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# “Alles oder Nichts”? The outer boundaries of the German citizenship debate

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*In this article we explore how constitutionally enshrined and historically conditioned conceptions of membership in Germany have continued to frame citizenship debates over the last two decades. These debates have been revived both by domestic developments, such as mass migration, and by external factors, such as European integration. The larger question examined is the extent to which, at least in the European Union, conceptions of “citizenship” now evolve in reaction to “internal” or “external” factors, and how the balance of such factors shapes the outcome of particular changes in policy. In our inquiry, we look first at the evolution of policy on access to full citizenship in Germany and then at that of its attendant rights and obligations. Finally, we draw certain general conclusions from the German example for European integration and for possible scenarios of coexistence of the national and European citizenship models.*

## 1. Introduction

The specific bond of “citizenship” in a polity is distinguished by both the rules of access to citizenship status and the scope and quality of the rights this status entails within a given territory. It is for this reason that citizenship has been described, rightly, as “intimately linked to the ideas of individual entitlement on the one hand and of attachment to a particular community on the other.”<sup>1</sup> Indeed, the specific solutions devised to questions of access and rights define the character of the political entity.

The ideal of “national citizenship”, born of the French and American revolutions, whereby all the members of the political community bounded by the borders of the

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<sup>1</sup> Will Kymlicka & Wayne Norman, *Return of the Citizen: A Survey of Recent Work on Citizenship Theory*, in *THEORIZING CITIZENSHIP* 283, 283 (Ronald Beiner ed., State Univ. of New York Press 1995).

state—and only they—were to have equal rights and duties and an equal stake in decisions regarding matters of that state, has been transformed in various ways in domestic legal orders as a result of particular historical and social circumstances. In like manner, “contingent historical advantages and accidental influences from the past”<sup>2</sup> are reflected in constitutional laws. Nevertheless, despite such divergence, access to the full membership designated by citizenship in modern democratic states has been, historically, a corollary of nationality, an ongoing legal tie between individual and state for international law purposes. Thus, “while ‘nationality’ [ . . . ] define[d] the bond between an individual and a state on the international level, ‘citizenship’ determine[d] the internal content of that bond,”<sup>3</sup> in particular, the scope and quality of rights in the territory of the state.

Since nationality—in particular, in its function as a gateway to citizenship—is generally conceived of as a status that also entails social belonging, it serves to demarcate clear boundaries between “ins” and “outs.”<sup>4</sup> As the German Bundesverfassungsgericht or Federal Constitutional Court (FCC) has noted, this status “cannot be parceled out gradually, but [instead] always represents a decision about ‘all or nothing’ for the individual.”<sup>5</sup> The maintenance of social boundaries takes place through the organization and reorganization of both the bases and the content of the claimed distinctiveness that sets the particular political community apart. With a view to such distinctiveness, broad categories of persons are designated, each with a particular set of relations to the state: “nationals,” “Union citizens,” “third-country nationals,” “aliens,” and so forth.

However, historical norms regarding membership determine the normative and legislative outlines of any future development in this context; they do so by setting the standard against which all future evolution is measured.<sup>6</sup> Such path dependency, which determines who is an in- or outsider today,<sup>7</sup> is an obvious matter, perhaps, but important to note, given the force of the status quo as the ostensible outcome of past consensus. This is not to say that policy shifts are impossible, just that a radical departure from existing approaches is improbable, particularly in light of the boundaries set by constitutional discourse.

At the same time, the ideal of a unified national citizenship has rarely, if ever, survived practical implementation—given that women and racial minorities have been systematically excluded from full membership—and even the model itself has been

<sup>2</sup> JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 16 (Erin Kelly ed., Harvard Univ. Press 2001).

<sup>3</sup> ENIKŐ HORVÁTH, *MANDATING IDENTITY: CITIZENSHIP, KINSHIP LAWS AND PLURAL NATIONALITY IN THE EUROPEAN UNION* 4 (Kluwer Law International 2008).

<sup>4</sup> Ulrich K. Preuß, *Problems of a Concept of European Citizenship*, 1 Eur. L.J. 267, 269 (1995). Approaches to citizenship as practice, which entails an engagement with other individuals and groups, and an acknowledgement of commonality or commitment to the basic principles underlying the given political community, will not be discussed here.

<sup>5</sup> “[ . . . ] er nicht graduell austariert werden kann, sondern für den Betroffenen immer eine Entscheidung über ‘Alles oder Nichts’ darstellt.” BVerfG May 24, 2006, 2 BvR 669/04, para 75. Cases decided since 1998 are available at: <http://www.bverfg.de>.

<sup>6</sup> HORVÁTH, *supra* note 3, at 10.

<sup>7</sup> *Id.*

increasingly disaggregated in Europe in recent years. Indeed, access to full citizenship generally still remains the flip side of nationality; however, many citizenship rights—though in most cases not political rights nor a guaranteed right to remain in the territory of the state in question—are, in fact, granted to non-nationals, such as Union citizens and other permanent residents. On the other hand, certain citizenship rights, including the right not to be removed from one’s country of nationality, may be denied nationals in specific circumstances.

In this article we explore how domestic systems restructure the “national citizenship” model in different ways on the basis of distinct historical and social traditions as these are reflected in the constitutional norms of the state. The example of Germany demonstrates how a particular historical and social model continues to frame citizenship debates revived by domestic developments, such as mass migration, but also how external factors, such as European law, in particular, can influence the same. The larger question examined here is the extent to which, at least in the European Union (EU), conceptions of citizenship evolve in reaction to internal or external factors, and how the balance of such factors shapes the outcome of particular changes in policy. In our inquiry, we look first at the evolution of access to full citizenship, then at its attendant rights and obligations. Finally, we draw some general conclusions from the German example for European integration.

## 2. Constitutional conceptions of membership in Germany

When looking at German conceptions of membership, one must take into account several parallel—albeit interdependent—approaches, all of which are present in the German Basic Law (Grundgesetz [GG]) of 1949.<sup>8</sup> These approaches form the background against which the German national citizenship model is being challenged by both domestic developments (for example, mass migration) and external ones (namely, European integration).

In the first place, the Basic Law contains a robust civic conception of citizenship (*Staatsbürgerschaft*), as reflected in GG Preamble,<sup>9</sup> articles 20(2)<sup>10</sup> and 146,<sup>11</sup> and embodied in the notion of a sovereign people or demos (*Staatsvolk*) as the foundation for German sovereignty in FCC decisions.<sup>12</sup>

<sup>8</sup> Grundgesetz für die Bundesrepublik Deutschland, as published in Bundesgesetzblatt Teil III, Gliederungsnummer 100-101, last amended by the Act of July 29, 2009, BGBl. I at 2248, available at <http://www.gesetze-im-internet.de/bundesrecht/gg/gesamt.pdf>.

<sup>9</sup> “Im Bewußtsein seiner Verantwortung vor Gott und den Menschen [. . .] hat sich das Deutsche Volk kraft seiner verfassungsgebenden Gewalt dieses Grundgesetz gegeben. Die Deutschen in den Ländern [. . .] haben in freier Selbstbestimmung die Einheit und Freiheit Deutschlands vollendet. Damit gilt dieses Grundgesetz für das gesamte Deutsche Volk.” GG Preamble.

<sup>10</sup> “Alle Staatsgewalt geht vom Volke aus. Sie wird vom Volke in Wahlen und Abstimmungen [. . .] ausgeübt.” GG art. 20(2).

<sup>11</sup> “Dieses Grundgesetz, das nach Vollendung der Einheit und Freiheit Deutschlands für das gesamte deutsche Volk gilt, verliert seine Gültigkeit an dem Tage, an dem eine Verfassung in Kraft tritt, die von dem deutschen Volke in freier Entscheidung beschlossen worden ist.” GG art. 146.

<sup>12</sup> See, e.g. BVerfGE 2, 266 (277); BVerfGE 83, 37 (51 et seq.); BVerfGE 89, 155 (186).

Over and beyond this primary civic construction of membership, however, two additional approaches are also present in GG article 116(1), which defines who is “German” for the purposes of the Basic Law with reference to statutory provisions.<sup>13</sup> The categories of people who are considered German are those who, on the one hand, hold German nationality (*Staatsangehörigkeit*) in accordance with the ever-evolving law on nationality and, on the other, those who are German-*Volk* refugees or expellees (*Volkszugehörigkeit*) as well as their spouses or descendants, who have been admitted into German territory in accordance with the Federal Law on Expellees and Refugees,<sup>14</sup> as discussed further below.

The reliance on an ethnocultural understanding of the German (cultural) nation (*Volkszugehörigkeit*) in GG article 116(1) is unusual, and exemplifies how a particular historical circumstance may modify or distort the national citizenship model. Nevertheless, given that both the civic conception and the “open” conception of membership—to be filled out by the statutory definition of nationality—coexist in the Basic Law together with this ethnocultural approach, it would be wrong to classify, as is often done, the German constitutional model of national citizenship as a paradigmatically ethnic one. In fact, the FCC has gone out of its way to clarify that the German nation is a purely civic construct for constitutional purposes. Thus, any reference to the “German nation” is to be understood as a synonym only for the “German *Staatsvolk*” rather than as shorthand for a “consciousness of linguistic and cultural unity present in the population.”<sup>15</sup>

On the other hand, the reference in the same article of the Basic Law to nationality is quite commonplace and fully in line with the two constituent parts of the national citizenship model discussed above. Indeed, the relationship between citizenship and nationality has been analyzed often by the FCC and relied on as a fundamental linkage constitutive of the German political community. As the Court has repeatedly noted, the function of nationality is to serve as the primary means by which to determine who will constitute the *Staatsvolk*.<sup>16</sup> In other words, nationality serves to

<sup>13</sup> “Deutscher im Sinne dieses Grundgesetzes ist vorbehaltlich anderweitiger gesetzlicher Regelung, wer die deutsche Staatsangehörigkeit besitzt oder als Flüchtling oder Vertriebener deutscher Volkszugehörigkeit oder als dessen Ehegatte oder Abkömmling in dem Gebiete des Deutschen Reiches nach dem Stande vom 31. Dezember 1937 Aufnahme gefunden hat.” GG art. 116(1).

<sup>14</sup> Bundesvertriebenengesetz [BVFG], May 19, 1953, BGBl I at 201. Such individuals are often referred to as “status Germans” (*Statusdeutsche*). BVFG § 6 sets out the requirements for German *Volk*-belonging, which include features such as descent, language, education, and culture.

<sup>15</sup> “Wir haben von der im Grundgesetz vorausgesetzten, in ihm ‘verankerten’ Existenz Gesamtdeutschlands mit einem deutschen (Gesamt-)Staatsvolk und einer (gesamt-)deutschen Staatsgewalt auszugehen. Wenn heute von der ‘deutschen Nation’ gesprochen wird, die eine Klammer für Gesamtdeutschland sei, so ist dagegen nichts einzuwenden, wenn darunter auch ein Synonym für das ‘deutsche Staatsvolk’ verstanden wird [ . . . ] Versteckte sich dagegen hinter dieser neuen Formel ‘deutsche Nation’ nur noch der Begriff einer im Bewußtsein der Bevölkerung vorhandenen Sprach- und Kultureinheit, dann wäre das *rechtlich* die Aufgabe einer unverzichtbaren Rechtsposition.” BVerfGE 36, 1 (19).

<sup>16</sup> See, e.g., BVerfGE 83, 37 (52). Nonetheless, the *Statusdeutsche* are on an equal footing with German nationals as constituent of the sovereign people. *Id.* at 51.

circumscribe a specific collectivity, tied together through the bonds of citizenship.<sup>17</sup> Nationality is “the legal prerequisite for an equal citizenship status, which establishes equal duties on the one hand but, on the other, and especially, the rights through the exercise of which state power acquires its legitimacy in a democracy.”<sup>18</sup> As such, nationality carries “a constitutional and democratic meaning, since citizenship status affects the foundations of the legal order and the polity: through it—as conveyed by the right to vote—state power is legitimated.”<sup>19</sup> For this reason, nationality must be a “reliable foundation for equal belonging, equally meaningful for the individual and for society.”<sup>20</sup> Because it serves such a foundational role, its constitutional protection also carries special weight.<sup>21</sup> This same foundational role has also buttressed the traditional German view that multiple nationality is to be viewed as an anomaly, an “evil” (*ein Übel*) to be avoided, ostensibly in the interest of both the individual and the state.<sup>22</sup>

In reality, German nationality has for a long while no longer been a matter of “all or nothing,” since many social rights traditionally identified as part of the citizenship package have been extended in past decades to permanent residents.<sup>23</sup> However, the “all or nothing” approach certainly has been maintained, consciously, in the realm of political rights, including voting rights, and has continued to influence access to the status of nationality, as multiple nationality is still shunned. Likewise, the various alternative approaches to membership identified above continue to guide the evolution of the national citizenship model and together continue to define German responses to the question of who, exactly, the people really are.

### 3. Access to the status of “German”

#### 3.1. The constitutional framework

Article 116(1) of the Basic Law provides a two-pronged definition of who is a “German,” as already indicated: German nationals, on the one hand, and refugees and expellees of German *Volk*-origin and their spouses or descendants, admitted into

<sup>17</sup> See Rolf Grawert, *Staatsvolk und Staatsangehörigkeit*, in *HANDBUCH DES STAATSRICHTS: BAND II* § 16, para. 16, 20 (Josef Isensee and Paul Kirchhof eds., C.F. Müller 2004).

<sup>18</sup> “Die Staatsangehörigkeit ist die rechtliche Voraussetzung für den gleichen staatsbürgerlichen Status, der einerseits gleiche Pflichten, zum anderen und insbesondere aber auch die Rechte begründet, durch deren Ausübung die Staatsgewalt in der Demokratie ihre Legitimation erfährt.” BVerfGE 83, 37 (51).

<sup>19</sup> “Die Staatsangehörigkeit als Rechtsinstitut hat über den subjektiven Gewährleistungsgehalt hinaus zugleich rechtsstaatliche und demokratische Bedeutung, denn der bürgerschaftliche Status betrifft die konstituierenden Grundlagen der Rechtsordnung und des Gemeinwesens: Über ihn wird die Staatsgewalt—vermittelt über das Wahlrecht—legitimiert.” *Id.*

<sup>20</sup> “für den Einzelnen und für die Gesellschaft gleichermaßen bedeutsame [. . .] verlässliche Grundlage gleichberechtigter Zugehörigkeit.” BVerfG Dec. 8, 2006, 2 BvR 1339/06, para. 12. See also BVerfGE 37, 217 (239).

<sup>21</sup> BVerfG May 24, 2006, 2 BvR 669/04, para. 75. The special protection afforded nationality status is reflected in GG art. 16(1).

<sup>22</sup> BVerfGE 37, 217 (254). For a discussion of cases and relevant doctrinal discussion, see RUTH RUBIO-MARÍN, *IMMIGRATION AS A DEMOCRATIC CHALLENGE* 230–232 (Cambridge Univ. Press 2000).

<sup>23</sup> See RUBIO-MARÍN, *supra* note 22, at 193–196.

German territory (the so-called *Statusdeutsche*), on the other. Both groups are considered “German” for constitutional purposes.<sup>24</sup>

The category of “Volk-Germans” is, as has been widely recognized, a remnant of historical circumstance, and, in particular, a response to both the division of Germany into two states and the mass deportation of *Volk-Germans* from their states of nationality after World War II.<sup>25</sup> Nonetheless, the ethnocultural understanding of the German nation it reflects has a long tradition, and remains firmly embedded in both constitutional and statutory law today.

Thus, despite the civic conception of the German nation delineated by the FCC (which views citizenship primarily as a corollary of German nationality and as an affiliation based on equal political and civic rights for all members of the *Staatsvolk*), the dual-pronged approach of the Basic Law to who is “German” continues to create legal anomalies. *Statusdeutsche*, as “Germans,” are considered a constitutive component of the sovereign German people and are granted citizenship rights—including freedom of assembly, freedom of association, freedom to choose a profession and so forth<sup>26</sup>—on the basis of ostensible belonging to the German ethnocultural nation and before they have passed through the gate of nationality.<sup>27</sup> Upon arrival in Germany, however, and despite their status as German nationals, the right of *Statusdeutsche* (now, in the main, the so-called “late expatriates” or *Spätaussiedler*)<sup>28</sup> to move freely within the country—as other Germans may do, pursuant to GG art. 11(1)—may be curtailed in the context of receipt of social benefits.<sup>29</sup>

The definition of “German” contained in the Basic Law and the concept of *Staatsvolk* it underpins are not isolated, fixed categories, however, and must be capable of accommodating social change, if only through the safety valve of a continuously revised nationality law. As the head of the committee of the interior put it during discussions about a significant reform of the law on nationality in 1999, “the question is whether constitutional law can accept that its underlying foundations can also change through

<sup>24</sup> GG art. 116(2) provides for the reinstatement of the nationality of individuals resident in Germany after May 8, 1945, and who had been stripped of that status between 1933 and 1945 on political, racial or religious grounds.

<sup>25</sup> See BVerfGE 83, 37 (51). See also RUBIO-MARÍN, *supra* note 22, at 226–227.

<sup>26</sup> See GG arts. 8, 9(1), 11, 12(1), 16(2), 33, 38 and 54(1). These are rights that the Basic Law specifically reserves for Germans, as opposed to other rights that it grants to everyone.

<sup>27</sup> As discussed below, since 1999 the acquisition of German nationality for *Volk-Germans* who may immigrate to Germany (since 1993, mainly the so-called “late expatriates” or *Spätaussiedler*) is automatic upon a certification of that status, thereby mitigating this anomaly as a practical matter.

<sup>28</sup> See BVerfG § 4, as modified by Kriegsfolgenbereinigungsgesetz [KfBG, Law on the Adjustment of Laws on the Effects of War], Dec. 21, 1992, BGBl I at 2094 for a complete definition of *Spätaussiedler* status.

<sup>29</sup> BVerfG Mar. 17, 2004, 1 BvR 1266/00 (determining that the provisions of a law restricting the provision of social benefits to the particular federal state [*Land*] to which expatriates and their families had been assigned at repatriation were constitutional in light of the large numbers of late expatriates immigrating to Germany and their particular needs).



a strengthened integration policy between nations and peoples.”<sup>30</sup> As shown below, recent reforms have brought about changes but no fundamental modification in the constitutional approach.

### 3.2. Statutory evolution and constitutional monitoring of boundaries

After several decades of only nominal amendment, the German Nationality Law of 1913<sup>31</sup> was at last significantly overhauled and renamed in 1999,<sup>32</sup> mainly in response both to the reality of decades of mass migration to Germany, which resulted in the presence of a large population of second- and third-generation non-nationals excluded from the political community, and to the ever-burgeoning requirements of European integration. The new nationality law (now called the *Staatsangehörigkeitsgesetz*, or StAG), which entered into force in 2000, marked a new beginning of sorts, as the long-held pillars of German nationality law—for example, an exclusive reliance on *jus sanguinis* in the attribution of birthright nationality—were abandoned. The StAG was then reformed in 2004<sup>33</sup> and has since been further amended, including in 2007.<sup>34</sup>

Section 1 of the StAG today provides that a “German”, for purposes of the law, is an individual who holds German nationality. Elsewhere, however, reference is still made to the nationality status of “Germans without German nationality,”<sup>35</sup> the *Statusdeutsche*, thereby importing the ethnocultural approach to German (cultural) nationhood found in the Basic Law into the nationality law. In any case, since 1999, the acquisition of German nationality is automatic upon a certification of late-expatriate (*Spätaussiedler*) status for those *Volk*-Germans (generally those from the territory of the former U.S.S.R.) with a right to immigrate to Germany.<sup>36</sup> On the other hand, changes have been gradually introduced to gain more control over the immigration patterns of those with late-expatriate status.<sup>37</sup>

<sup>30</sup> “[E]s geht [. . .] um die Frage, ob das Verfassungsrecht akzeptieren kann, dass sich die ihm zugrunde gelegten Grundlagen auch durch eine verstärkte Intergrationspolitik zwischen Nationen und Völkern verändern kann.” Willfried Penner in *Protokoll über die 12. Sitzung des Innenausschusses* (April 13, 1999) in REFORM DES STAATSANGEHÖRIGKEITSRECHTS – DIE PARLAMENTARISCHE BERATUNG 27, 96 (Deutscher Bundestag, Referat Öffentlichkeitsarbeit 1999).

<sup>31</sup> Reichs- und Staatsangehörigkeitsgesetz [RuStAG], July 22, 1913, RGBl 1913 at 583.

<sup>32</sup> Gesetz zur Reform des Staatsangehörigkeitsrechts, July 15, 1999, BGBl I at 1618.

<sup>33</sup> See HORVÁTH, *supra* note 3, at 250 et seq., 265 et seq.

<sup>34</sup> See Fritz Sturm, *Die versteckte Novelle des Staatsangehörigkeitsgesetzes*, 61(5) STAZ 129 (2008).

<sup>35</sup> “Deutsche [. . .] ohne die deutsche Staatsangehörigkeit”. See StAG §§ 7 and 40(a).

<sup>36</sup> *Id.* § 7. Before 1999, *Statusdeutsche* were entitled to request naturalization on the basis of their admission into German territory. Those already in Germany as of August 1, 1999, received German nationality automatically pursuant to StAG § 40(a).

<sup>37</sup> Political changes in the Eastern bloc resulted in a large increase in the numbers of *Statusdeutsche*. In response, an annual quota system was established in 1993. Similarly, a language test was introduced in order to help prove that people claiming late-expatriate status were actually *Volk*-Germans. The new Immigration Act of 2004 extended the requirement of proof of basic knowledge of German to the non-*Volk*-German spouses and non-*Volk*-German descendants of persons with late-expatriate status intending to acquire German nationality. See Kay Hailbronner, *Germany* in ACQUISITION AND LOSS OF NATIONALITY, VOLUME 2: COUNTRY ANALYSES 213, 216–217 (Rainer Bauböck et al. eds., Amsterdam Univ. Press, 2006).

### 3.2.1. Multiple nationality and the Optionspflicht

An important aim of the 1999 reform of the German nationality law was to promote the acquisition of German nationality by migrant workers and their second- and third-generation descendants as an essential prerequisite of their integration into German society.<sup>38</sup> Among other reforms, a *jus soli* regime for the children of migrants ordinarily present in Germany for eight years with a valid residence permit was introduced.<sup>39</sup> In addition, a less restrictive approach to multiple nationality was instituted.

#### 3.2.1.1. Multiple nationality

Despite heated debate,<sup>40</sup> the traditional principle of avoiding multiple nationality was ultimately maintained in the nationality law; nonetheless, the 1999 reform provided for a large number of statutory exceptions to the requirement that one relinquish one's previous nationality before naturalization. Hitherto, many of these exceptions had been included only in federal guidelines. The general rule was now that an individual was not obliged to give up her previous nationality if her state of nationality did not allow her to do so or allowed her to do so only under particularly difficult conditions, including considerable (financial) disadvantage.<sup>41</sup> In addition, the nationals of EU member states were allowed to retain their nationality at naturalization in Germany if their original state of nationality allowed German nationals to keep theirs at naturalization in the other member state.

The statutory march toward limited acceptance of multiple nationality, which began in 1999, has since continued, most prominently with the agreement, since 2007, to allow Union citizens and Swiss nationals to maintain their preexisting nationality at naturalization, without any requirement of reciprocity in the case of the former.<sup>42</sup> Similarly, German nationals who naturalize in another EU member state or Switzerland (or in a state with which Germany has entered into a relevant bilateral agreement) may keep their German nationality.<sup>43</sup>

While over half of all naturalizations now occur with permission to maintain one's previous nationality as a result of one of the exceptions,<sup>44</sup> attempts to allow for a blanket acceptance of multiple nationality—as is the case for the nationals of EU member states—have been regularly rejected. Similarly, attempts to extend the permissive stance on the maintenance of German nationality allowed to German nationals who naturalize in an EU member state to those who naturalize in third countries have also

<sup>38</sup> *Id.* at 213.

<sup>39</sup> StAG § 4(3).

<sup>40</sup> See HORVÁTH, *supra* note 3, at 250–258, 265.

<sup>41</sup> StAG § 12.

<sup>42</sup> *Id.* § 12(2).

<sup>43</sup> *Id.* § 25(1).

<sup>44</sup> Susanne Worbs, Die Einbürgerung von Ausländern in Deutschland 26 (Bundesamt für Migration und Flüchtlinge, Working Paper No. 17, 2008), available at [http://www.bamf.de/clin\\_092/nn\\_442016/SharedDocs/Anlagen/DE/Migration/Publikationen/Forschung/WorkingPapers/wp17-einbuengerung.templateId=raw.property=publicationFile.pdf/wp17-einbuengerung.pdf](http://www.bamf.de/clin_092/nn_442016/SharedDocs/Anlagen/DE/Migration/Publikationen/Forschung/WorkingPapers/wp17-einbuengerung.templateId=raw.property=publicationFile.pdf/wp17-einbuengerung.pdf).



faltered. Thus, the European Union forms a privileged space for the purposes of German nationality legislation, given that one of the main principles of access to German nationality—namely, that it provide a unique status—has been suspended.

### 3.2.1.2. The Optionspflicht

Along with the major policy shifts ushered in by the 1999 reforms a so-called *Optionspflicht* (duty of choice) was also introduced. This provision requires that first-generation German nationals who have obtained nationality as a result of jus soli choose between their German nationality and any additional nationalities they may have (as a result of the jus sanguinis regime of their parents' state of nationality, for example). This choice is to be made before the individuals reach the age of twenty-three.<sup>45</sup> However, this stipulation does not apply if the additional nationalities in question are those of another EU member state or Switzerland.<sup>46</sup>

This provision has led to an ongoing and lively debate about the constitutionality of the duty of choice, including whether the requirement is discriminatory in light of the equality principle enshrined in GG article 3. The question also arises as to whether it constitutes a deprivation of German nationality under the terms of GG article 16(1)<sup>47</sup>—in which case it would be unconstitutional—or whether it should be viewed as an acceptable, albeit involuntary, loss of German nationality with a statutory basis.<sup>48</sup> In light of FCC precedent regarding the revocation of nationality, and given the role of nationality as a reliable basis for the individual's affiliation with the state on the basis of equal rights, only a loss of citizenship the individual cannot avoid or could not reasonably be expected to avoid can be considered discriminatory.<sup>49</sup> At first glance, the *Optionspflicht* is not likely to meet this standard, since the loss of German nationality is avoidable by a simple written declaration and proof that any additional nationality has been surrendered.

In the context of a 2006 decision relating to a series of cases brought by new German nationals whose nationality had been withdrawn because they had reapplied for and regained their previous nationality after naturalization, a chamber of the FCC, in fact, expressed continued support for the constitutionality of a regulation that attributed the loss of German nationality to the actions of the persons concerned.<sup>50</sup> The individuals in question had received German nationality before the 1999 reforms had entered

<sup>45</sup> StAG § 29. Pursuant to StAG § 40(b), children under ten years of age who fulfilled the requirements of StAG § 4(3) could apply for naturalization in the course of 2000. The first of these young Germans reached eighteen years of age in the year 2008, and will be the first to have to choose between their nationalities in accordance with the duty of choice.

<sup>46</sup> *Id.* § 29.

<sup>47</sup> “Die deutsche Staatsangehörigkeit darf nicht entzogen werden. Der Verlust der Staatsangehörigkeit darf nur auf Grund eines Gesetzes und gegen den Willen des Betroffenen nur dann eintreten, wenn der Betroffene dadurch nicht staatenlos wird.” GG art. 16(1).

<sup>48</sup> See Kay Hailbronner, *Die Reform des deutschen Staatsangehörigkeitsrechts*, 12 NVwZ 1273 (1999).

<sup>49</sup> BVerfG May 24, 2006, 2 BvR 669/04, para. 49–51.

<sup>50</sup> BVerfG Dec. 12, 2006, 2 BvR 1339/06, para. 13. See also BVerfG June 22, 1990, 2 BvR 116/90, 53 NJW 2193 (1990).

into effect in January 2000, while renouncing their previous (in many cases Turkish) nationality. After naturalization, they had reapplied for their previous nationality and were eventually regranted it, albeit after the new nationality law had come into effect nullifying the so-called *Inlandsklausel* (domestic clause)<sup>51</sup> that had previously provided a loophole for such reapplications. As a consequence, the individuals' new German nationality was revoked. In the view of the Court, given clear and foreseeable legal stipulations, the loss of nationality resulted from an “autonomous and free determination” by the individual to act in a manner contrary to the regulation in effect.<sup>52</sup>

In this context, the issue of whether the duty of choice can be truly regarded as an “autonomous and free determination” must be considered. Although the loss of German nationality in the context of the *Optionspflicht* is avoidable in much the same way that it is avoidable in the context of naturalization, nonetheless, the two situations differ to the extent that, in the case of the former, certain young Germans are required to relinquish a status they had acquired as a birthright rather than in the context of an administrative process initiated by them, as is the case at naturalization.

Another pertinent question is whether the function of nationality as a reliable basis for “equal belonging” is undermined by such a policy. In the first place, considering that young Germans with the nationality of another EU member state (or Switzerland) will not be forced to make this decision, one can hardly speak of true equality, since a clear European exception to the general rule has been introduced. However, as a practical matter, it is difficult to understand what would be the difference between two young Germans—one also a national of Turkey, the other of the Netherlands—with regard to a state interest in curtailing nationality, other than the supplemental status of Union citizen accruing to the latter.

Second, as a psychological matter, it is questionable whether the conditional and/or temporary form of citizenship the *Optionspflicht* implies truly can be considered either meaningful for the individual in question or as a means of integration. In reality, the requirement of choice may well create doubt with respect to membership and could even lead to conflict (for example, within migrant families) as individuals are forced to choose one nationality over another.

Third, in light of the evolution of Union citizenship in recent years—now “destined to be the fundamental status of nationals of the member states”<sup>53</sup>—the future withdrawal of German nationality must be considered against the background of European law. After all, withdrawal of German nationality from certain young Germans would also result in a loss of Union citizenship and its attendant rights for those whose

<sup>51</sup> Pursuant to this clause (formerly RuStAG § 25), individuals resident or permanently present in Germany did not lose their German nationality upon acquisition of a foreign nationality on application.

<sup>52</sup> BVerfG Dec. 12, 2006, 2 BvR 1339/06, para. 13.

<sup>53</sup> Case C-184/99, Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve, 2001 E.C.R. I-6193.

other nationality is that of a third country; however, this would not be the case for those individuals whose additional nationality is that of another EU member state.<sup>54</sup>

As a matter of European law, nationality issues—including the regulation of the acquisition and loss of nationality status—remain matters for member state competence in line with customary international law; still, this competence must be exercised “with due regard to Community law.”<sup>55</sup> Thus, the European Court of Justice (ECJ) has hinted in the past at the possibility that “depriving any person who did not satisfy the definition of a national [. . .] of rights to which that person might be entitled under Community law,” once those rights had arisen, may be problematic under European law.<sup>56</sup>

Though there have been renewed, ongoing calls to abolish the *Optionspflicht*, as well as various new draft nationality laws recognizing multiple nationality submitted to the German parliament,<sup>57</sup> this provision of the StAG looks set to remain for now. Since the first individuals required to choose will have encountered this option in 2008, the issue is once again high on the political agenda.

The evolution of views concerning the conditions for gaining and maintaining access to German nationality is interesting on several accounts. Although the possibility of multiple nationality is still not embraced unconditionally, the general principle of avoidance has clearly weakened. Indeed, in 2008 the Bundesverwaltungsgericht (Federal Administrative Court) (FAC) noted that the introduction of a limited acceptance for multiple nationality in 1999 and the European exception, in its present form, in 2007 have rendered the public interest in avoiding multiple nationality relative, and shifted the balance in favor of the individual’s interest in keeping her previous nationality in the context of requests for an authorization to retain one’s existing nationality at naturalization (*Beibehaltungsgenehmigung*).<sup>58</sup> This turn of events is especially notable in light of the 2006 decision of the FCC discussed above, which took a stand for the

<sup>54</sup> HORVÁTH, *supra* note 3, at 262. See also Gerard-René de Groot, *Towards a European Nationality Law*, 8(3) ELECTRONIC J. COMP. L. (2004) (discussing possible Community law limitations on the loss of member state nationality at § 4(c)), available at <http://www.ejcl.org/83/art83-4.html>.

<sup>55</sup> Case C-369/90, Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria, 1992 E.C.R. I-4239. See also Final Act of the Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191/1), Declaration (No. 2) on nationality of a Member State.

<sup>56</sup> Case C-192/99, *The Queen v. Secretary of State for the Home Department*, ex parte Manjit Kaur, 2001 E.C.R. I-1237 (determining that the United Kingdom had been entitled to redesignate in a 1982 declaration the categories of its citizens to be regarded as its nationals for the purposes of Community law, in modification of a 1972 declaration made when the country acceded to the European Communities). As the ECJ noted, “adoption of that declaration did not have the effect of depriving any person who did not satisfy the definition of a national of the United Kingdom of rights to which that person might be entitled under Community law. The consequence was rather that such rights never arose in the first place for such a person.” *Id.* at para. 25. In the German context, however, such rights will have arisen.

<sup>57</sup> See BTDrucks 16/5107 (prepared by the Bundesrat) and BTDrucks 16/2650 (prepared by Bündnis 90/Die Grünen).

<sup>58</sup> BVerwG Apr. 10, 2008, 5 C 28.07, para. 21–22, available at <http://www.bverwg.de>.

constitutionality of a “statutory regulation, which links the loss of [German] nationality to the voluntary acquisition of a foreign nationality by application.”<sup>59</sup> Overall then, this evolution is likely to exempt ever more migrants from the requirement of relinquishing their previous nationality, rendering naturalization more appealing and thus helping to ensure that migrants will not remain excluded from the German body politic.

Also interesting is the evolution of the European exception in the context of a general avoidance of multiple nationality, including through the *Optionspflicht*. Unlike some of the developments discussed below, which have resulted from the implementation of European law, the present European exception was not a direct reaction to any such requirements. Rather, the European exception in this context seems to have been born of a general view within Germany—also reflected in the nationality regulations of other EU member states—that the incorporation of Union citizens into the national community should be facilitated. Indeed, the FAC noted in 2004 that, with a view to European integration, a stronger incentive to acquire German nationality was necessary for Union citizens, since such individuals had little need or interest in the acquisition of German nationality when their right to live and work in Germany was guaranteed through European law.<sup>60</sup> Through this approach, however, a clear demarcation is created between persons from the European Union and the rest of the world, at least for nationality purposes, with a different set of applicable rules. This demarcation is inexplicable from either the point of view of an ethnocultural conception of German membership (since Union citizens do not necessarily have German ancestors or any particular link to German culture) or as a matter of singular attachment (since Union citizens are no different from other migrants as concerns the maintenance of a unique tie to Germany). Rather, this approach seems to be an example of how the constitutionally enshrined margin of discretion granted to the legislator to reform the nationality law can accommodate social change. In this case, the change reflects the symbolic secondary effects of Union citizenship, as it gives concrete form to the incremental transformation of conceptions of membership within the European Union.<sup>61</sup>

### 3.2.2. Naturalization and integration requirements

As noted above, one of the main conceptual shifts embodied in the 1999 nationality law reform was a general facilitation of naturalization, with the understanding that naturalization by permanent residents should no longer be an exception but the rule, as a matter of public interest.<sup>62</sup> Accordingly, discretionary regulations were replaced

<sup>59</sup> “gesetzliche Regelung, die den Verlust der Staatsangehörigkeit an den freiwilligen, antragsgemäßen Erwerb einer ausländischen Staatsangehörigkeit knüpft.” BVerfG Dec. 8, 2006, 2 BvR 1 339/06, para. 13.

<sup>60</sup> BVerwG Apr. 20, 2004, 1 C 13.03, available at <http://www.bverwg.de>.

<sup>61</sup> See HORVÁTH, *supra* note 3, at 115–116, 126–128.

<sup>62</sup> Hailbronner, *supra* note 37, at 213. This change in the nationality law is said to be reflective of a change in the perception of migration, as the initial assumption that the migrant workers recruited in the early 1970s would eventually return to their home countries has been abandoned. *Id.* at 216.

by an entitlement-based system. Also, the previous fifteen-year habitual-and-lawful residence requirement gave way to an eight-year requirement. Additional requirements for naturalization included a declaration of loyalty to the free and democratic constitutional order and possession of a regular residence permit or freedom of movement as a Union citizen. In addition, the applicant had to provide evidence of the ability to earn a living without relying on social welfare assistance, as well as the absence of a criminal record and the renunciation of any previous nationality.

Interestingly, this opening of the naturalization gateway has coincided with ever-stricter cultural integration requirements. As a first step, the 1999 reforms introduced a provision whereby inadequate knowledge of the German language or any factual indication that the individual supported or had supported efforts aimed at undermining the Basic Law or the state were grounds to refuse naturalization. The 2004 amendments, in turn, introduced what is now StAG sec. 10(3), whereby the usual waiting period of eight years for naturalization may be shortened to seven years in the case of successful completion of a voluntary integration course. Since the 2007 StAG amendments, this waiting time may be further shortened to six years, through the demonstration of “special integration efforts” (*besonderer Integrationsleistungen*), especially as concerns knowledge of the German language.<sup>63</sup> Indeed, one of the main novelties of these amendments was the introduction of concrete language and integration requirements for most new nationals.<sup>64</sup> Sufficient knowledge of both written and spoken German must now be demonstrated, chiefly with a German Certificate.<sup>65</sup> Since 2008, a standardized citizenship test is required to verify “knowledge of the legal and social order under living conditions in Germany.”<sup>66</sup> In addition, a citizenship oath (*feierliches Bekenntnis*) is now to be administered to all new nationals in the context of a citizenship ceremony.<sup>67</sup>

The novelty of these provisions is twofold. In the first place, they underline the fact that integration, already one of the main goals of the 1999 StAG reforms, has become a guiding principle of the German approach to membership.<sup>68</sup> Second, these developments are analogous to similar provisions in the United Kingdom, France, Denmark, and the Netherlands, to give but a few examples, all of which have in recent years introduced language and/or integration tests as well as loyalty or citizenship oaths and, in some cases, citizenship ceremonies.<sup>69</sup> In fact, the outlines of a European

<sup>63</sup> StAG § 7(10)(3).

<sup>64</sup> *Id.* § 10(1)(6) and (7). The elderly, sick, and handicapped are exempt from these language and integration requirements. *Id.* § 10(6). Those who can prove knowledge of German norms and lifestyle in some other manner, including through school diplomas, are also exempt from integration requirements. See Sturm, *supra* note 34, at 134.

<sup>65</sup> StAG § 10(4).

<sup>66</sup> “Kenntnisse der Rechts- und Gesellschaftsordnung unter der Lebensverhältnisse in Deutschland.” *Id.* § 10(5). A regulation sets out uniform guidelines for the integration courses and tests. Verordnung zu Einbürgerungstest und Einbürgerungskurs, Aug. 5, 2008, BGBl. I at 1649.

<sup>67</sup> StAG § 16.

<sup>68</sup> This is not to say that all parties agree on the scope and breadth of the expected integration, however. See HORVÁTH, *supra* note 3, at 256 et seq.

<sup>69</sup> See *id.* at 290 et seq.; Christian Joppke, *Transformation of Immigrant Integration: Civic Integration and Antidiscrimination in the Netherlands, France and Germany*, 59 *WORLD POL.* 243 (2007).

Union approach to civic integration have already emerged with the Common Basic Principles for Immigrant Integration Policy in the European Union—aimed at foreigners from outside the European Union—which was accepted as part of the Hague Programme in 2004;<sup>70</sup> more recently, we have seen the issuance of Handbooks on Integration.<sup>71</sup>

Interesting, from our perspective, is the fact that whereas the nationals of EU member states now enjoy most of the prerogatives of citizens (including a more secure residential status and local voting rights) without having to naturalize and hence to “Germanize,” this is not true of third-country nationals. At the same time, the fact that Germany is now just one more European country joining the trend of enhancing “cultural integration” requirements frees it from the potential accusation that this policy is inevitably reflective of Germany’s persistent strand of ethnocultural membership. Indeed, strictly speaking, cultural integration requirements, such as the need to learn the official language(s) of the polity or to familiarize oneself with the institutions of a certain country, can be justified on the basis of civic conceptions of citizenship. For example, the requirements may mirror a concern with the health of democratic society, including that of a citizenry which has the linguistic capacity to become well-informed, to participate in the democratic process, and to enjoy the full rights and opportunities society has to offer on an equal basis.<sup>72</sup> Ironically though, what does not squarely fall within such a civic conception of citizenship is the two-tier membership approach that seems to be gradually consolidating along a divide between EU and third-country nationals.

#### 4. Attendant rights and obligations

While the modification of access to full membership in the German *Staatsvolk* continues to be guided, for the most part, by the traditional national citizenship model, the need to respond to the legal requirements of European integration—rather than an evolution of existing norms—has directed the changing nature of the rights and obligations entailed by citizenship in recent years. Indeed, the gradual consolidation of a form of European membership has acted as an engine of change in the context of the rights and obligations traditionally conceived of as elements in the core definition of German national citizenship, often despite considerable opposition. This evolution may best be assessed by taking a look at the two rights that have embodied the

<sup>70</sup> See Council Press Release of 2618th Council Meeting 14615/04 (Presse 321) (Nov. 19, 2004) at 15 et seq. The program constitutes an action plan launched by the European Commission, with detailed proposals for EU action on, inter alia, migration, visa policies, asylum, privacy and security, and the fight against organised crime and terrorism.

<sup>71</sup> See also *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee on the Regions. A Common Agenda for Integration: Framework for the Integration of Third-Country Nationals in the European Union*, COM (2005) 389 final; Martin A. Schain, *The State Strikes Back: Immigration Policy in the European Union*, 20 EUR. J. INT’L L. 93, 104 et seq. (2009).

<sup>72</sup> See Ruth Rubio-Marín, *Language Rights: Exploring the Competing Rationales*, in LANGUAGE RIGHTS AND POLITICAL THEORY 52–80 (Will Kymlicka & Alan Patten eds., Oxford Univ. Press 2003).



bastions of national citizenship in Germany and elsewhere: voting rights and full residential stability or, more specifically, the right of nationals to remain in their state of nationality.

#### 4.1. Voting rights

As the FCC noted in a recent decision on the constitutionality of Germany's ratification of the Lisbon treaty and of accompanying legislation, "the right to vote substantiates a claim to democratic self-determination, to free and equal participation in the state power exercised in Germany, as well as to the observance of the precept of democracy, including respect for the constitutional power of the people."<sup>73</sup> Article 38(1) of the Basic Law, which establishes that the members of the Bundestag are to be elected through direct, free, and secret elections, anchors this right in the view of the Court.<sup>74</sup> Democratic legitimacy thus requires that every national be entitled to an equal share in the exercise of sovereignty through participation in parliamentary elections.<sup>75</sup>

Conversely, the FCC has held that voting rights of any kind for non-nationals are incompatible with this approach, since such individuals are not full members of the sovereign German people.<sup>76</sup> This position does not mean, however, that the issue of whether or not permanent residents are included in the demos is irrelevant. In fact, the Court agrees that as a matter of democratic legitimacy, those who are permanently subject to state power should also have a say in political matters. In the view of the FCC, it is the access of permanent residents to German nationality—and hence Germany citizenship—that should be facilitated, however, not alternate forms of participation.<sup>77</sup> Thus, once again, the possibility of reforming the nationality law presents a safety valve, which allows external realities, such as mass migration, to loosen the bounds of national citizenship without displacing the centrality of the national citizenship model itself. Indeed, as already noted, the 1999 reform of the nationality law was aimed at facilitating access to German nationality for second- and third-generation migrants precisely to address the democratic legitimacy gap created by a large population of permanent residents without voting rights.

In 2005, the Court reiterated its strict stance on voting for non-nationals. At stake was the issue of whether to allow individuals whose German nationality had been revoked to vote in the 2005 elections, given that they had challenged the revocation of their nationality on constitutional grounds and the decision was still pending. In effect,

<sup>73</sup> "Das Wahlrecht begründet einen Anspruch auf demokratische Selbstbestimmung, auf freie und gleiche Teilhabe an der in Deutschland ausgeübten Staatsgewalt sowie auf die Einhaltung des Demokratiegebots einschließlich der Achtung der verfassungsgebenden Gewalt des Volkes." BVerfG June 30, 2009, 2 BvE 2/08, para. 208.

<sup>74</sup> *Id.* at para. 208–210.

<sup>75</sup> BVerfGE 112, 118.

<sup>76</sup> On the basis of this reasoning, in 1989 and 1990 the FCC struck down legislation enacted by Schleswig-Holstein and Hamburg conferring on permanent residents the right to vote and to run for office in local elections. See BVerfGE 83, 37 and BVerfGE 83, 60. See also RUBIO-MARÍN, *supra* note 22, at 203–204.

<sup>77</sup> BVerfGE 83, 37 (51, 53); BVerfGE 83, 60 (71).

the FCC was forced to undertake a balancing exercise between the drawbacks of two possible outcomes in this case: denial of a national's right to vote, on the one hand, and the danger of an irregularity in the elections if the individuals were allowed to vote and later found not to be nationals. The Court determined that, on balance, the drawbacks of both outcomes were equal, and, accordingly, allowed the revocation of nationality—and the consequent lack of a right to vote—to stand until its constitutionality had been determined.<sup>78</sup> In essence, then, the threat that a non-national would be allowed to vote in national elections outweighed the (possibly non-national) individual's right to participate in—and thereby, perhaps, undermine—the democratic process.

Despite such concerns, one explicit exception to the principle that non-nationals have no voting rights was introduced into the Basic Law in 1992, in the context of Germany's accession to the Treaty on European Union, allowing for municipal voting rights for Union citizens (in GG art. 28[1]).<sup>79</sup> Thus, as in the context of approaches to multiple nationality, Union citizens form an exception to the general rule. The fact that this exception now has constitutional grounding should probably lead to the conclusion that the foundation has been laid for a supplementary conception of political membership, namely, that of Union citizenship, coexistent with that of German national citizenship. This notion of European membership is clearly not an ethnic one, nor is it simply inspired by civic understandings of citizenship. Rather, it is one that shares with the notion of national citizenship the delimitation of a predefined political entity but shifts its boundaries from the national to the European level. Indeed, from a purely democratic angle, it raises certain tensions, since it calls for a justification of why some long-term residents may have a political say in community matters, whereas others remain disempowered in local affairs.

#### 4.2. The right to remain in the state of nationality

Voting rights are not the only aspect of national citizenship that the process of European integration has altered. Pursuant to the introduction of the European Arrest Warrant (EAW) in 2002, Union citizens must now be surrendered by their member state of nationality to another member state for any of the offenses covered by the EAW Framework Decision,<sup>80</sup> with only few exceptions. Though a number of conventions relating to extradition had been in place among member states before the introduction of the EAW, the new practice (in effect as of January 1, 2004), based on the

<sup>78</sup> BVerfG Sept. 2, 2005, 2 BvQ 25/05, para. 13.

<sup>79</sup> GG art. 28(1) now provides that, as far as county and communal elections are concerned, the nationals of other EU member states are eligible to both vote and be elected.

<sup>80</sup> These include, *inter alia*, murder or grievous bodily injury, rape, kidnapping, organized or armed robbery, racketeering or extortion, arson, trafficking in human beings, weapons, drugs, cultural goods or stolen vehicles, environmental crimes, computer-related crimes, fraud affecting certain financial interests, and racism or xenophobia. See Council Framework Decision 2002/584/JHA of June 13, 2002, On the European Arrest Warrant and the Surrender Procedures between Member States, 2002 O.J. (L 190/1).

principle of “mutual recognition,” has limited the grounds for a refusal to surrender to certain itemized reasons of an administrative and judicial nature, independent of traditional sovereignty concerns. In fact, only the preamble of the framework decision makes any reference to the application of the “constitutional rules” of member states—many of which prohibit the extradition of nationals—and curtails these to a very limited area.<sup>81</sup> As such, the EAW has profoundly changed the legal framework for extraditions between EU member states.

Several domestic courts, including the FCC,<sup>82</sup> have examined the constitutionality of the legislation implementing the EAW. In a decision widely criticized by scholars,<sup>83</sup> a majority of the Court found the German legislation implementing the EAW unconstitutional for two reasons; first, because it did not allow for recourse to a court against a grant of extradition, contrary to the requirement of GG article 19(4),<sup>84</sup> and, second, because it did not comply with the prerequisites of a qualified proviso of legality under GG article 16(2). This article had been amended in 2000 to establish a derogation from the general prohibition on the extradition of nationals to allow for surrender to an EU member state or international court.<sup>85</sup>

As an initial presumption, the Court noted citizens’ “special association to the legal system that is established by them,”<sup>86</sup> and from which citizens may, in principle, not be excluded. This constitutionally sanctified connection may be limited on the basis of the recently introduced article 16(2) of the Basic Law—which allows for extradition to other EU member states or international courts—but only to the extent that it does not result in a loss of the core elements of statehood (*Entstaatlichung*)<sup>87</sup> and, as regards individual rights, only “as long as the rule of law [and in particular the principle of proportionality] is upheld.”<sup>88</sup> The Basic Law thus requires that there be no disproportionate restriction of the constitutional right to freedom from extradition and that a threefold distinction be made for the purpose of assessing an instance of extradition: in the context of criminal acts with a significant domestic link, there may be no extradition; when a significant connecting factor to another EU member state exists, extradition is possible; finally, a case-by-case assessment is necessary if a crime has been com-

<sup>81</sup> *Id.* at recital 12 (“This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media”).

<sup>82</sup> BVerfG July 18, 2005, 2 BvR 2236/04. The Czech, Polish and Cypriot constitutional courts also examined the respective national laws implementing the EAW.

<sup>83</sup> See Simone Mölders, *European Arrest Warrant is Void – The Decision of the German Federal Constitutional Court of 18 July 2005*, 7 GERMAN L.J. 45–46 n.6 (2006), available at [http://www.germanlawjournal.com/past\\_issues\\_archive.php](http://www.germanlawjournal.com/past_issues_archive.php).

<sup>84</sup> BVerfG July 18, 2005, 2 BvR 2236/04, para. 63, 102. (English translation from FCC website, available at [http://www.bundesverfassungsgericht.de/entscheidungen/rs20050718\\_2bvr223604en.html](http://www.bundesverfassungsgericht.de/entscheidungen/rs20050718_2bvr223604en.html)).

<sup>85</sup> Prior to the amendment, GG art. 16(2) simply prohibited the extradition of Germans. Now the provision allows for extradition to another EU member state or international court on the basis of a statutory exception, so long as rule-of-law guarantees are respected.

<sup>86</sup> BVerfG July 18, 2005, 2 BvR 2236/04, para. 66.

<sup>87</sup> *Id.* at para. 75.

<sup>88</sup> *Id.* at para. 78.

mitted in Germany but its “result” occurs abroad.<sup>89</sup> In all cases, a specific examination is required as to whether the prosecuted person’s rights are guaranteed.<sup>90</sup> In addition, the surrender of a German may be allowed only if the EU member state undertakes to return the individual after the imposition of a final sentence.<sup>91</sup> Until the adoption of a new implementing law that took account of these prerequisites, the Court determined that no extradition of a German national could take place under the EAW mechanism.<sup>92</sup>

As a final matter, the FCC also noted why the principles set out in article 6(1) of the Treaty on European Union<sup>93</sup> do not provide adequate protection for individuals:

The mere existence of this provision [TEU art. 6], of a mechanism for imposing sanctions that secures the structural principles [TEU art. 7] and the existence of an all-European standard of human rights protection established by the European Convention on Human Rights and Fundamental Freedoms do not, however, justify the assumption that the rule-of-law structures are synchronized between the Member States of the European Union as regards substantive law and that a corresponding examination at the national level on a case-by-case basis is therefore superfluous. In this respect, putting into effect a strict principle of mutual recognition, and the extensive statement of mutual confidence among the states that is connected with it, cannot restrict the constitutional guarantee of the fundamental rights.<sup>94</sup>

In other words, in the opinion of the FCC, while a clear Union objective may exist and be furthered by the existence of the EAW, this circumstance does not justify, from the perspective of the individual, a displacement of the constitutional rights under the Basic Law.<sup>95</sup> While the Court’s decision may have raised significant questions about the principle of “mutual trust” that underlies much of the European Union’s third-pillar activities, it is worth remembering that the EAW procedure itself was not declared unconstitutional, so that, as a practical matter, the traditional prohibition on the removal of Germans from the territory of Germany and transfer to a foreign jurisdiction

<sup>89</sup> *Id.* at para. 85–88.

<sup>90</sup> *Id.* at para. 89.

<sup>91</sup> *Id.* at para. 91, 100, 101.

<sup>92</sup> *Id.* at para. 117, 124.

<sup>93</sup> “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.” Consolidated Version of the Treaty on European Union art. 6(1), Dec. 29, 2006, 2006 O.J. (C 321E/5) [hereinafter TEU (Consolidated Version)].

<sup>94</sup> BVerfG July 18, 2005, 2 BvR 2236/04, para. 119.

<sup>95</sup> The Opinion of Advocate General Colomer in Case C-303/05 (a reference from the Belgian Constitutional Court, then still called the Court of Arbitration, for a preliminary ruling on the validity of the Framework Decision) painted a very different picture of European integration. The Opinion—from the distinction made between “extradition” and the EAW to its consideration from a fundamental rights perspective—relied in large part on the actuality of a “high level of confidence,” “mutual trust,” and a “common interest” among member states. In the words of the Opinion, “the aim is to provide assistance to someone with whom one shares principles, values and objectives, through the creation of an institutional framework with its own special sources of law which vary in force but which ultimately are binding and which seek to prevent and combat crime in a single area of freedom, security and justice [. . .].” Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-303/05, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad* (Sept. 12, 2006). See Daniel Sarmiento, *European Union: The European Arrest Warrant and the Quest for Constitutional Coherence*, 6 INT’L J. CONST. L. (I•CON) 171 (2008).

has undergone a significant transformation when it comes to EU member states. Once again, the European exception, discussed above, can be glimpsed, although it now results in what is arguably a restriction in the scope of citizenship rights.

In conclusion, then, we are witness to another instance of constitutional reform, in particular, another instance of a constitutional grounding for European membership even though such an approach implies the restriction of a right traditionally associated with German national citizenship. The FCC oversees this evolution to ensure that the emergence of a concept of European membership does not result in a wholesale erosion of the status of national membership and the rights traditionally associated with it, however.

## 5. Conclusion

Recent years have brought about no significant evolution in the German constitutional conception of citizenship, which owes much to the national citizenship model, and continues to function as the linchpin of German sovereignty. That said, various domestic developments, including the permanent presence of several generations of migrants in Germany, have been acknowledged in the framework of the existing model. This has occurred thanks to a constitutional remission to the legislator's revision of the nationality law, and despite a sometimes incongruous outcome. Conversely, external developments, especially European integration, have led to the appearance of a European exception with regard both to stipulations on access to German nationality and to certain rights associated with citizenship, marking the beginning of what may well evolve into a considerable transformation.

The extent to which European membership will be able to replace the central notion of national citizenship as a predominant concept is unclear, however. As demonstrated by the FCC's recent decision on the constitutionality of Germany's ratification of the Lisbon treaty, the constitutional conception of national citizenship continues to define the contours of any evolution. Thus, although the FCC determined that no constitutional constraints stood in the path of ratification of the treaty<sup>96</sup> (with certain caveats, especially in the context of accompanying national legislation),<sup>97</sup> the ruling read more like a somewhat verbose and muddled attempt to set precise boundaries for European integration in the tradition of the *Maastricht* decision<sup>98</sup> than as an enthusiastic welcome.

<sup>96</sup> BVerfG June 30, 2009, 2 BvE 2/08, para. 273 et seq.

<sup>97</sup> *Id.* at para. 406 et seq.

<sup>98</sup> BVerfGE 89, 155 (Maastricht) (determining that any European-level action or decision that exceeded the constitutional threshold for the transfer of sovereignty would be *ultra vires* and inapplicable in Germany, effectively rendering the FCC the final arbiter of national sovereignty, and reasserting that any encroachment of constitutional significance by European law on fundamental rights would be reviewed by the FCC to the extent the EC did not provide sufficient protection).

In its judgment, the Court reaffirmed that although Germany’s constitutional arrangements allow it to pursue the aim of inserting itself into an international and European framework<sup>99</sup> by means of the creation of a “new form of political authority,”<sup>100</sup> such an authorization does not allow for the abandonment of the right of the German people to self-determination.<sup>101</sup> As a general guiding principle then, the process of the European Union may neither hollow out the existing German democratic system nor assume for itself fundamental democratic requirements.<sup>102</sup> For this reason, the European Union may still only be viewed as a union of sovereign states, “in which the constituent peoples—in other words the national citizens—of the member states remain the subjects of democratic legitimation.”<sup>103</sup> The principle of conferral and the requirement to maintain the national identities of the member states, which are inherent in their fundamental structures, both political and constitutional,<sup>104</sup> are, in this context, an expression of the constitutional foundations for Union power.<sup>105</sup>

The FCC also noted that the European Union cannot be compared to a state in view of the organization of its tasks and power; rather, it remains an entity subject to the will of the member states.<sup>106</sup> It follows that the European Parliament is (still) not an organ representative of a sovereign European people but rather a forum to represent the people of the member states.<sup>107</sup> No self-standing sovereignty flows from the totality of Union citizens.<sup>108</sup> Given these circumstances, the European Union should not be considered an entity analogous to states nor be measured by the democratic requirements applicable to states; it is, instead, free to develop its own forms of democratic supplementation, without regard for the principles (for example, “one man, one vote”) on which state-centered conceptions are based.<sup>109</sup>

In addition, while the integration process may open up possibilities for new forms of participation, the requirements of democratic legitimacy within the member states continue to set boundaries for this process to the extent that Union citizens are no

<sup>99</sup> “die grundgesetzliche Ausgestaltung des Demokratieprinzips ist offen für das Ziel, Deutschland in eine internationale und europäische Friedensordnung einzufügen.” BVerfG June 30, 2009, 2 BvE 2/08, para. 219. *See also*, GG art. 23(1).

<sup>100</sup> “neue Gestalt politischer Herrschaft.” *Id.* The “inalienable constitutional identity” (“unverfügbare [ ] Verfassungsidetität”) circumscribed in GG art. 79(3) establishes the far borders of such development, however.

<sup>101</sup> “das Selbstbestimmungsrecht des Deutschen Volkes in Gestalt der völkerrechtlichn Souveränität Deutschlands aufzugeben.” *Id.* at para. 228.

<sup>102</sup> *Id.* at para. 244.

<sup>103</sup> “in der die Völker – das heißt die staatsangehörigen Bürger – der Mitgliedstaaten die Subjekte demokratischer Legitimation bleiben.” *Id.* at para. 229.

<sup>104</sup> Consolidated Version of the Treaty Establishing the European Community art. 5, Mar. 25, 1957, 2006 O.J. (C 321E/37); TEU (Consolidated Version) art. 6(3).

<sup>105</sup> BVerfG June 30, 2009, 2 BvE 2/08, para. 234, 239, 272.

<sup>106</sup> *Id.* at para. 231, 278, 298.

<sup>107</sup> *Id.* at para. 279–281, 284, 286. European elections, accordingly, are only a supplementary possibility of political participation for the nationals of member states. *Id.* at para. 274, 277.

<sup>108</sup> *Id.* at para. 281, 346. Compare BVerfGE 89, 155 (188).

<sup>109</sup> BVerfG June 30, 2009, 2 BvE 2/08, para. 282.



longer able to orient themselves in the new web of competencies.<sup>110</sup> As a matter of democratic self-determination, then, the Court declared that European integration must not endanger the capacity of member states to make their own political arrangements for certain economic, cultural, and social matters, including citizenship; to make decisions that could interfere with constitutional rights (especially in the context of criminal law); to maintain the state monopoly on civil and military power; to make basic fiscal decisions about state income and expenses; or to make decisions about the welfare state, as well as on cultural matters, including language use, educational and family matters, on freedom of thought, press or assembly, or on dealings with religious denominations.<sup>111</sup>

Finally, the Court also repeated that the Basic Law sets clear limits on the kinds of sovereign rights state organs may transfer to the European Union and underlined that the Union may not become a subject of legitimation independent of its member states.<sup>112</sup> As already set out in the *Solange*<sup>113</sup> and *Maastricht* decisions, the FCC will continue to police such constitutional limits to integration.<sup>114</sup> In the context of citizenship, in particular, the derivative character of Union citizenship and the maintenance of member state nationality establish the outer boundary for the evolution of that citizenship status within European law.<sup>115</sup>

To the extent European integration is to continue as a political and social enterprise (in addition to an internal market-driven one) such a clear instance of boundary setting by a constitutional court raises larger questions. Certainly, the German example demonstrates that the boundaries of the national community—and the concomitant role of national citizenship—are slowly being stretched by European integration. Certain rights (such as voting in municipal elections) are extended to Union citizens despite a general ban on the practice, while the territory of the EU is increasingly the container in which fundamental rights are to be protected (despite the attempts of the FCC to remain in the national box). Simultaneously, access to nationality is made easier for Union citizens, even at the price of disregarding long-held principles, such as avoidance of multiple nationality.

Despite such changes, however, it does not seem that the function of citizenship has undergone any significant transformation, at least in Germany. This poses a clear conundrum for the future evolution of Union citizenship. Are member states willing to leave behind conceptions of citizenship grounded in a state-centered view

<sup>110</sup> *Id.* at para. 247.

<sup>111</sup> *Id.* at para. 249, 252.

<sup>112</sup> *Id.* at para. 232–233, 238–239.

<sup>113</sup> BVerfGE 37, 271 (*Solange I*) (determining that within the framework of the Basic Law and in light of the current stage of European integration, only the FCC was entitled to protect fundamental rights, with the practical result that the Court could review European law); BVerfGE 73, 339 (*Solange II*) (determining that as long as the European Communities generally provided effective protection for fundamental rights, the Court would no longer review European law for conformity with the fundamental rights contained in the Basic Law).

<sup>114</sup> BVerfG June 30, 2009, 2 BvE 2/08, para. 240, 340.

<sup>115</sup> *Id.* at para. 350.

of sovereignty? For example, would Germany extend the European exception that has crept into its conception of national citizenship to encompass general voting rights for Union citizens, as the European Commission has repeatedly alluded to?<sup>116</sup> Or could the existing approach, which leaves nationality matters to member state competence, be abandoned in favor of basic common principles on the acquisition and loss of member state nationality? And even if the political will to undertake such reforms existed, would the defense of the traditional role of national citizenship in member states, particularly as construed by constitutional courts, form a barrier to the transformation of approaches to membership within the European Union? It is at this constitutional juncture that future conceptions of citizenship, both in the EU and at the member state level, are likely to be negotiated.

<sup>116</sup> See Report from the Commission, Fourth Report on Citizenship of the Union, at §§ 3(3) and 5, COM (2004) 695 final (Oct. 26, 2004); Report from the Commission, Fifth Report on Citizenship of the Union, at § 4(4), COM (2008) 85 final (Feb. 15, 2008).