



INSIGHT

## THE *TJEBBES* FAIL

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**ABSTRACT:** This *Insight* briefly analyses ten most significant untenable assumptions underlying the Court of Justice's ruling in *Tjebbes* (judgment of 12 March 2019, case C-221/17 [GC]), where the Court departed from earlier case-law by essentially tolerating the annulment of EU citizenship *ex lege* as a result of a non-renewal of a Member State passport, thus introducing direct discrimination between different groups of EU citizens and legitimizing the treatment of law-abiding EU citizens worse than known terrorists and ISIS wives. EU citizenship has thus lost its proverbial 'fundamental status', downgraded to outright irrelevance for no tenable reason.

**KEYWORDS:** *Tjebbes* – dual nationality – expatriation – proportionality – EU federalism – EU citizenship.

### I. INTRODUCTION

In this *Insight* I explain how far the case of *Tjebbes*,<sup>1</sup> where the Court of Justice has agreed in principle with *ex lege* stripping some EU citizens residing abroad of their EU citizenship status and EU democratic rights based *solely* on non-renewal of the passport, showcases the dangerous limits to the understanding of the concept of citizenship<sup>2</sup> by the Grand Chamber of the Court of Justice. This *Insight* is a first reaction as opposed to a detailed case-note. The reader is advised to familiarize himself with the case before continuing with this text: I do not summarize what the Court has done. The case is so deeply problematic and most principally antagonistic to the logic of EU integration and meaningful EU citizenship that no summary will do justice to the intellectually vacant nature of the Court's reasoning and approach. The Grand Chamber has to speak for itself. It is clear at this point that scholars and judges will no doubt need some time to come to terms with the huge negative implications of the case at hand. My goal in this *Insight* is to provide ini-

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<sup>1</sup> Court of Justice, judgment of 12 March 2019, case C-221/17, *Tjebbes* [GC].

<sup>2</sup> D. KOCHENOV, *Citizenship*, Cambridge MA: MIT Press, 2019 (forthcoming).

tial input for such reflection and outline merely the key flaws plaguing the reasoning of the Court as well as the underlying assumptions informing such reasoning.<sup>3</sup>

The tension between EU citizenship and EU (internal market) law has been occupying the leading commentators for more than two decades,<sup>4</sup> and has been summarized best by Prof. J.H.H. Weiler's take on the Court's early citizenship case-law: "*L'aspetto problematico di questa giurisprudenza è che precisamente omette di compiere la transizione concettuale da una libera circolazione basata sul mercato ad una libertà basata sulla cittadinanza*".<sup>5</sup> The uneasy story has reached its troublesome climax when the Grand Chamber rendered *Tjebbes* on March 12, 2019, making the possession of the status of EU citizenship potentially dependent, for a randomly selected group of citizens, on a non-hypothetical use of the rights it grants, thus rendering key case-law on the fundamental nature of the status and the crucial importance of defending its *essence* irrelevant. *Both* internal market law and EU citizenship law emerged as losers as a result.

Absent any necessity to do so, the Court nevertheless managed to open the EU law door to endorsing the downgrade of EU integration to irrelevance for a large number of individuals selected based on a combination of untenable logic denying citizenship's abstract legal nature and the operation of *foreign* – Iranian, Canadian, and Swiss law in the context of depriving EU citizens themselves of any agency. The concept of dignity here is forgotten, since the holders of several citizenships are stigmatized in principle, made second class EU citizens for the sole reason of possessing a second nationality. Proportionality, which the Court calls for, is entirely deprived of the legally sound moral starting point.

It is old news that the logic of *apartheid européen*, to quote Balibar,<sup>6</sup> is at the core of the EU integration project,<sup>7</sup> where the whole idea of the EU as a common working-living space<sup>8</sup> is only open to those in possession of the formal status of citizenship. Unlike in

<sup>3</sup> For the opposing view, see S. COUTTS, *Bold and Thoughtful*, in *European Law Blog*, 25 March 2019, europeanlawblog.eu. See also M. VAN DEN BRINK, *Bold, but Without Justification? Tjebbes*, in *European Papers – European Forum, Insight* of 25 April 2019, www.europeanpapers.eu (criticising the decision for entirely different reasons).

<sup>4</sup> For the core recent contributions, see C. O'BRIEN, *Unity in Adversity*, Oxford: Hart, 2018; D. THYM (ed.), *Questioning EU Citizenship*, Oxford: Hart, 2017; D. KOCHENOV (ed.) *EU Citizenship and Federalism*, Cambridge: Cambridge University Press, 2017. Cf. E. SPAVENTA, *Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects*, in *Common Market Law Review*, 2008, p. 13 *et seq.*

<sup>5</sup> J.H.H. WEILER, *Europa: "Nous coalison des Etats, nous n'unissons pas des hommes"*, in M. CARTABIA, A. SIMONCINI (eds), *La sostenibilità della democrazia nel XXI secolo*, Bologna: Il Mulino, 2009, p. 82.

<sup>6</sup> É. BALIBAR, *We, the People of Europe? Reflections on Transnational Citizenship*, Princeton: Princeton University Press, 2003, p. 43 *et seq.*

<sup>7</sup> D. KOCHENOV, M. VAN DEN BRINK, *Pretending There is No Union: Non-Derivative Quasi-Citizenship Rights of Third-Country Nationals in the EU*, in D. THYM, M. ZOETEWIJ TURHAN (eds), *Degrees of Free Movement and Citizenship*, Leiden/Boston MA: Brill Nijhoff, 2015, p. 66 *et seq.*

<sup>8</sup> O. GOLYNKER, *European Union as a Single Working-Living Space: EU Law and New Forms of Intra-Community Migration*, in A. HALPIN, V. ROEBEN (eds), *Theorising the Global Legal Order*, Oxford: Hart, 2009, p. 145 *et seq.*

any other constitutional system around the world, in the EU the rights to reside, work, and not to be discriminated against in the whole territory of the Union are *de facto* and also *de jure* purely citizenship- as opposed to residence-based. Applying this same logic to dual national EU citizens is quite new, however.

To downgrade EU citizenship, while its significance is so absolutely all-encompassing, to an unfriendly subscription service under the pretext of respecting the separation of powers between the Member States and the EU is an unwelcome move pointing in the direction of the probable workability of Niamh Nic Shuibhne's respect of the "federal bargain" thesis:<sup>9</sup> the Court stays away from what is perceived as the national sphere of competences, again, potentially ignoring the language and the spirit of the Treaty<sup>10</sup> (and adding more questions concerning the essential meaning of its earlier case-law).<sup>11</sup> The fact that this has been done by the Court in an almost elegant *nonchalant* fashion makes it tragically comical, *pace* Coutts.<sup>12</sup> Akin to Bulgakov's Poligraph Poligraphovich, the main protagonist in *The Heart of a Dog*, caring to acquire a passport and a municipal housing registration while failing to grasp the limits of own humanity – the proletarian was a laboratory dog turned semi-human – the Court steers clear of the core ideas underlying the issue at hand, as I explain below outlining a selection of ten tragic misunderstandings earning this case a solid place in the hall of fame of the most intricately dubious *tours de force* of the highest Court in Europe.

A substantive issue of fundamental importance for the very essence of EU integration is misrepresented as a procedural discussion, where anything – especially the denial of legally-endorsed Europeaness, i.e. EU citizenship – is *in principle* allowed for no EU-law-compatible reasons. Proportionality is deployed to undermine the essence of the law: what the late Professor Tsakyrakis<sup>13</sup> was weary of and what George Letsas<sup>14</sup> has problematized with splendid precision: proportionality is meaningless without a defensible starting point, the minimal moral ground. Deaf to Vicky Jackson's warning calls,<sup>15</sup> the Court of Justice is not "proportionate about proportionality". *Tjebbes* is thus in line with the

<sup>9</sup> N. NIC SHUIBHNE, *Recasting EU Citizenship as Federal Citizenship: What Are the Implications for the Citizen When the Polity Bargain Is Privileged?*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 176 *et seq.*; but see: E. SPAVENTA, *Earned Citizenship – Understanding Union Citizenship through Its Scope*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 204 *et seq.*

<sup>10</sup> D. KOCHENOV, R. PLENDER, *EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text*, in *European Law Review*, 2012, p. 369 *et seq.*

<sup>11</sup> D. KOCHENOV, *The Right to Have What Rights? EU Citizenship in Need of Clarification*, in *European Law Journal*, 2013, p. 502 *et seq.*

<sup>12</sup> S. COUTTS, *Bold and Thoughtful*, cit.

<sup>13</sup> S. TSAKYRAKIS, *Proportionality: An Assault on Human Rights?*, in *Jean Monnet Working Papers*, no. 9, 2008.

<sup>14</sup> G. LETSAS, *Proportionality as Fittingness: The Moral Dimension of Proportionality*, in *Current Legal Problems*, 2018, p. 53 *et seq.*

<sup>15</sup> V. JACKSON, *Being Proportional About Proportionality*, in *Constitutional Commentary*, 2004, p. 803 *et seq.*

dubious case-law showcased best by Opinion 2/13,<sup>16</sup> where the core substantive constitutional question is ignored in favour of largely irrelevant procedural considerations, as Piet Eeckhout has brilliantly demonstrated.<sup>17</sup> By sacrificing the very legal nature of its citizenship while safeguarding no substantive interest, EU law emerges, yet again, as lacking the rule of law,<sup>18</sup> pushing the EU in the direction of taking up a role of a powerful actor of *injustice*: a possibility of which Gráinne de Búrca warned with sadness and clarity.<sup>19</sup>

## II. ANNIHILATING THE “FUNDAMENTAL” IN THE “FUNDAMENTAL LEGAL STATUS”

At issue was the fact that under the Dutch law the state does not remind you that you are about to be thrown out of the body of citizenry for no reason other than failure to submit non-self-evident paperwork. Somewhat similar to a well-known Slovenian example (see *Kurić et al.*),<sup>20</sup> the Dutch State simply erases you in some cases. Of course, your European-ness goes too, together with your *Nederlandschap*. All those residing outside of the EU, who got several citizenships and have not renewed the passport for ten years or have not filled in an online form that they are interested in remaining Dutch, as it were, are potentially affected. ‘The right to have rights’, as well as the very membership of the national political community – *pace Delvigne*<sup>21</sup> and all the high-brow talk of the EU’s democratic essence<sup>22</sup> – is thus made dependent on some kind of a renewal, which is new (the law has been effective since 2013), counterintuitive (other Member States do not require anything similar), and, crucially, of which the State does not remind you: erasure happens by stealth. At the deepest level *Tjebbes* is direct denial of both the “sovereign citizen”<sup>23</sup> logic, akin to the one formulated by the US Supreme Court in *Afroyim v. Rusk* (the branches of government are but custodians of popular sovereignty, so undoing citizens is not in their power)<sup>24</sup> and the “citizenship as a human right” logic, as formulated, most recently, by Peter Spiro.<sup>25</sup> In the words of Mr Justice Black, writing for the US Supreme Court, “In our

<sup>16</sup> Court of Justice, Opinion 2/13 of 18 December 2014.

<sup>17</sup> P. EECKHOUT, *Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky*, in *Fordham International Law Journal*, 2015, p. 955 *et seq.*

<sup>18</sup> D. KOCHENOV, *EU Law Without the Rule of Law: Is the Veneration of Autonomy Worth It?*, in *Yearbook of European Law*, 2015, p. 74 *et seq.*

<sup>19</sup> G. DE BÚRCA, *Conclusion*, in D. KOCHENOV, G. DE BÚRCA, A. WILLIAMS (eds), *Europe’s Justice Deficit?*, Oxford: Hart, 2015, p. 459 *et seq.*

<sup>20</sup> European Court of Human Rights, judgment of 26 June 2012, no. 26828/06, *Kurić et al. v. Slovenia* [GC].

<sup>21</sup> Court of Justice, judgment of 6 October 2015, case C-650/13, *Delvigne* [GC].

<sup>22</sup> K. LENAERTS, J.A. GUTIÉRREZ-FONS, *Epilogue on EU Citizenship: Hopes and Fears*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 751 *et seq.*

<sup>23</sup> P. WEIL, *The Sovereign Citizen. Denaturalization and the Origins of the American Republic*, Philadelphia, PA: Pennsylvania University Press, 2012.

<sup>24</sup> US Supreme Court, *Afroyim v. Rusk* 387 U.S. 253 (1967).

<sup>25</sup> P.J. SPIRO, *Dual Citizenship as Human Right*, in *International Journal of Constitutional Law*, 2010, p. 111 *et seq.*

country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship".<sup>26</sup> By contrast, EU citizens – thanks to *Tjebbes* – emerge as hostages at the whim of those in power.<sup>27</sup>

What makes the whole story trickier is that an ordinary Dutch passport is valid precisely for 10 years (unlike the 5 year term, in force when the law in question entered into effect). Not renewing your passport *ahead of expiration* can thus result in the annulment of citizenship *ex lege* if you reside abroad and have some other citizenship. Ironically, renewing a passport or an ID card is not required to vote in the Netherlands, as expired documents are accepted for this purpose, which makes the loss of citizenship provision particularly incomprehensible. Indeed, not renewing a passport ahead of its expiration date is a particularly low-threshold test for losing nationality, making Dutch citizenship easier to lose even than the British – one of the global leaders on this count.<sup>28</sup> In the context of the "hostile environment" for those disliked by the Government of Miss May, in Brexit UK it is enough that the Secretary of State is of the opinion that your being a citizen is not in the interests of the UK: we all heard abundantly about it in the recent cases of ISIS wives<sup>29</sup> and other terrorists and active terror-sympathizers, now repentant, in some cases (e.g. Shamima Begum).<sup>30</sup> The UK is not alone on this count of course, Cypriot citizenship, in another example, is also easy to lose: on Cyprus it is apparently enough in some cases to sell a house to be expatriated<sup>31</sup> – another absurd rule with clear EU dimension likely to withstand EU scrutiny after *Tjebbes*. Compared with taking part in and actively supporting rape, pillage and killings by radical islamists, or selling a house you promised to keep, the Dutch standard seems to be a joke, which is not funny: fail to renew the passport before the expiration date and your citizenship evaporates. The Court of Justice has agreed in principle to allow the treatment of law-abiding EU citizens, which is worse than the treatment reserved for known terrorists.<sup>32</sup>

<sup>26</sup> US Supreme Court, *Afroyim v. Rusk*, cit.

<sup>27</sup> To be fair, it is necessary to point out that the Court of Justice has already indicated, in its case law on ethnic minorities in the context of the internal market, that EU law will not apply to them as long as the Member State deploys identity reasoning, as became clear from the judgment of 12 May 2011, case C-391/09, *Malgožata Runevič-Vardyn*. The case is analysed in this vein in D. KOCHENOV, *When Equality Directives Are Not Enough: Taking an Issue with the Missing Minority Rights Policy in the EU*, in U. BELAVUSAU, K. HENRARD (eds), *EU Anti-Discrimination Law Beyond Gender*, Oxford: Hart, 2018, p. 119 *et seq.* Cf. A. ŁAZOWSKI, E. DAGILYTĖ, P. STASINOPOULOS, *The Importance of Being Earnest*, in *Croatian Yearbook of European Law and Policy*, 2015, p. 1 *et seq.*

<sup>28</sup> P.J. SPIRO, *Expatriating Terrorists*, in *Fordham Law Review*, 2014, p. 2169 *et seq.*

<sup>29</sup> T. SHIPMAN, R. KERBAJ, D. GADHER, *Ministers strip 150 Jihadists of UK Passports*, in *The Sunday Times*, 30 July 2017, [www.thetimes.co.uk](http://www.thetimes.co.uk).

<sup>30</sup> BBC, *Shamima Begum Case*, [www.bbc.com](http://www.bbc.com).

<sup>31</sup> S. KUDRYASHOVA, *The Sale of Conditional EU Citizenship: The Cyprus Investment Programme Under the Lens of EU Law*, in *European Papers*, 2018, Vol. 3, No 3, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 1265 *et seq.*

<sup>32</sup> This is of course true of the Netherlands itself, where to lose nationality for fighting for ISIS is more difficult than for not renewing a passport. The Dutch Council of State (Raad van State) on April 17 2019

If citizenship's one right is the right to return home (and not to be deported from there)<sup>33</sup> – in the case of EU citizenship, to return to the EU and remain in its territory,<sup>34</sup> as per *Ruiz Zambrano* and its progeny<sup>35</sup> – after *Tjebbes* we now know that this right alongside with all the other rights of importance abroad, such as voting in European elections and,<sup>36</sup> where available, diplomatic protection,<sup>37</sup> now can simply expire. That “Article 20 TFEU, read in the light of Articles 7 and 24 of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding legislation of a Member State such as that at issue in the main proceedings”<sup>38</sup> is the new law of EU citizenship law, which will be difficult for the Court of Justice to beat in the future.

It is unquestionable, as the Court of Justice has underlined on numerous occasions,<sup>39</sup> that EU citizenship's acquisition and possession must have due regard of EU law even though it follows a *ius tractum*<sup>40</sup> – derivative – logic with the Member States themselves obviously responsible for the grant, both of the national and of European citizenship to

has rightly annulled the expatriation of returning Dutch-Moroccan Islamist fighters, who deserved full due process of law (Uitspraak 201806107/1/V6, available at [www.rechtspraak.nl](http://www.rechtspraak.nl)): a review, to which a Dutch-Swiss, a Dutch-Canadian, and a Dutch-Iranian in *Tjebbes* were not entitled, since the facts were clear: while someone can make an argument that he did not fight for the Islamic State or other radical islamists, just training with Jabhat al-Nusra on an active vacation, for instance, determining whether one's passport has expired or not leaves less room for an argument. While an obvious way to go would be to ban expatriations, the Dutch Kingdom prefers an Islamist terrorist returning from a Syrian vacation to a Dutch-Swiss housewife as a citizen and as a voter and we now know that there is essentially no problem with such preference under EU law.

<sup>33</sup> D. KOCHENOV, B. PIRKER, *Deporting the Citizens Within the European Union: A Counter-Intuitive Trend in Case C-348/09*, P.I. v. Overbürgemeisterin der Stadt Remscheid, in *Columbia Journal of European Law*, 2013, p. 369 et seq.

<sup>34</sup> D. KOCHENOV, *A Commentary on Articles 52 TEU, 355, 349, and 198-204 TFEU*, in M. KLAMERT, M. KELLERBAUER, J. TOMKIN (eds), *Commentary on the EU Treaties and the Charter of Fundamental Rights*, Oxford: Oxford University Press, 2019 (forthcoming).

<sup>35</sup> Court of Justice, judgment of 8 March 2011, case C-34/09, *Ruiz Zambrano* [GC]; D. KOCHENOV, *A Real European Citizenship; A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe*, in *Columbia Journal of European Law*, 2011, p. 56 et seq.; S. PLATON, *Le champ d'application des droits du citoyen européen après les arrêts Zambrano, McCarthy et Dereçi*, in *Revue trimestrielle de droit européen*, 2012, p. 21 et seq.; M. VAN DEN BRINK, *EU Citizenship and EU Fundamental Rights*, in *Legal Issues of Economic Integration*, 2012, p. 273 et seq.; M. HAILBRONNER, S. IGLESIAS SÁNCHEZ, *The European Court of Justice and Citizenship of the European Union*, in *Viena Journal of International Constitutional Law*, 2011, p. 498 et seq.

<sup>36</sup> F. FABBRINI, *The Political Side of EU Citizenship in the Context of EU Federalism*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 271 et seq.

<sup>37</sup> P. VIGNI, *The Right of EU Citizens to Diplomatic and Consular Protection: A Step Towards Recognition of EU Citizenship in Third Countries?*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 584 et seq.

<sup>38</sup> *Tjebbes* [GC], cit., para 48.

<sup>39</sup> *Ibid.*, para. 30.

<sup>40</sup> D. KOCHENOV, *Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship Between Status and Rights*, in *Columbia Journal of European Law*, 2009, p. 169 et seq.

those who do not have another EU nationality.<sup>41</sup> EU citizenship's independent existence, scholarly calls for it notwithstanding,<sup>42</sup> is currently impossible, which *Tjebbes* equally confirms.<sup>43</sup> As per *Micheletti*,<sup>44</sup> *Rottmann*<sup>45</sup> and the very logic of EU federalism, as Daniel Sarmiento,<sup>46</sup> among others,<sup>47</sup> has explained in abundant detail and as has been discussed by the Court of Justice in depth in *Rottmann*, Member States' competences in this field, although of fundamental importance, are not absolute.<sup>48</sup> The crucial lesson of *Rottmann* is that EU citizenship is maturing into a possible trigger of the Court of Justice's jurisdiction.<sup>49</sup> Independent of the classical cross-border triggers,<sup>50</sup> as reconfirmed in *Tjebbes*, those situations where EU citizenship status is potentially jeopardized by the issuing Member State fall, "by reason of [their] nature and [their] consequences, within the ambit of EU law".<sup>51</sup> *Tjebbes* does not formally contradict the established case law. It renders it substantively irrelevant. The far-reaching poisonous potential of *Tjebbes* is clear: EU citizenship made dependent on the renewal of a passport before its expiration is *not* a fundamental status

<sup>41</sup> H.U. JESSURUN D'OLIVEIRA, *Union Citizenship and Beyond*, in *EUI Working Papers*, no. 5, 2018; G.-R. DE GROOT, *Towards a European Nationality Law*, in *Electronic Journal of Comparative Law*, 2004, www.ejcl.org; C. CLOSA, *Citizenship of the Union and Nationality of Member States*, in *Common Market Law Review*, 1995, p. 487 *et seq.*; H.U. JESSURUN D'OLIVEIRA, *Union Citizenship: Pie in the Sky?*, in A. ROSAS, E. ANTOLA (eds), *A Citizen's Europe. In Search for a New Order*, London: Sage, 1995, p. 58 *et seq.*

<sup>42</sup> D. KOSTAKOPOULOU, *Scala Civium: Citizenship Templates Post-Brexit and the European Union's Duty to Protect EU Citizens*, in *Journal of Common Market Studies*, 2018, p. 854 *et seq.*; H.U. JESSURUN D'OLIVEIRA, *Ontkoppeling van nationaliteit en Unieburgerschap?*, in *Nederlandsch Juristenblad*, 2010, p. 1028 *et seq.* For the most recent debate on this topic, see, L. ORGAD, J. LÉPOUTRE (eds), *Should EU Citizenship Be Disentangled from Member State Nationality?*, in *EUI Working Papers (RSCAS)*, no. 24, 2019.

<sup>43</sup> M. VAN DEN BRINK, D. KOCHENOV, *Against "Associate EU Citizenship"*, in *Journal of Common Market Studies*, 2019 (forthcoming).

<sup>44</sup> Court of Justice, judgment of 7 July 1992, case C-369/90, *Micheletti*, para. 10.

<sup>45</sup> Court of Justice, judgment of 2 March 2010, case C-135/08, *Janko Rottman v. Freistaat Bayern*.

<sup>46</sup> D. SARMIENTO, *EU Competence and the Attribution of Nationality in Member States*, in *Investment Migration Working Papers*, no. 2, 2019, www.investmentmigration.org.

<sup>47</sup> See also the literature cited in D. KOCHENOV, *On Tiles and Pillars: EU Citizenship as a Federal Denominator*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 3.

<sup>48</sup> *Janko Rottman v. Freistaat Bayern*, cit.; G. DAVIES, *The Entirely Conventional Supremacy of Union Citizenship and Rights*, in J. SHAW (ed.), *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?*, in *EUI Working Papers (RSCAS)*, no. 5, 2011. D. KOCHENOV, *Case C-135/08, Janko Rottmann v. Freistaat Bayern, Judgment of 2 March 2010 (Grand Chamber), Not Yet Reported*, in *Common Market Law Review*, 2010, p. 1831 *et seq.*; G.-R. DE GROOT, *Overwegingen over de Janko Rottmann-beslissing van het Europese Hof van Justitie*, in *Asiel & Migrantenrecht*, 2010, p. 293 *et seq.*; H.U. JESSURUN D'OLIVEIRA, *Ontkoppeling van nationaliteit*, cit.; S. IGLESIAS SÁNCHEZ, *¿Hacia una nueva relación entre la nacionalidad estatal y la ciudadanía europea?*, in *Revista de Derecho Comunitario Europeo*, 2010, p. 933 *et seq.*

<sup>49</sup> D. KOCHENOV, *Case C-135/08, Janko Rottmann v. Freistaat Bayern*, cit.

<sup>50</sup> A. TRYFONIDOU, *Reverse Discrimination in EC Law*, Boston: Kluwer Law International, 2009.

<sup>51</sup> *Tjebbes* [GC], cit., para. 32.

of the nationals of the Member States. *Tjebbes* thus tacitly overturns all the case law, from *Grzelczyk* and *Baubast*, to *Rottmann* and *Ruiz Zambrano*.<sup>52</sup>

It is, in principle, OK, the Court of Justice tells us, to punish the non-renewal of a passport – a document that merely attests to the status of citizenship rather than granting or terminating the status, of course – with the annulment of citizenship as such. In failing to build on the spirit of the law as it stands and *de facto* erasing the long-cherished fundamental nature of the legal status at issue, *Tjebbes* boasts humongous negative potential in our populist times: only the ‘real’ Dutchmen will remain citizens. By definition instead of killing off EU citizenship as such, as the learned AG seemingly proposed in his Opinion marked by absolute deference to the Member States,<sup>53</sup> the Court of Justice opted for vagueness poorly masking the absolute lack of principle. While the basic approaches outlined in *Rottmann*, *Eman and Sevinger*<sup>54</sup> and *Micheletti* (an approach, which Sir Richard Plender and I have critically analysed elsewhere)<sup>55</sup> seemingly hold, the Court, by *not* making a principled stance against an indefensible discriminatory policy of a Member State, turned all the possible arguments on their head. The disaster of losing EU citizenship based on an *ex lege* annulment, which comes without any warning and based on no wrong-doing or any citizenship-related developments in persons’ lives,<sup>56</sup> is presented as reasonable *per se*, since the form to retain citizenship is so easy to fill in to remain a citizen: the fact, which the AG has so clearly and misguidedly underlined. The absurdity of a presumption that someone is less Dutch and less European as a result of staying outside of the Union if – and only if – that person has another citizenship and does not fill in some obscure form (a real trap, with no reminder from the state) does not strike the Court as somewhat frivolous.

The Dutch submission concerning the lack of “genuine link” with the State of those who do not reside in the EU is recited uncritically. This is a radical departure from *Eman and Sevinger*, where the same Member State deployed the same logic with the only difference that instead of discriminating against those with no “genuine link” concerned the Dutch citizens residing in the Dutch Caribbean, as opposed to anywhere else in the

<sup>52</sup> Court of Justice, judgment of 20 September 2001, case C-184/99, *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, para. 31. See also, e.g. Court of Justice, judgment of 17 September 2002, case C-413/99, *Baubast and R. v. Secretary of State for the Home Department*, para. 82; *Ruiz Zambrano* [GC], cit., par. 41.

<sup>53</sup> Opinion of AG Mengozzi delivered on 12 July 2018, case C-221/17, *Tjebbes*.

<sup>54</sup> Court of Justice, judgment of 12 September 2006, case C-300/04, *Eman and Sevinger* [GC]; L.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*, in *Common Market Law Review*, 2008, p. 787 *et seq.*

<sup>55</sup> D. KOCHENOV, R. PLENDER, *EU Citizenship*, cit.

<sup>56</sup> This should be distinguished from the situations when a different citizenship has been acquired, for instance, like the expiration of the Austrian nationality in the case of *Rottmann*, cit., following Dr. Rottmann's naturalization in Germany.



world.<sup>57</sup> This approach to equality was not accepted by the Court of Justice, which deployed the general principle of equality between the Dutch on Aruba and Melbourne and New York, to strike down the absurd “genuine link” logic. In *Tjebbes*, by contrast, the Court agrees that EU citizens with a Swiss citizenship residing abroad are radically different, from EU citizens without Swiss citizenship residing abroad, making the continuous enjoyment of the supranational status dependent on the *lack of a foreign citizenship*. EU citizenship, thus, is not at all idiot-proof for an idiotic reason: a Swiss-Dutch in Switzerland is apparently less European than a Dutch in Switzerland and the Court does not see any problem with this.

### III. 10 SELECT ABSURDITIES UNDERLYING THE FAIL

Defiance to national rules, however absurd, is the key guiding star of the Grand Chamber in *Tjebbes*. Not a behaviour one would expect of a constitutional court acting as a truly insightful and responsible custodian of its legal system, if it leads to the denial of the *only thing* the EU legal order can offer a citizen: the status of citizenship on which all its rights and protections are based.

The judgment raises a number of (interrelated) burning questions/problematic assumptions about the nature of citizenship, which are of immediate importance including (but not limited to, given its all-round disastrous impact) the following ten:

1) Renewed ideological mischaracterization of citizenship as a “Special relationship of solidarity and good faith”<sup>58</sup>: if EU citizens are those who are nationals of the Member States, it is clear that the status cannot depend, legally speaking, on any bonds of solidarity, since not feeling such a bond does not undo a nationality of a Member State, making the statement – an ideologically charged submission of the German government repeated from *Rottmann* – factually incorrect. What is at stake in *Tjebbes* is whether failing to renew a passport should undo one’s EU citizenship: the Court does not do the job of explaining how someone’s Swiss or Iranian citizenship undermines solidarity and good faith anywhere in the Union or outside of its territory. The answer why the Court does not go there is clear: because it is obvious that the possession of Swiss or Iranian nationality does not undermine any special legal relationship between the EU and its citizens. And if this is true, then it is precisely the task of the Court of Justice to defend EU citizens stripped of the status on a phony pretext, when the situation by its very nature and consequences falls within the scope of EU law. The law is such, once again, that citizenship is an abstract legal bond: those who believe in solidarity are citizens and those who do not, are citizens as well, meaning that solidarity is a purely ideological logically irrelevant reference.

<sup>57</sup> *Eman and Sevinger* [GC], cit., para. 61. The principle dates back many decades: Court of Justice, judgment of 19 October 1977, case 117/76, *Ruckdeschel*, para. 7.

<sup>58</sup> *Tjebbes* [GC], cit., para. 33.

2) Regrettable goal of the protection of “reciprocity of rights and duties”<sup>59</sup>: while it could be tenable in the context of some Member State nationalities, for instance the Greek one, given that Greece boasts one of the largest *per capita* conscript militaries in the world, this 19<sup>th</sup>-century-inspired reciprocity cannot apply to EU citizenship, which knows no duties as per the text of Part II TFEU.<sup>60</sup> In this context national claims to the existence of such reciprocities should be scrutinized critically: what if a Member State is simply willing to disenfranchise a particular group under this pretext (which has always been a classical deployment of citizenship duties since *Dred Scott*<sup>61</sup>)? Even if the harmful legend is somehow convincing to some,<sup>62</sup> it remains unclear how turning EU citizenship into a subscription operation based on the obligation of regular renewals for no reason and expirations without a warning would actually further such reciprocity? If the only duty that arises in *Tjebbes* is the duty to renew the passport, can it be wholeheartedly argued that this duty really be commensurable with the rights of EU (and national) citizenship? And what if there were no such duties (consider the case of mono-national Dutch EU citizens abroad) – would the Court of Justice then exclude such duty-less citizens from rights?

3) Regrettable connection between EU citizenship and residence. Why does residence in a particular place suddenly come to be of crucial significance for the enjoyment of the status of EU citizenship? None of the relevant provisions in the Treaties makes such a connection, rendering it dubious from the outset; presupposing that EU law frowns at its citizens’ travel and living a life around the world would be equally unacceptable outright: the Treaties nowhere state that the EU should be a cage, similar to North Korea or some of the Central Asian dictatorships. The Court has already pointed at the legal difficulty relating to such framing of EU citizenship in *Eman and Sevinger*. In that case the Court unconditionally confirmed that EU citizenship does *not* expire upon leaving the territory of the Union and continues as a fundamental legal status of the nationals of the Member States.<sup>63</sup> In contrast, *Tjebbes* presents leaving the Union as potentially problematic in the light of the possession of the status of EU citizenship, which is a position as clearly untenable in its absurdity, as it is *ultra vires*, should the Treaties be taken seriously. The conceptual separation between the status of citizenship and the concept of residence unquestionably requires avoiding the confusion between the two. This is in particular due to the fact that many EU citizenship rights are not territorial in essence and can thus be enjoyed abroad too, including the right to benefit from the

<sup>59</sup> *Ibid.*, para. 33.

<sup>60</sup> D. KOCHENOV, *EU Citizenship Without Duties*, in *European Law Journal*, 2014, p. 482 et seq.

<sup>61</sup> US Supreme Court, *Dred Scott* 60 U.S. 393 (1857), 420-421.

<sup>62</sup> Eg M. CONDONAZZI, A. LANG, B. NASCIBENE, *Citizenship of the Union and Free Movement of Persons*, Leiden, Boston: Martinus Nijhoff, 2008, p. 19; J. SHAW, *Citizenship of the Union: Towards Post- National Membership?*, in *Collected Courses of the Academy of European Law*, 1998, pp. 343-344.

<sup>63</sup> L. BESSELINK, *Annotation of Case C-145/04*, cit., p. 48.

general principle of non-discrimination, as in *Eman and Sevinger*, which the Grand Chamber seems to have totally forgotten.

4) Regrettable exclusion of those residing abroad from body politic. Besides general non-discrimination where EU law applies, those residing abroad enjoy full membership of body politic – since, even in the Netherlands – voting from abroad is a citizenship right as well, thus extending to European Parliament elections. *Tjebbes's* silence on this matter is very problematic, since the body politic is obviously not a fully territorial idea in EU law, while the deprivation of EU citizenship is now potentially territorialized. Following *Delvigne* the Court could be expected to be at least theoretically interested in a secret arbitrary disenfranchisement of a vaguely-defined group of EU citizens through *ex lege* expatriation.

5) Regrettable misrepresentation of the link with the State. Why is it that the legal link with the EU – EU citizenship – remains a legal bond only for those who do not have any other citizenship, turning into a check of residence for all the dual nationals? Should the genuine link imply some cultural baggage – like the humiliating knowledge of the answers to the dull Dutch naturalization tests<sup>64</sup> – the possession of a different nationality cannot matter. Even more: EU languages and cultures obviously cannot die out on a 1h 20min KLM City Hopper flight from Schiphol to Switzerland with an open return date. Even a flight to *Curaçao* or *Aruba* would not suffice, as we know from *Eman and Sevinger*. It follows that the genuine link implied in *Tjebbes* is thus obviously not substantively linguistic or cultural. This said – and given that the body politic is not necessarily territorial, just as the rights of EU citizenship are not – the claim of the Dutch government that the genuine link connecting the Kingdom of the Netherlands with its citizens is in some way dependent on residence in a particular place in the world is not a logical conclusion.<sup>65</sup> *Tjebbes* is an approving nod in the direction of an argument that does not stand, failing to capture the essence of citizenship: an obvious misrepresentation of facts.

6) Direct discrimination based on second nationality as a starting point emerges as a related problem. Why is direct discrimination between different groups of nationals of

<sup>64</sup> D. KOCHENOV, *Mevrouw De Jong Gaat Eten: Naturalisatievooroordelen in De Praktijk Getoetst*, in B. VAN MELLE (ed.), *Liber Amicorum Ted Badoux*, Den Haag: Sdu, 2018, p. 139 *et seq.*

<sup>65</sup> Crucially, neither the Court, nor the Advocate General seem to be interested in any connection between the EU citizen and the Union, what AG Poiares Maduro suggested, for instance, in *Nerkowska*. Where the approaches to connecting citizenship and territoriality differ between the Member States to a great degree, non-discrimination among EU citizens would seemingly require not allowing radically different EU citizenship deprivation rules to apply to EU citizens solely based on their nationality. After all, nationality discrimination is prohibited within the scope of EU law and Part II TFEU obviously qualifies. To push this further, one can quote Miguel Poiares Maduro: "Citizenship of the Union must encourage Member States to no longer conceive of the legitimate link of integration only within the narrow bonds of the national community, but also within the wider context of the *society of peoples of the Union*" (Opinion of AG Poiares Maduro delivered on 28 February 2008, case C-499/06, *Nerkowska*, para. 23, emphasis added). As long as the majority of the Member States does not view their peoples as purely territorial entities, EU law has to scrutinise such views half-heartedly proposed by the Netherlands in connection to its dual nationals very critically.

a particular Member State residing outside of the EU – the one outlawed in *Eman and Sevinger* – now allowed in principle? While *Micheletti* prohibited the undermining of EU rights of EU citizens who also have a third country nationality in the territory of the Union, the Court has reversed this in *Tjebbes* for those who are resident outside of EU territory, taking *discrimination*, rather than non-discrimination as the starting point, the soundness of which is dubious.

7) Regrettable misrepresentation of the geography of European integration is another puzzling point to mention. Why is the territory of rights confined to EU Treaty-based rights, as opposed to EU international agreements-based rights? Given that residence and work in Switzerland is one of the rights which EU citizens enjoy under the relevant bilateral agreement, to present Switzerland<sup>66</sup> (or any EEA county with the sole exception of Liechtenstein<sup>67</sup>) as radically different from an EU Member State on this count seems to amount to a misrepresentation of the legal-political reality on the ground, which is regrettable, given the depth of the level of integration achieved between Switzerland and the EU and, especially, the crucial role that free movement of persons has to play in this context.

8) Regrettable presumption of desirability of mono-nationality. EU law is mute on the number of nationalities EU citizens should be allowed to hold to remain connected to the Union. While the Member States could have different ideas on this matter – as they legitimately do – the Court of Justice could be reasonably expected to protect the interests of the Union by ensuring that one does not face a situation of being forced to renounce other nationalities which have been acquired in full compliance with the law in order not to be subjected to unjustifiable, unnecessary, and discriminatory EU citizenship annulments. Para. 46 of *Tjebbes*, where the Court lists examples of the circumstances to be taken into account in the context of the deployment of the proportionality text, thus sends a deeply problematic signal, especially given the growing toleration of

<sup>66</sup> Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons – Final Act – Joint Declarations - Information relating to the entry into force of the seven Agreements with the Swiss Confederation in the sectors free movement of persons, air and land transport, public procurement, scientific and technological cooperation, mutual recognition in relation to conformity assessment, and trade in agricultural products. For analysis, see, S. PEERS, *The EC-Switzerland Agreement on Free Movement of Persons: Overview and Analysis*, in *European Journal of Migration and Law*, 2000, p. 127 *et seq.*; M. VAHL, N. GROLMUND, *Integration without Membership: Switzerland's Bilateral Agreements With the European Union*, Bruxelles: CEPS, 2006; F. MAIANI, R. PETROV, E. MOULIAROVA (eds), *European Integration Without EU Membership: Models, Experiences, Perspectives*, in *EUI Working Papers (LAW)*, no. 10, 2009, p. 103 *et seq.*

<sup>67</sup> Decision of the EEA Joint Committee 158/2007 amending Annex V (free movement of workers) and Annex VIII (Right of establishment) to the EEA Agreement. For an analysis see M. MARESEAU, *On the External Dimension of Directive 2004/38/EC*, in I. GOVAERE, D. HANF (eds), *Scrutinizing Internal and External Dimensions of European Law*, Bruxelles: Peter Lang, 2013; N. RENNUNY, P. VAN ELSUWEGE, *Integration without Membership and the Dynamic Development of EU law: United Kingdom v Council (EEA)*, in *Common Market Law Review*, 2014, p. 935 *et seq.*

the cumulation of nationalities all around the world and the solid nature of both human rights and sovereignty arguments in favour of such toleration as discussed above.<sup>68</sup>

9) Absurd reliance on foreign law at hand in *Tjebbes* is contrary to the message of the autonomy of EU law that the Court seemed to be trying hard to articulate over decades, carefully building supranational law as a separate legal order. In this sense *Tjebbes* is contrary to a whole line of cases, from *Micheletti* and *Kadi*, to the Opinion 2/13. Even accepting the problematic assumption of desirability of mono-national populations, why is the continuous possession of EU citizenship made dependent on the law of other states extending (or not) and/or allowing to renounce (or not) their particular nationalities to the Dutchmen residing abroad? How is the autonomous supranational legal order come to be subjected, in essence, to the law of the third countries? And if possessing a non-renounceable nationality has to be tolerated and is thus obviously not really harmful, how could the subjection of a continued possession of EU citizenship to a renunciation requirement applied to a renounceable nationality be justified?

10) Misconceived references to international law is the tenth point I would like to highlight. The Court refers to the Convention on the Reduction of Statelessness (Arts 6 and 7 paras 3 to 6) and Convention on Nationality (Art. 7, para. 1, let. e) and para. 2), in a most problematic fashion. While allowing for the loss of nationality in the contexts covered by the Dutch law, these have nothing to say about EU citizenship. The Court simply pretends as if EU citizenship is merely a couple of additional rights on top of the nationality of the Member State, denying it an independent status,<sup>69</sup> thus saying goodbye to the prevalent characterization of the status in the literature, rooted in the Opinion of AG Poiares Maduro in *Rottmann*, where EU citizenship has rightly been characterized as 'autonomous'.<sup>70</sup> Instead of critically engaging with the essential principled shortcomings of the rules of international law invoked by the Member State in defence of its policy having potentially harmful effects for the project of European unity, the Court simply restates the dubious provisions, which are by definition – EU citizenship not being a nationality of a state – *not designed* to take EU citizenship into account. *Tjebbes* is thus in stark logical opposition to *Kadi* or *Micheletti*, representing a worrisome account

<sup>68</sup> P.J. SPIRO, *At Home in Two Countries: The Past and Future of Dual Citizenship (Citizenship and Migration in the Americas)*, New York: New York University Press, 2016.

<sup>69</sup> The Grand Chamber, quite astonishingly, seems to be on the same page with AG Mengozzi on this issue, as well as some Italian doctrine. Giuseppe Tesauero's textbook, to give one example, had this to say about EU citizenship ten years ago: "non esiste, né potrebbe allo stato ippotizzarsi, una nozione comunitaria di cittadinanza, sì che le norme che ne prescrivono il possesso come presupposto soggettivo per la loro applicazione in realtà rinviando alla legge nazionale dello Stato la cui cittadinanza viene posta a fondamento del diritto invocato" (G. TESAURO, *Diritto comunitario*, Padova: CEDAM, 2008, p. 480). *Tjebbes* is in full agreement with this statement.

<sup>70</sup> Opinion of AG Poiares Maduro delivered on 30 September 2009, case C-135/08, *Rottman*, para. 23: "la citoyenneté de l'Union suppose la nationalité d'un État membre mais c'est aussi un concept juridique et politique *autonome* par rapport à celui de nationalité" (emphasis added).

of a truly uncritical reading of international law potentially at the expense of EU law's autonomy: a particularly high price to pay for the constitutional system of EU law.<sup>71</sup>

#### IV. THE PUZZLING NATURE OF COURT OF JUSTICE'S PROPORTIONALITY: INDIVIDUAL CIRCUMSTANCES OF WHAT?

Unwilling to confront the unjustifiable assumptions behind the directly discriminatory subscription EU citizenship in principle, the Court opted for a humble questioning strictly confined to their effects. Para. 41 of the judgment is crucial in this regard. The Court stated that "the loss of the nationality of a Member State by operation of law would be inconsistent with the principle of proportionality if the relevant national rules did not permit at any time an individual examination of the consequences of that loss for the persons concerned from the point of view of EU law". But against which benchmarks? That not renewing your passport one day before it expired annuls one's mystical "genuine link" with the Netherlands? From *Micheletti* we know that genuine links are not a tolerated part of EU law, which is in conformity with the framing of citizenship in international law, as Peter Spiro, among numerous others, has shown.<sup>72</sup> Moreover, assessing genuine links would not be acceptable, since this would deny EU citizenship its abstract legal nature. As Christian Joppke has outlined in detail,<sup>73</sup> where citizenship is legalistic and procedural, the only link one might have with a state is precisely the official decision granting citizenship, since residing in a particular place or speaking a particular language could not be framed as enforceable duties of citizenship outside of atrocious totalitarian regimes.

The check of the personal circumstances in the context of proportionality assessment is thus bound to amount to looking at the reasons why someone who possesses other nationalities than the Dutch has not renewed the passport of the Netherlands before the document expired. While seemingly accommodating and forward looking – on this Coutts is right – at its core the reasoning of the Court is thus devoid of substance at its best, since the Court failed to reaffirm any of the acceptable substantive principles in the context of *EU law* against which such individual assessment could possibly take place, thus undermining the very idea of a meaningful engagement. The fact that only

<sup>71</sup> A. ARENA, *The Twin Doctrines of Primacy and Pre-emption*, in R. SCHÜTZE, T. TRIDIMAS (eds), *Oxford Principles of European Union Law*, Oxford: Oxford University Press, 2018.

<sup>72</sup> P.J. SPIRO, *Nottebohm and 'Genuine Link': Anatomy of a Jurisprudential Illusion*, in *Investment Migration Working Papers*, no. 1, 2019, [www.investmentmigration.org](http://www.investmentmigration.org); see also the literature cited therein, especially A. SIRONI, *Nationality of Individuals in Public International Law: A Functional Approach*, in A. ANNONI, S. FORLATI (eds), *The Changing Role of Nationality in International Law*, Abingdon: Routledge, 2014, pp. 54-68. Cf. M. TRATNIK, *Limitations of National Autonomy in Matters of Nationality in International and EU Law*, in S. KRALJIĆ, J. KLOJČNIK (eds), *From an Individual to the European Integration – Discussion on the Future of Europe: Liber Amicorum in Honour of Prof. Emer. Dr. Silvo Devetak on the Occasion of his 80<sup>th</sup> Birthday*, Maribor: University of Maribor Press, 2019, p. 507 *et seq.*

<sup>73</sup> C. JOPPKE, *The Inevitable Lightening of Citizenship*, in *European Journal of Sociology*, 2010, p. 9 *et seq.*

dual nationals are presumed to have lost their genuine link *with the EU* as a result of not renewing the passport immediately is not even mentioned, just as the abstract and legal nature of the link required, reinforcing the intellectually vacant rationalizing of the Dutch government at the expense of the idea of European unity and law. A reference to the Dutch democracy and the will of the law-giver would be misplaced as a counter-argument, since this is precisely the idea behind the rule of law that the deployment of sovereign power should not be arbitrary, or justified by flawed, obviously non-sense reasons.<sup>74</sup> Should the EU indeed be based on the rule of law,<sup>75</sup> it definitely owes its citizens effective protection against arbitrary overreach of their national governments, where EU law is at play. EU citizenship, particularly as understood following *Rottmann*, is precisely such a domain. The idea of undoing European citizenship by stealth and for no objectively sound reason should be questioned in substance by the supranational Court of Law in charge of nurturing and preserving the status.

That the Court of Justice sensed that this be the case cannot be doubted: para. 46, where it reaffirms discrimination between dual and single Member State nationals is the core element of the judgment. Among the “circumstances of the individual situation of the person concerned” outlined by the Court are

“limitations when exercising [...] right to move and reside freely within the territory of the Member States, including, depending on the circumstances, particular difficulties in continuing to travel to the Netherlands or to another Member State in order to retain genuine and regular links with members of his or her family, to pursue his or her professional activity or to undertake the necessary steps to pursue such activity. Also relevant are (i) the fact that the person concerned might not have been able to renounce the nationality of a third country [...] and (ii) serious risk, to which the person concerned would be exposed, that his or her safety or freedom to come and go would substantially deteriorate because of the impossibility for that person to enjoy consular protection under Article 20(2)(c) TFEU in the territory of the third country in which that person resides”.

Besides hinting at substantive conditions to be met for the enjoyment of the very Ar-entian right to have rights, i.e. the EU citizenship status, the Court states also that “[t]hose consequences cannot be hypothetical or merely a possibility”,<sup>76</sup> thus disqualifying the abstract nature of the citizenship status. What is not abstract leads to the concrete, begging for a conclusion that following *Tjebbes* the neo-Mediaeval turn in EU citizenship

<sup>74</sup> G. PALOMBELLA, *Beyond Legality – Before Democracy: Rule of Law Caveats in the EU Two-Level System*, in C. CLOSA, D. KOCHENOV (eds), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press, 2016, p. 36 *et seq.*; M. COHEN-ELIYA, I. PORAT, *Proportionality and the Culture of Justification*, in *American Journal of Comparative Law*, 2011, p. 463 *et seq.*

<sup>75</sup> L. PECH, *The Rule of Law as a Constitutional Principle of the European Union*, in Jean Monnet Working Paper, no. 4, 2009.

<sup>76</sup> *Tjebbes* [GC], *cit.*, para. 44.

law has received a renewed boost.<sup>77</sup> Indeed, *Tjebbes's* para. 46 with the list drafted by the Court, which seems so logical at the first glance is thus *absolutely irrelevant* in essence. The very enjoyment of the *legal status* of EU citizenship is made dependent, for a heterogeneous minority group (10 percent of the population) of dual Dutch nationals, on the *use* of the rights the status brings. Consequently, even beyond the discriminatory essence of the rule, the Court denies in principle the abstract legal nature of a bond between the Union and its citizens. This move opposes the vector responsible for the emergence of the classical understanding of citizenship in modern law – an abstract status of equals – described so well by Keechang Kim in his *Aliens in Mediaeval Law*.<sup>78</sup>

## V. THE UNTOLD STORY: DUAL EU CITIZENSHIP

The negative effects of possessing a number of nationalities, rather than one, are well known and have been, in the case of EU nationalities, excellently documented by David de Groot as far as the enjoyment of EU citizenship rights is concerned.<sup>79</sup> To hear that even the *status* of citizenship can be in jeopardy as a result of having a Moroccan grandfather or an Iranian background – as one of the applicants in *Tjebbes* – is something new however. To make matters worse, the Court of Justice is silent on the loss of EU nationalities, while the learned AG endorses this *in principle* on a number of occasions (e.g. para. 93 of the Opinion), where he speaks about the fact that the operation of the same law, which is at issue in *Tjebbes* to the citizens of several EU Member States simultaneously is not a problem. This approach, besides being deeply counterproductive from the point of view of EU values – it disregards both the human rights and the sovereign citizen logic – is short of shocking for two key reasons.

Firstly, it is based on the assumption that acquiring a second EU nationality is not worthy *per se*, thus undermining the very logic of the Union as a supranational constitutional system ensuring, through the unity in diversity, that the citizens benefit from the supranational law, their *legal heritage*, to refer to the classical *van Gend en Loos* directly,<sup>80</sup> taking crucial decisions about where and how to live their lives in the context of the whole territory of the internal market: Member State nationalities thus give access to rights in the whole territory of the EU – not a particular Member State – forming an in-

<sup>77</sup> D. KOCHENOV, *Neo-Mediaeval Permutations of Personhood in the European Union*, in L. AZOULAI, S. BARBOU DES PLACES, E. PATAUT (eds), *Constructing the Person: Rights, Roles, Identities in EU Law*, Oxford: Hart, 2016, pp. 133-158.

<sup>78</sup> K. KIM, *Aliens in Medieval Law*, Cambridge: Cambridge University Press, 2000.

<sup>79</sup> D. DE GROOT, *Free Movement of Dual EU Citizens*, in *European Papers*, 2018, Vol. 3, No 3, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 1075 *et seq.*

<sup>80</sup> Court of Justice, judgment of 5 February 1963, case 26/62, *van Gend en Loos*. O. DUE, *The Law-Making of the European Court of Justice Considered in Particular from the Perspective of Individuals and Undertakings*, in *Nordic Journal of International Law*, 1994, p. 123 *et seq.*



tricate web of “intercitizenships” as I have argued elsewhere.<sup>81</sup> To imply that cumulation of Member State nationalities is somehow a hostile act on behalf of EU citizens, which should be frowned upon contradicts the very logic of integration and cannot, thus, be endorsed by the highest Court, even *en passant*, as if it does not matter.<sup>82</sup> To treat dual nationality in the EU context in the same way as it is treated with Iran or Canada misses the special nature of the Union, ignoring what Allott called a move from “diplomacy” to “democracy” at the international plane.<sup>83</sup>

Even worse, secondly, the endorsement of the loss of the original Member State nationality by EU citizens who make use of their free movement rights punishes those who chose to naturalize in a new Member State thus taking a decision to take full part in the political life of that Member State. Before the problem of disenfranchisement of EU citizens<sup>84</sup> who use their free movement rights has not been solved and national elections are not within the realm of EU law – which might never happen of course – it is impossible to make a convincing argument, it seems, in favour of the toleration of the loss of the original nationality as a result of naturalizing elsewhere in the EU. Such toleration pushes EU citizens to make a choice between the original nationality and taking part in political life in the place where they reside. To make matters worse, EU citizens are presented with this choice for no defensible reason, which makes it unacceptable in principle.

## VI. CONCLUSION: A SHAMEFUL FAIL

The true essence of things tends to reveal itself at a certain point. Just as Poligraph Poligraphovich in *The Heart of a Dog*, then already in possession of a passport and a municipal housing registration, turned back into a stray dog towards the end of the novella, EU citizenship’s abstract legal nature will unquestionably survive the regrettable absurdity of *Tjebbes*. Awaiting common sense one can only restate that punishing those who fail to renew a passport worse than known terrorists, jihadists and ISIS wives, denying them the legal connection with the EU and the rights to be enjoyed in the internal market, while opening a possibility to weigh this punishment against the *use* of the rights they are precisely being deprived of for no reason at all and in the interest of no stated EU-related common good, in the context where such use cannot be hypothetical or merely a possibility is undoubtedly a moment significantly undermining the EU inte-

<sup>81</sup> D. KOCHENOV, *Interlegality – Citizenship – Intercitizenship*, in G. PALOMBELLA, J. KLABBERS (eds), *Interlegality*, Cambridge: Cambridge University Press, 2019 (forthcoming).

<sup>82</sup> D. KOCHENOV, *Double Nationality in the EU: An Argument for Tolerance*, in *European Law Journal*, 2011, p. 323 *et seq.*

<sup>83</sup> P. ALLOTT, *The European Community is not the True European Community*, in *Yale Law Journal*, 1991, p. 2485.

<sup>84</sup> F. FABBRINI, *The Political Side of EU Citizenship*, *cit.*; D. KOCHENOV, *Free Movement and Participation in the Parliamentary Elections in the Member State of Nationality: An Ignored Link?*, in *Maastricht Journal of European and Comparative Law*, 2009, p. 197 *et seq.*

gration project. European citizens deserve better. Denying the abstract nature of citizenship, directly discriminatory and stripping dual nationals of dignity as a starting assumption, *Tjebbes* is without any doubt among the high points of intellectual shame.