has estimated that about 1 million persons residing abroad have received Italian passports between 1998 and 2010, 73% of which were issued in Argentina, Brazil and Uruguay.[79] This is a clear case of over-inclusion since it offends equality both with regard to the other South Americans who are not so lucky to have Italian ancestry, and also inside the Italian

[79] See G. Tintori (2012), "More than one million individuals got Italian citizenship abroad in twelve years (1998-2010)", *EUDO Citizenship News*, 21 November (http://eudo-citizenship.eu/news/citizenship-news/748-more-than-one-million-individuals-got-italian-citizenship-abroad-in-the-twelve-years-1998-2010%3E). The case may appear similar to the Hungarians living for generations in the neighbouring countries, but unlike most of the Argentinean Italians, the Hungarians do identify as Hungarians, even though arguably they do not have a genuine link with the contemporary Hungarian State. Both cases, however, show the problem of over-inclusion and the need to phase out intergenerational transmission of citizenship.

polity by attributing equal status and rights to persons who have no stake in the political community. Both reasons support phasing out *ius sanguinis* acquisition across generations born abroad. For third generations lapse procedures seem uniquely justified, if neither grandparents nor parents have resumed residence in the country of origin for a sufficient period of time.

After residence abroad, the second common proxy for loss of genuine link is the acquisition of another citizenship. Historically, this was a strong presumption for loss of link and could lead to automatic loss. Nowadays, despite the increasing worldwide tolerance of multiple nationality, 14 out of 42 European States in the EUDO Citizenship databases still deprive citizens for this reason, although often with significant qualifications. This ground for deprivation can be easily supported by the discretionary understanding of citizenship. It is unsustainable on the individual choice conception – if we exclude the outdated US doctrine of expatriation discussed in section 2. With so many countries allowing multiple citizenships today, it is difficult for anyone to believe that acquisition necessarily includes renunciation. The ascriptive conception provides strong arguments against deprivation on this ground for birthright citizens, but allows for asymmetrical treatment of incoming naturalisations by using renunciation of a foreign citizenship as a test of assimilation into the birthright community. As pointed out on several occasions, on the genuine link conception the establishment of a link to another country does not necessarily break the relationship with the original one. Even where a citizen acquires a foreign nationality without a genuine link to that country, this is not sufficient proof that the person no longer has a genuine link to her country of origin. The duty to prevent over-inclusion lies in this case with the foreign State. The Slovakian law of 2010 that strips those who voluntarily acquire a foreign nationality of their Slovak citizenship provides a negative illustration. Although there are reasonable doubts whether Hungarian language minorities that do not take up residence in Hungary should be awarded Hungarian citizenship, their taking up the Hungarian offer cannot possibly be interpreted as proof that they no longer have a genuine link to their country of birth and permanent residence.

5. EU citizenship as a constraint on deprivation

In this section we consider whether EU citizenship as established by the Maastricht Treaty and interpreted by the Court of Justice of the European Union (CJEU) adds anything to the constraints on State powers in citizenship deprivation that emerge from the individual choice, ascriptive membership and genuine link conceptions and that apply to liberal States independently of their membership in a supranational union.

We focus on constraints because EU citizenship is derivative of the nationality of Member States. The four conceptions can therefore be applied to EU citizenship only indirectly. A State discretion view that maximises legislative freedom for Member States thereby minimises the scope of EU law in matters of citizenship determination. An ascriptive conception will have the same effect. Since EU citizenship is not based on descent from EU citizens or birth in the EU territory, there is no ascriptive community of EU citizens, let alone a nation-building project at EU level that sustains such a vision. Maintaining the integrity of the Member States' ascriptive communities requires keeping EU competencies in matters of acquisition and loss of citizenship as weak as possible. By contrast, an individual choice perspective will promote that individuals can choose EU citizenship relatively independently of their interest in the nationality of a Member State. Since the two statuses are derivatively linked to each other, the practical implication is that Member States should open access to their nationality to those who are mainly interested in EU citizenship and its free movement rights rather than in residence and membership in the State granting them citizenship.[80] A genuine link conception differs from all three alternative approaches. Instead of conceiving of individual ties to Member States and the EU as conflicting affiliations, it allows for considering them complementary and mutually reinforcing.

In this paper we cannot fully explore how the four conceptions influence acquisition of EU citizenship, but we will consider five ways in which the common status of EU citizenship could constrain Member States' laws and policies on citizenship deprivation.

(1) Fundamental rights protection: The EU has committed itself in various ways to fundamental rights that constrain deprivation policies of its Member States especially through non-discrimination requirements and procedural safeguards.

[80] Dimitry Kochenov has consistently defended this view, see most recently Kochenov, op. cit.

(2) Exercise of free movement rights: The core right of EU citizenship is freedom of movement within the Union; therefore, EU citizenship must not be lost due to long-term residence in other Member States.

(3) Dual citizenship toleration in a political union: Non-toleration of dual citizenship is based on assumptions of citizenship duties of exclusive loyalty or potential enmity between States, which cannot be upheld between the Member States of a politically integrated union.

(4) Unequal risks of loss: Member States' diverging provisions on renunciation and deprivation create different opportunities and risks of citizenship loss that make EU citizenship itself unequal as a status.

(5) Genuine link to the EU: Since EU citizenship is a fundamental status of Member State nationals, a Member State should not be able to deprive its nationals of this status as long as they have a genuine link to the EU, even if they have lost their genuine links to the Member State.

5.1 Fundamental rights protection

Protection of fundamental rights and the rule of law are conditions for membership in the European Union and general principles of EU law that can create additional constraints for the deprivation policies of its Member States. The norms on non-discrimination and the requirements for procedural safeguards are especially pertinent. In its judgement in the case of *Janko Rottmann v. Freistaat Bayern*[81] the CJEU made it explicit that these constraints apply also to derivative loss of EU citizenship. In his opinion Advocate General Maduro raised normative arguments that were not repeated explicitly in the subsequent decision of the Court, but remain important for the normative discussion.

Most important, in justifying the applicability of EU law in citizenship matters – an area considered to be at the heart of national sovereignty – Maduro claimed that the powers of the Member States cannot be discretionary. On the basis of the earlier judgement in the *Micheletti* case,[82] Member States were required to specify the conditions for acquisition and loss of nationality with "due regard to Community law." This is a (limited) challenge to the discretionary conception itself. Discretion, as we defined it here, implies a broad scope for legislative choices to be made in matters of citizenship. However, when loss of European citizenship is at stake, some choices that are acceptable under national constitutions may not be available under EU law. For example, facilitated naturalisation for categories of third-country nationals who intend to use their EU citizenship right of free movement in order to take residence in another Member State could violate the principle of sincere cooperation required by Article 4(3) TEU and thus fail to show "due regard to Community law".[83] The Advocate General was careful enough not to challenge the general principle that Member States are free to determine under their own laws who shall possess their nationality, yet for him due regard to Community law entails that certain legislative choices are not available to Member States. The Court seems to go a bit further, asserting that all Member State decisions that entail an involuntary loss of EU citizenship shall be guided by the principle of proportionality enshrined in Article 5(4) TEU Treaties.

Interestingly, in acknowledging the powers of the States to withdraw citizenship in case of fraud, the Court notes that this is necessary "to protect the special relationship of solidarity and good faith between [a State] and its nationals." As we have discussed in section 3, a 'special relationship' conception of citizenship suggests some reciprocity of duties that is difficult to square with unilateral choices of the States or the individuals concerned. On the other hand, when specifying the circumstances that the national authorities must take into account when deciding on deprivation, the Court seems to be concerned only about basic rule of law and protection of rights rather than about the existence of a genuine link. Of the criteria listed in paragraph 56 of the judgement – consequences for the person and her family members, lapse of time, gravity of the offence, and possibility of recovery of the original nationality – only the first two refer to genuine links, while the gravity of the offence has clearly a retributive basis and the recovery of original citizenship considers the severity of consequences in case of deprivation. It is worth noting that taking recovery options into account would lead to different treatment of similar cases depending on the rules of the State of origin. This can be especially problematic if the *Rottmann* test is to be applied to other grounds for deprivation. In sum, the limits

[81] Case C-135/08, opinion of the AG Maduro from 30 September 2009 and judgement of the Court from 2 March 2010.

[82] Case C-369/90, judgement from 7 July 1992.

[83] Another example is, of course, the Maltese investor citizenship scheme to which we return below.

set by the Court on the powers of EU Member States to denaturalise their citizens are modest, and European citizens are clearly less than 'sovereign' in the sense that Patrick Weil reads in the jurisprudence of the U.S. Supreme Court. This is hardly surprising given the derivative nature of the EU citizenship.

The Court implicitly set out a constraint on the deprivation procedure too. If the exercise of deprivation powers by the Member States is amenable to judicial review carried out in light of European Union law,[84] it follows that an active decision of a public authority is required and it must be subject to judicial review.[85] As obvious as this is, there is no possibility of judicial review in several Member States: had Janko Rottmann taken residence in Bulgaria instead of Germany, he would not have had any chance of a court hearing and his case could not possibly have reached the CJEU. De Groot & Wautelet note that, although the Court made an explicit requirement that Member States should comply with the principle of proportionality only, they must also comply with the principles of legitimate expectations and equality, as mentioned by Advocate General Maduro (paragraphs 34 and 31 respectively), and also of access to court.[86] The latter is a necessary precondition for the application of all the other principles that were explicitly mentioned.

The *Rottmann* judgement and Maduro's opinion do not reject the State discretion view but invoke a number of general principles that significantly constrain it. The principles of proportionality, legitimate expectations, non-discrimination and judicial review provide strong safeguards against illiberal choices of the Member States.[87] Judicial review is particularly important with regard to public security grounds for deprivation, which are often subject to no or only very limited due process. It remains to be seen, however, whether the Court of Justice is willing to challenge a decision to deprive a person of British citizenship on grounds that it is not conductive to the public good. The British law of 2002, as amended in 2006 and 2014, does not take into account that the British citizens who are deprived of their citizenship on grounds of public security will in nearly all cases also lose their EU citizenship. The CJEU has repeatedly argued that EU citizenship is a fundamental status and that EU law protection of this status is not entirely dependent on cross-border situations inside the EU. If the British government deprives citizens who are abroad in a third country of their EU citizenship, they lose not only the right to return to Britain, but also the right to avail themselves of diplomatic protection by other Member States.

It is interesting to note that *Rottmann* leaves open a lacuna in international law. If the procedural requirements are satisfied and the person has voluntarily renounced his former citizenship, a new citizenship acquired by fraud can be withdrawn even if the person becomes stateless and the country of former citizenship is under no legal obligation to take him back. However, the EU as a common area of justice, freedom and security is different from the international State system and therefore ought to provide an environment where statelessness is avoided even in such a case. As a developed system for cooperation among Member States it can be expected to allocate the duty to provide the person with a nationality to either the State of residence or origin. In this case, as Maduro hinted,[88] it is plausible to conclude that Austria has a duty to restore the citizenship of Janko Rottmann. Even though the Advocate General stopped short of asserting such powers for the Union, and the Court shied away from the question, they could have argued that the Member States have a duty, under Article 4 (3), to sincerely cooperate in order to avoid creating statelessness and jointly assure the effectiveness of the right to nationality.[89]

5.2 Exercise of free movement rights

The core right of EU citizenship (and historically a *raison d'être* of the Union itself) is freedom of movement within the Union. Therefore EU citizenship must not be lost due to long-term residence in other Member States.

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[84] Para 48.

[85] There are due process requirements in matters of nationality in the European Convention on Nationality (Arts 11 and 12) and the 1961 Convention on the Reduction of Statelessness (Art. 8(4)), but the *Rottmann* ruling implies that this must be exercised by courts and cannot be limited to procedural matters only.

[86] de Groot & Wautelet, op. cit., p. 27.

[87] Note, however, that the protection of EU law will not apply to a person who is a dual citizen of two EU Member States and thus would not lose her EU citizenship if one of them deprives her of her nationality.

[88] See Opinion of the AG Maduro in *Rottmann*, para 34.

[89] Art. 15 of the Universal Declaration of Human Rights.

This is the most obvious constraint EU law imposes on legislative choices of the Member States – they cannot make long-term residence in another Member State a ground for deprivation.[90] As we have noted in section 4, long-term residence abroad may constitute a legitimate ground for deprivation for all citizens under some interpretations of the State discretion and genuine link views, as well as under the ascriptive view for the category of naturalised citizens only. Yet this ground cannot be accepted within the EU, on any of the four conceptions. As pointed out by de Groot already in 2003,[91] it would be paradoxical if EU citizenship status, which entails a right of free movement within the EU, can be lost as a consequence of exercising that very same right. The Netherlands, whose law foresees a loss of citizenship after 10 years of residence abroad, amended their legislation in 2003 to include an exception for residence in other EU States.

The 2014 German reform of the option duty for *ius soli* children can be criticised for failing to fully respect this constraint. The current version of the law exempts children who can demonstrate their genuine link to Germany through eight years of residence or six years of schooling from the duty to renounce a foreign nationality in order to retain their German citizenship beyond their 23rd birthday. Children born in Germany who are German and third-country dual nationals by birth and who do not meet the residence or schooling requirement because they have resided for too long in another EU Member State will still have to renounce their third-country nationality. The law foresees that they have to be notified by the German authorities about their option duty so that they do not lose their German citizenship inadvertently and have enough time to renounce their third-country nationality. However, the German legislature was apparently unwilling to accept as a general rule that long-term residence in the EU can count as a genuine link to the EU that protects an EU citizen against involuntary loss of EU citizenship. This provision potentially collides with free movement rights under the EU Treaties not only because residence in another Member State may lead to loss of EU citizenship, but also because it can deter the child's parents from exercising their own free movement rights, so as not to jeopardise the citizenship rights of the children.

Defenders of the reform can invoke three reasons why it may still be compatible with EU law. First, it is insufficient residence in Germany rather than long-term residence abroad that leads to the loss of German and potentially also EU citizenship. A person may reside up to 17 years abroad without jeopardising her German citizenship. Second, this loss can be avoided by renouncing a foreign nationality in time. Third, the option duty merely applies the general principle of avoidance of dual citizenship involving third countries to Germans who have acquired their citizenship *iure soli* and this principle itself is not in conflict with EU law.

These defences appear, however, insufficient if one accepts our argument (see 5.5 below) that long-term residence of EU citizens in the territory of the EU maintains their genuine link to the EU itself. From this perspective, it seems incoherent that a Member State can deprive EU citizens of their status on grounds of loss of genuine links if these persons have confirmed their genuine link to the EU through mobility and long-term residence within EU territory. A 'genuine link to the EU' argument differs, however, substantively from a pure free movement argument. For the former it is the total time of residence in the EU territory since birth that counts (including thus the time spent in the EU country of citizenship) rather than the crossing of internal borders. The practical difference would, however, be minimal if we construct an EU genuine link standard by analogy with the Scandinavian rule for loss of extraterritorial *ius sanguinis*.[92] Germany should then exempt from the option duty also those German-born citizens who have resided for a sufficient time in the EU territory, who return there from a third country before their 23rd birthday or who declare their intention to return.

5.3 Dual citizenship toleration in a political union

A third possible constraint concerns loss of citizenship on the ground of voluntary acquisition of a foreign nationality. The essence of the argument is that citizenship of an EU Member State cannot be regarded as 'foreign' for deprivation purposes. In contrast to the previous argument, the present one does not appeal to individual exercise of free movement or genuine links, but to the collective nature of the EU as a political union whose Member States have accepted duties of sincere cooperation and therefore cannot consider

[90] See Opinion of the AG Maduro in *Rottmann*, para 11.

[91] G.-R. de Groot (2004), "Towards a European Nationality Law", *Electronic Journal of Comparative Law*, 8.

[92] Denmark, Sweden and Finland phase out citizenship of the second generation born abroad at age 22 but exempt those who are resident in another Scandinavian country.

acquisition of another Member State's citizenship as proof of insufficient loyalty. For the same reason they also cannot require renunciation of another Member State's citizenship as a condition for naturalisation.

Apart from the argument for cooperation and trust within the Union, there is an interesting relationship between free movement and self-government. The Treaties, which proclaim the right to move and settle in another Member State and guarantee that EU citizens are not discriminated vis-à-vis the local population, deliberately stop short of requiring the host Member State to assure their full *political* integration through giving mobile EU citizens voting rights in host country national elections. Yet the common constitutional traditions of the European States, as well as the general principles of democracy, suggest that the permanent residents of a country must be included, at some point in time, in the process of self-government through being "set on the road to citizenship".[93] At the same time, EU internal migrants must be presumed to retain a stake in their country of origin when they settle in another Member State. Thus European citizens must have the right to participate in the self-government of both the Member State of origin and of residence States and this right cannot be adequately satisfied by anything short of full citizenship rights in each of them. Neither the country of origin, nor the host State can thus legitimately require them to renounce their membership of the other political community as a condition for accepting (or not excluding) them. In other words, mobile EU citizens should not have to choose between exercising political rights in their State of long-term residence and retaining the franchise in their Member State of origin. Member States should therefore not make voluntary acquisition of a second EU citizenship (and *a fortiori* service in a foreign army or public administration of another EU Member State) a ground for deprivation.

While in most Member States this issue does not arise because they generally tolerate dual citizenship both in incoming and outgoing naturalisations, among the minority of countries that remain committed to avoiding it in either or both contexts, only Germany and Latvia make exceptions for EU citizens, whereas Spain exempts Latin American countries with whom it has concluded bilateral agreements on dual citizenship even though it is not in a similar political union with any of them. The rarity of these exceptions is rather surprising, given that EU citizens residing in other Member States enjoy so many other privileges compared to third-country nationals and that five Member States (Austria, Germany, Greece, Italy and Romania) also offer them facilitated naturalisation after shorter residence periods. Even in the case of Germany, which introduced the exception in 2007, the normative argument for toleration of multiple citizenships within the EU does not seem to have resonated very strongly. A restricted exception for EU Member States was initially adopted in 2000 under the condition of reciprocity. This condition was dropped in 2007 mainly because the old rule had become administratively and legally too complex.[94]

The importance of this relationship is not duly appreciated in jurisprudence either. When conceding that the EU law cannot oblige Austria to restore the citizenship of Janko Rottmann, Advocate General Maduro could justify his position in different ways, most obviously by pointing to the limited competences of the Union. Instead, he emphasised that the loss was a result of Rottmann's *personal decision* to acquire another citizenship and stated that EU law does not preclude the legislation that deprives him automatically from his Austrian citizenship.[95] In our view, Member States should not create such dilemmas for the EU citizens and force them to choose between losing their original nationality and integrating in the new polity. Creating incentives for the nationals of fellow Member States to renounce or lose their citizenship is deeply inimical to the European project. While free movement may only require the right of mobile EU citizens to be treated equally with the nationals of their host country, a claim to political participation thus provides a much stronger reason for providing access to naturalisation in another Member State without losing a previous citizenship.

A possible argument against toleration of dual citizenship between Member States on grounds of political participation claims is that this will allow these EU citizens to cast their votes in two national elections. Indeed, while in cases of second citizenship of a third country, voting in two national elections does not lead to double representation in any legislative body in the EU, the European Parliament shares legislative powers with the Council. In P elections the problem is avoided, as dual citizens are required to decide to vote for candidates of either their Member State of residence or of citizenship. The Council, however, represents national

[93] M. Walzer (1983), *Spheres of Justice. A Defense of Pluralism and Equality*, New York: Basic Books 1983, p. 60.

[94] See Kay Hailbronner (2012), "Country Report: Germany", EUDO Citizenship Observatory.

[95] See AG Opinion, para 34.

governments that are elected by citizens residing in the country and – in most cases – also by citizens residing abroad. Dual EU citizens may thus be said to have double representation in the Council. The implication of this argument is that dual citizenship should be tolerated only if the second citizenship is that of a third country or of a Member State that does not allow for external voting. We believe that this argument is overstated, mainly because the Council is an intergovernmental institution, in which citizens are represented only indirectly, as they would be in an international organisation. Our conclusion is thus that the normative case for mutual toleration of dual citizenship within the EU is robust.[96]

The duty of sincere cooperation between Member States in matters of citizenship need not only concern instances where EU citizenship itself is at risk of being lost. This duty was quite ostensibly violated in the notorious 2010 tit-for-tat between Hungary and Slovakia discussed in section 4.[97] While Hungary was generously handing out passports to ethnic Hungarians in neighbouring States, Slovakia responded by adopting a law that provided for loss of Slovak citizenship in case of voluntary acquisition of another citizenship. As both countries were already members of the EU, this did not lead to deprivation of EU citizenship, so the constraints established by the CJEU in *Rottmann* do not apply. Still, it is plausible that an EU dimension is also involved if one Member State specifically targets a group for deprivation in case of acquisition of the citizenship of another Member State.

5.4 Unequal risk of loss

Article 20(1) of the Treaty on the Functioning of the EU defines EU citizenship as derivative of Member State nationality as well as additional without replacing it. Since its *Grzelczyk* judgement the CJEU has repeatedly emphasised that "the status of citizen of the European Union is destined to be the fundamental status of nationals of all the Member States."[98] This complex formula suggests, at the very least, that EU citizens ought to be equally protected by EU law in the enjoyment of their rights as EU citizens. Since the *Rottmann* judgement – which is widely regarded as applying to all cases of loss of EU citizenship – one could argue that such equality of protection must include equal security of the status itself. Carried to its logical end, this argument would entail that the EU ought to acquire a competence in determining itself the conditions of loss of EU citizenship.

This may appear extremely controversial, but in our view it does not necessarily lead to harmonisation of Member States' provisions for the *acquisition* of national and EU citizenship. Switzerland provides empirical evidence for this – the rules governing acquisition of Swiss citizenship through naturalisation are competences of the cantons and municipalities that are merely constrained by federal legislation, whereas the loss of Swiss citizenship is exclusively regulated by federal law. The argument can also be supported theoretically since differential opportunities for access to a status do not violate a norm of equality for those who hold the status, whereas unequal conditions for loss clearly do.

Critics of this line of reasoning can point out that Swiss federal law regulates not only the conditions for loss, but also for acquisition by birth and thus trumps sub-State competencies in all respects except with regard to the naturalisation of immigrants from outside Switzerland. If this model were applied to the EU, Member States would merely be left with some marginal powers to legislate on the naturalisation of third-country nationals. This would clearly be incompatible with the "shall not replace" clause of the EU citizenship formula and thus cannot be regarded as compelling inference from the present legal principles governing this status. Yet in our view the Treaty articles that would govern the exercise of such powers could be narrowly tailored to make sure that the competence to constrain the discretion of the Member States in deprivation does not 'creep' into regulation of conditions for acquisition.

The norms of equality of membership inherent in every conception of democratic citizenship can be reconciled with the essentially derivative nature of EU citizenship. The *Rottmann* decision has already taken the first step. It demands that Member States must take EU law into account and apply a proportionality test if

[96] Our most preferred option is extending dual citizenship toleration also to third-country nationals on grounds of the genuine link principle.

[97] See Bauböck (2010), op. cit.

[98] Case 184/99 *Grzelczyk v. Centre Public d'aide sociale d'Ottignies-Louvain-la-Neuve*, para 31.

denationalisation entails the loss of EU citizenship. On the other hand, from a perspective of domestic equality of national citizens, it is unacceptable to have two different levels of protection against deprivation (or two different sets of conditions for voluntary renunciation) for those citizens who have exercised their freedom to move across borders and those who have not. Therefore, Member States must apply a *Rottmann* standard to any citizenship deprivation. Finally, one could add to this a duty of Member States to coordinate amongst themselves their conditions for citizenship loss in order to make sure that they are not grossly unequal and thus violate the equality of protection that the EU owes to all its citizens. These three steps would enhance equality of conditions for loss and retention of EU citizenship without fully transferring the legislative competence to the Union.

5.5 Genuine link to the EU

As we have already argued, while the Member States may still understand their citizenship law as discretionary, that discretion is limited. St Kitts and Nevis may legitimately decide to grant citizenship to everyone who can invest a certain amount of money without ever setting foot on the islands, but this choice should not be available to Malta, Cyprus or other Member States of the Union.

A much stronger specific protection against deprivation would emerge if the EU started to apply a genuine link constraint on deprivation of EU citizenship. The genuine link criterion has generally been applied negatively – the lack of a genuine link has been invoked as a reason against the granting of citizenship status (or against invoking citizenship status as a reason for immunity and diplomatic protection, as in the *Nottebohm* case)[99] and as a justification for deprivation. However, genuine links can also be invoked positively so that their presence counts as a reason for awarding citizenship or as a reason against deprivation.

In the course of reviewing the investor citizenship programmes recently adopted by Malta and other Member States, Commissioner Reding emphasised the need "to make sure that the minimum requirement of a 'genuine link' to the country is met."[100] In a resolution of 16 January 2014 the European Parliament went further by claiming "that EU citizenship implies the holding of a stake in the Union and depends on a person's ties with Europe and the Member States or on personal ties with EU citizens."[101] To our knowledge similar references to a genuine link and stakeholder criterion with regard to the citizenship polities of the Member States have not been made in the past. They could signal a step towards a more proactive EU approach.

The relevant question for the present report is whether the genuine link criterion in relation to the EU could also be applied as a constraint against deprivation at EU level. Consider a case where an EU citizen who has resided in other EU Member States for a long time is threatened with deprivation by her country of nationality for reasons unconnected to her long-term absence, such as public security grounds or derivative loss. Assume further that the person would not be deprived of her nationality if she had resided permanently in her country of nationality. Should her residence in the EU count as equivalent to residence in her country of nationality and should thus the genuine link to the EU qualify as a relevant constraint on the power of that State to deprive her of EU citizenship even in the absence of a genuine link to the State of nationality? The answer is probably "yes" if we consider EU citizenship as a fundamental status and involuntary loss of that status as having serious consequences for the person not merely in her relation to her State of nationality but to the EU itself.

Since EU citizenship is derivative from Member State nationality, a genuine link to the EU cannot be a sufficient ground for access to EU citizenship in the absence of a genuine link to any Member State. A hypermobile third-country national who spends decades in the EU but never stays long enough in any Member State to meet reasonable conditions for naturalisation will remain a foreigner unless the nature of EU citizenship changes fundamentally. A genuine link to the EU could, however, play a more important role in preventing involuntary loss of nationality of a Member State, since in this case the derivative nature of EU citizenship is not undermined. The person cannot retain EU citizenship without also retaining the nationality of a Member State. The impact of EU citizenship is in this case to constrain Member States' discretion by

[99] See Sloane, op. cit.

[100] Answer given by Mrs Reding on behalf of the Commission to a Parliamentary question, E-013318/2013, 28 February 2014.

[101] European Parliament resolution of 16 January 2014 on EU citizenship for sale (2013/2995(RSP)) (http://eudo-citizenship.eu/images/docs/EP-Malta-news%2016%20January%202014.pdf).

requiring them to take a genuine link to the EU into account in their national decisions on deprivation. After *Rottmann*, this would no longer be an extraordinary move. As we have already discussed in section 5.2 above, the 2014 reform of the German *ius soli* option duty might provide a test case.

In section 5.3 above we have argued that a political union of States needs to secure opportunities for full political participation of mobile citizens in both the Member State of origin and that of long-term residence. Currently, no Member State allows EU citizens from other Member States to vote in its national elections.[102] Mobile EU citizens thus face a choice between casting external votes in the Member State whose nationals they are and naturalisation in the Member State where they reside. If they meet the residence conditions and decide to make a lifelong commitment to become citizens of their adopted EU host country, they should not lose their franchise and representation in the country of origin as a consequence of having to renounce their previous nationality. It is rather far-fetched to construe such a constrained choice as deterring free movement within the EU, as the CJEU has done in a number of similar cases. The argument becomes much more plausible once we combine the duty of sincere cooperation in a political union with a genuine link principle. Instead of privileging mobile citizens over sedentary ones, the argument would point out that those EU citizens who take a decision to naturalise in another Member State and who meet fair conditions for naturalisation have a claim to political participation and representation in two Member States. The general case for toleration of dual citizenship in cases of migrants with genuine links to two States seems prima facie weaker in the EU, where a single citizenship is already sufficient to guarantee free movement and access to labour markets and social protection in other Member States. For rights of political participation and representation, the case becomes, however, much stronger in a political union of States that aims at guaranteeing democratic equality of citizenship at both Member State and supranational levels.

6. Conclusions

The power of States to deprive citizens of their status was historically strong and nearly universally acknowledged. Since the Second World War, this power has been constrained in liberal democracies by the international duty to prevent statelessness and by domestic standards of rule of law. Nevertheless, these constraints have not amounted to a wholesale abolition of the power. Few democratic States have followed the doctrine of "citizenship sovereignty" developed by the U.S. Supreme Court. In Europe, Poland remains exceptional as the only country whose law does not foresee any involuntary loss of its nationality by adult citizens.[103] Most other States retain a repertoire of several legal grounds for deprivation in their nationality laws.

As discussed in section 1, the recent expansion of deprivation powers has been focused nearly entirely on averting threats to public security and has specifically targeted suspects of terrorism. However, a closer examination of justifications offered for such policies has revealed their incoherence or ineffectiveness as punitive sanctions. We have therefore proposed a wider perspective that considers all instances of involuntary deprivation as attempts to restore the integrity of citizenship as membership in a political community.

Variations of the extent and focus of deprivation powers can be best understood as emerging from different normative conceptions of citizenship. In section 2 we have argued that the basic distinction between voluntary and involuntary loss already relies on a normative judgement that puts the burden of justification for involuntary loss on the State rather than the individual.

In section 3 we have suggested a typology of four conceptions: a State discretion view, an individual choice view, an ascriptive community view, and a genuine link view of the relation between States and their citizens. These four conceptions are not meant to describe national citizenship regimes but normative logics that are often articulated in specific provisions of citizenship laws and that can be combined within a single law or change over time through legislative reform. A State discretion view lends itself most easily to justifying wide deprivation powers. The implications of the other three conceptions are less obvious. An individual choice view will tend to strengthen individual entitlements and protections, but will also promote instrumental

[102] They can, however, vote in regional elections in Scotland, Wales and Northern Ireland.

[103] The only persons who may lose Polish citizenship involuntarily are minor children under age 16 who are included in a parent's renunciation of Polish citizenship.

attitudes towards acquisition and renunciation that are likely to undermine citizenship as a stable bond between individuals and States. The ascriptive community view is inclined to exempt birthright citizens from threats of involuntary loss, but opens the door for discrimination against naturalised citizens in this regard. A genuine link view will instead consider the strength of biographical bonds between individuals and States, which can justify automatic loss by second or third generations born abroad.

In section 4 we have discussed five substantive grounds for involuntary loss of citizenship: public security threats, non-compliance with citizenship duties, flawed acquisition, derivative loss and loss of genuine links. We have shown how the four conceptions often lead to different conclusions with regard to justifications for these grounds and we illustrate how a suitably contextualised genuine link conception can provide strong protection against involuntary deprivation, even in cases of severe threats to public security or flawed acquisition.

Section 5, finally, has identified five reasons why EU citizenship could provide additional constraints against deprivation beyond those that emerge from international and constitutional law. Two of these are already widely recognised: the EU provides additional mechanisms of procedural protection and makes it impossible to denationalise citizens on grounds of long-term residence in another Member State. The other three grounds are more controversial but are at least partially supported by the current constitutional architecture of the EU and could eventually become salient through further citizenship jurisprudence of the CJEU: dual citizenship between Member States of a political union should be tolerated even by those States that prohibit it when involving third countries; grossly unequal conditions of loss of Union citizenship undermine the equality of the status itself; and EU citizens may be protected against involuntary loss by their genuine links to the EU itself.

Annex

Table 1. Grounds and procedures for citizenship loss

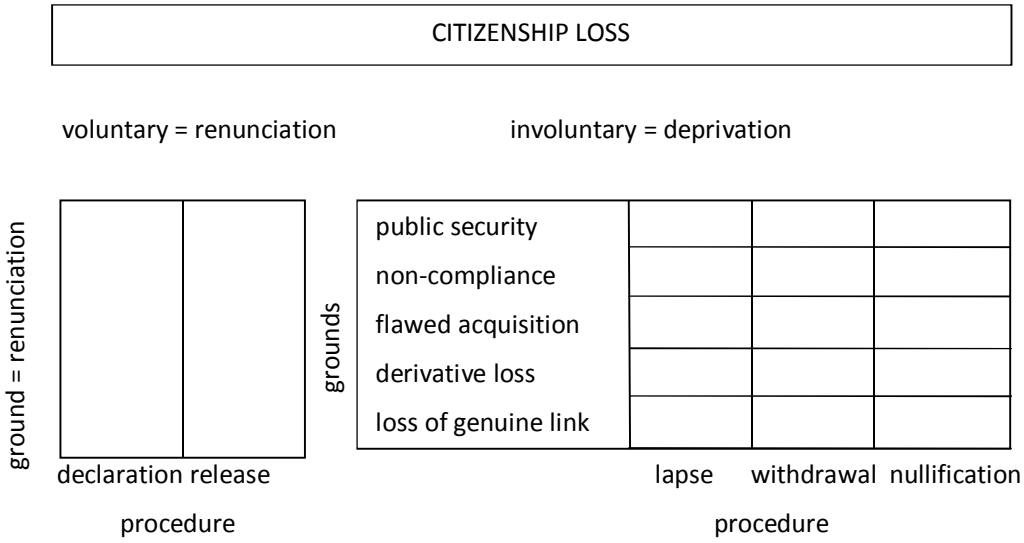

Table 2. Grounds for and modes of loss

Grounds for Loss	Modes of Loss (EUDO Citizenship)
Renunciation	L01 Renunciation
Public security	L03 Service in foreign army
	L04 Other service for foreign country
	L07 Disloyalty or treason
	L08 Other offences
Non-compliance	L06 Non-renunciation (birth)
	L10 Non-renunciation (naturalisation)
Flawed acquisition	L09 Fraudulent acquisition
Derivative loss	L011 Loss of citizenship by parent
	L012 Loss of citizenship by spouse
	L13a Annulment of paternity
	L13b Adoption
Loss of genuine link	L02 Residence abroad
	L05 Acquisition of foreign citizenship
	L14 Establishment of foreign citizenship
	L15 Other reasons

Table 3. Four normative conceptions of citizenship acquisition and loss

		dominant interests	
		state	individual
citizenship relation	generic	state discretion	individual choice
	special	ascriptive community	genuine link

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