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When EU Citizens become Foreigners

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Abstract: *Although EU citizenship has matured as an institution, a combination of hope and caution ought to accompany the tale of its evolution. Contradictory processes of inclusion and greater equalisation coexist with exclusionary logics. These would have to be taken into account, and be addressed, by assessments of its present state and its future evolution. A focus on three key manifestations of state sovereignty, namely, the erasure of citizenship status, expulsion and the disappearance of individuals owing to extraordinary rendition, sheds light onto the edges of EU citizenship and the undesirable effects of untrammelled state power on the lives of individuals. Probing into the moments when EU citizens are treated as aliens or foreigners, and the troublesome ambiguities, tensions and limitations surrounding them, reveals the gaps in the protection of EU citizens and the constraints that stand in the way of change in the institutional scheme of things.*

I Introduction

Political life becomes crystallised in institutions, practices, both formal and informal, laws and policies. But despite human beings' desire for stability and certainty, change is endemic in political life thereby propelling the adaptation of all the above to new conditions and circumstances and necessitating juridical and political reform. Although the forces of change are not always eruptive, and thus clearly visible, and quite often are so varied that one loses sight of their direction and their specific impact on political life, it is, nevertheless, true that all institutions constantly adapt, and adjust, to changing conditions, expectations and circumstances. In this respect, the fact that EU citizenship, which was formally established by the Treaty on European Union 21 years ago, not only has matured but has also been recently elevated to a central building block of the European polity edifice is not surprising at all. Despite the pessimistic assessments of its role and constructive potential[1] in the 1990s, the

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[1] See J.H. Weiler, 'Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision' (1995) 1(3) *European Law Journal* 219–58; G. de Burca, 'The Quest for Legitimacy in the European Union' (1996) 59(3) *Modern Law Review* 349–379; D. Curtin, *Postnational Democracy: The European Union in Search of a Political Philosophy* (Kluwer, 1997); C. Closa, 'The Concept of Citizenship in the Treaty of European Union' (1992) 29 *Common Market Law Review* 1137; 'Supranational Citizenship and Democracy: Normative and Empirical Dimensions', in M. La Torre (ed.), *European Citizenship: An Institutional Challenge* (Kluwer, 1998); E. Meehan, *European Citizenship* (Sage, 1993); T. Kostakopoulou, 'Towards a Theory of Constructive Citizenship in Europe' (1996) 4(4) *Journal of Political Philosophy* 337–358; T. Kostakopoulou, 'European Citizenship and Immigration after Amsterdam: Silences, Openings, Paradoxes' (1998) 24(4) *Journal of Ethnic and Migration Studies* 639–656; U. Preuss, 'Two Challenges to European Citizenship' (1996) XLIV *Political Studies* 534–552; J. Shaw, 'The Many Pasts and Futures of Citizenship in the EU' (1997) 22 *European Law Review*

Court of Justice of the European Union (CJEU) has made a number of important interventions which have resulted in procuring transformative institutional change.[2]

Following a period of judicial minimalism (1993–1997), the importance of the normative template of equal treatment entailed by Union citizenship was highlighted by the CJEU in *Martinez Sala* (this was a phase of 'signalling intentions').[3] In the new millennium, the Court proceeded to transform it into living instrument by adopting more robust normative frames which have had an empowering effect on EU citizens. In addition to the Court's decisive interventions, the adoption of the Citizenship Directive, the fully binding Charter of Fundamental Rights, the appointment of a Commissioner in charge of the 'Justice, Fundamental Rights and Citizenship' DG, the adoption of the Stockholm Programme on an 'open and secure Europe serving and protecting the citizen' and an ambitious policy programme aiming at removing obstacles to the exercise of EU citizenship rights adopted by the Barosso II Commission,[4] all have reinforced EU citizenship and opened up possibilities for its broadening and deepening.[5]

Encouraged by these developments, scholars diagnose a new chapter in European federalism and anticipate a linkage between fundamental rights and EU citizenship so that EU citizens, be they 'static' or 'mobile', can invoke both within the parameters established by the EU law.[6] But such assessments might be premature. In what follows, I argue that a combination of hope and caution ought to accompany the tale of the evolution of the experimental institution of EU citizenship.[7] Contradictory processes of inclusion and greater equalisation coexist with exclusionary processes, and these would have to be taken into account, and be fully addressed, by perspectives on EU citizenship's present as well as future. Probing into the not-so-clearly visible edges of EU citizenship, that is, the moments when EU citizens are treated as aliens or foreigners, and the troublesome ambiguities, tensions and limitations surrounding them, reveals the gaps in the protection of EU citizens and the constraints that stand in the way of change in the institutional scheme of things.

The subsequent discussion is structured as follows. Section 1 briefly discusses the archetypical account of EU citizenship, while in section 2 I shift the attention from the centre to the 'margins'. Three case studies addressing the 'edgelands' of EU citizenship reveal how easy it is for the EU citizen status to be shaken off and thus to become devoid of significance as national sovereignty and state power reassert themselves, thereby turning EU citizens into foreigners. Shedding light onto these edges of

554–572; A. Wiener, 'Assessing the Constructive Potential of Union-Citizenship—A Socio-Historical Perspective' (1997) 1(17) *European Integration On-line Papers* (http://eiop.or.at/eiop/); *Building Institutions: The Developing Practice of European Citizenship* (Westview, 1998).

[2] I borrow this from T. Kostakopoulou, 'Ideas, Norms and European Citizenship', (2005) 65(2) *Modern Law Review* 233–267.

[3] *Ibid*.

[4] 2013 has also been designated as the European Year of Citizens; Proposal for a Decision of the European Parliament and the Council on the European Year of Citizens (2013) COM (2011) 489.

[5] See T. Kostakopoulou, 'Co-creating EU Citizenship: Institutional Process and Crescive Norms', (Forthcoming, 2013) 15 *Cambridge Yearbook of European Legal Studies* 255–281.

[6] D. Kochenov, 'The Citizenship Paradigm', (Forthcoming, 2013) 15 *Cambridge Yearbook of European Legal Studies* 197–225.

[7] See further, T. Kostakopoulou, 'The European Court of Justice, Member State Autonomy and European Union Citizenship: Conjunctions and Disjunctions', in B. de Witte and Hans-W. Micklitz (eds.) *The European Court of Justice and the Autonomy of the Member States* (Intersentia, 2012), at 175–203, 177 *et seq*.

EU citizenship enables us to recognise its many-sided reality and the variegated patterns that coexist within it. Accordingly, EU citizenship reveals itself as an incomplete institution always in the process of completing in line with environing conditions and as a dynamic norm whose potential to guarantee the equal treatment of EU citizens is only attained by continuous growth.

II Archetypal European Union Citizenship

EU citizenship is neither a reflection of national citizenships nor a nominal citizenship corollary to the fully fledged or 'real' national citizenships. In fact, it can never be a reflection of national citizenships since the latter have been premised on the ideal of sedentariness that has characterised the statist paradigm. While the latter conceives of human mobility as a nuisance or a problem, EU citizenship is based on border crossings and the free movement of EU nationals. True, mobility is differential, thereby leading us to refer to those exercising free movement rights as 'privileged' EU citizens, but it, nevertheless, remains the case that it is actively encouraged and promoted as a source of great strength for the economy, society and the individual and that citizenship has burst the national-statist container. Additionally, EU citizenship cannot be regarded to be a nominal citizenship because its supranational character has ruled out the exercise of national autonomy over the grant of entry and residence rights to EU nationals and their family members, residence rights for third country national parents of children, who are EU citizens[8] and who are enrolled at educational establishments irrespective of their economic status,[9] the grant of welfare assistance to both economically active and non-active citizens who can demonstrate a certain degree of integration into the host society or a real link with its labour market[10] and the payment of war-related pensions and allowances.[11] In other words, in all the above-mentioned areas, 'more' EU law has resulted in less discretion in policy making by national authorities. And less discretion on the part of national executives tends to be depicted as a loss of national sovereignty. But this is only a partial view of a complex political reality.

For when one lifts the veil of discourse, (s)he realises that Mead was correct to note that 'a reality that transcends the present must exhibit itself in the present'.[12] National citizenship may have been portrayed as the institutionalised reflection of pre-existing

[8] Case C-413/99, Baumbast and R *v.* Secretary of State for the Home Department [2002] ECR I-7091; Case C-200/02 Zhu and Chen [2004] ECR I-9925; Case C-34/09 *Zambrano*, Judgment of the Court of 8 March 2011.

[9] See Case C-310/108, London Borrow of Harrow *v.* Nimco Hassan Ibrahim and Secretary of State for the Home Department, Opinion of AG Mazak delivered on 20 October 2009, Case C-480/08, Maria Teixeira *v.* London Borough of Lambeth and Secretary of State for the Home Department, Opinion of Advocate General Kokott delivered on 20 October 2009.

[10] See, inter alia, Case C-184/99, Grzelczyk *v.* Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve [2001] ECR I-6193; Case C-209/03, Bidar *v.* London Borough of Ealing, Judgement of 15 March 2005; C-138/02 *Brian Francis Collins* [2004] ECR I-2703; Joined Cases C-22/08 and C-23/08 Athanasios Vatsouras *v.* Arbeitsgemeinshcaft (ARGE) Nurnberg 900 *and* Josif Koupatantze *v.* Alrbeitsgemeinschaft (ARGE) Nurnberg 900, Judgement of the Court of 4 June 2009.

[11] Case C-499/06, Halina Nerkowska *v.* Zaklad Ubezpieczen Spolecznych, Judgement of the Court of 22 May 2008; Case C-212/06, Krystyna Zablocka-Weyhermuller *v.* Land Baden-Wurttembrg, Judgement of the Court of 4 December 2008.

[12] H.G. Mead, *The Philosophy of the Present* (1922, London; The Open Court Company, Nabu Public Domain Reprints) pp. 11.

commonalities, often conceived of in ethno-national or civic national terms, but, in reality, it constantly creates and recreates the common political and social space contained within states' borders. The same function is performed by EU citizenship; it brings about a social and political space which is superimposed on, but also interacts with, national-statist publics.[13] As Advocate General Maduro has noted, 'Citizenship of the Union must encourage Member States to no longer conceive of the legitimate link of integration only within the narrow bonds of the national community, but also within the wider context of the society of peoples of the Union'.[14] The EU citizenship space is thus a social space energised by the creation of an ever-closer union of the peoples of Europe and an enlarged political space within which particularistic identities can simultaneously coexist and merge into wider moralities that do not tolerate discrimination on the ground of nationality. In this enlarged communal space, our conceptions of community, membership and democracy are reconfigured, and the lives of 'others' (ie, non-national EU citizens) and their claims to equal treatment, equal opportunity and fair play become part of 'our realities'[15] and of a shared legal as well as moral code.

EU law will thus protect Europeans from discrimination be it direct or indirect in the exercise of their free movement rights as well as from non-discriminatory restrictions that hinder or make less attractive the former by posing 'unjustified burdens'[16] and 'serious inconveniences'.[17] They will also subject denationalisation (and naturalisation) decisions taken by the Member States (MS) to judicial review[18] and will protect the EU citizen children and their parents from expulsion from an MS as well as the Union as a whole—an issue that has also featured in high-profile cases in New Zealand[19] and the United Kingdom,[20] since such national measures would have the effect of 'depriving EU citizens of the substance of the rights attached to EU citizenship'.[21] And as Lenaerts has argued, in light of *Zambrano*, a European citizen can invoke AG Jacobs' phrase in Konstadinidis[22] '*civis europeus sum*' against all Member States including his or her own in order to oppose any deprivation of the genuine enjoyment of the substance of the rights conferred by virtue of EU citizenship.[23]

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[13] Compare the Opinion of Advocate General Jacobs in Case C-168/91, Konstadinidis *v.* Stadt Altensteig [1993] ECR I-1191 and his reference to 'civis europeum sum'.

[14] Point 23 of AG Maduro's opinion in *Nerkowska*, 28 February 2008; see also the Opinion of Advocate General Trstenjak in Joined Cases C-396/05, C-419/05 and C-450/05, *Habelt and Others* [2007] ECR I-0000, points 82 to 84.

[15] Compare the Opinion of A.G. Jaaskinen in Case C-202/11 *Las* which was delivered on 12 July 21012.

[16] Case C-224/02, Heikki Antero Pusa *v.* Osuuspankkien Keskinainen Vakuutusythio [2004] ECR I-5763; Case C-406/04, G. De Cuyper *v.* Office national de l-emploi, Judgment of the Court of 18 July 2006; Case C-192/05, K. Tas-Hagen, R. A. Tas *v.* Raadskamer WUBO van de Pensioen—en Uitkeringsraad, Judgment of the Court of 26 October 2006; Joined Cases C-11/06 and C-12/06, Rhiannon Morgan *v.* Bezirksregierung Köln *and* Iris Bucher *v.* Landrat des Kreises Düren, Judgment of the Court of 23 October 2007; Case C-76/05, Schwarzand Gootjes-Schwarz, Judgment of the Court of September 2007.

[17] See Case C-391/00, *Runevic-Vardyn*, Judgment of the Court of 12 May 2011.

[18] Case C-135/08, *Rottmann* [2010] ECR I-0000.

[19] *Ding and Ye* [2009] NZSC 76.

[20] *ZH (Tanzania)* [2011] UKSC 4.

[21] Case C-34/09, *Zambrano*, Judgment of the Court of 8 March 2011, para 42. The 'substance of rights test' was reiterated, and distinguished, in *McCarthy* and *Dereci and Others*; Case C-434/09, Judgement of the Court of 5 May 2011 and Case C-256/11, Judgment of the Court of 15 December 2011.

[22] Case C-168/91, n. 10 above, para 46.

[23] 'Civis Europeaus Sum': From the Cross-Border Link to the Status of Citizen of the Union', *Online Journal of Free Movement of Workers within the EU*, no. 2, European Commission, Publications Office

But 'archetypal' EU citizenship also has its edges. In these edges, its dynamic and empowering effect is hemmed in by coercive state power which has very little sympathy for EU citizens and their life-world. So what does really happen when states threaten to withdraw the status of EU citizenship either *de jure* or *de facto* thereby turning EU citizens into foreigners? And, more importantly, what do those edges tell us about the nature and importance of EU citizenship? It is to these moments of 'rupture', that is, the moments when a contradictory and unsettling logic threatening to compromise the fundamental status of EU citizenship unfolds, that the subsequent discussion is devoted.

III Edgelands

A To be Erased

The link between the possession of a Member State nationality and the enjoyment of the EU citizenship status has been deemed to be a necessary, as opposed to a contingent, one. This is understandable. Layers of time conceal not only the crucial moments when policy decisions are made but also the juridical options that were available at the time of a decision. Accordingly, we have in front of us one of the possible realities which the actual decision has made possible. This does not only apply to the 1991 Intergovernmental Conference (IGC) which institutionalised EU citizenship and pronounced that 'every person holding the nationality of a Member State shall be a citizen of the Union' (formerly 8(1) EC, then Article 17(1) EC on renumbering and now Article 20 TFEU). It also applies to the early stages of European integration when national executives imposed their hegemonic interpretation to the open textured provision of the term 'workers' entailed by the Treaty of Rome by limiting the personal scope of the free movement provisions to workers who are nationals of the Member States.[24]

The concealment of the contingency of the entanglement of Member State nationality and the pre- as well as post-TEU free movement and residence provisions did not dissuade scholars, policy practitioners and civic society activists from expressing concerns about the implications of making membership to the European public subject to the definitions, terms and conditions of membership prevailing in national publics. After all, the latter are not only variable in space, that is, different in the 28 Member States, but they are also variable in time, thereby resulting in the opening and closing of the gates of EU citizenship in ways that often test the principles and values underpinning the EU.[25]

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of the EU, 2011, 12. See also D. Kochenov, 'A Real European Citizenship: The Court of Justice Opening a New Chapter in the Development of the Union in Europe', (2012) 18(1) *Columbia Journal of European Law* 55–109 and M. Hailbronner and S. Iglesias Sanchez, 'The European Court of Justice and Citizenship of the European Union: New Developments Towards a Truly Fundamental Status', (2011) 5 *International Criminal Law and Justice* 498.

[24] See the chapters written by T.C. Hartley and R. Plender in F.G. Jacobs (ed.), *European Law and the Individual* (North Holland, 1976). For a discussion on the implications of this for EU citizenship and European identity, see T. Kostakopoulou, *Citizenship, Identity and Immigration in the EU: Between Past and Future* (Manchester University Press, 2001), at 42 *et seq*.

[25] See the *Declaration on Nationality of a Member State*, annexed to the Final Act of the Treaty on European Union which stated that 'the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned'. See

Both the European Commission and the Court initially respected the existing division of competences by recognising that determination of nationality fell within the exclusive jurisdiction of the Member States—a competence that had to be upheld in the context of both international and European laws. Until the 1990s, supranational institutions were simply observers to the Member States' legislative initiatives and changing citizenship policies in this area despite the ensuing anomalies in the field of application of EU law. The duty of sincere cooperation (the principle of mutual loyalty under Article 4(3) TEU) could be activated in order to ensure that the Member States informed the Commission about their intentions in this area and made the necessary binding declarations in the reshuffling of the political and normative weight of their former colonial links.[26]

But it became progressively apparent that the EU could not function as a mere observer in nationality matters. As EU nationals were facing impediments in the exercise of the fundamental freedoms of free movement and residence, the CJEU had to function as an 'adjustment centre' between the claims of individuals, on the one hand, and of the Member States, on the other. So when Micheletti, a dual national, Argentinian and Italian, was precluded from registering as an orthodontist in Spain because the Spanish Civil Code deemed him to be an Argentinian national thus sidestepping his dormant Italian nationality, the Court stipulated that while determination of nationality falls within the exclusive competence of the Member States, this competence must be exercised with due regard to the requirements of Community law.[27] In *Kaur*, the Court felt that given the declarations submitted by the United Kingdom, no balancing act was necessary and stated that 'it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality.[28] But in *Chen* the Court made it clear that the Member States are not free to impose additional conditions for the recognition of nationality of a Member State, be they of a political or subjective nature that is based on the presumed motives of the parents. Accordingly, the United Kingdom had an obligation to recognise a minor's (Catherine Zhu) Union citizenship status even though her Irish nationality had been acquired in order to secure a right of residence for her mother Chen, a third country national, in the United Kingdom.[29]

While the 'adjustment function' in nationality matters performed by the Court could provide a temporary relief to the dilemmas that sprang in the 1990s and in the early 2000s, developments in Eastern Europe showed that states could no longer be legitimately viewed as the actuality of concrete freedom.[30] Instead, they became the manifestation of unfreedom, as former citizens who were Russian speaking became non-citizens in the newly independent countries of Estonia and Latvia in 2004, and

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also the Birmingham declaration; Bull. EC 10–1992 I 8.9. The Amsterdam Treaty added the statement that 'Union citizenship shall complement national citizenship' to Article 8(1) EC (Article 17(1) on renumbering).

[26] See R.W. Bohning, *The Migration of Workers in the United Kingdom and the European Community* (Oxford University Press, 1972).

[27] Case C-369/90, Micheletti and Others *v.* Delegacion del Gobierno en Catanbria [1992] ECR I- 4329.

[28] Case C-192/99, R *v.* Secretary of State for the Home Department, ex parte Kaur [2001] ECR I-1237, para 19.

[29] Case C-200/02, Kunqian Catherine Zhu and Man Lavette Chen *v.* Secretary of State for the Home Department, Judgement of the Court of 19 October 2004.

[30] G.W.F. Hegel, *Philosophy of Right* (ed. and trans. T.M. Knox) (Oxford University Press, 1952).

18 000 permanent residents originating from other republics of the former Yugoslavia were 'erased' in Slovenia, that is, were removed from the register of permanent residents, thereby becoming foreigners. This meant that the status of Union citizenship was not available to them.[31]

Besides the problems of reconciling the universality of Union citizenship with the actual fragmentation of statuses occurring in the new members of the EU, external citizenship policies gave rise to concerns, too. Hungary's contemplation of granting external or extraterritorial citizenship to persons of Hungarian origin living in non-EU states, such as in Serbia, Montenegro and in the Ukraine, thereby altering the personal scope of EU citizenship unilaterally and implicating the latter in nation-building strategies across borders and manoeuvres obeying expansionist summons that could endanger stability and peace gave rise to concerns.[32]

The simple coincidence of another set of raw facts in the last part of the first decade of the 21st century marked the end to the EU's modest 'adjustment function' in nationality matters. It became a 'reviewer of the regulatory choices' of the Member States to the extent that 'they restrict the rights conferred and protected by the legal order of the Union'.[33] In its *Rottmann* judgement of 2 March 2010, the Grand Chamber reiterated the maxim that the Member States can determine the conditions for the acquisition and loss of nationality but it also noted that as far as EU citizens are concerned the exercise of that power is amenable to judicial review in the light of EU law.[34] Particularly when the loss of the status of EU citizenship is at stake, the situation falls within the scope of EU law 'by reason of its nature and its consequences',[35] and national regulations concerning the loss, and acquisition, of nationality are no longer a reserved domain of jurisdiction untrammelled by the principles of EU law.[36] Germany's withdrawal decision of Mr Rottmann's citizenship following a fraudulent naturalisation application which had resulted in the loss *ex lege* of his

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[31] Instead, imperfect solutions were sought in the lesser status of quasi-civic citizenship entailed by Directive 2003/109/EC of 25 November 2003 *Concerning the Status of Third Country Nationals who are Long-Term Residents in the EU* (OJ L 16/44 of 23 January 2004) and the EU anti-discrimination directives (Dir. 2004/43/ EC of 29 June 2000 *implementing the principle of equal treatment between persons irrespective of racial and ethnic origin* [2000] OJ L 180/22 and Dir. 2000/78/EC of 27 November 2000 *establishing a general framework for equal treatment in employment and occupation* [2000] OJ L 303/16). Yet, the panoply of rights afforded by the latter instruments is imperfect and partial.

[32] Article 16 of the Hungarian Constitution establishes the state's responsibility to support Hungarians living abroad, but the 2001 legislation granted them limited access to the Hungarian labour market thereby falling short of awarding state nationality. On the need to abide by the principle of mutual loyalty in such a case, see G.-R. de Groot, 'Towards a European Nationality Law', in H. Schneider (ed.), *Migration, Integration and Citizenship: Volume 1* (Forum Maastricht, 2006), at 25.

[33] European Commission, Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee under Article 25 TEU on Progress towards effective EU Citizenship 2007–2010, COM(2010) 603 final, Brussels 27 10 2010, page 5.

[34] Case C-135/08, *Rottmann* [2010] ECR I-1449, para 48. See also D. Kochenov's annotation in CMLRev; [2010] 47 CMLRev 1831 as well as all the EUDO contributions contained in J. Shaw (ed.), 'Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?' (2010) RSCAS Working Paper, EUI, 2011.

[35] *Ibid*, para 42.

[36] This has been argued by academics in the 1990s; S. Hall, 'Loss of Citizenship in Breach of Fundamental Rights', (1996) 21 *European Law Review* 129; *Nationality, Migration Rights and Citizenship of the Union* (Martinus Nijhoff, 1995); G.-R. de Groot, 'The Relationship between the Nationality Legislation of the Member States of the European Union and European Citizenship', in M. La Torre (ed.) *European Citizenship: An Institutional Challenge* (Kluwer, 1998), at 115–148.

Austrian citizenship had to comply with the requirements of proportionality, and national courts had to take into account the gravity of the offence committed by the person, the lapse of time between the naturalisation decision and the withdrawal decision and whether it would be possible for Rottmann to recover his original nationality. But sadly, the Court remained silent on the issue of statelessness and the role that the EU could play in its elimination considering its human rights' commitments and its forthcoming accession to the European Convention on Human Rights (ECHR).

These commitments, I would argue, could lead us to contemplate the possible addition of a sentence to Article 20 TFEU in the future stating that 'loss of a Member State nationality would not automatically result in the forfeiture of Union citizenship, if the Union citizen concerned were rendered stateless'.[37] The insertion of such a provision within the ambit of EU citizenship could be justified in the light of the *effet utile* of Community law (the principle of effectiveness)[38] and the fundamental status of EU Citizenship[39] which requires that weight should be given to the link between the citizen and the Union and his/her place in the European community of citizens. Otherwise put, the fundamental status of EU citizenship necessitates the presence of compelling reasons for actions that deny this status thereby bringing forth the recognition of the (relative) autonomy of EU citizenship.

Arguably, the latter is implied by the 'additionality' of EU citizenship. Additionality or complementarity or 'existing alongside' does not preclude autonomous functioning. In fact, both EU citizenship and national citizenship need to be endowed with a certain degree of relative autonomy in order to be able to function effectively. If such autonomy is not recognised within the system of nested citizenships,[40] then additionality becomes synonymous to absorption or subjugation. From a normative point of view, it is not fair that a Union citizen, who has established a multitude of relations and connections in a Member State other than his/her state or origin and a link directly with the Union from which directly effective rights flow, is automatically denied of social and political standing in the Community legal order because a Member State may decide to deprive him/her of nationality, however legitimate the reasons might be. Such a state-induced de-citizenisation and thus erasure of the right to remain a citizen of the EU resembles what according to Chief Justice Warren happened with denationalisation in the United States in the late 1950s, namely, 'the total destruction of the individual's status in an organised society'.[41]

The survival of EU citizenship following the rupture of the link between an individual and a Member State as a default option in cases of statelessness could be

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[37] For an elaboration of this argument, see Kostakopoulou, 'The European Court of Justice, Member State Autonomy and European Union Citizenship: Conjunctions and Disjunctions,' 198 *et seq*, n. 5 above.

[38] As the Court has stated in Joined Cases C-46 and 48/93, the full effectiveness of Community rules and the effective protection of the rights which they confer are principles inherent in the Community legal order; Brasserie du Pecheur *v.* Germany *and* R v. Secretary of State for Transport ex parte Factortame [1996] ECR I-1029.

[39] Case C-184/99, Grzelczyk *v.* Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve [2001] ECR I-6193, para 31.

[40] D. Kostakopoulou, 'Nested "Old" and "New" Citizenships in the EU: Bringing Forth the Complexity', (1999) 5(3) *Columbia Journal of European Law* 389–413; *Citizenship, Identity and Immigration in the European Union: between Past and Future* (Manchester University Press, 2001).

[41] Trop *v.* Dulles, 356 U.S. 86, 101 (1958).

seen to be implicit in the EU constitutional system which is committed to reducing human vulnerability.[42] In addition to the issue of statelessness in the EU, which was not addressed in *Rottmann*, this case also highlighted the problematic nature of the existing policy of automatic denationalisation upon naturalisation in another Member State, a requirement that still persists in 10 out of the 28 Member States of the EU.[43] A remnant of the old-fashioned suspicion against the existence of 'divided loyalties' in a world monopolised by national collectivism, this practice does not reflect the contemporary reality of the widespread acceptance of multiple nationality in the light of increasing human mobility and the ascendance of dual nationality into an international norm.[44] Although neither statelessness nor automatic expatriation upon naturalisation in another Member State were given attention by the Justices, these issues are likely to come to the fore of their attention in the near future thereby prompting a normative response. For the time being, both issues are left within the Member States' regulatory matrix despite the fact that the EU's silence becomes increasingly difficult to square with its commitment to protecting fundamental rights,[45] the elevated Treaty status of the Charter of Fundamental Rights and the forthcoming accession of the EU to the European Convention on Human Rights.

Finally, the economic crisis in the Eurozone coupled with its capitalisation by right-wing populist discourses and the ensuing rise in Euro-scepticism, which has given renewed impetus to calls for referenda on continued EU membership or to the withdrawal of financially insolvent countries from the EU, such as Greece, have raised the spectre of reclassification in the map of EU belonging. This, in turn, has created anxiety among EU citizens living in a Member State other than the state of their origin thereby prompting a surge in naturalisation applications in certain Member States, such as the United Kingdom. Certainly, from a normative point of view, any such scenario, and decision to exit the EU taken by transient domestic elites or majorities, should not result in the shattering of individuals' lives, life chances and the future of their families. In such a case, it would be impossible to ignore legitimate claims for the retention of EU citizenship and thus the possibility of grounding the former on domicile in the territory of the Union. Although this may be deemed to be a radical proposal unlikely to meet national executives'

[42] See my contribution to the EUDO debate on *Rottmann* in J. Shaw (ed.), n 22 above.

[43] Most EU Member States have amended their naturalisation laws; for a detailed discussion see D. Kochenov, 'Double Nationality in the EU: An Argument for Tolerance', (2011) 17(3) *European Law Journal* 323–343.

[44] See, for instance, S. Hall, 'The European Convention on Nationality and the Right to Have Rights', (1999) 25(4) *European Law Review* 586; P.J. Spiro, 'Embracing Dual Nationality', in R. Hansen and P. Weil (eds), *Dual Nationality, Social Rights and Federal Citizenship in the US and Europe* (Randall Books, 2002), at 20–26; 'Dual Citizenship as Human Rights', (2010) 8(1) *International Journal of Constitutional Law* 111–30. Spiro has defended the normative case for plural citizenship as human right via the freedom of association and liberal autonomy values. Kochenov has pinpointed that a failure to affirm dual citizenship in the EU may provide a disincentive for free movement; 'Free Movement and Participation in the Parliamentary Elections in the Member State of Nationality: An Ignored Link?' (2009) 16 *Maastricht Journal of European and Comparative Law* 197.

[45] Mr Thomas Hammarberg, the Council of Europe's Commissioner for Human Rights, has urged states to give higher priority to the problem of statelessness in Europe; see his viewpoint on 'No one should have to be stateless in today's Europe', 9 June 2008, *Human Rights in Europe: Time to Honour our Pledges* (Council of Europe, 2008).

approval, it has been proposed and defended since the 1990s and has featured on policy agendas at the European level.[46]

Conditioning EU citizenship on domicile for a period of five years in territory of the Union[47] would make the social fact of community membership a true determinant of belonging, end the exclusion of long-term resident third country nationals and remedy the lack of uniformity in the application of EU law owing to differing naturalisation requirements in the various Member States. In sum, it would bring about normative coherence, legal certainty and simplified, principled rules of membership of the Europolity. It would also supplement the Member States' efforts to respond to their internal diversity in a better way.[48] The EU would thus be transformed into a philanthropic polity, not in the sense of being implicated in charitable acts, but a true champion of the values of humanism, enhanced freedom and democratic life.

In the light of the foregoing, it may be argued that being erased, that is, being de-citizenised, owing to unilateral Member State action cannot be consonant with the fundamental status of EU citizenship. One's identity as a national of a Member State is just one of the 'multiple constituents' of selfhood.[49] To ignore this reality and to make it the only, or the overriding, consideration in policy design and choice cannot but result in the diminution of the concreteness of human beings and thus the concern and respect they deserve.[50] And while it is so true that for centuries, peoples' lives have been monopolised, and to a large extent, disregarded by all sorts of elites, monarchical, ecclesiastical and state elites as well as political parties, it may be unduly optimistic to expect that in the 21st century, people will be forced once again to choices over which they were never asked to express an opinion and to merely observe their lives drifting away according to collective currents. Nor should they be expected to be willing to exchange their real lives as EU citizens for the imaginary ones which their own states of origin or residence may harbour for them. For in these lives, forged over years and often decades, 'there is too much of them and too little of their country of origin'.[51] Given that the link between Member State nationality and EU citizenship has been a contingent one, in the sense of being the product of a political decision making at a certain point in time, pragmatism coupled with normative thinking necessitate its rethinking, both in terms of loosening it and even breaking it by conditioning EU citizenship on domicile in the future.

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[46] It was suggested by the European Union's Migrants Forum in its proposals for the revision of the TEU at the 1996 IGC. For early normative justifications of this policy option, see D. Kostakopoulou, 'Towards a Theory of Constructive Citizenship in Europe', (1996) 4(4) *Journal of Political Philosophy* 337–358 and R. Rubio-Marin and J. Monar's contributions in M. La Torre (ed.) *European Citizenship: An Institutional Challenge* (Kluwer, 1998).

[47] Case C-34/09, Ruiz Zambrano *v.* Office national de l'emploi (ONEm) [2011] 8 March 2011; L. Azoulai, 'A comment on the *Ruiz Zambrano* Judgement: A Genuine European Integration', 29 March 2011, available at http://eudo-citizenship.eu/eu-citizenship; D. Kochenov, 'A Real European Citizenship: A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe', (2011) 18(1) *Columbia Journal of European Law* 56.

[48] See M.A. Becker, 'Managing Diversity in the European Union: Inclusive European Citizenship and Third Country Nationals', (2004) 7 *Yale Human rights and Development Law Journal* 132–183, 162 *et seq*.

[49] J. Dewey, *Human Nature and Conduct* (Dover Publications, 2002 [1922]), at 138.

[50] I. Kant, *Groundwork of the Metaphysics of Morals* (trans. H.J. Paton) (New York and London, 1964[1948]); R. Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977); *A Matter of Principle* (Harvard University Press, 1985).

[51] The phrase is borrowed from G. Sanatayana, *Middle Span: The Background of My Life* (Constable, 1947), at 7.

B To Be Expelled

Since the creation of the European Community, Member States have had the power to derogate from the free movement provisions of the Treaty on the grounds of public policy, public security and public health. But although they have retained the power to exclude 'undesirable' EU nationals from their territory and to define the meaning of the notions of public policy and public security, the European legislature and the Court have never left EU nationals unprotected.[52] They have always insisted on a strict interpretation of the derogations and the full application of the proportionality test. In addition, since 1964 Community law has barred the scapegoating of EU nationals who commit minor offences[53] and expressly stated that MS cannot invoke these grounds as a short-term response to an economic recession (ie, in order to meet economic goals).[54] Furthermore, the EU's preference for a rights-based approach in this field has precluded the Member States from invoking amorphous threats or abstract risks to public policy or public security. Instead, EU law has prescribed the personification of actual policy or security risks before any action is contemplated by the relevant authorities.[55] Accordingly, Member State authorities have to identify the real and specific harms generated by the conduct of an EU citizen and cannot use the expulsion mechanism as a means of deterrence or as a general preventive action.[56] They are obliged to verify that an individual poses an actual and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society.[57] The development of such a protective case-law has limited the Member States' discretionary power in this area and has foiled xenophobic discourses about 'criminal outsiders'.

The entry into force of the Directive 2004/38 has reinforced this protection. In particular, it has decreased the vulnerability of individuals by incorporating the previous case-law and by requiring national authorities contemplating the expulsion of an individual to take into account a complex array of other considerations, such as age, health, family and economic situation, social and cultural integration in the host state and the extent of his/her links with the country of origin, in line with the case-law of the European Court of Human Rights.[58] The final innovation of the Citizenship directive in this area is the establishment of a system of graduated protection as regards security of residence, whereby permanent residents, that is, those residing for five years in the host MS, can be deported only 'on serious grounds of

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[52] European Council (1964) Directive 64/221, OJ Special Edition 850/64, 117 which was replaced by European Parliament and European Council Directive of 29 April 2004, Directive 2004/38, OJ 2004 L 158/77 (30 April 2004). For early accounts, see A. Durand, 'European Citizenship', (1979) 4 *European Law Review* 3; A. Evans, 'European Citizenship: A Novel Concept in EEC Law', (1984) 32(4) *American Journal of Comparative Law* 674; A. Barav 'Court Recommendations to Deport and the Free Movement of Workers in EEC Law', (1981) 6 *European Law Review* 129; D. O'Keeffe, 'Practical Difficulties in the Application of Article 48 of the EEC Treaty', (1982) 19 *Common Market. Law Review* 35; J. Handoll, *Free Movement of Persons in the European Union* (London: John Wiley, 1995), Chapter 7.

[53] Case 67/74, Bonsignore *v.* Oberstadtdirecktor der Stadt Koln [1975] ECR 297.

[54] Article 2(2) of Directive 64/221 until 2006; now Article 27(1) of Dir. 2004/38.

[55] Case 36/75, Rutili *v.* Minister of the Interior [1975] ECR 1219; Case 30/77, R *v.* Bouchereau [1977] ECR 1999.

[56] *Ibid*, *Rutili*, para 29; Case C-441/02, Commission *v.* Federal Republic of Germany [2006] ECR I-3449; Case C-524/06, Heinz Huber *v.* Bundesrepublik Deutschland [2008] ECR I-9705. See also Article 27(2) of Council Directive 2004/38.

[57] R *v.* Bouchereau, para 43.

[58] Article 28(1) of Dir. 2004/38.

public policy or public security' (Article 28(2) of Dir 2004/38), while permanent resident Union citizens for the previous ten years and minors can only be ordered to leave on 'imperative grounds of public policy' (Article 28(3) of Dir. 2004/38). The rationale behind this graduated system of protection is that the longer one's residence and thus entanglement with the host society is, the more difficult it becomes to justify forced removal and the ensuing harm that this causes to him/her and his/her family.

Despite these pronouncements, however, the security of residence of EU citizens remains insecure. This is not only due to the incorrect implementation of the directive.[59] This is not surprising, and it is the case that the tide of time irons out inconsistent interpretations and thus the incorrect implementation of the provisions of the directive. What is more problematic, in my opinion, is that CJEU has allowed the Member States to interpret the directive in ways that undermine its rationale and effectiveness.[60] True, this may be due to the European judiciary's awareness of the Member States' sensitivities as regards 'law and order' matters as well as the rising Euroscepticism. Notwithstanding any possible explanations for the recent judicial deference on this matter, however, the first two cases concerning the interpretation of the new provisions on the increased security of residence of Union citizens that have reached the Court have given rise to concerns.

Both cases, namely, *Tsakouridis* and *PI*, concerned the interpretation of the term 'imperative grounds of public security' under Article 28(3) of the Directive.[61] And both Tsakouridis and PI, a Greek and Italian national, respectively, had lived in Germany for more than 20 years. In fact, Tsakouridis was born in Germany and went to school there. In his mid-20s, he spent a few months in Greece running a crepe hall in Rhodes where he was eventually arrested for drug dealing as part of a criminal gang. He was transferred to Germany, and the Regional Court in Stuttgart sentenced him to imprisonment of six years and six months, while the regional administration threatened him with expulsion to Greece. Mr Tsakouridis challenged this decision, and the Administrative Court correctly annulled the expulsion of decision because, among other considerations, as he had lived in Germany for more than 10 years and thus his situation fell within the scope of in Article 28(3), he did not constitute a major threat to the external or internal security of the German state. The Land Baden-Wurttemberg appealed against his decision, and the Court ruled that the term 'imperative grounds of public security' does not exclude domestic criminal law matters and that the fight against crime in connection with dealing in narcotics as part of an organised group can fall within the ambit of Article 28(3).[62]

This ruling blurs the distinction between the second and the third paragraphs of Article 28 inexact. National authorities contemplating expulsion decisions need not be concerned about the fact that public security threats are different from public policy threats or public order disturbances since the latter do not threaten the existence of a

[59] See European Commission, 5th Report on EU Citizenship, COM (2008) 85 final, 5.

[60] It has been established by the Court of Justice of the EU that the Member States must refrain from applying national rules which are liable to jeopardise the achievement of the objectives of a directive and to deprive it of its effectiveness; see, for example, Case C-508/10, Commission *v.* The Kingdom of Netherlands [2012], Judgement of 26 April 2012.

[61] Case C-145/09, Land Baden—Wurttemberg *v.* Panagiotis Tsakouridis, Judgement of the Court of 23 November 2010 and Case C-348/09, P.I. *v.* Oberburgermeisterin der Stadt Remscheid, Judgement of the Court of 22 May 2012.

[62] Compare also A.G. Bot's conclusion of his Opinion on *Tsakouridis* delivered on 8 June 2010, para 133.

Member States or its institutions or the survival of the population.[63] Apparently, any serious criminal behaviour can lead to the expulsion of EU citizens irrespective of the length of their residence in the host Member State. This underscores the strong bonds that individuals have formed in the state of residence[64] as well as the fact that national criminal justice systems provide ample scope for the punishment of undesirable conduct without the need of transforming EU citizens into 'criminal aliens' who must be expelled.[65] After all, the rationale of punishment is to allow individuals to pay their debt to society which has been harmed by their offensive behaviour—not to be extricated from it.

The Court's ruling on *PI*, following *Tsakouridis*, raised similar questions about the security of residence of EU citizens and increased concerns that the status of EU citizenship can become a meaningless normative category in the deportation field. PI had lived in Germany since 1987, and in 2006, he was sentenced to a term of imprisonment of seven years and six months for the sexual abuse, sexual coercion and rape of his 14-year-old stepdaughter. An expulsion order that was immediately enforceable was served in May 2008. Advocate General Bot's Opinion referred to what he called 'genuine integration' considerations and a 'presumption of integration', which is rebuttable, and, contrary to the provisions as well as the recital of the directive, he concluded that Mr I's criminal behaviour signalled the absence of actual integration thereby placing him outside the circle of the enhanced protection under Article 28(3).[66] As he put it, 'although the integration of a Union citizen is, in fact, based on territorial and time factors, it is also based on qualitative elements. Now it seems clear to me that Mr I's conduct, which constitutes a serious disturbance of public policy, shows a total lack of desire to integrate into the society in which he finds himself and some of whose fundamental values he so conscientiously disregarded for years. Today he relies on the consequences of having completed a period of ten years which was not interrupted because this conduct remained hidden owing to physical and moral violence horribly exercised on the victim for years'.[67] One observes here that the perception of the risk posed by the criminal conduct of an EU citizen is flowing backwards in order to unsettle an actual fact, namely, residence exceeding 10 years. PI's past presence did not merely create a risk but was transformed into a real harm which had escaped the authorities' attention. Such a reversal of the arrow of time, however, contradicts Article 27(2) of the Directive which requires the existence of 'a genuine, present and sufficiently serious threat'. But with respect to whether this conduct was covered by the 'imperative grounds of public security' concept, however, the Advocate General stated that it was not, since it did not threaten the 'calm and physical security of the population as a whole or a part of it'.

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[63] Communication from the Commission to the European Parliament and the Council, COM(2009) 313 final, Brussels, 2 July 2009, 10.

[64] See recital 24 of Directive 2004/38. Compare also AG Bot's Opinion, para 45.

[65] I discussed this in 'European Union Citizenship: Enduring Patterns and Evolving Norms' (EUSA 12th Biennial International Conference, Boston MA, 3–5 March 2011) as well as in 'When EU Citizens Become Foreigners' (2nd Jean Monnet Workshop on 'The Reconceptualisation of EU Citizenship', Universidad Pontificia Comillas, Madrid, 7–8 October 2012).

[66] A.G. Bot, Opinion on Case C-348/09, P.I. *v.* Oberburgermeisterin der Stadt Remscheid, delivered on 6 March 2012, paras 49, 53, 54 and 56.

[67] *Ibid*, para 60.

The Court disagreed with the latter statement. It ruled that 'it is open to the Member States to regard criminal offences such as those referred to in the second subparagraph of Article 83(1) TFEU as constituting a particularly serious threat to one of the fundamental interests of society, which might pose a direct threat to the calm and physical security of the population and thus be covered by the concept of "imperative grounds of public security" capable of justifying an expulsion measure under Article 28(3), as long as the manner in which such offences were committed discloses particularly serious characteristics, which is a matter for the referring court to determine on the basis of an individual examination of a specific case before it'.[68] In other words, in the light of these two judgements, not only Article 28(3) of Dir 2004/34 becomes a gradation of Article 28(2)—a development that is not consonant with the intentions of the drafters of the directive and the Commission's written guidance on the proper interpretation of its provisions.[69] The Member States are thus given discretion to broaden the public security agenda by bringing a wide range of criminal offences within the ambit of pubic security. In designating certain crimes as particularly threatening, they will follow 'the particular values' of their national legal orders which, according to the Court, cannot be uniform across the EU.[70] Public security is thus effectively decentred from the state and its institutions and is endowed with an individual-societal dimension.

The leeway given to the national authorities in this area undermines the Citizenship Directive's objective of strengthening the security of residence of long-term resident EU citizens thereby revealing the edges, and thus the limits, of EU citizenship.[71] It seems that sociative function of EU citizenship and its equalising dimensions dissipate owing to the Member States' interpretative monopoly over the definition of public policy and public security threats as well as the lowering of the threshold of 'imperative grounds of public security'. Consequently, long-term resident EU citizens can easily be transformed into criminal aliens who have no right to reside in the territory of their state of residence, if they find themselves on the wrong side of the law. Insecurity cuts deep and impairs personal dignity and family life. It also constructs 'Otherness'. The recent rulings of the Court have a gravitational force not only for the specific provisions of the Citizenship directive discussed above but also for the future of EU citizenship norm since they can transform it from a fundamental status into a mere 'phenomenology'.

C To Vanish

There is another dimension of what may be called the 'hypertrophy' of state power which collides directly with the normative template of EU citizenship, namely, a particular type of security politics mobilised in the fight against international terrorism which has found concrete manifestations in the practices extraordinary rendition and secretive detention of individuals suspected to be Al Qaeda sympathisers or activists. True, critics would be quick to observe here that the disappearance of

[68] Case C-348/09, *P.I.*, para 33.
[69] See n 25 above.
[70] Case C-348/09, *P.I.*, paras 21 and 29.
[71] Here, I do not share the argument that deportation is constitutive of citizenship as a normative category; B. Anderson, M.J. Gibney and E. Paoletti, 'Citizenship, Deportation and the Boundaries of Belonging', (2011) 15(5) *Citizenship Studies* 547–563, at 554.

individuals, who are nationals of the Member States, by CIA agents with the view to their transfer to third countries for detention and interrogation is a matter falling outside the material scope of EU law.[72] After all, while Article 3(1) TEU states that the Union's aim is to promote *inter alia* 'the well-being of its peoples' and under Article 3(5) TEU, 'in its relations with the wider world, the Union shall uphold and promote its values and interests and contributes to the protection of its citizens', Article 4(2) pronounces the maintenance of law and order and the safeguarding of nationals security as exclusive competences of the Member States. According to 4(2) TEU, 'national security remains the sole responsibility of each Member State'.

Yet, it may be argued that the complicity of a Member State in any extraordinary rendition and/or detention programme owing to its direct or indirect involvement in it, for example, by providing assistance with respect to the enforced disappearance of an individual, by allowing the use of its airspace and airports for extraordinary rendition flights, by scheduling flights designed to conceal extraordinary rendition flights, making available secret detention facilities and so on, could be a matter falling within the purview of EU law if the victim is an EU citizen. Following *Rottmann* and *Zambrano*, Article 20 TFEU precludes national measures which have the effect of 'depriving citizens of the Union of the genuine enjoyment of the substance of rights conferred by virtue of their status as citizens of the Union'.[73] Although the Court has not provided yet clarification on the meaning of *inter alia* the term 'effect', it is plausible to argue that assisting directly or indirectly Central Intelligence Agency (CIA) agents in the abduction of Union citizens, irrespective of whether the latter have exercised the right to free movement or not, and in their enforced transfer into countries where they will be detained, tortured or suffer inhuman and degrading treatment would constitute a deprivation of the genuine enjoyment of the substance of EU citizenship rights. One's status as a Union citizen would have to be treated as a connecting factor to EU law thereby activating the protective scope of EU law in situations which would normally be excluded from the ambit of the latter.[74] As Carrera *et al*. have noted, a Member State's proven involvement in the extraordinary rendition or secret detention of an EU citizen 'constitutes a challenge to the institution of EU citizenship and the effectiveness of its substance'.[75] Their study highlighted the case of Mr El-Masri, who has now brought a case before the ECtHR, a German citizen, who was allegedly detained in Skopje for 23 days by Macedonian security agents and then transferred by CIA to Iraq and subsequently to Afghanistan. If a similar situation occurs in a Member State in the future, be this an EU citizen's state of origin or residence, then the actions of that State's authorities would have to be amenable to judicial review under EU law.

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[72] On this, see the Report of the European Parliament's Temporary Committee on the Alleged Use of European Countries by CIA for the transportation and illegal detention of prisoners (TDIP) in 2007 and European Parliament, resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200 (INI), P6_TA-PROV (2007) 0032, 26.01.2006.

[73] See *Zambrano*, para 42, n 8 above.

[74] On the human rights dimension of this in light of the forthcoming accession of the EU to the ECHR, see S. Carrera, E. Guild, J. Soares de Silva and A. Wiesbrock, The Results of Inquiries into the CIA's Programme of Extraordinary Rendition and Secret Prisons in European States in Light of the New Legal Framework Following the Lisbon Treaty, Report requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, May 2102 (available at http://www.euroarl.europa.eu/studies).

[75] *Ibid*, 39.

Ernest Gellner has referred to the nation as a 'bordered power-container',[76] but both 'law and order' policies and contestable assumptions about what security for 'we, the national people' might require cannot be in direct collision with EU law. Certainly, the normative template of EU citizenship coupled with the Citizenship Directive (Dir. 2004/38) and the innovative case-law of the Court point unmistakably towards the reduction in EU citizens' vulnerabilities. The latter are neither tolerated 'foreigners' nor rightless beings and any authoritative interference of the state cannot override or impair the fundamental status of EU citizenship.

The Member States must be held responsible for failing to protect EU citizens, irrespective of their nationality, their place of residence and cross-border status, by taking part in performative politics of waging a 'war' against dangerous 'aliens' which renders the very core of EU citizenship rights ineffective. And if EU citizens find themselves in such unfortunate situations in the future, they should be able to raise a state liability claim in order to get reparation. In other words, the question of what is to be done when EU citizens vanish in the future must be answered with reference to Article 20 TEFU, in addition to our values of respect for human rights, human dignity and freedom—values that have been proclaimed to be the foundation of the EU (Article 2 TEU).

IV Conclusion

The foregoing discussion has sought to show the familiar institutional reality of EU citizenship from an unfamiliar angle. By focusing on three key manifestations of state sovereignty which have not received attention by the literature, it has shed light onto the edges of EU citizenship and the undesirable effects of untrammelled state power on the lives of ordinary human beings. Examining the edges of EU citizenship enables us to develop more nuanced perspectives about its (-incomplete) state in the second decade of the new millennium as well as to discern the constraints that may impede its further development. If EU citizens can easily become erased and expelled from the Member State of their residence then the fundamental status of EU citizenship is just an abstraction. One would have to agree with Calvino's statement: 'No one, wise Kublai, knows better than you that the city must never be confused with the words that describe it'.[77]

By exploring the institutional as well as the analytical gap between the two realities, I have argued that if these dimensions of EU citizenship are not seriously addressed then the latter risks being demoted from a fundamental status and a principle of immense constitutional importance to EU law to a thin overlay upon rooted and persistent national statuses. After all, a truncated or openly repudiated status can never be a fundamental one. And tolerating the instances discussed above is bound to raise questions about 'the fundamental worth' of EU citizenship. But equally, this disjuncture between 'what is' and 'what ought to be' should not lead to pessimistic judgements or negative assessments. For like almost all institutional configurations, EU citizenship cannot be reduced into a *factum*, that is, into something that is already there. It can only be a *faciendum*, that is, an institutional configuration to be refined, redefined and actualised.

[76] It is cited in J. Hutchinson and A. Smith (eds.), *Nationalism* (Oxford University Press, 1999), at 34.
[77] I. Calvino, *Invisible Cities* (Vintage, 1997), at 53.

Although the Member States might object here that determination of nationality, the power of expulsion of 'undesirable foreigners' and the adoption of all those measures necessary to protect their publics from acts of international terrorism are of vital importance to contemporary statehood, the problems created by the manner in which these competences have been exercised in the sphere of application of EU law are serious enough to merit attention and reflection. Solutions need to be sought quite urgently, and these are more likely to be found in not only the mutations that recent developments introduce but also in normative thinking and effective political interventions. For more often than not, micro-risks, which are not clearly visible, can lead to macro-limitations.

True, the economic crisis in the Eurozone does not create a fertile environment for such radical changes. But it is also the case that principles are not at the centre of the crisis. Fortunately enough, we cannot talk about a generalised moral crisis in Europe, for it is simply a crisis in economic management, sound governance of public budgets and regulating untamed and risky capitalist accumulation. However, when the space between convictions and principles, on the one hand, and pure power politics, on the other, is left exposed, it is only proper that we keep wondering about the EU citizens' place in this and about the measures that need to be taken in order to protect, and advance, their life chances. In this way, instead of striving to fit human life with political agendas, electoral plans and ideological programmes, the time has come to recognise that the latter have 'no other reality than that which accrues to them as tools for life'.[78]

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[78] Ortega y Gasset, *Man and Crisis* (George Allen and Unwin Ltd, 1959), at 112.

