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EU CITIZENSHIP FOR LATVIAN "NON-CITIZENS": A CONCRETE PROPOSAL

By Dimitry Kochenov [*] and Aleksejs Dimitrovs[+]

Abstract

This contribution embraces a purely utilitarian view of European Union law in suggesting a viable way to enlarge the horizon of opportunities of the holders of the so-called "non-citizen" status in the Republic of Latvia, which is reserved for some ethnic minorities in that country and does not amount to the possession of full Latvian citizenship. It is argued that the extension of EU citizenship to the holders of this status can be helpful in the context of an ethnically divided society. It is demonstrated that such an extension is legally feasible and is in line with the doctrine of continuity on which the statehood of the Latvian Republic rests, implying virtually no economic or political internal cost.

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"The holder of this passport is under the protection of the Republic of Latvia"

- Alien's Passport of the Republic of Latvia, page 34.

Introduction and the Structure of the Argument

This contribution explains that European Union (EU) law allows for the extension of the status of EU citizenship and important rights associated with it to "non-citizens of Latvia". It argues that such an extension, while not affecting the internal situation in the Republic of Latvia and building on the doctrine of continuity with the pre-Second World War Republic,[1] will clearly contribute to the improvement of the legal situation of the "non-citizens", who are in a vulnerable position.[2] The authors fully realise that extending EU citizenship does not, as such, amount to a grant of full Latvian citizenship. This will obviously be viewed by many as disappointing. It is submitted, however, that ignoring the likely positive impact of EU citizenship, with its rights and entitlements, on purely ideological grounds would be unwise. Even if not a full citizenship of Latvia, EU citizenship – which could be extended automatically, immediately and at virtually no cost (either economic or political) to Latvia – should not be dismissed outright.[3] If there is a viable possibility to improve the legal situation of a vulnerable group, such a

[1] The doctrine of continuity is enshrined in the 1990 Declaration "On the Restoration of Independence of the Republic of Latvia". As the Constitutional Court put it, "if a State, independence of which has been illegally terminated, restores its statehood, it can under the doctrine of continuity recognize itself as the same State which had been illegally terminated. In this case it is necessary that the state itself establishes its continuity and acts in accordance with the claims of this doctrine both in international relations and domestic policy, and it is also necessary that such self-assessment of the state is accepted by the international community. A State may be said to be the 'same' State (with the consequence that the same legal rules, including conventional rules, continue to apply) where it is continuous in the sense defined or where after temporary suppression, an entity with substantially the same constituent features is re-established and its claim to continuity is accepted". *See* Constitutional Court of the Republic of Latvia, Case No. 2007-10-0102, ¶ 32 (2007), *available at* http://www.satv.tiesa.gov.lv/upload/judg_2007_10_0102.htm (citations omitted). *See also* KRYSTYNA MAREK, IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW (1954); INETA ZIEMELE, STATE CONTINUITY AND NATIONALITY: THE BALTIC STATES AND RUSSIA – PAST, PRESENT AND FUTURE AS DEFINED BY INTERNATIONAL LAW (2005); JAMES CRAWFORD, CREATION OF STATES IN INTERNATIONAL LAW (2nd ed., 2006); Aleksejs Dimitrovs & Vadim Poleshchuk, *Kontinuitet kak osnova gosudarstvennosti i ètnopolitiki v Latvii i Èstonii*, *in* ÈTNOPOLITIKA STRAN BALTII (Vadim Poleshchuk & Valery Stepanov, ed., 2013).

[2] LATVIAN HUMAN RIGHTS COMMITTEE, CITIZENS OF A NON-EXISTENT STATE (2011).

[3] The idea of thinking in this direction did the rounds ten years ago, but neither benefitted from serious elaboration nor serious discussion in Latvian society. *See* Kristine Krūma & Ineta Ziemele, *Eiropas Savienības pilsonība un Latvijas nepilsoņi*, 33 JURISTA VĀRDS (2003).

possibility should be discussed in the most serious terms. This is the intention of this paper, containing a concrete proposal for the Latvian authorities. A draft Declaration for the Latvian government to append to the EU Treaties in order to act on this proposal is included in the Annex.

In the short to medium-term future, any political change leading to the full embracing of minorities is difficult to imagine in a divided society like Latvia's.[4] The starting assumption of this paper is thus the following: the large number of Russian-speaking Latvians with no Republic citizenship will not disappear. Consequently, the problem of the societal split between "citizens" and "non-citizens" should be solved by looking in all directions for possible tools. The paper demonstrates that the EU, with its citizenship, can be really helpful in this regard. The starting assumption is chiefly based on four interrelated factors. Firstly, at 300,000 (in a country of two million), the number of persons holding "non-citizen" status is quite high and has remained so over the years.[5] Secondly, their naturalisation rates are low,[6] ensuring, alongside the

[4] James Hughes, *"Exit" in Deeply Divided Societies: Regimes of Discrimination in Estonia and Latvia and the Potential for Russophone Migration*. (43) J. COMMON MKT. STUD. 739 (2005); HOW INTEGRATED IS LATVIAN SOCIETY? AN AUDIT OF ACHIEVEMENTS, FAILURES AND CHALLENGES (Nils Muižnieks ed., 2010); Priit Järve, *Sovetskoje nasledije i sovremennaja ètnopolitika stran Baltii*, *in* ÈTNOPOLITIKA STRAN BALTII (Vadim Poleshchuk & Valery Stepanov, ed., 2013).

[5] As of 1 January 2013, the population of Latvia was 2,201,196. Of this, 1,837,206 (83.5%) are citizens; 297,883 (13.5%) are non-citizens; 66,107 (3.0%) are citizens of foreign states, stateless or refugees. There are almost no non-citizens among ethnic Latvians; conversely, among 890,650 persons belonging to minorities, 297,006 (or 33.3%) are non-citizens. Of all the numerous ethnic groups, the share of non-citizens is highest among ethnic Ukrainians (53.9%) and Belorussians (53.3%). The share of non-citizens is higher in the biggest cities: for example, they comprise 21.9% of the population of Riga. The number of non-citizens is also large in the municipalities, where industrial facilities were located in Soviet times: for example, 24.6% in the region of Olaine, 23.3% in the region of Salaspils. *See* The Office of Citizenship and Migration Affairs data, *available at* http://www.pmlp.gov.lv/assets/images/statistika/2013gads/naturalizacija_1995_2012pdf.pdf.

[6] It was expected that the naturalisation process would solve the issue of non-citizens in Latvia. Naturalisation began on 1 February 1995. As of 1 January 2013, 139,126 naturalisation applications had been received, 139,886 people (including the children of the naturalised) were granted citizenship. Between 5 October 1995 and 1 January 2013, the number of non-citizens fell from 731,078 to 297,883. *See* The Office of Citizenship and Migration Affairs data, *available at* http://www.pmlp.gov.lv/assets/images/statistika/2013gads/naturalizacija_1995_2012pdf.pdf. Thus the naturalisation process reduced the number of non-citizens by only 32% in almost ten years, even if we presume that all those naturalized had been non-citizens (the remaining decrease could be explained by emigration, negative population growth and taking foreign citizenship, mainly Russian). The low rates of naturalisation have been criticized by international bodies. *See, e.g., Concluding Observations of the UN Human Rights Committee: Latvia*, ¶¶ 16–17, UN Doc. CCPR/CO/79/LVA (2003); *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Latvia*, ¶ 13, CERD/C/63/CO/7 (2003).

inheritability of the non-citizenship status,[7] that the group will not disappear within the body of Latvian citizens in the immediate future: the status is "no longer treated as temporary."[8] Thirdly, discrimination against this group is widespread, causing concerns, *inter alia*, in the UN Human Rights Committee.[9] Fourthly, lacking in political power – non-citizens cannot take part in any elections[10] – this group cannot be improve its situation within the realm of Latvian democracy, which demonstrates ethnically-biased traits.[11]

The argument proceeds as follows. The status of a "non-citizen of Latvia," although not a nationality *sensu stricto*, does not amount to statelessness.[12] Under Latvian law[13] it implies mutual obligations between the "non-citizens" on the one hand and the Republic of Latvia on the other, signifying a durable legal bond between the holders of this status and the Latvian state[14] (I). Under EU law – just as under international law[15] – it is up to Latvia to decide who its nationals are. This includes such

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[7] Par to bijušās PSRS pilsoņu statusu, kuriem nav Latvijas vai citas valsts pilsonības [Law on the Status of Former USSR Citizens Who Do Not Have the Citizenship of Latvia or of Any Other State], section 8(2), LATVIJAS VĒSTNESIS, 63(346) (1995).

[8] Kristine Krūma, *Country Report: Latvia – Revised and updated February 2013*, *in* EUDO CITIZENSHIP OBSERVATORY 18 (Eur. Univ. Inst. 2013).

[9] "The Committee is concerned about the large proportion of non-citizens in the State party, who by law are treated neither as foreigners nor as stateless persons but as distinct category of persons with long-lasting and effective ties to Latvia, in many respects comparable to citizens but in other respects without the rights that come with full citizenship. The Committee expresses its concern over the perpetuation of a situation of exclusion, resulting in lack of effective enjoyment of many Covenant rights by the non-citizen segment of the population, including political rights, the possibility to occupy certain State and public positions, the possibility to exercise certain professions in the private sector, restrictions in the area of ownership of agricultural land, as well as social benefits." *See Concluding Observations of the UN Human Rights Committee: Latvia*, UN Doc., ¶ 18, CCPR/CO/79/LVA (2003).

[10] Constitution of the Republic of Latvia, Arts. 8 and 101.

[11] Svetlana Diatchkova, *Ethnic Democracy in Latvia*, *in* THE FATE OF ETHNIC DEMOCRACY IN POST-COMMUNIST EUROPE (Sammy Smooha & Priit Järve eds., 2005); Sammy Smooha, *Types of Democracy and Models of Conflict Management in Ethnically Divided Societies*, 8 NATIONS & NATIONALISM 423 (2002); Richard C. Visek, *Creating the Ethnic Electorate through Legal Restorationism: Citizenship Rights in Estonia*, 38 HARV. INT'L L.J. 315, 357 (1997); Alfred Stepan, *Kogda logika demokratii protivorechit logike natzional'nogo gosudarstva*, 3 ROSSIJSKIJ BIULLETEN' PO PRAVAM CHELOVEKA 100 (1995).

[12] *See, e.g.,* Constitutional Court of Latvia, Case No. 2004-15-0106, ¶ 15 (2005), *available at* http://www.satv.tiesa.gov.lv/upload/2004-15-0106E.rtf.

[13] Par to bijušās PSRS pilsoņu statusu, kuriem nav Latvijas vai citas valsts pilsonības [Law on the Status of Former USSR Citizens Who Do Not Have the Citizenship of Latvia or of Any Other State], Latvijas Vēstnesis, 63(346) (1995).

[14] Constitutional Court of Latvia, Case No. 2004-15-0106, ¶ 17 (2005), *available at* http://www.satv.tiesa.gov.lv/upload/2004-15-0106E.rtf.

[15] "It is for each State to determine under its law who are its nationals." *See* Hague Convention Governing Certain Questions Relating to the Conflict of Nationalities, Apr. 12, 1930, Art. 1, 179 L.N.T.S. 89. *See also*

determinations for the purposes of EU law,[16] *i.e.* who among the Latvian population will acquire EU citizenship[17] – an autonomous legal status,[18] the acquisition of which depends on the nationality of a Member State for the purposes of EU law.[19] A Member State nationality for the purposes of EU law can have a different meaning and scope, compared with "citizenship" in national law.[20] A simple declaration[21] clarifying who Latvian nationals for the purposes of EU law are, if issued by the Latvian government, would suffice, with immediate effect, to extend EU citizenship to all those in possession of the "non-citizen of Latvia" status.[22] EU citizenship, with its attached rights of work, residence and equal treatment across the territory of the EU represents a considerable bundle of rights[23] of potential benefit for the "non-citizens of Latvia" (II). The extension

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Article 2 of the Convention: "Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of the State."

[16] Case C-135/08, *Rottmann v Freistaat Bayern*, [2010] E.C.R. I-1449; Case C-192/99, *The Queen v Secretary of State for the Home Department, ex parte: Kaur*, [2001] E.C.R. I-1237; Case C-369/90, *Micheletti and others v Delegación del Gobierno en Cantabria*, [1992] E.C.R. I-4239. *See also* Stephen Hall, *Determining the Scope* Ratione Personae *of European Citizenship: Customary International Law Prevails for Now*, 28 LEGAL ISSUES OF ECON. INTEGRATION 355 (2001).

[17] *See generally* Jo Shaw, *Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism*, *in* EVOLUTION OF EU LAW 575 (Paul Craig & Gráinne de Búrca eds., 2nd ed., 2011); Ferdinand Wollenschläger, *A New Fundamental Freedom beyond Market Integration: Union Citizenship and Its Dynamics for Shifting the Economic Paradigm of European Integration*, 17 EUR. L.J. 34 (2011); Dimitry Kochenov, *The Essence of European Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon?*, 62 INT'L. & COMP. L.Q. 97, 136 (2013).

[18] Case C-135/08, *Rottmann v Freistaat Bayern* [2009] ECR I-1449, Opinion of Advoc. Gen. Poiares Maduro, ¶ 23. *See also* Dimitry Kochenov & Richard Plender, *EU Citizenship: From and Incipient Form to an Incipient Substance?*, 37 EUR. L. REV. 369 (2012).

[19] Case C-192/99, *The Queen v Secretary of State for the Home Department, ex parte: Kaur*, [2001] E.C.R. I-1237. *See also* Dimitry Kochenov, Ius Tractum *of Many Faces: European Citizenship and a Difficult Relationship between Status and Rights*, 15 COLUM. J. EUR. L. 169, 186–190 (2009) (for an analysis).

[20] *See, e.g.,* Richard Plender, *An Incipient Form of European Citizenship*, in EUROPEAN LAW AND THE INDIVIDUAL 39 (Francis G. Jacobs ed., North Holland 1979) (for criticism).

[21] Ákos G. Toth, *The Legal Status of the Declarations Attached to the Single European Act*, 23 COMMON MKT. L. REV. 803 (1986) (on the legal effect of declarations in EU law).

[22] Treaty of Accession to the European Communities of the Kingdom of Denmark, Ireland, and the United Kingdom of Great Britain and Northern Ireland, 1st U.K. Declaration, Jan. 22, 1972, 1972 O.J. (L 73) 196. It was later updated upon the entry into force of the 1981 British Nationality Act. *See, e.g.,* Andrew C. Evans, *Nationality Law and the Free Movement of Persons in the EEC: With Special Reference to the British Nationality Act 1981*, 2 Y.B. EUR. L. 173, 189 (1982); K.R. Simmonds, *The British Nationality Act 1981 and the Definition of the Term "National" for Community Purposes*, 21 COMMON MKT. L. REV. 675 (1984); Dimitry Kochenov, Ius Tractum *of Many Faces: European Citizenship and a Difficult Relationship between Status and Rights*, 15 COLUM. J. EUR. L. 169, 186–190 (2009).

[23] *See, e.g.,* Ferdinand Wollenschläger, *A New Fundamental Freedom beyond Market Integration: Union Citizenship and Its Dynamics for Shifting the Economic Paradigm of European Integration*, 17 EUR. L.J. 34 (2011); Dimitry Kochenov, Ius Tractum *of Many Faces: European Citizenship and a Difficult*

of EU citizenship to the "non-citizens of Latvia" is particularly attractive, as it will not have virtually any economic or political cost for the Latvian Republic: it is associated with rights in *other* Member States – France, Croatia, the UK – not at home.[24] Equally, it will not create burdens on the other Member States[25] due to the tiny number of "non-citizens" involved, compared to the half a billion EU citizens, and given that all of them cannot possibly leave Latvia to benefit from these newly-acquired rights (III). It thus makes sense to discuss the deployment of EU citizenship in the interests of the "non-citizens of Latvia" in all seriousness.

I. The Status of a "Non-citizen" of Latvia

For historical reasons, the weight of guilt by association for the Soviet aggression against the tiny Latvian Republic has been born by the ethnic minorities whose ancestors settled in its territory after Second World War. For such minorities a special legal status of connection with the Latvian state has been created: they are the "non-citizens" of Latvia, unless they naturalise.[26] This status is now held by almost 300,000 people belonging to ethnic minorities – a large share of the population of a tiny state – and this situation is permanent: "non-citizens" are born every day.[27] Moreover, Latvian law in some cases allows foreign national parents to register their child as a "non-citizen".[28]

Relationship between Status and Rights, 15 COLUM. J. EUR. L. 169, 193–209 (2009) (for an overview of EU citizenship rights).

[24] Alina Tryfonidou, *In Search of the Aim of the EC Free Movement of Persons Provisions* 46 COMMON MKT. L. REV. 1591, 1592–1595 (2009); Niamh Nic Shuibhne, *The Resilience of EU Market Citizenship*, 47 COMMON MKT. L. REV. 1597 (2010).

[25] Gerard-René de Groot argued that the grant of Member State nationality to considerable groups of third-country nationals without informing the twenty-six other Member States could violate EU law. *See* Gerard-René de Groot, *Towards a European Nationality Law*, 8 ELECTRONIC J. COMP. L. (2004), text accompanying n. 54 (no pagination available). *See also* Andrew C. Evans, *Nationality Law and the Free Movement of Persons in the EEC: With Special Reference to the British Nationality Act 1981*, 2 Y.B. EUR. L. 173, 177–178 (1982).

[26] Par to bijušās PSRS pilsoņu statusu, kuriem nav Latvijas vai citas valsts pilsonības [Law on the Status of Former USSR Citizens Who Do Not Have the Citizenship of Latvia or of Any Other State], LATVIJAS VĒSTNESIS, 63(346) (1995).

[27] In accordance with Section 8(2) of the Law on the Status of Former USSR Citizens Who Do Not Have the Citizenship of Latvia or of Any Other State, a child also becomes a non-citizen if both of his/her parents are non-citizens, or one is non-citizen and the other one is stateless. This situation has been criticized by the UN Committee on the Rights of the Child. *See Concluding Observations of the Committee on the Rights of the Child: Latvia*, UN Doc. CRC/C/LVA/CO/2 (2006). In accordance with Section 3(1) of the Latvian Citizenship Law, however, either parent may register such a child as a citizen, if some administrative formalities are fulfilled. This is problematic from the point of view of international

Legally speaking, "non-citizenship of Latvia" verges on a nationality without citizenship and political participation.[29] To the bearers it brings a large array of rights traditionally associated with citizenship,[30] including the unconditional right to enter Latvian territory, to remain, and to build a life there: work, non-discrimination and permanent residence are all included in the package.[31] It definitely does not imply statelessness in the sense of international law, amounting, all rights and obligations associated therewith considered, to a specific class of a durable connection with Latvia, even if the highest courts of the country are careful not to use the term "nationality" in this context. Thus the Latvian Constitutional Court clarified that the status of "non-citizens" is a "new, up to that time unknown category of persons".[32] This venturing into the unknown has been criticized by the UN Human Rights Committee, which underlined the problematic nature of perpetuating this kind of half-way solution.[33] The very "continued existence" of the status of "non-citizens" caused concern for the UN Committee against Torture,[34] among other international bodies.

Crucially, while a number of differences in Latvian law persist in the treatment of citizens and "non-citizens", two particularly important distinguishing features of the latter status can be outlined. The first of the two is full exclusion from elections.[35] To

law. *See* Gérard-René de Groot, *Strengthening the Position of the Children: Council of Europe's Recommendation 2009/13*, *in* CONCEPTS OF NATIONALITY IN A GLOBALISED WORLD (Council of Europe 2011).

[28] If one of the parents is a non-citizen and the other one is a foreign national, the parents are entitled to choose non-citizen status for the child, instead of foreign nationality (an administrative practice which imposed only foreign nationality for such cases was recognized as illegal by the Senate of the Supreme Court on Apr. 13, 2005 in Case No. SKA-136). *See also* Kristine Krūma, *Country Report: Latvia – Revised and updated February 2013*, *in* EUDO CITIZENSHIP OBSERVATORY 19–20 (Eur. Univ. Inst. 2013) (for a compelling overview of curious case-law).

[29] And is thus different from, for instance, Puerto Rico in the US context, as Puerto Ricans, although non-citizen nationals of the US, enjoy political rights in a number of contexts.

[30] CITIZENSHIP RIGHTS (Jo Shaw & Igor Štiks eds., 2013).

[31] Kristine Krūma, *Country Report: Latvia – Revised and updated February 2013*, *in* EUDO CITIZENSHIP OBSERVATORY (Eur. Univ. Inst. 2013).

[32] In Latvian: "Radās jauna, līdz šim starptautiskajās tiesībās nezināma personu kategorija." *See* Constitutional Court of Latvia, Case No.2004-15-0106, ¶ 15 (2005), *available at* http://www.satv.tiesa.gov.lv/upload/2004-15-0106E.rtf.

[33] *Concluding Observations of the UN Human Rights Committee: Latvia*, UN Doc. CCPR/CO/79/LVA, ¶ 18 (2003).

[34] *Concluding Observations of the Committee against Torture: Latvia*, UN Doc. CAT/C/LVA/CO/2, ¶ 19 (2008).

[35] Constitution of the Republic of Latvia, Arts. 8 and 101.

vote, naturalisation is required.[36] The second is full exclusion from the enjoyment of EU citizenship rights in the territory of the European Union (EU), which Latvia joined ten years ago, on 1 May 2004. This paper is concerned with EU law as a possible way of improving the situation of these "non-citizens", thus dealing merely with one of the two core limitations of this legal status outlined above.

The legal history of the status of "non-citizens of Latvia" is closely intertwined with the recent past of the Republic itself. On 15 October 1991 the Latvian Supreme Council (interim Parliament) passed the Decision "On the Renewal of the Rights of the Citizens of the Republic of Latvia and on the Fundamental Principles of Naturalisation",[37] which was based on the concept of the continuity of the citizenship of the Latvian Republic that existed before the Soviet occupation:[38] only those persons who had been citizens of independent Latvia in 1940 and their descendants had their citizenship restored.[39] This approach was confirmed by the Citizenship Law of 1994,[40] and is a reflection of the doctrine of continuity existing between the current Latvian state and the Republic which gained independence following the split of the Russian Empire after the First World War.

The legal status of people who were not recognized as citizens of Latvia remained unclear until 1995, when the Law on the Status of Former USSR Citizens Who Do Not Have the Citizenship of Latvia or of Any Other State[41] was adopted. The Law introduced a special legal status of "non-citizens",[42] granted to those who enjoyed registered

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[36] Pilsonības likums [Latvian Citizenship Law], LATVIJAS VĒSTNESIS 93(224) (1994).
[37] Latvian Supreme Council, Par Latvijas Republikas pilsoņu tiesību atjaunošanu un naturalizācijas pamatnoteikumiem, atvijas Republikas Augstākās Padomes un Valdības Ziņotājs [On the Renewal of the Rights of the Citizens of the Republic of Latvia and on the Fundamental Principles of Naturalisation], 43.nr. (1991).
[38] Constitutional Court of Latvia, Case No. 2004-15-0106, ¶ 13 (2005), *available at* http://www.satv.tiesa.gov.lv/upload/2004-15-0106E.rtf.
[39] *Id.*, ¶ 2.
[40] Pilsonības likums [Latvian Citizenship Law], LATVIJAS VĒSTNESIS, 93(224) (1994).
[41] Par to bijušās PSRS pilsoņu statusu, kuriem nav Latvijas vai citas valsts pilsonības [Law on the Status of Former USSR Citizens Who Do Not Have the Citizenship of Latvia or of Any Other State], LATVIJAS VĒSTNESIS, 63(346) (1995).
[42] Par to bijušās PSRS pilsoņu statusu, kuriem nav Latvijas vai citas valsts pilsonības [Law on the Status of Former USSR Citizens Who Do Not Have the Citizenship of Latvia or of Any Other State], section 1(1), LATVIJAS VĒSTNESIS, 63(346) (1995).

domicile in Latvia on July 1 1992 and who did not have citizenship of Latvia or any other country (except for some retired USSR army officers and members of their families).[43] Latvia has been consistent in its insistence on the fact that "non-citizens" are *not* stateless persons – a fact tacitly accepted by the organs of the EU,[44] but not always by the UN and other international organizations.[45] According to the helpful clarification by the Latvian Constitutional Court, "non-citizens" "can be regarded neither as the citizens, nor as aliens and stateless persons".[46] Latvian and international courts clarified that this status amounts to a permanent legal bond between the Latvian Republic and its "non-citizens", thus excluding statelessness.[47] The far-reaching nature of "non-citizenship" has been underlined in the context of the situations where this status could be revoked under the law should permanent residence be acquired abroad, thus *de jure* and also *de facto* producing statelessness.[48] Such revocations were deemed by the Latvian Constitutional Court unconstitutional, given the "mutual rights and obligations"[49] between the "non-citizens" and the Latvian Republic, also reaffirmed by the European Court of Human Rights (ECtHR).[50]

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[43] Par to bijušās PSRS pilsoņu statusu, kuriem nav Latvijas vai citas valsts pilsonības [Law on the Status of Former USSR Citizens Who Do Not Have the Citizenship of Latvia or of Any Other State], section 1(3), LATVIJAS VĒSTNESIS, 63(346) (1995).

[44] *See, e.g.,* FUNDAMENTAL RIGHTS AGENCY OF THE EUROPEAN UNION, FUNDAMENTAL RIGHTS: CHALLENGES AND ACHIEVEMENTS IN 2012 44 (F.R.A. 2013) (referring to "non-citizens of Latvia" as "recognized non-citizens", and distinguishing them from stateless persons).

[45] Latvia is considered to be in breach of its commitments under the 1961 Convention on the Reduction of Statelessness. *See, e.g., Addendum on the Mission to Latvia of the Report to Human Rights Council of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance,* UN Doc. A/HRC/7/19/Add.3, ¶ 88 (2008). Some UN bodies make a clear distinction between "non-citizens" and stateless persons in Latvia, however. *See, e.g., Submission by the UN High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report: Universal Periodic Review – Latvia*, at IV (2010).

[46] In Latvian: "Latvijas nepilsoņi nav uzskatāmi ne par pilsoņiem, ne ārvalstniekam, ne arī bezvalstniekiem." *See* Constitutional Court of Latvia, Case No. 2004-15-0106, ¶ 15 (2005), *available at* http://www.satv.tiesa.gov.lv/upload/2004-15-0106E.rtf.

[47] *Id.*, ¶ 17. *See also* Department of Administrative cases, the Senate of the Supreme Court of Latvia, Case No. SKA – 89 (C27261801) (2004). *See* Kristine Krūma, *Country Report: Latvia – Revised and updated February 2013*, *in* EUDO CITIZENSHIP OBSERVATORY 20 (Eur. Univ. Inst. 2013).

[48] Par to bijušās PSRS pilsoņu statusu, kuriem nav Latvijas vai citas valsts pilsonības [Law on the Status of Former USSR Citizens Who Do Not Have the Citizenship of Latvia or of Any Other State], former section 1(3)5, LATVIJAS VĒSTNESIS, 63(346) (1995).

[49] Constitutional Court, Case No. 2004-15-0106, ¶ 17 (2005), *available at* http://www.satv.tiesa.gov.lv/upload/2004-15-0106E.rtf.

[50] Andrejeva v Latvia, App. No. 55707/00, Eur. Ct. H.R. ¶ 88 (2009) (in the context of social security).

The rights enjoyed by non-citizens point in the direction of the fact that we are dealing with a classical nationality, only with no voting rights: a fact criticized by the UN bodies.[51] "Non-citizens" have rights akin to citizens. These include, for example, the right to reside in Latvia without visas or residence permits,[52] the right to work without a work permit,[53] *etc.* Some rights and opportunities are reserved, however, only for "full" citizens. This includes political rights (such as the right to participate in elections[54] and the right to establish political parties),[55] the right to hold certain government positions, and social and economic rights (land property rights in some territories,[56] public and private sector careers in some professions,[57] pensions for work periods accrued during the Soviet period outside Latvia – or for working in Latvia for employers from different Soviet Republics[58] – if the period is not covered by an international agreement).[59] As of October 2011, there were as many as eighty differences in rights between citizens and "non-citizens", mainly relating to careers in the public sector.[60] The absolute majority persists to this day.

Such a discrepancy between those possessing the two statuses of legal attachment to the Latvian state – *i.e.* that of Latvian citizenship as well as that of "non-citizen of Latvia" – could not but give rise to questions concerning possible discrimination. In September 2008 the [Latvian] Ombudsman completed an investigation into the differences in rights between citizens and "non-citizens".[61] The Ombudsman found that some restrictions on non-citizens were not proportional, such as the ban on "non-

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[51] *See, e.g., Concluding Observations of the UN Human Rights Committee: Latvia*, UN Doc. CCPR/CO/79/LVA, ¶ 18 (2003); *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Latvia*, UN Doc. CERD/C/63/CO/7, ¶ 12 (2003).
[52] Imigrācijas likums [Immigration Law], section 1(1)1, LATVIJAS VĒSTNESIS, 169 (2744) (2002).
[53] *Id.*
[54] Constitution of the Latvian Republic, arts. 8 and 101.
[55] Politisko partiju likums [Law on Political Parties], section 12(1), LATVIJAS VĒSTNESIS, 107 (3475) (2006).
[56] *See, e.g.,* Likums par zemes privatizāciju lauku apvidos [Law on Land Privatisation in Rural Areas], section 29(2), ZIŅOTĀJS, 32 (1992).
[57] *See, e.g.,* Valsts civildienesta likums [State Civil Service Law. State Civil Service Law], section 7(1)1, LATVIJAS VĒSTNESIS, 331/333 (2242/2244) (2000).
[58] Andrejeva v Latvia, App. No. 55707/00, Eur. Ct. H.R. (2009).
[59] Likums par valsts pensijām [Transitional Provisions of the Law on State Pensions], section 1, LATVIJAS VĒSTNESIS, 182 (465) (1995).
[60] LATVIAN HUMAN RIGHTS COMMITTEE, CITIZENS OF A NON-EXISTENT STATE 29–33 (2011).
[61] ATZINUMS PĀRBAUDES LIETĀ (2008), *available at* http://www.tiesibsargs.lv/img/content/atzinums_par_pilsonu_un_nepilsonu_tiesibam_2008_09.pdf.

citizens" from working as advocates or patent attorneys,[62] from receiving the highest level of clearance for security work,[63] or from being heads or members of the board in the investigative agencies.[64] He also found a disproportionate restriction to the legal limitations on obtaining land property in the cities by "non-citizens".[65] The Ombudsman recommended verifying whether restrictions concerning those rights guaranteed for EU citizens but denied to non-citizens are justified.[66] Such verification has never taken place in practice, however, since the new Ombudsman elected in March 2011 declared that the principle of equality required a differential treatment towards persons in legally different situations, finding that the difference in rights between citizens and "non-citizens" was not of a discriminatory nature, since a legal status of "non-citizens" is not comparable with that of citizens.[67]

Given that no substantive arguments in favor of this finding were listed, it can only be characterized as dangerously unsubstantiated. Especially given that none of the nationals of the twenty-seven other Member States of the EU can be discriminated on the same grounds, as guaranteed by the general prohibition of discrimination in Article 18 TFEU.[68] The same applies to long term resident third-country nationals moving from other Member States using their rights under the EU Long Term Resident Third-Country Nationals Directive.[69] The logic of the Ombudsman thus implies that it is

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[62] Latvijas Republikas Advokatūras likums [Advocacy Law Advocacy Law], section 14(1), ZIŅOTĀJS, 28 (1993); Patentu likums [Patents Law], section 26(4)1, LATVIJAS VĒSTNESIS, 34 (3610) (2007).

[63] Apsardzes darbības likums [Security Guard Activities Law], section 6(1), LATVIJAS VĒSTNESIS, 83 (3451) (2006).

[64] Detektīvdarbības likums [Law of Detective Activity], section 4(1), LATVIJAS VĒSTNESIS, 110 (2497) (2001) (difference abolished since 1 October 2012).

[65] Likums par zemes reformas pabeigšanu pilsētās [Law on Completion of Land Reform in the Cities], section 3(1), LATVIJAS VĒSTNESIS, 333 (1394) (1998).

[66] ATZINUMS PĀRBAUDES LIETĀ 5 (2008), *available at* http://www.tiesibsargs.lv/img/content/atzinums_par_pilsonu_un_nepilsonu_tiesibam_2008_09.pdf.

[67] PAR NEPILSOŅU TIESISKO STATUSU (2011), *available at* http://www.tiesibsargs.lv/img/content/tiesibsarga_viedoklis_par_nepilsonu_tiesisko_statusu.pdf.

[68] GARETH DAVIES, NATIONALITY DISCRIMINATION IN THE EUROPEAN INTERNAL MARKET 188 (2003); Silvia Gastaldi, *L'égalité de traitement au service de la citoyenneté européenne*, *in* L'HARMONISATION INTERNATIONALE DU DROIT 326, 342–344 (C. Chappuis et al. eds., 2007).

[69] Directive 2003/109/EC. The Directive does not apply to "non-citizens" because of how it was transposed into Latvian law. In May 2006 the *Saeima* (Parliament) adopted the Law on the Status of a Long-term Residents of the European Community in the Republic of Latvia, which stipulates that Latvian non-citizens should be subjected to several requirements, in particular that they must demonstrate Latvian language skills in order to obtain the status of an EU permanent resident. The President of Latvia refused to promulgate the law and criticized the *Saeima* for the Law adopted, arguing that non-citizens belong to a special category, therefore not requiring the imposition of integration requirements upon

legitimate that a Frenchman or a Pole who decided to move to Latvia, or a Russian holding EU long term residence status under the relevant Directive should be treated better than "non-citizens",[70] who enjoy a lasting legal bond with Latvia. Such problematic reasoning is, regrettably, not uncommon in the Baltic state in question.[71] Latvia lost a number of cases in Strasbourg over such unjustifiable distinctions and restrictions of rights.[72] The UN Human Rights Committee has been explicit in condemning the discriminatory practices entrenched in Latvian law and practice.[73]

Given that "non-citizens" are fully excluded from elections, the Constitutional Court's clarification that "it is not and cannot be regarded as a variety of Latvian citizenship"[74] is most logical, as political participation is usually regarded as going to the

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them. *See* Law on the Status of a Long-term Resident of the European Community in the Republic of Latvia, LATVIJAS VĒSTNESIS, 85(3453) (2006). Nevertheless, the parliamentary majority confirmed the adopted provision once again. According to the Constitution, if the President refuses to promulgate a law and returns it to Parliament for repeated consideration, Parliament has to vote on the disputed provisions again. If the previous vote is confirmed, the President is obliged to promulgate the law. Thus, non-citizens are not automatically recognized as long-term residents of the EU. In 2010 a total of only 265 persons possessed such status in Latvia, 64 of whom were non-citizens. *See* PILSONĪBAS UN MIGRĀCIJAS LIETU PĀRVALDES PUBLISKAIS PĀRSKATS 19.l (2010).

[70] The Parliamentary Assembly of the Council of Europe has called for the "review [of] the existing differences in rights between citizens and non-citizens with a view of abolishing those that are not justified or strictly necessary, at least by providing non-citizens with the same rights as are enjoyed by nationals of other European Union Member States within Latvian territory". *See* Council of Europe, Rights of National Minorities in Latvia, PACE Resolution 1527 (2006) (Nov. 17, 2006).

[71] Dimitry Kochenov, Vadim Poleshchuk & Aleksejs Dimitrovs, *Do Professional Linguistic Requirements Discriminate? A Legal Analysis: Estonia and Latvia in the Spotlight*, 10 EUR. Y.B. MINORITY ISSUES (2013) (for analysis).

[72] *Andrejeva v Latvia*, App. No. 55707/00, Eur. Ct. H.R. (2009). The relevant Latvian law has not been changed since and the Constitutional Court refused to apply *Andrejeva* to other similar cases. *See* Constitutional Court, Case No. 2010-20-0106 (2011), *available at* http://www.satv.tiesa.gov.lv/upload/judg_2010_20_0106.htm. As a consequence, another high profile case largely following *Andrejeva* is now pending before the ECtHR. *See Savickis and Others v Latvia*, App. No. 49270/11, Eur. Ct. H.R.

[73] "The Committee expresses its concern over the perpetuation of a situation of exclusion, resulting in lack of effective enjoyment of many Covenant rights by the non-citizen segment of the population, including political rights, the possibility to occupy certain State and public positions, the possibility to exercise certain professions in the private sector, restrictions in the area of ownership of agricultural land, as well as social benefits (Art. 26). The State party should prevent the perpetuation of a situation where a considerable part of the population is classified as 'non-citizens'." *See Concluding Observations of the UN Human Rights Committee: Latvia*, UN Doc. CCPR/CO/79/LVA, ¶ 18 (2003).

[74] In Latvian: "Nepilsoņa statuss nav un nevar tikt uzskatīts par Latvijas pilsonības paveidu". *See* Constitutional Court of Latvia, Case No. 2004-15-0106, ¶ 17 (2005) *available at* http://www.satv.tiesa.gov.lv/upload/2004-15-0106E.rtf.

essence of what citizenship means and is.[75] Calling the apolitical status of "non-citizenship" a variety of citizenship would thus amount to disregarding the essential features implied by the latter.

The Latvian Constitutional Court's clarification of its implicitly distinguishing "non-citizenship" also from what would be commonly characterized as a nationality is more interesting. The court found that "[t]he fact, whether the Latvian non-citizens can be regarded as the nationals in the understanding of the international law is not only a juridical but mainly a political issue, which shall be reviewed within the framework of the democratic political process of the state."[76] However, given that, as has been demonstrated, the status already meets a classical understanding of nationality in international law implying a lasting legal bond between a person and a state supported by mutual rights and obligations, the political deliberation that the Constitutional Court seems to have in mind could only concern the *name* rather than the *essence* of the status in question. The court stands to be reminded that not only names, but also essential features matter in judicial decision-making. Indeed, the essence of the status in question is what drives Latvian doctrinal legal thought where a consensus emerged, in the words of Krūma, that "non-citizens possess the same rights as citizens except for political rights and the right to hold certain positions (…)."[77] Crucial in this context is that "the courts interpret the status [of "non-citizen" of Latvia] according to the same principles as the status of a citizen."[78]

All in all, the status of "non-citizens of Latvia" implies the following: its bearers are *not* stateless in the eyes of the Latvian law – notwithstanding the fact that this approach is dubious in the light of international law. The internal Latvian understanding is essential, however, for the argument that follows. As a consequence of

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[75] *See, e.g.,* Linda Bosniak, *Citizenship Denationalised*, 7 IND. J. GLOBAL LEGAL STUD. 477 (2000); Will Kymlicka & Norman Wayne, *Return of the Citizen: A Survey of Recent Work on Citizenship Theory*, 104 ETHICS 352 (1994).

[76] In Latvian: "Tas, vai Latvijas nepilsoņi būtu uzskatāmi par *nationals* (angļu val.) starptautisko tiesību izpratnē, ir ne tikai juridisks, bet galvenokārt politisks jautājums, kas būtu jāizskata valstī pastāvošā demokrātiski politiskā procesa ietvaros." *See* Constitutional Court of Latvia, Case No. 2004-15-0106, ¶ 24 (2004), *available at* http://www.satv.tiesa.gov.lv/upload/2004-15-0106E.rtf.

[77] Kristine Krūma, *Country Report: Latvia – Revised and updated February 2013, in* EUDO CITIZENSHIP OBSERVATORY 9 (Eur. Univ. Inst. 2013). Note that the renowned expert ignores the crucial distinction between citizens and "non-citizens" related to EU law and the access to the status of EU citizenship.

[78] *Id.*, 19.

the reading of the status by the Latvian Constitutional Court, it cannot be compared with the statuses enjoyed in Latvia by foreigners and migrants. "Non-citizens" enjoy a lasting and stable legal bond with Latvia, which is sealed by mutual rights and obligations akin to those of nationality. The status does not amount to citizenship of Latvia, but grants access to all the main rights of citizenship with a sole exception, besides the right to hold some offices, of political rights. It is not a temporary status and can only be lost upon naturalisation either in Latvia – upgrading the legal position to a citizen – or abroad. The status is currently not connected with EU citizenship, thus disqualifying its bearers from the enjoyment of the majority of the rights stemming from the supranational legal system of the EU. The latter is an issue that can be easily resolved.

II. EU Citizenship and the "Non-citizens" of Latvia

EU citizenship can be extended to the "non-citizens" of Latvia by a simple declaration and is associated with a number of important rights, the majority of which are outlined in Part II TFEU.[79] These originate in the EU, not in the national legal order, allowing the characterization of the legal status of EU citizenship as "autonomous"[80] from the legal orders of the Member States of the EU, following Advocate General Poiares Maduro.

EU citizenship rights would be a welcome addition to the rights associated with the Latvian "non-citizen" status (a). The status of EU citizenship is extended to the nationals of the Member States for the purposes of EU law. Although in the absolute majority of cases the legal scope of Member State nationality for the purposes of EU law overlaps with that of citizenship under national law, this is not necessary under the law of the EU (b). The "non-citizens" of Latvia can be classified as nationals of Latvia for the purposes of EU law, and thereby turned into EU citizens overnight (c).

[79] The wording of the leading provision in this Part – Art. 20 TFEU – is quite broad, pointing in the direction of the rights "in the Treaty" and definitely also covering unwritten rights, such as the right not to be pushed to leave the territory of the Union. *See* Case C-34/09, *Ruiz Zambrano v Office national de l'emploi* [2011] ECR I-1449. *See* Dimitry Kochenov, *The Right to Have What Rights? EU Citizenship in Need of Clarification* (2013) 19 EUR. L.J. 502 (for an analysis).

[80] Case C-135/08, *Rottmann v Freistaat Bayern* [2009] ECR I-1449, Opinion of Advoc. Gen. Poiares Maduro, ¶ 23. *See also* Dimitry Kochenov, *Annotation of* Rottmann, 47 COMMON MKT. L. REV. 1831 (2010).

a. EU Citizenship Rights

The scale of rights coming from the EU significantly supersedes national rights of citizenship in any of the Union Member States, as EU rights apply in the territory of all the Member States together. EU citizens enjoy the right of residence[81] and free movement around the Union[82] which goes far beyond travel and includes virtually unlimited access to work,[83] establishment of a business,[84] and residence all over the territory of the EU[85] accompanied by a family of any nationality.[86] They enjoy voting rights in European Parliament[87] and local elections[88] all over the Union, no matter where they reside and also benefit from the "protection by the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that state"[89] in the countries around the world where their own Member State of nationality is not represented.

EU citizenship implies a full prohibition of direct and indirect discrimination on the basis of nationality,[90] which in fact means two things: the Member States cannot favor "their own" in their law (no, France does not love Frenchmen more than, say, Estonians or Spaniards) and effectively amounts to – to borrow from the renowned account by Gareth Davies – the "abolition"[91] of the nationalities of the Member States in

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[81] Art. 21(1) TFEU; Council Directive 2004/38, 2004 O.J. (L 158) 77.
[82] Art. 21(1) TFEU.
[83] Art. 45(1) TFEU.
[84] Art. 49 TFEU.
[85] Dimitry Kochenov, "A Real European Citizenship: A New Jurisdiction Test – A Novel Chapter in the Development of the Union in Europe" (2011) 18 COLUM. J. EUR. L. 56, 99–101 (for an analysis).
[86] Council Directive 2004/38, Art. 2(2)(b), 2004 O.J. (L 158) 77 (EC); Eugenia Caracciolo di Torella & Annick Masselot, *Under Construction: EU Family Law*, 29 EUR. L. REV. 32 (2004); Peter Van Elsuwege & Dimitry Kochenov, *On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights*, 13 EUR. J. MIGRATION L. 443 (2011).
[87] Art. 22(2) TFEU.
[88] Art. 22(1) TFEU. *Also see* JO SHAW, THE TRANSFORMATION OF CITIZENSHIP IN THE EUROPEAN UNION: ELECTORAL RIGHTS AND THE RESTRUCTURING OF POLITICAL SPACE 131–142 (2007) (on the meaning and the legal delimitation of this level of political representation under the EU Treaties).
[89] Art. 23(1) TFEU. This right should be a particular asset for EU citizens coming from a tiny Member State without a broad network of consular missions, such as the "non-citizens of Latvia".
[90] Art. 18 TFEU. *Also see* Pieter Boeles, *Europese burgers en derdelanders: Wat betekent het verbod van discriminatie naar nationaliteit sinds Amsterdam?*,12 SOCIAAL-ECONOMISCHE WETGEVING 502 (2005); Tamara Hervey, *Migrant Workers and Their Families in the European Union: The Pervasive Market Ideology of Community Law*, *in* NEW LEGAL DYNAMICS OF THE EUROPEAN UNION 91, 97 (Jo Shaw & Gillian More eds., 1995) (for the analysis of the scope of this provision).
[91] Gareth Davies, *"Any Place I Hang My Hat?" or: Residence is the New Nationality*, 11 EUR. L. J. 1, 43 and 55 (2005).

the sphere of application of EU law. To put it differently, EU citizenship coupled with the prohibition of discrimination established by Article 18 TFEU outlaws reliance on the nationalities of the Member States as legally relevant factors.[92] Coupled with the fundamental principles of supremacy[93] and direct effect[94] of EU law within the ambit of its application,[95] this ensures that EU citizens' rights enjoy effective protection: any national law installing a requirement discriminatory on the basis of nationality will be set aside by national courts and administrations: no formal annulment is required.[96]

EU citizens' protection goes even further: non-discriminatory restrictions on the enjoyment of EU citizenship rights are also prohibited by EU law and are regularly struck down by the Court of Justice of the European Union (ECJ).[97] Exceptions from the rules of EU law are interpreted in a very strict manner.[98] While the Member States are allowed to reserve some public functions to the holders of their own nationality,[99] abuse of this is not allowed – the ECJ will scrutinize whether the arguments of the Member States in question make sense. A huge number of ECJ cases illustrate the strengths of this EU-level status. Member States cannot demand EU citizens from other parts of the Union to pay higher University tuition[100] or to deport those engaged in professions

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[92] Gareth Davies, *Humiliation of the State as a Constitutional Tactic*, *in* THE CONSTITUTIONAL INTEGRITY OF THE EUROPEAN UNION (Fabian Amtenbrink & Peter van den Bergh eds., 2010).
[93] Case 6/64, *Flaminio Costa v E.N.E.L.*, [1964] E.C.R. 585.
[94] Case 26/62, *N.V. Algemene Transport en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen*, [1963] E.C.R. 3, ¶ II B. *See also* Bruno de Witte, *Direct Effect, Supremacy, and the Nature of the Legal Order*, *in* THE EVOLUTION OF EU LAW 177 (Paul Craig & Gráinne de Búrca eds., 1st ed., 1999).
[95] Eleanor Spaventa, *Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects* (2008) COMMON MKT. L. REV. 13 (as applied, specifically, to EU citizenship).
[96] Gareth Davies, *Humiliation of the State as a Constitutional Tactic*, *in* THE CONSTITUTIONAL INTEGRITY OF THE EUROPEAN UNION (Fabian Amtenbrink & Peter van den Bergh eds., 2010).
[97] Case C-192/05, *Tas-Hagen en Tas v Raadskamer WUBO van de Pensioenen Uitkeringsraad*, [2006] ECR I-10451. Case C-224/02, *Pusa v Osuuspankkien Keskinäinen Vakuutusyhtiö*, [2004] E.C.R. I-5763, Opinion of Advoc. Gen. Jacobs; Case C-403/03, *Schempp v Finanzamt München V*, [2005] E.C.R. I-6421, Opinion of Advoc. Gen. Kokott. *See also* Francis Jacobs, *Citizenship of the European Union: A Legal Analysis*, 13 EUR. L.J. 591, 596–598, 608 (2007).
[98] Art. 45(3) TFEU. *See, e.g.,* Joined Cases C-482 & C-493/01, *Orfanopoulos & Oliveri v Land Baden-Württemberg*, [2004] E.C.R. I-5257. *See also* Case C-149/79, *Commission v Belgium*, [1981] E.C.R. 3881; Niamh Nic Shuibhne, *Derogating from the Free Movement of Persons: When Can EU Citizens Be Deported?*, 8 CAMBRIDGE Y.B EUR. LEGAL STUD. 187 (2006).
[99] Art. 45(4) TFEU. NANDA BEENEN, CITIZENSHIP, NATIONALITY AND ACCESS TO PUBLIC SERVICE EMPLOYMENT (2001) (providing a detailed study of employment exception to free movement).
[100] Case 293/83, *Gravier v City of Liege*, [1985] E.C.R. 593. *See also* DOROTHEA CHARLOTTE RINGE, TUITION FEES AND EQUAL ACCESS TO HIGHER EDUCATION IN GERMANY AND THE EU (2009).

which are not prohibited for nationals – prostitutes are also protected by EU law.[101] Even the permanent banishment of EU citizens from the territory of a particular Member States for crimes is prohibited as discriminatory on the basis of nationality.[102]

The emergence of EU citizenship as a meaningful legal status put the nationalities of the Member States in a new perspective:[103] it is impossible to claim that EU citizens are foreigners in any of the EU Member States, given that plenty of the rights they enjoy and which would normally be associated with national citizenship – from non-discrimination on the basis of nationality to the right to work, to be joined by a spouse of any nationality and to remain in the territory – are effectively removed from the realm of national law, and provided by the EU directly. All in all, EU citizenship is a meaningful legal status empowering individuals through *de facto* multiplying classical rights of nationality by a factor of twenty-eight: as a Latvian citizen one can work in Latvia – as an EU citizen in twenty-eight states; as an Irish citizen, one can reside in Ireland – as an EU citizen in twenty-eight states; as a Maltese citizen one enjoys direct diplomatic protection in two capitals outside the EU: Washington and Moscow[104] – as an EU citizen all over the world.

b. Acquisition of EU Citizenship

"Every national of a Member State shall be a citizen of the Union",[105] the EU Treaty tells us. There is no other way to acquire EU citizenship. In other words, while the status itself is autonomous and comes adorned with important rights, its acquisition is based on a derivation: *ius tractum*, as opposed to *ius soli* or *ius sanguinis*.[106] Under

[101] Joined cases 115 & 116/81, *Adoui v Belgian State and City of Liège; Cornuaille v Belgian State*, [1982] E.C.R. 1665.
[102] Case C-348/96, *Criminal proceedings against Donatella Calfa*, [1999] E.C.R. I-11. *See* Cathryn Costello, *Case C-348/96*, 37 COMMON MKT. L. REV. 817 (2000) (for a commentary). *See also* Dimitry Kochenov & Benedikt Pirker, *Deporting EU Citizens: A Counter-Intuitive Trend*, 19 COLUM. J. EUR. L. 369 (2013).
[103] Dimitry Kochenov, *Member State Nationalities and the Internal Market: Illusions and Reality*, *in* FROM SINGLE MARKET TO ECONOMIC UNION (Niamh Nic Shuibhne & Laurence W. Gormley eds., 2012).
[104] The network of Maltese consulates and embassies is not really extensive.
[105] Art. 9 TEU. *See also* Art. 20 TFEU.
[106] Dimitry Kochenov, Ius Tractum *of Many Faces: European Citizenship and a Difficult Relationship between Status and Rights*, 15 COLUM. J. EUR. L. 169, 181 (2009).

international law – fully recognized by EU law in this particular context[107] – states are free to establish who their citizens are.[108] There is no uniformity around the world and, similarly, around the EU about how the legal regulation of citizenship should work.[109] This variety allows states to give full expression to their specificity and find an approach to defining who "belongs" that suits them best.[110] In fact, the EU context endows the Member States with even more freedom in outlining the scope of EU citizenship than what the plain reading of the relevant provisions of the Treaties would suggest: a historical approach to the law is required to understand its intricacies.[111]

Before EU citizenship was officially introduced into the Treaties in the early nineties by the Treaty of the Maastricht,[112] the majority of the rights now associated with this status have already been extended to the nationals of the Member States of the then European Communities.[113] Rather than simply granting supranational rights to all the citizens of the Member States, a notion of a "national for the purposes of Community law"[114] emerged, to underline the possible differences in scope between Member States' nationalities and those of their citizens entitled to benefit from EU law. The choice to separate the nationality of a Member State from nationality for the purposes of Community law is understandable when regarded from two perspectives. Germany and the UK supply relevant historical examples.

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[107] Dimitry Kochenov & Fabian Amtenbrink, *The Active Paradigm of the Study of the EU's Place in the World: An Introduction*, *in* EUROPEAN UNION'S SHAPING OF THE INTERNATIONAL LEGAL ORDER (Dimitry Kochenov & Fabian Amtenbrink eds. 2013) (for a general overview of EU law – International Law interactions).

[108] "It is for each State to determine under its law who are its nationals." *See* Hague Convention Governing Certain Questions Relating to the Conflict of Nationalities, Apr. 12, 1930, Art. 1, 179 L.N.T.S. 89. *See also* Art. 2: "Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of the State."

[109] For an up-to-date overview, please consult the EUDO citizenship database of the European University Institute in Florence.

[110] Matthew J. Gibney, *The Rights of Non-Citizens to Membership*, *in* STATELESSNESS IN THE EUROPEAN UNION: DISPLACED, UNDOCUMENTED, UNWANTED 41 (Caroline Sawyer & Brad K. Blitz eds., 2010).

[111] Dimitry Kochenov & Richard Plender, *EU Citizenship: From and Incipient Form to an Incipient Substance?*, 37 EUR. L. REV. 369 (2012).

[112] Treaty of Maastricht O.J. (C 191/1) 1992.

[113] ANTJE WIENER, "EUROPEAN" CITIZENSHIP PRACTICE: BUILDING INSTITUTIONS OF A NON-STATE (1997).

[114] *See, e.g.,* Dimitry Kochenov, Ius Tractum *of Many Faces: European Citizenship and a Difficult Relationship between Status and Rights*, 15 COLUM. J. EUR. L. 169, 186–190 (2009); Stephen Hall, *Determining the Scope Ratione Personae of European Citizenship: Customary International Law Prevails for Now*, 28 LEGAL ISSUES ECON. INTEGRATION 355 (2001); D.F. Edens & S. Patijn, *The Scope of the EEC System of Free Movement of Workers*, 9 COMMON MKT. L. REV. 322, 323 (1972).

Germany wanted to ensure a broader reading of nationality compared with the actual scope of its citizenship, willing to incorporate – even if somewhat ephemerally – all the Germans left behind the Iron Curtain – in Poland, the GDR, the Soviet Union and elsewhere.[115] Although merely a symbolic gesture, this potentially enlarged the personal scope of EU law to cover a number of individuals who, *de jure* at least, were not in possession of a nationality of the Federal Republic. A special declaration to this effect has been appended by Germany to the founding Treaties.[116]

Another important example emerged following the accession of the UK to the Communities in the early seventies. Resulting from the swift deterioration of the Empire, the UK recognized a large number of different classes of citizenship and other types of attachment to the state and the crown. In this context – and given that EU-level rights affect *all* the Member States, since they include, *inter alia*, residence and work rights all over the Union – the founding Member States of the Union demanded that the UK choose among all the categories of its citizens, extending nationality for the purposes of Community law only to some of these categories rather than to all.[117] This is exactly what was done. Following the German example, the UK appended a declaration to the Treaties, outlining who its nationals for the purposes of Community law were. Just as in the case of Germany, there was no direct correlation between this concept and UK citizenship *sensu stricto*. The UK Declaration,[118] which was later updated following a change in national law,[119] extended nationality for the purposes of Community law to some categories of persons who were not considered UK citizens, although unquestionably enjoyed a stable legal bond with the UK. Legally resident "British

[115] Eberhard Grabitz, *L'unité allemande et l'intégration européenne*, *in* CAHIERS DE DROIT EUROPEEN 421 (1991).
[116] Dimitry Kochenov, Ius Tractum *of Many Faces: European Citizenship and a Difficult Relationship between Status and Rights*, 15 COLUM. J. EUR. L. 169, 188 (2009) (for an analysis).
[117] D.F. Edens & S. Patijn, *The Scope of the EEC System of Free Movement of Workers*, 9 COMMON MKT. L. REV. 322, 326 (1972).
[118] Treaty of Accession to the European Communities of the Kingdom of Denmark, Ireland, and the United Kingdom of Great Britain and Northern Ireland, 1st U.K. Declaration, Jan. 22, 1972, 1972 O.J. (L 73) 196. It was later updated upon the entry into force of the 1981 British Nationality Act.
[119] The text of the 2nd Declaration, currently in force, does not correspond to the current categories of British nationality. It has been argued that an update of the Declaration is necessary. *See* Gerard-René de Groot, *Towards a European Nationality Law*, 8 ELECTRONIC J. COMP. L. 3 (2004) (no pagination available).

Subjects without citizenship" in particular are the cases in point.[120] The precedent has been set: nationality for the purposes of Community law does not necessarily overlap in full with the understanding of citizenship in the national law of the Member States.[121] Both German and UK examples testify to this.

When the concept of EU citizenship made its way into the Treaties with the fall of the Berlin Wall, the reading of the essence of the personal scope of supranational law was thereby left unchanged. The Court of Justice found in *Kaur* that the personal scope of EU citizenship is not co-extensive with that of the citizenships of the Member States in the sense of the national law of the Member States, but rather follows the concept of nationality for the purposes of Community law in the sense of the special declarations, where such declarations exist. As a result, Mrs. Manjit Kaur, who possessed a British passport of a category not allowing her to benefit from Community law before the introduction of the concept of EU citizenship into the Treaties (British Overseas, which does not grant a right of abode in the UK) could not benefit from the newly-introduced EU citizenship provisions.[122] Although a UK national (albeit of a very special category, not granting her any rights in the UK), she had never been an EU citizen.[123] The approach of the Court is only understandable in light of the principle of conferral:[124] it would be unreasonable to expect the EU to disregard the express wishes of the Member States, given the derivative nature of the EU's competences.[125] In other words, the introduction of EU citizenship did not result in the redundancy of the general pre-Maastricht approach to defining the personal scope of nationality for the purposes of EU law by the Member States distinctly from regulating citizenship in national law. This profoundly affects the reading of the term "national" in Articles 9 TEU and 20 TFEU. "National" in the sense of these provisions does not necessarily overlap with the term "citizen" and its equivalents in the national law of the Member States. As the examples

[120] 1st UK Declaration, point (a).
[121] This has long being accepted by EU institutions. *See* European Parliament's Resolution on the British Nationality Bill, 1981 O.J. (C 260) 100.
[122] Case C-192/99, *The Queen v Secretary of State for the Home Department, ex parte: Kaur*, [2001] E.C.R. I-1237, ¶ 27.
[123] Case C-135/08, *Rottmann v Freistaat Bayern*, [2010] E.C.R. I-1449, ¶ 49 (distinguishing *Kaur*).
[124] Art. 4(1) TEU.
[125] *But see* Richard Plender, *An Incipient Form of European Citizenship*, in EUROPEAN LAW AND THE INDIVIDUAL 39 (Francis G. Jacobs ed., 1979).

of Germany and the UK demonstrate, EU citizenship can thus be denied to certain groups of nationals in the sense of national law, as well as extended to those who, while enjoying a legal bond with a Member State, cannot be characterized as full citizens under national law.

The discretion of the Member States in deviating from national law on citizenship when defining the scope of their nationals for the purposes of EU law is not unlimited. The general duty of loyalty applies:[126] the definition of the scope of those who will benefit from EU citizenship is not supposed to harm the goals of the European integration project as outlined in Article 3 TEU. A number of examples of possible limitations of the Member States' discretion arising out of EU law can be listed. The Member States are not free not to recognize the nationalities that activate EU citizenship conferred in compliance with the law of other Member States.[127] Thus in *Micheletti* Spain had to recognize an Italian nationality for the purposes of EU law of a dual Argentinian-Italian citizen, Dr. Micheletti, notwithstanding the fact that his bond with Argentina was presumably stronger. Moreover, in *Rottmann*,[128] the ECJ specified that even when revoking a fraudulently acquired Member State nationality the Member States had to apply the EU law principle of proportionality, weighing their interest in denaturalizing a person against the distress which the loss of EU citizenship rights by that person will cause.[129] Lastly, the Member States cannot apply purely territorial logic to limiting the scope of the EU citizenship status: even nationals residing outside the EU proper retain their EU citizenship and a possibility to benefit from the non-territorial rights attached to it.[130] In general the freedom of the Member States to take sovereign decisions on citizenship and, equally, on nationality for the purposes of EU law (*i.e.* EU

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[126] Art. 4(3) TEU.

[127] Case C-369/90, *Micheletti and others v Delegación del Gobierno en Cantabria*, [1992] E.C.R. I-4239. *See also* the informative Opinion of Advoc. Gen. Tesauro.

[128] Case C-135/08, *Rottmann v Freistaat Bayern*, [2009] ECR I-1449.

[129] *Id.*, ¶ 56. *See also* HAS THE EUROPEAN COURT OF JUSTICE CHALLENGED THE MEMBER STATE SOVEREIGNTY IN NATIONALITY LAW? (Jo Shaw ed., Eur. Univ. Inst., RSCAS Working Paper No. 2011/62, 2011), *available at* http://eudo-citizenship.eu/citizenship-forum/254–has-the-european-court-of-justice-challenged-member-state-sovereignty-in-nationality-law (for a general analysis); Dimitry Kochenov, *Annotation, Case C-135/08*, 47 COMMON MKT. L. REV. 1831 (2010); Gerard-René de Groot, *Overwegingen over de* Janko Rottmann-*beslissing van het Europese Hof van Justitie*, ASIEL & MIGRANTENRECHT 293 (2010).

[130] Case C-300/04, *Eman and Sevinger v College van burgemeester en wethouders van Den Haag*, [2006] E.C.R. I-8055, ¶¶ 29, 72.1. *Also see* Dimitry Kochenov, *EU Citizenship in the Overseas*, *in* EU LAW OF THE OVERSEAS 199 (Dimitry Kochenov ed., 2011) (for an analysis).

citizenship) is limited by the duty of Union loyalty and finds its expression in the declarations appended by the Member States to the Treaties.

c. EU Citizenship for the "Non-citizens" of Latvia

The most obvious way to remedy one of the main discrepancies between the citizenship of Latvia and the status of a "non-citizen" of Latvia is thus to extend EU citizenship to all the "non-citizens" of Latvia. This will result in a tangible broadening of the "non-citizens's" horizon of opportunities as Sen put it,[131] and will also amount to acting in line with the recommendations of virtually *all* the international bodies monitoring the situation of the "non-citizens" in Latvia and who decry the innate discriminatory nature of this status. The status of "non-citizen" of Latvia unquestionably denotes a lasting legal bond, implying rights and responsibilities between the holders of the status and the Latvian Republic. Moreover, similarly to the categories of British nationals without UK citizenship included by the 1st and 2nd UK Declarations within the ambit of the notion of "nationals for the purposes of Community law", it also implies an unlimited right of abode.

Given that EU law respects the sovereignty of the Member States united in the Union, under the general principle of conferral the EU itself cannot decide who its own citizens are – merely intervening in the individual cases when the Member States, in applying their national laws, fail to honor the principles of EU law in full in the areas where the EU is not directly competent to act.[132] It will thus definitely be up to Latvia, not the supranational or international bodies, to take the legal step of extending EU citizenship to the "non-citizens". The majority of the Member States simply extend EU citizenship to all those who enjoy the status of a citizen under national law, thus equating "citizenship" with "nationality for the purposes of EU law". Others, like the UK, however, use their sovereign competence to shape the two differently. Latvia, having

[131] Gianluigi Palombella, *Whose Europe? After the Constitution: A Goal-Based Citizenship*, 3 INT'L. J. CONST. L. 357 (2005) (referring to Sen's work in the context of EU citizenship).
[132] Case C-369/90, *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria*, [1992] E.C.R. I-4239, ¶ 10; Case C-135/08, *Janko Rottmann v Freistaat Bayern*, [2009] ECR I-1449, ¶ 56.

chosen the first option by default – as did the absolute majority of other Member States[133] – can amend its view at any time.

Indeed, just as any other sovereign state, Latvia is free to change its citizenship law. This includes the definition and redefinition of the scope of the "nationality for the purposes of EU law". No steps on the part of the EU are required to change the scope of this notion, to which the bringing of the second declaration by the UK testifies. Moreover, crucially, as full overlap between the scope of national citizenship and "nationality for the purposes of EU law" is not required[134] – deviations from the usual outline of the scope of citizenship in national law are possible in the declarations specifying the scope of the latter. Moreover, the first UK declaration, read in conjunction with the ECJ judgment in *Kaur*, clearly demonstrates that a Member State is free to exclude some groups of citizens as well as include groups of those who are *not*, strictly speaking, citizens of that Member State. The latter is precisely the situation of the "non-citizens" of Latvia. Although enjoying a lasting legal bond with the Republic under national law, they are not citizens of Latvia. They can, however, be turned into Latvian "nationals for the purposes of EU law" – a concept distinct from national citizenship or indeed nationality of Latvia *senso stricto* – by a special declaration of the Republic of Latvia. Leaving the status of the "non-citizen" of Latvia largely intact in the context of national Latvian law, such a declaration will connect it with the status of EU citizenship in EU law, thus extending all the rights of EU citizenship to the "non-citizens" at the very moment of bringing the declaration. The "non-citizens" of Latvia will become EU citizens and Latvian "nationals for the purposes of EU law." As the *Micheletti* case has demonstrated, this status is not subject to approval by other Member States, who will have to respect the exercise by the Republic of Latvia of its sovereign right to determine who its nationals are for the purposes of EU law.[135]

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[133] *See* Protocol No. 2 to the Act of Accession, Relating to Færoe Islands, Art. 4, 1972 O.J. (L 73) 163; Treaty Amending, With Regard to Greenland, the Treaties Establishing the European Communities, Jan. 2, 1985, 1985 O.J. (L 29) 1. *See* Friendl Weiß, *Greenland's Withdrawal from the European Communities*, 10 EUR. L. REV. 173 (1985) (for rare exceptions).

[134] Should this be the case, the whole process of making declarations to specify, *de facto*, who among a country's population is to be considered an EU citizen and who not would be entirely redundant.

[135] Gerard-René de Groot, *Towards a European Nationality Law*, 8 ELECTRONIC J. COMP. L. (2004) text accompanying n. 54 (no pagination available). *See also* Andrew C. Evans, *Nationality Law and the Free*

III. The Question of Costs

Making the "non-citizens" of Latvia EU citizens implies virtually no costs for the Republic of Latvia. This is due to the fact that EU citizenship and the rights associated with it are practically confined to the scope of EU law in its operation.[136] The vertical division of powers in the EU between the Union and the Member States functions in such a way that the EU is only responsible for the regulation of the factual constellations spanning several Member States or having a material EU law dimension, called "cross-border situations". All other cases are uniquely regulated by the national law of the Member States and are referred to as "wholly internal".[137] While the border-line between the two is not always entirely clear[138] – as the ECJ has established, for instance, that physical cross border movement is not necessary to establish a cross-border situation – there is always a factual dimension to the case that gives it broader implications compared with all the situations uniquely confined to a single Member State.[139] The analysis of the delimitation of the scopes of the law always focuses on the essence of the facts of the situation in question. As a result, being born in the territory of one Member

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Movement of Persons in the EEC: With Special Reference to the British Nationality Act 1981, 2 Y.B. EUR. L. 173, 177–178 (1982).

[136] Dominik Hanf, *"Reverse Discrimination" in EU Law: Constitutional Aberration, Constitutional Necessity, or Judicial Choice?*, 18 MAASTRICHT J. EUR. & COMP. L. 29 (2011). *See also* Peter Van Elsuwege & Stanislas Adam, *Situations purement internes, discriminations à rebours et collectivités autonomes après l'arrêt sur l'Assurances soins flamande*, CAHIERS DE DROIT EUROPEEN 655 (2008); Alina Tryfonidou, *Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe*, 35 LEGAL ISSUES ECON. INTEGRATION 43 (2008). *See generally* ALINA TRYFONIDOU, REVERSE DISCRIMINATION IN EC LAW (2009).

[137] Niamh Nic Shuibhne, *Free Movement of Persons and the Wholly Internal Rule: Time to Move On?*, 39 COMMON MKT. L. REV. 731 (2002); Niamh Nic Shuibhne, *The EU and Fundamental Rights: Well in Spirit but Considerably Rumpled in Body?*, *in* CONVERGENCE AND DIVERGENCE IN EUROPEAN PUBLIC LAW 177, 187 (Paul Beaumont et al. eds., 2002); Miguel Poiares Maduro, *The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination*, *in* THE FUTURE OF REMEDIES IN EUROPE 117 (Claire Kilpatrick et al. eds., 2000); Haris Tagaras, *Règles communautaires de libre circulation, discriminations à rebours et situations dites "purement internes"*, *in* 2 MÉLANGES EN HOMMAGE DE MICHEL WAELBROECK 1499 (1999); Giorgio Gaja, *Les discriminations à rebours: Un revirement souhaitable*, *in* 2 MÉLANGES EN HOMMAGE DE MICHEL WAELBROECK 993, 997–998 (1999); Enzo Cannizzaro, *Producing "Reverse Discrimination" Through the Exercise of EC Competences*, 17 Y.B. EUR. L. 29 (1997).

[138] Dimitry Kochenov, *Citizenship without Respect: The EU's Troubled Equality Ideal* 34–58 (Jean Monnet Working Paper No. 08/10, 2010), *available at* http://centers.law.nyu.edu/jeanmonnet/papers/10/100801.pdf.

[139] The ECJ clarified that "the situation of a national of a Member State who (…) has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation." *See* Case C-403/03, *Schempp v Finanzamt München V*, [2005] E.C.R. I-6421, ¶ 22.

State with a nationality of another,[140] or having your EU citizen wife leave you and move to another Member State[141] brings EU law into play. In the same way, actions of the Member States able to deprive EU citizens of the essence of the rights acquired via the supranational status can also result in the activation of EU law with no regard to a cross-border situation.[142] This, however, mostly covers those extreme cases where the Member States seemingly disregard their own law, thereby forcing the EU to intervene to protect the rights and status of EU citizen in carried by the nationals of the Member State in question, as was the case in *Ruiz Zambrano* for instance.[143]

In other words, the scope of application of EU citizenship rights is virtually completely confined to the rest of the Union, *not* to the territory of the Latvian Republic as such. EU citizens who cannot demonstrate a logical connection with a cross-border situation do not benefit from EU law, as their situation is only covered by the law of the Member State. In practice this might lead to seemingly paradoxical results, when the residents of a Member State who never moved or otherwise benefited from EU law, enjoys fewer rights than EU citizens moving in from other Member States. While this situation, branded as "reverse discrimination" in EU law, has been consistently criticized by scholars,[144] this is the law.[145]

Applied to the situation of the "non-citizens of Latvia" it means that the legal position of this category, when turned into EU citizens, will not actually change as long as they stay in Latvia: the rights of European citizenship will only manifest themselves upon moving to other Member States or conducting cross-border business. The Latvian

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[140] Case C-200/02, *Zhu & Chen v Secretary of State for the Home Department*, [2004] E.C.R. I-9925.
[141] Case C-403/03, *Schempp v Finanzamt München V*, [2005] E.C.R. I-6421.
[142] Case C-34/09, *Ruiz Zambrano v Office national de l'emploi*, [2011] E.C.R. I-1177; Case C-434/09, *McCarthy v Secretary of State for the Home Department*, [2011] E.C.R. I-3375; Koen Lenaerts, *"*Civis Europaeus Sum*": From the Cross-border Link to the Status of Citizen of the Union* (2011) 3 ELECTRONIC J. FREE MOVEMENT WORKERS EU 6, esp. 18; Dimitry Kochenov, *A Real European Citizenship: A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe* (2011) 18 COLUM. J. EUR. L. 56; Sara Iglesias Sánchez, *¿Hacia una nueva relación entre la nacionalidad estatal y la cuidadanía europea?*, 37 REVISTA DE DERECHO COMUNITARIO EUROPEO 933 (2010).
[143] Dimitry Kochenov & Richard Plender, *EU Citizenship: From and Incipient Form to an Incipient Substance?*, 37 EUR. L. REV. 369 (2012).
[144] *See, e.g.,* Niamh Nic Shuibhne, *Free Movement of Persons and the Wholly Internal Rule: Time to Move On?*, 39 COMMON MKT. L. REV. 731 (2002); Dimitry Kochenov, *Citizenship Without Respect: The EU's Troubled Equality Ideal* 34–58 (Jean Monnet Working Paper No. 08/10, 2010), *available at* http://centers.law.nyu.edu/jeanmonnet/papers/10/100801.pdf.
[145] Dominik Hanf, *"Reverse Discrimination" in EU Law: Constitutional Aberration, Constitutional Necessity, or Judicial Choice?*, 18 MAASTRICHT J. EUR. & COMP. L. 29 (2011).

legislator will thus be in the position to maintain the full extent of the legal differences between the two statuses of personal attachment to the Republic recognized in its national law: between the citizens and "non-citizens" of Latvia. This consideration is of utmost importance, since given that the newly-extended status of EU citizenship for the "non-citizens" will not have immediate implications in Latvia internally, the political costs of bringing the declaration in question are non-existent. Given that reverse discrimination, however criticized, is not only allowed but also entrenched in EU law at its current stage of its development,[146] Latvia will be legitimately empowered to use it in order to enforce the differentiated approach to the two statuses in question in national law. It is probably one of the rare examples when reverse discrimination could actually play an overtly positive role, guaranteeing that the extension of EU citizenship to "non-citizens" will not mean sacrificing the essential difference of principle between the two statuses, going back to the core of the doctrine of Latvian state continuity with the pre-war Republic. Moreover, it will also lead to the reduction of the number of "non-citizens", as EU citizens enjoy preferential treatment when naturalizing in other Member States of the Union.[147] While it would take a Ukrainian ten years of residence and an enormous effort to be granted a residence and work permit on the way to becoming an Italian, an EU citizen can become an Italian after five years and with no administrative formalities related to entry and settlement in the territory.[148] The benefits of the EU citizenship status in this context are clear.

The only area where problems could arise even in the context of reverse discrimination is the area of voting rights. EU law empowers EU citizens to vote and stand as candidates in municipal and European Parliament elections.[149] The Treaty provisions are worded in such a way, however, that they only extend voting rights to those EU citizens who have *moved* to a different Member State, leaving the outline of the scope of those who enjoy voting rights in the Member State of "nationality for the

[146] *Id.*; Niamh Nic Shuibhne, *The Resilience of EU Market Citizenship*, 47 COMMON MKT. L. REV. 1608 (2010).
[147] Dimitry Kochenov, *Member State Nationalities and the Internal Market: Illusions and Reality*, *in* FROM SINGLE MARKET TO ECONOMIC UNION (Niamh Nic Shuibhne & Laurence W. Gormley eds., 2012).
[148] *See id.* for more examples of similar differences.
[149] Art. 22(1) and (2) TFEU.

purposes of EU law" to the national law to decide.[150] The ECJ has already clarified that the Member States do not enjoy absolute discretion in this respect and have to respect the general principle of equality:[151] there can be no disenfranchisement of a group of EU citizens based uniquely on the territorial factors. In *Eman and Sevinger*,[152] the Court struck down the Dutch law excluding EU citizens of Dutch nationality residing on the island of Aruba – an Overseas Country or Territory Associated with the Union, which is under the sovereignty of the Kingdom of the Netherlands[153] – finding that extending the right to vote to all the Dutch citizens outside of the Union with the exception of those residing in the Caribbean possessions amounted to a breach of the general unwritten principle of equality in EU law.[154]

At the same time, however, the ECtHR did not find any breach of the Convention in the practice depriving Arubans of voting rights at the national level.[155] Moreover, plenty of countries disenfranchise all their citizens residing abroad.[156] Crucially, however, EU law rules on voting only contain a general non-discrimination principle applicable outside of the territory of the Member State of nationality, not a general right as such. Coupled with an undisputed right enjoyed by the Member States to enfranchise (or not) any category of citizens or non-citizens as it sees fit[157] as long as the basic requirements of the relevant protocol to the ECtHR are met,[158] it is clear that differentiation depending on the particular status of attachment to a Member State – albeit theoretically dubious akin to the status of "non-citizenship" itself – is nevertheless perfectly possible. All in all, although EU law does not of itself provide for voting rights

[150] Case C-145/04, *Spain v U.K.*, [2006] E.C.R. I-7917.
[151] *See, e.g.*, Case 117/76, *Ruckdeschel et al v Hauptzollamt Hamburg-St Annen*, [1977] E.C.R. 1753, ¶ 7.
[152] Case C-300/04, *Eman & Sevinger v College van Burgemeester en Wethouders van Den Haag*, [2006] E.C.R. I-7917.
[153] Dimitry Kochenov, *The EU and the Overseas*, *in* EU LAW OF THE OVERSEAS 47–53 (Dimitry Kochenov ed., 2011) (on this status in EU law). Also see Prime Minister Eman's contribution in the same edited volume for the story behind bringing the *Eman & Sevinger* case.
[154] Case C-300/04, *Eman & Sevinger v College van Burgemeester en Wethouders van Den Haag*, [2006] E.C.R. I-8055, ¶ 23.
[155] *Sevinger & Eman v The Netherlands*, App. No. 17173/07, Eur. Ct. H.R. *See* Leonard F.M. Besselink, *Annotation of Case C-145/04 Spain v U.K., Case C-300/04 Eman en Sevinger, and ECt.HR Case Sevinger and Eman v The Netherlands*, 45 COMMON MKT. L REV. 787 (2008).
[156] *See generally* Dimitry Kochenov, *Free Movement and Participation in the Parliamentary Elections in the Member State of Nationality: An Ignored Link?*, 16 MAASTRICHT J. EUR. & COMP. L. (2009) (for a critical overview).
[157] Case C-145/04, *Spain v U.K.*, [2006] E.C.R. I-7917.
[158] Art. 3 First Protocol ECHR. *See also Matthews v U.K.*, App. No. 24833/94, 28 Eur. Ct. H.R. 361 (1999).

of EU citizens in their Member State of nationality, it is overwhelmingly clear that it is presumed that the Member States would extend it, at least at the levels where the EU principle of non-discrimination applies, *i.e.* in municipal and European Parliament elections. Should this not be the case, however, it will most likely be not EU law, but ECtHR law, that will apply – allowing for a very wide margin of appreciation and taking the historical context of the country in question fully into account. This means that, while extending voting rights to the newly-minted EU citizens who are "non-citizens of Latvia" is not *per se* one of the requirements of EU law, it would be much better to make this step, to ensure that Latvia is in compliance with the ECHR and its Protocols.[159]

To sum up, given the architecture of the vertical division of powers in the context of the multi-level legal system of the EU, EU citizenship is largely confined to the situations which are cross-border in nature, not affecting those who do not move around the Union or conduct cross-border business that much.[160] In this context granting EU citizenship to Latvian "non-citizens" will have only marginal consequences for national law, as it will empower these people *outside* of the Republic in other EU Member States. This will definitely reduce the political cost of taking the decision to extend EU citizenship to this group. Moreover, as far as voting rights are concerned, while extending voting rights at the municipal and EU level is most desirable, it is not an absolute requirement of EU law at this stage.

Conclusion

This paper made three essential points which, if taken seriously, are capable of improving the situation of "non-citizens" of Latvia at no political or economic cost for the Republic.

Firstly, based on a brief overview of the Latvian legislation and court practice it was demonstrated that the status of a "non-citizen" of Latvia is not to be compared with statelessness *i.e.* not having any citizenship at all. Indeed, this *is* an inheritable quasi-

[159] Such a step will also be in line with virtually *unison* recommendations of all the international bodies monitoring the situation of the "non-citizens", also following the example of Estonia, largely facing a similar problem, but solving it slightly differently. *See* Estonian Local Government Council Election Act, section 5(2)1, RIIGI TEATAJA, I 2002, 36, 220.

[160] Dimitry Kochenov, *The Citizenship Paradigm*, 15 CAMBRIDGE Y.B. EUR. LEGAL STUD. (2012–2013) (forthcoming) (for criticism).

citizenship status seemingly recognized as such by a number of states and international organizations. Latvian courts are explicit on the matter.

Secondly, based on a brief overview of Europe-wide practice of EU citizenship conferral, it was demonstrated that the *ius tractum* status of EU citizenship does not always follow neatly from full Member State nationality/citizenship in the national law of a Member State, but rather builds on an EU law notion of "nationality for the purposes of EU law", which can include all categories of persons. Historical examples from Germany and the UK demonstrate that both narrow and expansive readings of who the "nationals for the purposes of EU law" are are possible. In *Kaur*, the Court of Justice of the EU has fully embraced Member States' practice of making Declarations to clarify who is to be considered a citizen of the EU. Moreover, other Member States of the Union do not have a right, following the *Micheletti* case-law, not to recognize the responsible exercise of sovereignty by their peers in this field.

The third point combines the other two: a strong citizenship-like personal status of legal attachment to the Latvian Republic enjoyed by ethnic minorities offers a possibility of extending EU citizenship by declaration to the "non-citizens of Latvia", thereby granting them important rights throughout all the Member States of the European Union, including a virtually unlimited right to work, reside and not to be discriminated against in the whole territory of the EU. Given the importance of drawing a clear line between the scopes of application of national law of the Member States "wholly internal situations" and EU law "cross-border situations", the extension of EU citizenship to Latvian "non-citizens" will not affect the internal situation in the country, empowering these individuals elsewhere in the Union, thus reducing the political-economic cost of this decision, adding to its feasibility.

A draft of the necessary declaration that would instantly activate the EU citizenship of the "non-citizens" of Latvia is appended (in the Latvian language with an English translation).

Annex I: Draft declaration of the Republic of Latvia

Latvijas Republikas deklarācija par termina "pilsoņi" definīciju

Attiecībā uz Latvijas Republiku termini „pilsoņi" vai „Dalībvalstu pilsoņi", kas tiek lietoti Līgumā par Eiropas Savienību, Līgumā par Eiropas Savienības darbību vai Eiropas Atomenerģijas kopienas dibināšanas līgumā, vai arī jebkurā aktā, kas vai nu atvasināts no minētajiem Līgumiem, vai paliek spēkā saskaņā ar minētajiem Līgumiem, attiecināmi uz:

(a) Latvijas pilsoņiem;

(b) Latvijas nepilsoņiem, kuriem šis statuss piešķirts saskaņā ar likumu „Par to bijušās PSRS pilsoņu statusu, kuriem nav Latvijas vai citas valsts pilsonības".

Declaration by the Republic of Latvia on the definition of the term "nationals"

As to the Republic of Latvia, the terms "nationals" or nationals of Member States", wherever used in the Treaty on the European Union, the Treaty on the Functioning of the European Union, or the Treaty establishing the European Atomic Energy Community, or in any of the acts deriving from those Treaties or continued in force by those Treaties, are to be understood to refer to:

(a) Latvian citizens;

(b) Non-citizens of Latvia enjoying this status by virtue of the Law on the Status of Former Soviet Citizens who are not Citizens of Latvia or Any Other State.