

# Mandating Identity

Citizenship, Kinship Laws and  
Plural Nationality in the European Union

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EUROPEAN MONOGRAPHS

By  
*Enikő Horváth*

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**Enikő Horváth**

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# **Mandating Identity**

## **EUROPEAN MONOGRAPHS**

*Editor-in-Chief Professor David O'Keeffe*

In this series *European Monographs* this book *Mandating Identity* is the fifty-sixth title.  
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*Továbbra is, szüleimnek*

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*Finalement, à C: pour toutes les 'jolies, jolies' choses ... merci.*

New York, September 2007

## Introduction

*I'd root out bureaucracy once and for ever.  
I have no respect for formalities.  
May every paper go to the devil  
But for this ...  
This little thing, so dear to me ...  
Read it and envy me: I happen to be  
A citizen of the Soviet Union.*

Vladimir Mayakovsky, Poem of the Soviet Passport, 1929

Imagine a (fairly neurotic) personal ad: 'Short, blond, green-eyed, vegetarian, atheist, German-speaking engineer, descended from Hungarian and unknown Slavic ancestors, with Italian passport, looking for swing dance and in-line skating partner. London and environs only. Call Giulia at ...' While Giulia may feel that she belongs to a number of groups, cultural and otherwise, only one of her social identities (and the one a hopeful Romeo is least likely to note) will be of interest to the authorities in London – her Italian nationality. Her nationality will determine her status as a European citizen, with attendant rights, and allow her to forgo the visa and other requirements of the person in the line next to her at passport control. On entry, it will determine the conditions (and length) of her stay, as well as her treatment by authorities and the private sector. Should she decide to move back to Bolzano, Italian authorities will be interested in another element of her identity – specifically her identity as a German speaker and hence a member of a linguistic minority – but this interest will be conditioned on establishing, in the first instance, her Italian nationality. In turn, should she decide that her Hungarian and Slavic roots are important to her, she could rely on them in applying for cultural and other benefits in a number of Central European states. The success of her application would, however, depend in large part on the nationality she holds, as well as those



her ancestors carried. Franck is thus right when he claims that ‘the state has been the alpha and omega of personal identity’.<sup>1</sup>

It has assumed this role through a monopoly on establishing, maintaining and monitoring the legal personality of individuals. In essence, an individual does not (legally) exist until recognized by the state: registered at birth, endowed with characteristics like name and sex retained throughout her life, and given a status, as a national (and generally also as a citizen). The effect of legal personalities on individual identities – and vice versa – is a matter of some debate. To the extent that individual legal personality remains fixed, even as the individual changes – so that each of us has an abstract counterpart, with an ever-expanding set of characteristics monitored by the state – the former provides a sense of continuity; its very constancy renders it an inaccurate reflection of the real individual, however.

For most matters, approximate resemblance between the individual and her legal counterpart is enough – hence the sometimes unfamiliar photos of our (much) younger selves in our national identity cards. In certain cases, however, legal personality, including legal status, can interfere with some element of individual identity. Hence the determination of the European Court of Human Rights (hereinafter, ECtHR) that a refusal to change the gender noted on the birth registration of a post-operative transsexual by state authorities constitutes a violation of the right to respect for private life under Article 8 of the European Convention on Human Rights (hereinafter, ECHR).<sup>2</sup> As the Court noted:

[T]he stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot, in the Court’s view, be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety.<sup>3</sup>

Such a conflict may arise in the context of any number of social signifiers, however, and helps account for the ever-expanding bases of demands for legal recognition in modern democratic states.<sup>4</sup>

While a number of elements of our legal personality – including gender, name or marital status – may be of import to us, only one is also regularly associated with a collective identity actively and overtly constructed, even manipulated, by the state: nationality. This dualistic nature of nationality – both legal status and source (or confirmation) of collective identity – renders it a singular component of individual identity, conferred unilaterally. It would thus be more precise, in terms of the temporal dimension, to say: the legal status comes first – when one is born, in most cases – and is complemented by the state’s efforts to make it

1. Franck (1996), p. 360.

2. *Christine Goodwin v. the United Kingdom* (Grand Chamber), ECtHR (2002).

3. *Ibid.*, at para. 77.

4. Compare Taylor (1992), p. 25.

meaningful to the individual. This is not to say that other elements of identity may not find legal or administrative expression. The proliferation of communities and entities that require proof of both identity and membership seems endless (as anyone with a wallet knows). Even the state dispenses other statuses – permanent resident, for example. But none have the identity function of nationality. As Cassuto recognizes, ‘nationality . . . goes beyond the individual and refers to a community and hence to identification, to the feeling of belonging to that community’.<sup>5</sup> As such, state power to include or exclude – to grant nationality or refuse it – is simultaneously a matter of resource distribution (of rights and benefits) and of symbolism.

Proof for the continuing relevance of this identity, at least from the state’s point of view, can be gleaned from a number of sources. Most obviously, this is the case for government statements in the context of naturalization, articulating that nationality should be either the end-result of integration or an element of it.<sup>6</sup> As the French Commission on Nationality, constituted in 1987 to examine all aspects of nationality before a major overhaul of the country’s laws, noted:

[T]he Code of Nationality is simultaneously conceived as *a tool of . . . integration* and a *reference point for national identity*. It should organize, together, the right to integration of the foreigners concerned, acknowledging their individual choice, and, if the need arises, a capacity to verify the degree of this integration. National identity effectively expresses itself through nationality.<sup>7</sup>

This identity function is embedded primarily in domestic regulation of nationality, as one would expect, but can also be glimpsed in international norms, as courts examine the existence of attachment in decisions on the recognition of state attribution of nationality.

Yet, a number of writers describe the disappearance of nationality’s identity function – from post-nationalists to theorists of citizenship.<sup>8</sup> Is it then really true

5. Cassuto (2001), p. 45. *See also* Comments of Council of Europe Deputy Secretary General Krüger on the occasion of the 1st European Conference on Nationality, Proceedings (1999). This has especially been true for state of emigration, such as Italy, Spain, Greece or Ireland in the past. *See* Pastore (2001), p. 110; Moreno Fuentes (2001), p. 124; Rozakis (2001), p. 173 and p. 178; and Symmons (2001), p. 275 *et seq.*

6. *See Fünftes Bericht über die Lage der Ausländer in der Bundesrepublik Deutschland* 53 (2002); remarks of United Kingdom Home Secretary David Blunkett on the occasion of the first citizenship ceremony performed in February 2004, in accordance with the requirements of the Nationality, Immigration and Asylum Act (2002). For the views of some of the participants, *see* <[www.indymedia.org.uk/en/regions/london/2004/02/285998.html](http://www.indymedia.org.uk/en/regions/london/2004/02/285998.html)>. *See also* Bousakla (2004).

7. ‘*Le Code de la Nationalité est conçu à la fois comme un instrument d[']intégration . . . et un point de référence pour l’identité nationale. Il doit organiser, ensemble, le droit à l’intégration des étrangers concernés, la prise en compte de leur choix individuel et une capacité à vérifier, le cas échéant, le degré de cette intégration. L’identité nationale trouve en effet à s’exprimer à travers la nationalité*’ Rapport Long, Tome II (1988), p. 87 (emphasis in original). *See also* pp. 25–26 and p. 28. *All translations in the text are by the author, unless otherwise noted.*

8. *See* discussion at Sec. I.B.

that ‘passports ... tell us little about loyalties or habitus, but they tell us a great deal about the relative likelihood of their holders being permitted to seek jobs in Milan or Copenhagen’, and, as such, are ‘counterfeit in the sense that they are less and less attestations of citizenship, let alone loyalty to a protective nation state?’<sup>9</sup> Individuals certainly seem to attribute continuing relevance to their nationality. Specifically – and as would be expected from theories of social psychology – individuals socialized into a national identity do so. This does not stop them (why should it?) from acquiring other nationalities for reasons of practicality, of course; but many immigrants are reluctant to give up their original nationality, which is viewed as a sign of belonging to the community.<sup>10</sup> In a comparable manner, numerous national minorities in East-Central and Eastern Europe have demanded the nationality of their kin-state, as a means to *nemzetegyesítés*.<sup>11</sup> In their case, nationality serves as *de facto* recognition of belonging to a larger cultural (in this case national) community.

Concurrent with increased interest in such questions of identity, national and international norms of nationality have been undergoing a series of transformations; a notable development, given the emergence of the latter, for the most part, in the 19th century and their relative stagnation from the 1950s onwards. (Only the entrance of human rights considerations brought some development). On the national level, more activity could be observed during this period, mainly in the form of facilitated access to nationality through *jus domicilii*, but no large-scale change. The 1990s, however, brought a sudden burst of activity – European citizenship, growing acceptance of plural nationality and, finally, kinship laws – with the potential for upheaval.

Despite their varied geneeses, then, each development challenges existing practice (and norms believed to be accepted) in matters of nationality, as well as (on a more conceptual level) the rights/duties and identity functions of the concept. The appearance of European citizenship in 1992 and its development since that time fundamentally re-fashions approaches to a status that grants rights in the state of nationality only, while simultaneously attempting to mobilize the power of national identity (if not its form) on a supra-national level. The rise of plural nationality, on the other hand, questions the assumption of a necessary link to one state only, and leaves states scrambling to regulate the contours of multiple membership not only as a legal matter but, in determined efforts at management of

9. Anderson (1994), p. 323.

10. ‘[R]espondents ... mentioned in the interviews that they were afraid that the acquisition of Dutch nationality would go at the cost of contacts within the [sic] own community’. Netherlands (van den Bedem, 1993), pp. 4–5. This Summary provides a good overview of other considerations for and against naturalization (including limited knowledge of its advantages, pragmatic concerns and integration requirements). Also see *ibid.* for a discussion of motives for naturalization in the Dutch context.

11. ‘Union or unification of the nation’. From *Délvidéki Levél Gyurcsány Ferenchez* (Letter from Vojvodina to [the Hungarian Prime Minister]).

a perceived threat to societal security,<sup>12</sup> as one of identity. Finally, kinship laws and especially the subset of status laws-break with the idea that individuals can be linked to a state only through the status of nationality; at the same time, such laws introduce the nation as an entity with a claim to recognition in a manner not heretofore considered.

In contrast to earlier periods of state self-reflection on national identity (or navel-gazing, if you will), individuals are consciously considering whether to play along. If individuals have always picked and chosen from among the groups around them those that would constitute elements of their social identity, they are doing so today in the context of 'a world in which self-determination evolves from a plural to a singular entitlement, from a right of peoples to that of *persons*'.<sup>13</sup> In fact, if individuals have been moulded in the past to be Frenchmen, rather than peasants<sup>14</sup> (or more likely, subjects of King XYZ), they are now the ones demanding, from states, recognition of their identity, as composed, in light of a claimed right to that identity. This development is clearest in the case of the growing acceptance of (the former 'evil' of) plural nationality; but is also present in the appearance (and proliferation) of kinship laws. In the case of European citizenship, the turned tables are harder to spot, but are nonetheless present in individuals' measured reactions to Commission-developed definitions of what it means to be 'European'.

Still, we have not quite arrived at the point of treating nationality, especially a particular nationality, as a personal right. This would mean a complete inversion of the idea of nationality, as something state-focused, into either an active implementation of personal identity ('I feel Brazilian and should accordingly have that nationality') or a matter of convenience ('A United States passport allows me to travel without visa restrictions, so I should hold it'). While some may welcome such rights-based development, it is hard to imagine how a system of this kind would function in practice – not only for reasons of administrative (in)convenience, but also because of conflicting approaches to what nationality signifies. How would those who consider nationality an implementation of identity view those who regard it as a matter of convenience, for example? In addition, to the extent that nationality is not only a link to a state, but also (hopefully, from the point of view of the state) to a group with a given collective identity with which one shares a sense of belonging, any transformation of nationality is also mediated by developments in citizenship.

The gradual transformation (or erosion) of the ideal of national citizenship, as citizenship rights are extended to non-nationals, allows for the appearance of community membership on other bases. One possibility is a community of those residing in the territory of a given state. In this approach, it is geographical proximity and the traditional principle of state sovereignty within its territory that provide the basis for membership. Another possibility, however, is the radiation of diaspora identities – centred either on the state that institutionalizes a particular

12. See Theiler (2003).

13. Franck (1996), p. 359.

14. Weber (1976).

collective identity or on the territory inhabited by a nation, or possibly not focused on any geographical place. In this view, a community is constituted by individuals with shared (linguistic, national, religious or other) cultural identities wherever they may find themselves. Still another possibility is the cosmopolitan or post-national model, whereby individuals belong to communities of norms and beliefs (without a necessarily shared national identity). Though this form of community is also not perforce linked to a territorially delimited state, it does rely on some entity to organize the development and maintenance of the norms that form the basis of commonality.

How these developments may be accommodated by changes in laws of membership remains to be seen. The three processes discussed in this book are, in any case, steps toward reconciling new forms of membership with the framework of nationality, with greater or lesser efficacy. Policies combining the acceptance of plural nationality with more stringent requirements of integration are an example of the territorial approach. Kinship laws (and diaspora programmes) are instances of overt reliance on shared cultural identity; while European citizenship is, at least officially, an attempt to mobilize of shared norms and beliefs across state boundaries.

As even this brief introduction to our subject has illustrated, any discussion of particular legal statuses with claims to anchoring cultural identities requires taking into account a multiplicity of factors (and actors). In the name of clarity, then, we must set out the assumptions on which this work proceeds. In the first place, it is assumed that an examination of the legal developments presented here through the prism of as amorphous a concept as 'cultural identity' is, in fact, worth the effort. (Certainly, some may find that it is too imprecise to form the basis for any comparison.) This is not to say that other approaches are not valid or useful; this same project could have been undertaken from the starting point of resource distribution, for example. Nor is it to say that the legal statuses discussed here are all 'about' culture. Rather, we accept that understandings of cultural identity both inform and are influenced by legal norms of membership, and attempt to understand this dynamic in three particular instances. In a related point, it is also considered that legal developments in functionally dissimilar legal systems are comparable. In particular, it is assumed that the emergence of European citizenship in a *sui generis* entity like the European Union is comparable to a legal development in the regulation of membership in (member) states, despite the divergent foundations of the legal orders in which they have originated.

Third, we assume that nationality cannot be understood purely as a legal phenomenon. Any proper discussion of the concept must also take into account the manner in which it fulfils its secondary role of circumscribing the national community, too. (To understand the perceived need for improvement or the consequences of particular amendments, for example, we must look not just at the content of the laws in question, but also at how these laws are embedded in particular political and social frameworks.) Legal approaches don't offer sufficient tools for such a discussion; the disciplines of sociology, social psychology and political theory, on the other hand, do. To give but one example, law doesn't even

know what to make of the concept of 'cultural identity', fundamental to our discussion. For this reason, our discussion of nationality is necessarily multi-disciplinary.

A fourth assumption underlying this work is that 'nationality' and 'citizenship' do not signify the same legal status or legal relationship. Although the distinction made here is often blurred both in theory and legislation, it remains a crucial one. In short, the two serve different functions: nationality has heretofore been the sole individual-state link recognized for the purposes of international law. It has traditionally been the primary legal status for both rights purposes – as the basis for claims of diplomatic protection, for example – and for that of identity. In the domestic realm, nationality has served as a gateway to citizenship rights; the ensemble of these rights, in turn, has been termed 'citizenship'. The rights and identity functions of citizenship have thus traditionally functioned in the domestic realm only. Granted, the two statuses were fused to create the predominant (ideal) form of legal membership in the 20th century – national citizenship – but this fusion is neither necessary nor absolute.

Finally, this work does not consider that facile conclusions can be drawn regarding the legal developments presented. While the secondary effects alluded to above do allow us to identify certain consequences for regional and general international law then, the very novelty and even controversiality of the statuses, not to mention the considerable role of unforeseeable political and sociological processes in questions of legal membership, mean that any claim to prediction would amount to mere guesswork.

Instead, this work has four modest aims. In the first place, it aims to draw attention to a phenomenon: to show how states and entities (like the EU) in Europe have in recent years devised legal statuses supplementary to that of nationality to anchor cultural identities. We propose that three processes of legal evolution – European citizenship, kinship laws and the acceptance of plural nationality – may be identified, each aiming to harness and manipulate a particular type of cultural identity. It is hoped that our discussion will clarify the manner in which the corresponding legal statuses have emerged since the early 1990s.

Our second aim is to compare the three processes. It is proposed that these developments, each in its own way, deconstruct the unified individual-state link created by an ideal national citizenship and reconstruct it on the basis of new (or re-tooled) statuses, in the process revealing the variety of ways in which the union of nationality and citizenship can come undone. It is also suggested that these three sites of contention undermine the identity and rights functions of both nationality and citizenship; and present new scenarios in the ongoing contest between personal and territorial conceptions of community.

Our third aim is to point out the ways in which the three processes of evolution, each with different roots, have influenced one another, in both public discussion and legal effects. To the extent the European Union can be considered a singular legal space, with multiple levels of criss-crossing legal orders, each separate legal development presented here interacts with the others, intensifying or constricting their respective endemic effects.



Our final aim is to expose the tensions inherent in any linkage of cultural identity and legal status and, more generally, of identity-formation and maintenance and law. Identity matters necessarily constitute a unique challenge to a discipline as sluggish as law, since the very stability that lends any legal categorization force may also prevent it from reflecting ongoing evolution. In the face of individual demands for respect of varied identities, the developments presented here demonstrate the challenges and advantages of particular legal responses.

In proceeding toward our goal, each topical chapter hopes to demonstrate the following: In the first place, it seeks to show how each process of legal evolution has unfolded in a given context, providing descriptions of both background and legal content. Second, it seeks to explain why each development has occurred in the manner that it has, with special emphasis on non-legal approaches. Third, it seeks to present both the legal and political or sociological issues raised by the particular development, where necessary through comparison with the other developments.

Our examination begins in the customary manner, with the status quo. In the chapter titled 'Basic Concepts', the concepts of 'nationality' and 'citizenship' are distinguished, their meanings, background and relationship discussed, and their traditional place in international and domestic law presented. Our primary focus here is on legal materials and commentary, though some references are also made to political theory. Given that all three of our examined processes are unfolding in the (claimed) name of 'identity', specifically individual and collective cultural identity, this is the final concept to be examined, mainly from the perspective of social psychology, but with due consideration for its place in international law.

The second chapter, on 'European Union Citizenship', presents our first case study. We begin with a brief historical survey of the emergence of scattered identity policies – and the idea of a 'European identity' – before 1992. After a look at legal and policy developments in the area of identity/culture before, and especially since, the Maastricht Treaty, the seemingly distinct idea of European citizenship – as legal status and as the foundation for an emerging European identity – will be presented. The existing, practical link between identity/culture and citizenship in recent policy, even if separate in official discourse, will then be set out, along with some considerations for future development.

In the third chapter, on 'Kinship Laws', legislation targeted at non-nationals with claimed kinship (usually linguistic, ethnic or broad cultural) ties to a given state are examined. Various kinds of kinship legislation, including their scope and the benefits they confer both inside and outside the territory of the legislating state, will be discussed before the Hungarian status law of 2001 – one of the most controversial – is delineated in greater detail. The history of this law, its content, international and domestic reactions, and subsequent amendments will be presented in turn. Finally, the significance of this and other similar laws will be considered, in light of their reliance on a novel legal role for the nation and a new understanding of minority protection.

The fourth chapter, on 'Plural Nationality', starts with a presentation of the traditionally hostile state approach to multiple membership – as well as its neutral

treatment in international law – before moving on to recent claims for acceptance. The context of the wholesale transformation of nationality regulation in Germany in the late 1990s will then serve as an example of possible reaction to such claims, as well as of the manner in which laws on various kinds of membership can interact in public discourse to re-frame a common approach to national identity. A discussion of the general considerations of membership and belonging that underlie any public discourse on this issue follows. The chapter finishes with a look at the tendencies of development in Europe.

The final chapter of this work brings together the three developments and presents their commonalities. As part of this discussion, the general interaction of law and identity is considered. It is argued that the boundary-maintenance necessary to all groups is externalized – and legalized – in ever more diverse ways by states in Europe. The diffusion of claims for recognition across state borders and the parallel process of entrenching national identities, in turn, threaten to undo the established, albeit tenuous balance between community belonging (as social concept) and membership (as officially recognized by legal status). More generally, the proliferation of legal statuses with claims to expressing or re-enforcing identity encompasses new conceptions of the interaction between individual and group, national and state, and domestic (or regional) and general international law, presented in turn.



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