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Irish Citizenship Law after Brexit: Implications for Northern Ireland

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This chapter will focus on Northern Ireland (NI), the site of the UK's only land-border with the EU, where many aspects of Brexit are felt most sharply. The issue of EU citizenship is no exception to this. In this chapter, I will examine one particular aspect of Irish citizenship law, which stems from its application in the territory of NI. I will argue that, to a certain extent, at least, the Republic of Ireland (Ireland) applies what I will call an extraterritorial jus soli principle in NI. By this I mean that it awards Irish citizenship to people who would not normally qualify for Irish citizenship based on the principle of jus sanguinis, primarily because they are of British descent. In particular, I will address three questions. First, what are the principles on the basis of which citizenship can be acquired? In so doing I will develop the point that Ireland's application of its citizenship law in NI does not fully conform to established practice and convention. Second, has Ireland given 'due regard to European Union law' when it comes to the application of its citizenship law in NI? Here I will argue that the extraterritorial jus soli principle violates the EU principle of 'sincere cooperation'. Finally, the chapter will seek to identify possible solutions to Ireland's violation of EU law. I will argue that in response, Ireland could either change its citizenship law or, the more radical approach, the EU itself, could conceptualise EU citizenship law in a new way.

In 1998, the Good Friday Agreement (GFA) ended open violence in Northern Ireland (NI).[1] Despite this, it seems that Northern Irish society has failed to take full advantage of this opportunity to fully integrate its two communities, that is Protestant/Unionist/British and Catholic/Nationalist/Irish. In this context, a fundamental error made by the political elites and society as a whole was in assuming that a culture of tolerance would emerge in the wake of the GFA. In fact, 20 years after its ratification, 90% of children continue to be educated in

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I am grateful for the careful reading by and helpful feedback I received from Professor Dora Kostakopoulou and Professor Colin Harvey. All errors remain mine.
[1] For a legal analysis of the Good Friday Agreement in the Brexit context, see R Humphreys, *Beyond the Border: The Good Friday Agreement and Irish Unity after Brexit* (Merrion Press 2018).

either Protestant or Catholic schools.[2] It also is telling that only 10% of marriages in NI are "mixed", that is, between a Protestant/Unionist/British person and a Catholic/Nationalist/Irish person.[3] All of this suggests that communities remain largely separated from each other. In many ways, one has the impression that NI 'has been suspended in time since the Good Friday Agreement was signed, the region and its people entirely frozen at the moment the parties put their pens to the document'.[4]

This "frozen" status may have always constrained NI's development into a more modern, open and welcoming society. However, maintaining the status quo was at least an option as long as both the United Kingdom and the Republic of Ireland (Ireland) were members of the EU. It was, perhaps, also because of this somewhat external stability that NI has been able for so long to entertain what Denis Bradley, Vice Chairman of NI Policing Board and a Co-Chairman of the Consultative Group on the Past, has described as a 'really small, petty, inward-looking kind of conflict'.[5] With the advent of Brexit, however, the situation has significantly changed.[6] Since the Brexit vote, there has been considerable discussion on the island of Ireland regarding the implications of the UK's withdrawal from the EU, not only for the Irish border but also for Irish EU citizens living in NI. In line with the identity navel gazing which is predominant in NI society, there has been little discussion of the implications for non-Irish EU citizens, who often find themselves in a far more vulnerable situation as their very right to remain may be contested.

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[2] Department of Education, 'Integrated Schools' <www.education-ni.gov.uk/articles/integrated-schools> accessed 14 September 2019.
[3] Siobhán Fenton, *The Good Friday Agreement* (Biteback Publishing 2018) ch 2.
[4] Ibid 3.
[5] Denis Bradley, Vice Chairman of NI Policing Board and a Co-Chairman of the Consultative Group on the Past, quoted in Tony Connelly, *Brexit and Ireland* (Penguin 2017) 272.
[6] For a critical analysis of the UK Supreme Court reasoning on the NI dimension in *R (Miller) v Secretary of State for Exiting the European Union*, see Christopher McCrudden and Daniel Halberstam, 'Miller and Northern Ireland: A Critical Constitutional Response' [2017] U of Michigan Public Law Research Paper no 575.

In this chapter, I want to focus on one particular question which to date has received no scholarly attention, namely whether Irish citizenship law, as it applies in NI, conflicts with Ireland's obligations under EU law. Specifically, I will focus on the principle of 'sincere cooperation' as it is established in Article 4(3) of the Treaty on European Union (TEU). As Irish citizenship law currently stands, a baby born in NI to an Irish or British parent or a person who is 'entitled to reside in Northern Ireland without any restriction on his or her period of residence', qualifies for British and/or Irish citizenship and consequently is also an EU citizen by virtue of Irish citizenship.[7]

While it is true that under EU law Member States enjoy considerable sovereignty over their national citizenship laws,[8] it is also the case that Member States, as emphasised by the European Court of Justice (ECJ) in *Micheletti* and subsequently in *Rottmann*, have a 'duty to exercise those powers having *due regard to European Union law*'.[9] Although this chapter is focused on NI, the issues discussed may have more general relevance. Take, for example, the case of Cyprus,[10] or broader questions of independence and segregation, which are gaining increasing traction across the EU. One might wonder, for example, whether Spain could offer the application of its citizenship laws to an independent Catalonia, while at the same time blocking its accession to the EU.

This chapter is structured as follows: Section 1 examines the dominant principles on the basis of which citizenship can be acquired. Here I will differentiate between the two archetypical categories of *jus sanguinis* and *jus soli*. Section 2 asks whether the Republic of

[7] Irish Nationality and Citizenship Act (2004) s 6; see also Article 2 of the Constitution of Ireland (as amended in 1999). For a detailed legal and historic analysis, see Bernard Ryan, 'The Ian Paisley Question: Irish Citizenship and Northern Ireland' (2003) 25 Dublin University Law Journal 145.
[8] Case C-369/90, *Mario Vicente Micheletti a.o. v Delegación del Gobierno en Cantabria* EU:C:1992:295, para 10.
[9] Case C-135/08, *Janko Rottmann v Freistaat Bayern* EU:C:2010:104, para 62 (emphasis added).
[10] Yiannis Papadakis and others (eds), *Divided Cyprus: Modernity, History, and an Island in Conflict* (Indiana UP 2006).

Ireland has given 'due regard to European Union law' when it comes to the application of its citizenship law in NI. Here, I will focus specifically on the question of whether Irish national law violates the duty of 'sincere cooperation' as outlined in Article 4(3) TEU. Finally, in Section 3 I will investigate possible solutions to any violations of EU law. My proposal for institutional reform involves a two-pronged approach: one evolutionary, based on the idea that national citizenship law of Ireland changes, and the other revolutionary, in which EU citizenship is reconceptualised as partly independent from national citizenship.

1. Boundaries

Thomas Humphrey Marshall, whose work is a frequent reference point in Anglo-American writing on the subject of citizenship, divided citizenship into three categories: civil, political and social.[11] Since the days of Marshall's writing, there has been 'a definite shift from a strict political definition of a citizen [. . .] to a broader, somewhat more sociological definition, which implies greater emphasis on the relationship of the citizen with society as a whole'.[12] For the purpose of this chapter, I am interested especially in territory and the role it plays in the acquisition of citizenship.

Traditionally, the acquisition of citizenship has been based either on *jus sanguinis* or on *just soli.* In more recent times, we find a combination of both.[13] According to *jus sanguinis,*[14] an individual acquires citizenship because at least one of their parents is a citizen

[11] Thomas Humphrey Marshall and Tom Bottommore, *Citizenship and Social Class* (Pluto 1992) 8.
[12] Bart van Steenbergen, 'The Condition of Citizenship: An Introduction' in Bart van Steenbergen (ed.), *The Condition of Citizenship* (Sage 1994) 1, 2.
[13] James Brown Scott, 'Nationality: *Jus Soli* or *Jus Sanguinis*' (1930) 24 *The American Journal of International Law* 58.
[14] Rainer Bauböck, 'Jus *Filiationis*: A Defence of Citizenship by Descent' in Rainer Bauböck (ed.) *Debating Transformations of National Citizenship* (Springer 2018) 83.

of that country.[15] Here the territorial boundaries of a nation state are irrelevant. The principle of *jus sanguinis* is in operation across continental Europe.[16] One extreme example is Austria, which confers citizenship exclusively based on the principle of *jus sanguinis*.[17] Such an exclusive application of the *jus sanguinis* principle is problematic, because although people may remain entitled to citizenship even when their ancestors have not lived in the country for generations, actual residents may face considerable obstacles to becoming citizens because they lack the correct "bloodline".

The second principle which governs the acquisition of citizenship and which is of particular relevance to the discussion here is the *jus soli* principle. According to *jus soli*, a person who is born within the specific territorial boundaries of a given country is entitled to citizenship of that country, irrespective of whether or not they have any prior connection to that country.[18] As Brubaker argues, '[*j*]*us soli* defines the citizenry as a territorial community';[19] it has also been described as 'a more inclusive conception of citizenship'.[20] The principle of *jus soli* dates back to Calvin's Case, a 1608 English legal decision which established a person's entitlement to legal benefits based on the place of their birth.[21] Under the jus soli principle, the only question which is relevant for the acquisition of citizenship is 'whether the child was born *within* the territory over which the state maintains (or in certain cases has maintained or wishes to extend) its *sovereignty*.[22] The link between *jus soli* and

[15] Gerad-René de Groot and Oliver Vonk, 'Acquisition of Nationality by Birth on a Particular Territory or Establishment of Parentage: Global Trends Regarding *Ius Sanguinis* and *Ius Soli*' (2018) 65 *Netherlands International Law Review* 319, 321.
[16] Dora Kostakopoulou, '*The Future Governance of Citizenship'* [2008] CUP 26.
[17] § 7 Staatsbürgerschaftsgesetz 1985, BGBl. Nr. 311/1985 (as currently amended).
[18] Rogers Brubaker, *Citizenship and Nationhood in France and Germany* [1992] Harvard UP 81.
[19] Ibid 122-123.
[20] Kostakopoulou (note 16) 26.
[21] Calvin's Case (1572) 77 ER 377.
[22] Ayelet Shachar, 'Children of a Lesser State: Sustaining Global Inequality through Citizenship Laws' (2003) Jean Monnet Working Paper no 2/03, 9 (emphasis added).

sovereignty is no coincidence: *jus soli* 'is historically linked with the feudal doctrine of perpetual allegiance to a *sovereign* lord'.[23]

One consequence of the application of the *jus soli* principle is that membership boundaries, which are so important in the *jus sanguinis* context, have no role to play. One prominent example of a country in which the jus soli principle operates unconditionally is the United States. The US Constitution stipulates that '[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside'.[24] In Europe, too, an unconditional *jus soli* principle has been in operation, for example, in Ireland until 2005. Until then, anyone born on the island of Ireland was automatically granted Irish citizenship.[25] This applied not only to the Republic of Ireland but also NI, which is under the sovereign authority of the United Kingdom.

The case of *Chen* showed the implications of unconditional *jus soli* under EU law.[26] The case was important because it was the first in a series of cases in which the ECJ bolstered the effects of EU citizenship. In this case, a Chinese mother gave birth in NI to a baby girl who became an Irish and an EU citizen based on the unconditional and extraterritorial *jus soli* principle that was in force in Ireland at the time. As far as can be seen from the facts of the case, the Chen family never had shown any intention of residing in Ireland. Their only interest was in living in the UK. The development in the case law of the Court, which allowed third-country nationals to remain in EU territory in order to take care of EU citizens, forcefully brought home the (obvious) point that Irish citizenship law by virtue of EU citizenship could have significant implications on residency rights, not necessarily for Ireland but for another Member State, in this case the UK.

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[23] Kostakopoulou (note 16) 117 (emphasis added).
[24] 14th Amendment to the US Constitution (1968).
[25] Karolina Rostek and Gareth Davies, 'The Impact of Union Citizenship on National Citizenship Policies' (2006) 10 EIoP, 1. 16-21, <eiop.or.at/eiop/pdf/2006-005.pdf> accessed 15 September 2019.
[26] Case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* EU:C:2004:639 .

In the aftermath of *Chen*, Ireland changed its law on citizenship and narrowed the scope of its *jus soli* approach.[27] As a consequence, a child now born in Ireland will only be entitled to Irish citizenship if one parent is Irish or British or has a right of indefinite leave to remain.[28] Adopting this mixed approach of *jus soli* and *jus sanguinis* brought Ireland in line with the rest of Europe, as a recent briefing report for the European Parliament on the *Acquisition and Loss of Citizenship in EU Member States* suggests. The report outlined key trends and issues, and clearly stated that '[n]o country in the EU grants automatic and unconditional citizenship to children born in their territories to foreign citizens.'[29]

While it is true that the field of national citizenship is at the heart of state sovereignty, the existence of EU citizenship, at least to some extent, limits the ability of Member States to exclude or include individuals at will. This limitation of sovereignty through EU citizenship has both a doctrinal and a political dimension, as the case of Ireland shows. While one may engage in extensive speculation as to why Ireland changed its law, it seems reasonable to assume that *Chen* played a role in this change. It is plausible that, following political pressure from other Member States, Ireland eventually changed its citizenship law.[30] It is noticeable that with the advent of EU citizenship, Member States have developed an increasing interest in each other's citizenship laws.

There are two main reasons why Member States have become especially concerned about the citizenship laws of other Member States. First, national citizenship law may generate significant numbers of citizens beyond the territorial boundaries of the EU in

[27] Identifying the mix of reasons: Bernard Ryan, 'The Celtic Cubs: The Controversy over Birthright Citizenship in Ireland' (2004) 6 *European Journal of Migration and Law* 173, 187-190.
[28] Irish Nationality and Citizenship Act (2004) s 6.
[29] Maria Mentzelopoulouand and Costica Dumbrava, 'Acquisition and Loss of Citizenship in EU Member States: Key Trends and Issues' (2018) European Parliamentary Research Service (PE625.116) 2 <www.europarl.europa.eu/RegData/etudes/BRIE/2018/625116/EPRS_BRI(2018)625116_EN.pdf> accessed 15 September 2019.
[30] Ryan (note 27) 186, and Dimitry Kochenov, 'EU Influence on the Citizenship Policies of the Candidate Countries: The Case of the Roma Exclusion in the Czech Republic' (2006) 3 Journal of Contemporary European Research 124, 129-131.

significant numbers.[31] Second, some Member States have begun to sell citizenship to rich individuals based on the nascent concept of *jus pecuniae* principle.[32] This raises concerns, not only in relation to security but also regarding the preservation of identity because some of these schemes provide pathways to naturalisation with no requirement that the individual has ever lived within the national territory (or that of the EU). I will examine both reasons in turn because the principles at stake will also play a role in the debate over Irish citizenship.

Particular criticism about the handling of citizenship was raised in relation to some post-Communist countries before they joined the EU.[33] Romania especially was singled out for its citizenship laws in relation to Moldovia. Based on the principle of *jus sanguinis,* Romania allowed the restoration of Romanian citizenship to all former Romanians who had lost their citizenship as a consequence of the Soviet annexation of Bessarabia.[34] Consequently, some of Moldova's 4.4 million people are of Romanian descent.[35] Romania's citizenship law was criticised by other Member States because they feared that it would create a back door to EU citizenship which would be suddenly wide open to otherwise third-country nationals.[36]

In response, the EU Commission simply adopted a purely doctrinal and formalistic position, namely that citizenship is an internal issue for Romania to determine. Other EU agencies, however, shared the concern raised by Member States regarding Romania's

[31] Maarten Peter Vink and Gerad-René de Groot, 'Birthright Citizenship: Trends and Regulations in Europe' (2010) EUDO Citizenship Observatory Comparative Report No. RSCAS/EUDO-CIT-Comp. 2010/8. <https://ssrn.com/abstract=1714975> accessed 15 September 2019.
[32] Jelena Džankić, *The Global Market for Investor Citizenship* (Palgrave Macmillan 2019).
[33] Generally on ethnic citizenship laws of the new Member States: Myra A Waterbury, 'Making Citizens Beyond the Borders: Nonresident Ethnic Citizenship in Post-Communist Europe' (2014) 61(4) Problems of Post-Communism 36.
[34] Constantin Iordachi, 'Country Report: Romania' (2010) EUDO Citizenship Observatory 1 <https://cadmus.eui.eu/bitstream/handle/1814/19633/Romania.pdf?sequence=1> accessed 15 September 2019.
[35] 'EU worries about Romanian offer of citizenship to Moldovans' (*Deutsche Welle*, 17 April 2009) <www.dw.com/en/eu-worried-about-romanian-offer-of-citizenship-to-moldovans/a-4185592> accessed 15 September 2019.
[36] Constantin Iordachi, 'Romanian Citizenship Offer to Moldovans: Exaggerated Fears in the European Union' (2009) *EUDO Citizenship Observatory* 1, 2.

citizenship law.[37] Between 1991 and 2001, a steady increase in the rate of citizenship restitution in Romania was observed, with a noticeable and exponential jump in 2001,[38] the year when Romanian citizens were granted visa-free travel to the Schengen Area. Between 2002, before Romania joined the EU, and 2011, after almost a decade as a Member State, there were 118,507 restitution cases, with significantly higher numbers from 2009 onwards;[39] I will return to this point later.

By contrast, the *jus pecuniae* principle enables citizenship to be sold, which usually does not require a link between either the individual and identity (*jus sanguinis*) or the individual and territory (*jus soli*). While this route to the acquisition of citizenship has been under the spotlight of the news more recently, it is not entirely new. In the Middle Ages, for example, foreign merchants would pay higher customs duties in order to gain access to certain liberties.[40] Today, when the conventional process of naturalisation is becoming more and more burdensome, under currently available investor schemes, 'the applicant's wallet is the core, if not sole criterion determining whether gates of admission will open'.[41]

These schemes have become especially lucrative in the EU, where it is possible for smaller Member States to add significant value to their otherwise less marketable national citizenships. Currently, approximately 'half of Member States now have dedicated immigrant investor routes'[42] which contribute to the '*marketization of citizenship'*.[43] Malta has been especially criticised in this context because it grants naturalisation for a sum of €650,000 originally, rising subsequently to €1.15 million.[44] For the purpose of this chapter, I am not

[37] Iordachi, 'Country Report: Romania' (note 34) 17.
[38] Ibid.
[39] Ibid 23.
[40] Keechang Kim, *Aliens in Medieval Law: The Origins of Modern Citizenship* (CUP 2000) 40-41.
[41] Ayelet Shachar, 'Citizenship for Sale?' in Ayelet Shachar et al (eds) *The Oxford Handbook of Citizenship* (OUP 2018) 789, 794.
[42] Madeleine Sumption and Kate Hooper, *Selling Visas and Citizenship: Policy Questions from the Global Boom in Investor Immigration* (Migration Policy Institute 2014) 2.
[43] Shachar (note 41) 793 (original emphasis).
[44] Ibid 795.

interested in the question of whether the selling of citizenship is in itself ethical,[45] but rather the fact that for some groups of people, the acquisition of citizenship is no longer governed by the archetypical principles of *jus sanguinis* or *jus soli*. This development indicates a seismic shift in the meaning of citizenship away from belonging and has been criticised not only by Member States but also now by the EU Commission.

In response to the developments taking place in some Member States, in 2019 the Commission issued its first *Report on Investor Citizenship and Residence Schemes in the European Union*, in which it outlined the situation in the Member States but also highlighted the risks for the EU as a whole.[46] So called "Citizenship for sale schemes" raise difficult questions due to the close link between national and supranational citizenship. In this context, one is inevitably reminded of Weiler's famous 'Eros and civilization' dichotomy. The absence of a requirement to reside within the territory of a Member State for any length of time seems especially problematic for national citizenship (i.e Eros), *which* is assumed to instil a sense of 'belonging' that could be eroded if citizenship is sold to individuals who may have formed no connection to the community.[47]

Having outlined the core principles of *jus sanguinis* and *jus soli* which usually determine the acquisition of citizenship and having briefly outlined the concept of *jus pecuniae* and related issues, I will now focus on the question of how Irish citizenship law, as it is currently applied in NI, fits into this existing framework. According to Article 2 of the Irish Constitution,

> It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish Nation. That is also the

[45] Džankić (note 32) ch 3.
[46] EU Commission, 'Report from the Commission to the European Parliament, the Council, the European Economic and Special Committee and the Committee of the Regions on investor citizenship and residence schemes in the European Union' COM (2019) 12 final.
[47] Joseph H H Weiler, 'To Be a European citizen – Eros and Civilization' (1997) 4 Journal of European Public Policy 495, 511.

> entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland.

The relevant law in operation is the Irish Nationality and Citizenship Act of 2004, to which I now turn.

In relation to NI, Section 6A(2) of the Irish Nationality and Citizenship Act of 2004 stipulates that babies whose parents are either Irish or British or are 'entitled to reside in Northern Ireland without any restriction on his or her period of residence' are citizens of Ireland. This is in line with the British-Irish Agreement which also acknowledges that it is the birthright of the people of NI

> to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland.[48]

Brexit, however, introduces a significant change in relation to EU citizenship, because the territory of NI will no longer be under the jurisdiction of the EU.

While the Republic of Ireland can, of course, confer citizenship beyond its territorial boundaries based on the *jus sanguinis* principle, the issue becomes controversial, at least from an EU perspective, to the extent that Ireland applies an extraterritorial *jus soli* principle in NI. Given that the Republic does not have sovereignty over NI, at best it could be said that it 'wishes to extend its sovereignty'. Unsurprisingly, it is difficult to find examples of other Member States which grant citizenship based on an extraterritorial *jus soli* principle.[49] The closest example, albeit obviously different in its details and probably weaker in its territorial connotation, is Germany prior to reunification in 1990.

[48] Good Friday Agreement, s 2, para 1 (vi).
[49] Overseas countries and territories differ in this regard; see Loïc Azoulai, 'Transfiguring European Citizenship: From Member State Territory to Union Territory' in Dimitry Kochenov (ed.), *EU Citizenship and Federalism. The Role of Rights* (CUP 2017) 178, 178-182.

Based on Article 11 of the German Basic Law, which protects freedom of movement of German citizens, Germany applied a unitary German citizenship which, according to the German Constitutional Court,[50] covered both the Federal Republic of Germany and the German Democratic Republic (GDR).[51] This interpretation of the law, pursued by the Federal Republic of Germany, was disputed by the USSR and the GDR.[52] Leaving aside the restrictions imposed on emigration from the GDR, the fact that Germany was unified before the introduction of EU citizenship limits its relevance as a precedent. Nevertheless, the crucial question remains of whether, and if so how, an extraterritorial *jus soli* principle violates Article 4(3) TEU, which specifically stipulates a duty of 'sincere cooperation'.

2. 'Sincere Cooperation'

In the previous section, I outlined the different ways that a person can acquire citizenship of a state. To this end, I distinguished between two archetypical principles, *jus soli* and *jus sanguinis*, noting that many states now apply a mix of the two. I also discussed the concept of *jus pecuniae*, and its implications for national identity and cohesion. I then examined how the law governing Irish citizenship, as it applies in NI, fits into the existing framework. Noting that the island of Ireland will no longer be undivided EU territory following Brexit, I argued that Irish citizenship law, at least as it applies to those in NI who are not covered by *jus sanguinis*, expresses an extraterritorial *jus soli* principle, which constitutes a conceptual anomaly.

This section will examine the possible implications of this finding in relation to Ireland's duty of 'sincere cooperation' under EU law. The principle of sincere cooperation is

[50] BVerfGE 2, 266 – Notaufnahme.
[51] Ferdinand Weber, *Staatsangehörigkeit und Status. Statik und Dynamik politischer Gemeinschaftsbildung* (Mohr Siebek 2018) 163, FN 8, 10-11.
[52] Ibid 165, para 20.

protected under Article 4(3) TEU, which stipulates that 'the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.' This duty has both positive and negative "faces". On the one hand, a Member State should not engage in any activity that jeopardises the attainment of the objectives of the Union; on the other hand, it is required to actively engage in activities that advance those objectives. Before examining whether the application of Irish citizenship law in NI is at odds with the duty of 'sincere cooperation' as it is outlined and protected in Article 4(3) TEU, we must consider whether that duty can limit the sovereignty of Member States in relation to citizenship, despite the fact that this area of law is largely within the competence of the Member States.

This specific question has already been addressed by the Court, albeit in a different context. In *Commission v Luxembourg*, the Court clarified that a 'duty of genuine cooperation is of general application and does not depend either on whether the Community competence concerned is exclusive or on any right of the Member States to enter into obligations towards non-member countries'.[53] In other words, 'the scope *ratione materiae* of the principle of sincere cooperation extends also to areas of intervention in domains of "overlapping" competence between the Union and national arenas, or even in domains where Member States retain the monopoly of action'.[54]

The aim of this section is to examine whether Irish citizenship law, as it is applied in NI, amounts to a violation of the principle of sincere cooperation. Because the focus of my analysis in this chapter is on the extraterritorial application of the *jus soli* principle in NI, my argument has implications primarily for members of the Protestant/Unionist/British

[53] Case C-266/03 *Commission v Luxembourg* EU:C:2005:341 , para 58.
[54] Sergio Carrera, 'The Price of EU Citizenship: The Maltese Citizenship-for-Sale Affair and the Principle of Sincere Cooperation in Nationality Matters' (2014) 21 Maastricht Journal of European and Comparative Law 406, 420; also, with further references, M Klamert, *The Principle of Loyalty in EU Law* (OUP 2014) 24.

community, who have been encouraged by Ian Paisley Jr., an MP for the Democratic Unionist Party (DUP),[55] to apply for an Irish passport following Brexit (an outcome consistently promulgated by the DUP).[56]

More generally, however, the question of a possible link between national citizenship law and the obligation of 'sincere cooperation' was addressed by Advocate General Maduro in the seminal citizenship case of *Rottman*, in which he argued that the obligation of sincere cooperation '*could* be affected if a Member State were to carry out, without consulting the Commission or its partners, an unjustified mass naturalisation of nationals of non-member States'.[57] Although clearly Ireland engaged in discussions with the Commission during the drafting of the Withdrawal Agreement,[58] this may not be sufficient to avert a violation of the principle of sincere cooperation. Carrera claims that '[t]he mere act of informing or consulting the European counterparts and institutions' would not constitute a sufficient excuse.[59] Ultimately, even the Commission cannot simply negotiate away core principles of the EU Treaty. In any case, more flesh needs to be put on the bare bones of sincere cooperation.

The obvious starting point for a substantive debate on the meaning of sincere cooperation is Article 4(3) TEU: its positive face requires Member States to 'facilitate the achievement of the Union's tasks', whereas its negative face requires Member States to

[55] The DUP is the main Unionist party in NI, which often receives media attention for its ultra-conservative, misogynistic, right wing and racist views.
[56] Casey Eagan, 'Ian Paisley, Jr. Dismissed Irish Passport as "an EU Document with a Harp Stuck On"' (*Irish Central*, 11 August 2016) <www.irishcentral.com/news/politics/ian-paisley-jr-dismissed-irish-passport-as-an-eu-document-with-a-harp-stuck-on> accessed 21 September 2019.
[57] Case C-135/08 *Janko Rottman v Freistaat Bayern* EU:C:2010:104 Opinion of AG Maduro, para 30 (emphasis added).
[58] Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ 2019/66 I/01 and Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom [2019]OJ 2019/C 66 I/02.
[59] Carrera (note 54) 425.

'refrain from any measure which could jeopardise the attainment of the Union's *objectives*'.[60] In other words, Member States jeopardise the attainments of these objectives when they undermine the interests of the EU.[61] In this section, I will highlight especially three different types of interests the EU has, which may be challenged through the application of Irish citizenship law in NI. First, the EU has an interest in reinforcing its territorial boundaries and integrity in order to protect its single market. Second, the EU has an interest in providing security to the people living in its territory, which is critical for the functioning of Schengen. Third, the EU has an increasing interest in preserving the integrity of EU citizenship in order to develop a shared identity, which is important for generating a feeling of solidarity.

Let me begin with the sensitive issue of preserving boundaries, which may be challenged through the rules on the acquisition of citizenship. Whatever one makes of the Romanian extraterritorial naturalisation figures cited in the previous section, they are dwarfed by the more recent figures coming from Ireland in the post-Brexit environment. In 2018 alone, Ireland, a country of around 5 million people, issued 84,855 passports to people in NI and it issued another 98,544 to people living in the UK. This amounts to an increase of 22% in comparison to the year before.[62] NI has a population of around 1.8 million people, most of whom are entitled to Irish and, at least as the law currently stands, EU citizenship. Thus, unless countries such as Romania and Ireland have a somewhat different status, one would expect at least a political discourse about Ireland's citizenship law simply because it produces, in a consistent and perpetual manner, significant numbers of EU citizens outside the EU's territorial boundaries.

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[60] Emphasis added.
[61] Klamert (note 54) 123.
[62] Lisa O'Carroll, 'Record Number of Britons Seek Irish Passports before Brexit' *The Guardian* (London, 31 December 2018) <www.theguardian.com/politics/2018/dec/31/record-number-of-britons-seeking-irish-passports-ahead-of-brexit> accessed 21 September 2019.

Another crucial interest of the EU is the preservation of its security. For example, security concerns were a core argument against investor schemes, as a report by the European Parliament shows.[63] They are also cited regularly by Member States to undermine the Schengen framework.[64] As a consequence, the idea of a Union offering its citizens 'an area of freedom, security and justice without frontiers' as promoted in Article 3(2) TEU has increasingly come under pressure. Irrespective of whether we consider these security concerns justified or not, they are a political reality and they undermine the core objectives of the EU. The question which needs to be addressed next is, in what sense the Irish question raises security concerns.

When it comes to NI, it must not be forgotten that there are still active paramilitary groups on both sides of the political spectrum.[65] These groups constitute 'the most disturbing and dangerous threats to the peace process in modern-day Northern Ireland'.[66] Their existence has broader, possibly destabilising implications for society. On the Catholic side, there are successors to the IRA such as the New IRA, which sent a chilling message by killing 29-year journalist Lyra McKee in Derry in 2019.[67] On the Protestant side, the Ulster Volunteer Force also has engaged in killings; one of their most recent victims was Ian Ogle, also in 2019.[68]

To be clear, I am not suggesting that NI terrorist groups would necessarily attack targets within the EU, but members of these groups would enjoy free movement. Were the

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[63] European Parliament, P8_TA-PROV(2019)0240 Report on financial crimes, tax evasion and tax avoidance. European Parliament resolution of 26 March 2019 on financial crimes, tax evasion and tax avoidance (2018/2121(INI)) paras 182-201.
[64] European Commission, 'Temporary Reintroduction of Border Control' <https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control_en> accessed 21 September 2019.
[65] Ann Marie Gray and others, *Northern Ireland Peace Monitoring Report No 5* (Northern Ireland Community Relations Council 2018) 106-114.
[66] Fenton (note 3) 92.
[67] Matthew Weaver and Kevin Rawlinson, 'Lyra McKee: New IRA Says its Activists Killed Journalist' *The Guardian* (London, 23 April 2019) <www.theguardian.com/uk-news/2019/apr/22/lyra-mckee-friends-stage-protest-derry-offices-saoradh> accessed 21 September 2019.
[68] Rory Carroll, 'Belfast Murder of Ian Ogle "Not in the Name of Loyalism", says UVF' *The Guardian* (London, 29 January 2019) <www.theguardian.com/uk-news/2019/jan/29/belfast-of-ian-ogle-not-in-the-name-of-loyalism-says-uvf> accessed 21 September 2019.

conflict to heat up again, this may increase an unspecified feeling of threat within the EU and among its populations, to be further exploited by political populists. What is more relevant in the context of this chapter is that, even when they do not kill, such groups terrorise communities as quasi-police forces, punishing those whom they suspect of breaking the law by shooting them in the arms and legs.[69] Paramilitaries fuel a sectarian society which holds NI back in many ways; for example, there appears to be a close correlation between paramilitary activity and poverty.[70] This highlights another significant characteristic of NI society, which is its considerable poverty.

On a macro-economic level, it is estimated that The Troubles account for a 15-20% reduction in GDP if one excludes the post-1968 subventions.[71] In this context it is interesting to note that when it comes to citizenship law, the Republic of Ireland treats the territory of NI as if it were part of the Irish State through the application of the *jus soli* principle, and yet seems unwilling to make significant transfer payments to NI in order to support citizens there.[72] Even cross-border investments seem to be rather limited in scope, if one takes the Belfast-Dublin train line as a focal point. The journey takes more than twice as long as comparable routes on the Continent, with far fewer journeys available each day.[73] It is astonishing that such a poor service between two major cities exists anywhere in Western Europe. Generally, one has the impression that the Republic is not serious in pursuing the project of reunification.

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[69] Henry McDonald, 'Northern Ireland "Punishment" Attacks Rise 60% in Four Years' *The Guardian* (London, 12 March 2018) <www.theguardian.com/uk-news/2018/mar/12/northern-ireland-punishment-attacks-rise-60-in-four-years> accessed 21 September 2019.

[70] Goretti Horgan and Marina Monteith, 'What Can We Do to Tackle Child Poverty in Northern Ireland?' (*Viewpoint*, November 2009) 1, 14 <https://pure.ulster.ac.uk/ws/portalfiles/portal/11497252/tackling-child-poverty-Northern-Ireland-summary_%281%29.pdf> accessed 21 September 2019.

[71] Richard Dorsett, 'The Effect of the Troubles on GDP in Northern Ireland' (2013) 29 European Journal of Political Economy 119, 130.

[72] Nancy Fraser and Linda Gordon, 'Civil Citizenship against Social Citizenship? On the Ideology of Contract versus-Charity' in Bart van Steenbergen (ed.), *The Condition of Citizenship* (Sage 1996) 90, 99.

[73] Cormac McQuinn, 'Faster Rail Link between Dublin and Belfast Needed to Tackle Brexit Challenges, Says Report' (*Herald.ie*, 12 December 2018) <www.herald.ie/news/faster-rail-link-between-dublin-and-belfast-needed-to-tackle-brexit-challenges-says-report-37617843.html> accessed 21 September 2019.

Even in the midst of the dramatic constitutional change and crisis created by Brexit, the Irish government still seems unwilling to prepare for the possibility of reunification. Ireland's apathy has been frequently criticised by Colin Harvey, who rightly has characterised the Irish government's position as 'constitutional negligence'.[74] My point is that if Ireland were actively engaging in any constitutional planning for reunification, then one could argue that the violation of the principle of sincere cooperation is temporary, and when balanced against another constitutional principle, proportionality, could be justified. However, if the aim of Ireland is merely to spread the risk and draw the EU into a bilateral conflict with the UK, without having a clear plan for the future, then it seems to me that these two principles cannot be balanced.

In effect, Irish citizenship law gives a third country, the UK, a say in who can become an EU citizen, even if only indirectly. A person born in NI is entitled to Irish/EU citizenship if born to a UK parent or to a person who is 'entitled to reside in Northern Ireland without any restriction'. The conditions under which a person becomes a UK citizen or has permanent residency rights in NI are for the UK to decide, however, and neither Ireland nor the EU have any influence over that decision. Finally, I want to focus on the integrity of EU citizenship and the solidarity it engenders, both of which are undermined by the current situation.

Originally, '[t]he traditional extended family gave a wide range of kinfolk, and at times neighbours and villagers, […] some economic responsibilities for each other'.[75] In some ways, citizenship serves a similar function, in that the State assumes economic responsibility for its citizens. This begs the question of in what sense Irish citizenship law requires the EU to assume responsibility for those NI based on their EU citizenship. In other words, the extent to which the EU may be responsible for providing remedies for the difficulties that exist in NI

[74] He used the phrase in a talk at St Mary's University College, Belfast, on 7 August 2019.
[75] Fraser and Gordon (note 72) 99.

society must be discussed. Towards this end, I want to draw on Pogge's seminal book, *World Poverty and Human Rights*, in which he describes a pyramid of duties, each of which implies some degree of responsibility;[76] after all, a duty makes us answerable.

Negative duties, according to Pogge, are those which require 'that others are not unduly harmed (or wronged) through one's own conduct'; all others ('the remainder') are positive.[77] Negative duties, so the conventional moral argument goes, trump any and all positive duties one may have, including the duty to support our next of kin or our fellow citizens.[78] For example, while it may be acceptable that we give preferential treatment to our parents in a rescue operation, we nevertheless must not (directly) harm others in attempting to rescue them.[79] The negative duty not to harm others is at the top of Pogge's pyramid.[80]

At the bottom of this pyramid are positive duties, those we have towards people who are unrelated to us.[81] This lack of relationship explains why people feel relatively less responsibility to provide help beyond their identity boundaries. Identity boundaries, which circumscribe our family, friends and, many would argue, even our nation, are in the middle of the pyramid. Given the importance of identity, it is unsurprising that it plays such a prominent role. Recall that one of the reasons why Member States and the EU Commission were critical of the investor schemes was that applicants were not required to live in the territory of a specific Member State or the EU.[82] The European Parliament specifically made

[76] Joel Feinberg, 'Supererogation and Rules' in Joel Feinberg (ed.), *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton UP 1970) 3, 7.
[77] Thomas Pogge, *World Poverty and Human Rights* (2nd edn, Polity 2008) 136.
[78] Ibid, 138.
[79] Valentin Beck, *Eine Theorie der globalen Verantwortung: Was wir Menschen in extremer Armut schulden* (Suhrkamp 1996) 90.
[80] Pogge (note 77) 138.
[81] Ibid, 138.
[82] European Commission (note 46) 4.

the point that 'EU citizenship implies the holding of a stake in the Union and depends on a person's ties with Europe and the Member States or on personal ties with EU citizens'.[83]

As Pogge's pyramid indicates, those inside our identity boundaries feature most prominently in relation to our sense of responsibility. It follows that the arguments of civic nationalists such as David Miller, who contend that our positive duties toward those within our identity boundaries rank higher than our duties to those outside them, are at least normatively plausible.[84] For Miller, a sense of community is a prerequisite for remedial responsibility.[85] After Brexit, however, NI will no longer constitute a territory of the EU and it is difficult to see how the situation of those who acquired Irish citizenship solely based on extraterritorial *jus soli* in NI is any different from those who acquired citizenship based on *jus pecuniae* when it comes to the issue of identity.

The point can be made that citizenship influences boundaries of responsibility. 'We assume an established group and a fixed population', Michael Walzer argued, 'and so we miss the first and most important distributive question: *How is that group constituted*?'[86] It is because of Irish citizenship law, so we can argue, that the people who live in the territory of NI move from the bottom to the middle of the pyramid in terms of positive obligations. Once repositioned, the EU no longer has merely a general negative duty to do them no harm. Rather, it has a positive duty to provide support and seek solutions for those people as if they were not only inside our identity boundaries but also, as a consequence of the fiction applied to NI territory through the principle of extraterritorial jus soli, within the territorial boundaries of the EU.

[83] European Parliament Resolution of 16 January 2014 on EU citizenship for sale (2013/2995(RSP) point 7.
[84] Pogge (note 77) 136.
[85] David Miller, *National Responsibility and Global Justice* (OUP 2007) 97.
[86] Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (The Pitman Press 1983) 31 (emphasis added).

While Irish society has had its say on the Irish law on citizenship through a national political discourse, there has been no political debate at the EU level. Though it may be a slight exaggeration, one could argue that what is taking place in front of our eyes is an unapproved, quasi-enlargement of the EU, or at least a spreading of the political risk from one Member State to the rest of the EU. In other words, Ireland is creating additional responsibilities for the EU, and there is a risk that other Member States and EU citizens may lose trust in the European project if, as a consequence of the legal status quo, they are called upon to honour those responsibilities without ever having had a political discourse on the implications of the Irish-UK conflict. Germany's unilateral act during the "refuge crisis", while morally praiseworthy, has shown that the EU has limited resilience when defending its core pillars when under pressure; Schengen, for example, has still not recovered. Creating facts without having a political discussion will hurt the European project as a whole. In the next section, I offer institutional recommendations which may help to remedy the violation of the principle of sincere cooperation.

3. Recommendations

The conflict identified in this chapter is between the duty of sincere cooperation and the application of Irish citizenship law in NI. I want to suggest two possible solutions to this conflict: amending the national citizenship law of Ireland and/or adapting the supranational law which governs EU citizenship. Before examining these options in detail, however, it is necessary to identify Ireland's obligations under international law. Of particular relevance are the Good Friday Agreement (GFA) concluded between Ireland and the UK in 1998, which makes specific reference to Irish citizenship in NI, and the (as yet unratified) Withdrawal

Agreement which was concluded between the EU and the UK in 2018 and which makes specific reference to EU citizenship.

I want to begin my discussion with the GFA, which is an agreement between a Member State, i.e. Ireland, and a third country, i.e. the UK. The GFA is 'extraneous to Union law' but forms 'part of the *national* law' of Ireland which concluded this agreement.[87] While the issue of agreements concluded by the EU has been examined closely, much less has been said about agreements which are concluded by individual Member States and the relevance they have for EU law.[88] In EU primary law there are a variety of Treaty provisions which recognize the right of Member States to conclude international agreements.[89] In particular, two types of agreement can be distinguished: those which have been concluded before a Member State joined the EU and those concluded by a state that is already a member of the EU. The GFA belongs to the latter group.

An important provision which aims to resolve any conflicts that may emerge between national law and international agreements is Article 351(2) of the Treaty on the Functioning of the European Unity (TFEU), which constitutes 'an application of the general duty of cooperation laid down in Article 4(3) TFEU'.[90] The provision stipulates that

> The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, *before the date of their accession*, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.[91]

Clearly this provision does not apply to the GFA, which came into force in 1998, 25 years after Ireland and the UK joined the EU.

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[87] Allan Rosas, 'The Status in EU Law of International Agreements Concluded by EU Member States' (2011) 34 Fordham International Law Journal 1304, 1310 (original emphasis).
[88] Ibid.
[89] Ibid 1313.
[90] Klamert (note 54) 16.
[91] Emphasis added.

The Treaty expressly states that agreements which were concluded before a Member State joined the EU must be compatible with EU law, and Klamert argues that the same principle should apply to agreements which were concluded after a state becomes a member of the EU. If compatibility cannot be achieved, then the agreement must be renegotiated.[92] However, a literal interpretation of the GFA shows that there exists no conflict between Ireland's obligations under EU law and its obligation under the GFA. The GFA only stipulates that the people of NI can 'identify themselves and be accepted as Irish or British, or both'.[93] It makes no specific reference to EU citizenship.

The situation is different in relation to the Withdrawal Agreement. References to both Irish citizenship and EU citizenship are found in the Protocol on Ireland and Northern Ireland of the Withdrawal Agreement. The relevant passage states that

> Irish citizens in Northern Ireland, by virtue of their Union citizenship, will continue to enjoy, exercise and have access to rights, opportunities and benefits, and that this Protocol should respect and be without prejudice to the rights, opportunities and identity that come with citizenship of the Union for the people of Northern Ireland who choose to assert their right to Irish citizenship as defined in Annex 2 of the British-Irish Agreement 'Declaration on the Provisions of Paragraph (vi) of Article 1 in Relation to Citizenship'.[94]

The paragraph is opaque and an example of particularly poor drafting. Three questions in particular stand out: First, why is there this emphasis on Irish citizens? What about the rights of EU citizens from other EU member states? It almost seems as if the Withdrawal Agreement invited the introduction of first- and second-class EU citizenship in NI, which is not only highly problematic but also not without irony. After all, Irish citizens in NI, who have never activated their EU citizenship by exercising their right of free

[92] Klamert (note 54) 280.
[93] GFA (note 48) s 2, para 1 (vi).
[94] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council on 25 November 2018, Protocol on Ireland/Northern Ireland, 302.

movement,[95] apparently have entitlements under EU law, whereas EU citizens who have exercised that right' deserve no special mention in the view of the Commission. Second, it remains entirely unclear to which rights the Withdrawal Agreement is alluding, given that, after Brexit, NI will no longer be part of EU territory and the laws of the EU and the jurisdiction of the ECJ will no longer apply there. Finally, there is the question of whether the wording of the Protocol of the Withdrawal Agreement can be construed to guarantee that Irish citizens in the North will retain EU citizenship also in the future.

In relation to this last question, I want to make the following points. The first sentence of the passage in question is cryptic and yet also expresses a banality, namely that Irish citizens retain rights 'by virtue of their Union citizenship', wording which *per se* does not guarantee that they retain Union citizenship. The reference to identity and Union citizenship also seems peculiar, given that it is possible that some people will adopt Irish/EU citizenship who have no relationship with the EU whatsoever, either through a Member State or the territory of the EU. In light of previous observations, one can only wonder why the Commission is critical of citizenship based on *jus pecuniae* on the grounds that those who acquire citizenship in this way lack sufficient identity with the Union, while at the same time apparently having no issue with Irish citizenship law. Finally, there is the reference to the GFA agreement, which, as previously noted, makes no mention of EU citizenship. All in all, it would be useful to seek an Opinion from the ECJ based on Article 218 (11) TFEU.

In addition to questions of interpretation, it may be helpful to undertake a conceptual analysis by asking about the position of international law in the context of EU law. Given the opacity of the Protocol of the Withdrawal Agreement, it remains an open question whether it would fulfil the requirements of direct effect, under which, according to EU law, a provision

[95] In Case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* EU:C:2011:277, para 56, together with Case C-165/16 *Toufik Lounes v Secretary of State for the Home Department* EU:C:2017:862, paras 49-62. From the perspective of EU law, it is certainly peculiar, to say the least, that the NI First-Tier Tribunal did not request a preliminary ruling from the ECJ on the case of Emma de Souza.

must be sufficiently clear, precise and unconditional, but also must not be precluded by the 'nature and structure' or 'broad logic' of the Treaty.[96] As outlined above, the provision in question seems to be neither clear and precise nor in line with the logic of the Treaty, if one considers the following question: if Ireland exited the EU tomorrow, could Irish citizens successfully claim that they had retained EU citizenship based on the Withdrawal Agreement? There is little doubt that the answer to this question is "no". Moreover, even if the Protocol has direct effect, international law 'generally does not rank more highly than EU primary law (EU Treaty provisions)'.[97] In other words, core principles of the EU cannot simply be overwritten by international agreements.

Some of the problems discussed in this chapter stem from the close relationship between national and EU citizenship. That relationship follows from the wording of Article 20 TFEU, which states that 'Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union'. The close relationship between national identity and supranational citizenship was also echoed in the case of *Tjebbes.*[98] Coutts identified the core of the judgement as follows: 'The absence of *a genuine link with one of the Member States* is sufficient *to justify loss of Union citizenship*; being a member of a national political community is necessary to be a Union citizenship.'[99] If one considers this close relationship as axiomatic, then Ireland must amend its citizenship law in order to achieve a conceptually plausible solution.

[96] Case C-308/06, *Intertanko a.o.* EU:C:2008:312, para 45.
[97] Katja Ziegler, 'The Relationship between EU Law and International Law' (2015) University of Leicester School of Law Research Paper No 15-04, 1, 11 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2554069> accessed 21 September 2019.
[98] Case C-221/17, *M.G. Tjebbes a.o. v Minister van Buitenlandse Zaken* EU:C:2019:189, paras 35-36.
[99] Stephen Coutts, 'Bold and Thoughtful: The Court of Justice Intervenes in Nationality Law Case C-221/17 Tjebbes' (*European Law Blog*, 25 March 2019) <https://europeanlawblog.eu/2019/03/25/bold-and-thoughtful-the-court-of-justice-intervenes-in-nationality-law-case-c-221-17-tjebbes/> (original emphasis) accessed 21 September 2019.

In this context it should be recalled that when Ireland replaced its citizenship law in 2004, abandoning an unconditional *jus soli* approach, the Tánaiste (Deputy Prime Minister) argued that 'it was not the number of persons coming to Ireland which mattered, but the fact that [. . .] "our constitutional provisions are being used in a way we did not intend".'[100] If Ireland changed its citizenship law then to protect the integrity of its citizenship, it should change its citizenship law now, because Brexit changes the situation dramatically in relation to EU citizenship, thereby undermining Ireland's integrity. The only question is, in what way Irish citizenship should be changed.

I suggest the introduction of a 'special EU protected citizen status'. The idea for such a status under EU citizenship law was developed by Kostakopoulou in the context of Brexit,[101] but the origins of the concept of a 'special status of British protected person' date back to the British Nationality Act of 1948 and therefore has its roots in Britain's colonial past, when Britain created a variety of 'sub-citizenships'.[102] Of course, the irony is not lost on me that it is primarily people from the Unionist community who, if they wished to avail of EU citizenship in the future, would need to resort to this status, which was originally designed for use by residents of Britain's former colonies. In some ways, the former colonisers would finally be governed by their own colonial rules.

The special status of British protected persons under the British Nationality Act 1948 'was granted to individuals from territories which were originally British protectorates or protected states or states over which the Crown had exercised jurisdiction without their inclusion into the Crown's dominions'.[103] The status recognizes a certain lack of national identity which is also absent in the cases governed by the extraterritorial *jus soli* principle but

[100] Ryan (note 27) 189.
[101] Dora Kostakopoulou, '*Scala Civium*: Citizenship Templates Post-Brexit and the European Union's Duty to Protect its Citizens' (2018) 56 Journal of Common Market Studies 854, 862-866.
[102] Prakash Shah, 'British Nationals under Community Law: The Kaur Case' (2001) 3 European Journal of Migration 271.
[103] Kostakopoulou (note 101) 863-864.

which seems to be pivotal under EU law, as the foregoing discussion of the *jus pecuniae* principle suggested. Protected status simply 'demonstrates a generalized awareness of the responsibility of a political unit to protect individuals following political change as well as an acceptance of its complementarity with other nationality statuses'.[104] This type of citizenship is different in kind from and does not amount to full citizenship. It would apply only to those who have been granted Irish citizenship based on the extraterritorial *jus soli* principle.

The protected status simply recognizes that the link to the EU is weaker for those people who have been granted citizenship based on the extraterritorial *jus soli* principle than for those people who have been granted their Irish citizenship based on *jus sanguinis*. The Court has accepted a divided form of national citizenship already when it held in *Kaur* that

> On the basis of that principle of customary international law, the United Kingdom has, in the light of its imperial and colonial past, defined several categories of British citizens whom it has recognised as *having rights which differ* according to the nature of the ties connecting them to the United Kingdom.[105]

While some of these categories would come with EU citizenship, others will not. My point is simply that certain groups of people in NI, while still qualifying for a form of Irish citizenship based on the idea of a protected status, would no longer automatically qualify for EU citizenship. This protected status could be applied either *ex nunc* or preferably *ex tunc*.

The changes suggested on the national level could then be complemented by detaching EU citizenship from national identity/citizenship under certain circumstances and making it autonomous. This would allow the EU to introduce its own terms and conditions for the acquisition of EU citizenship based on a specified identity nexus which has nothing to do with national identity. While this may seem radical at first, it should not be forgotten that

[104] Ibid 864.
[105] Case C-192/99, The Queen v Secretary of State for the Home Department, ex parte: Manjit *Kaur* EU:C:2001:106, para 20 (emphasis added).

the close link between citizenship and nationhood is a consequence of the French Revolution. During that period, at least, the nation developed at the expense of guilds, provinces and other subnational groups.[106] Even so, the French Revolution remained remarkably cosmopolitan and in line with the ancient regime for some time. As Brubaker points out, however, '[i]t was in the xenophobic nationalism of its radical phase, not in the cosmopolitanism of its liberal phase, that the Revolution was genuinely revolutionary'.[107] One of the achievements of the nation was that the boundaries that existed below the level of the nation-state were finally abolished, whereas boundaries among nation-states were reinforced.[108]

Habermas also dates the interconnectedness between citizenship and national identity back to the French Revolution and identified a similar purpose. He contends that nationalism played a 'functional role' that helped to broaden the reach of citizenship, which was otherwise 'never conceptually tied to national identity'.[109] Thus, detaching EU citizenship from national citizenship would free EU citizenship from the requirement of national identity. In order to detach EU citizenship from national identity/citizenship, again I want to refer to Kostakopoulou, who has suggested that Article 20 TEU be amended as follows: '*every person holding the nationality of a Member State or declared as an EU citizen shall be a citizen of the Union*.'[110]

While adopting the idea of 'declaring EU citizens', I would like to make a slightly different suggestion. My aim is to keep any changes to citizenship to a minimum while changing the concept of EU citizenship. Towards this end, the starting point of my approach is for all Member States to apply a form of *jus soli* or *jus sanguinis*. In my view, Article 20

[106] Brubaker (note 18) 44.
[107] Ibid 45.
[108] Ibid 47-48.
[109] Jürgen Habermas, 'Citizenship and National Identity: Some Reflections on the Future of Europe' in Ronald Beiner (ed.), *Theorizing Citizenship* (Suny 1995) 255, 259.
[110] Dora Kostakopoulou, 'Who Should Be a Citizen of the Union? Toward an Autonomous European Union Citizenship' in Liav Orgad and Jules Lepoutre (eds), *Should EU Citizenship Be Disentangled from Member State Nationality? EUI Working Papers* (RSCAS 2019/24) 3 (original emphasis).

TEU should read that an EU citizen is 'any person holding the nationality of a Member State, granted on a *jus sanguinis* or *jus soli* basis, or who has become a national in any other way and has lived on the EU territory for at least one year'. This approach not only overcomes the issues of identity noted in the context of *jus pecuniae* but would also solve the problem created by Irish citizenship law, since people who had received Irish citizenship on the basis of an extraterritorial *jus soli* principle would fall under the third category and therefore would be required to spend one year on the territory of the EU before they could be declared EU citizens.

While *national* identity would no longer play an exclusive role in relation to EU citizenship, the issue of identity, albeit more broadly, would remain significant. Together with Simmel, we would still need to ask the fundamental question, 'How is society possible?'[111] The answer Kostakopoulou provides is that people become part of a society through their work and their social relations they develop.[112] Capitalism can play a functional role in overcoming existing boundaries: 'the growth of exchange relationships, the expansion of markets and the development of a modern system of money [make] possible the growth of autonomous individuals and [undermine] the importance of local, religious or particularistic definition of the social person'.[113]

Attempting to preserve EU identity by virtue of Irish identity in NI presents a genuine conceptual problem. What differentiates a UK citizen living in Germany and the Irish citizen living in NI is that only the former can develop this type of identity because only she lives in the territory of the EU. As currently formulated, however, the law engenders the perverse situation in which the former is excluded from EU citizenship while the latter can gain access to EU citizenship at will. This situation also has a political dimension. Citizens in NI are

[111] Georg Simmel, *Soziologie* (Suhrkamp 1992) 42-61.
[112] Kostakopoulou (note 101) 858.
[113] Bryan S Turner, *Citizenship and Capitalism. The Debate Over Reformism* (Allen & Unwin 1986) 26.

largely excluded from the decision-making processes in the Irish Republic and the EU. This exclusion has significant implications for identity building. Preuß has argued that the 'egalitarian dynamics of the idea of citizenship' helped to extend the concept to all adult nationals.[114] What's more, '[i]t is not identity which determines citizenship; rather, it is citizenship which creates (political) identity'.[115]

In some ways, my suggestion is less radical than Kostakopoulou's because it would leave nationality intact as the main link to citizenship, while at the same time restricting the ability of Member States to grant citizenship only modestly. My suggestion could be considered an additional moderate step. What both of our suggestions share, however, is that they enable Member States 'to retain their definitional monopoly over nationality but [end] their definitional monopoly over EU citizenship and thus giv[e] European institutions a say in determining the EU's citizenry'.[116] This seems justified, given that it is the EU which may be asked to shoulder additional responsibility as a consequence of EU citizenship in NI.

The aim of this section was to identify possible solutions to the problem of Irish citizenship law, which, as it currently stands, may violate Article 4(3) TEU, which stipulates an obligation of sincere cooperation. Focussing on two international agreements which deal specifically with NI, the GFA and the Withdrawal Agreement, it was determined that the solutions proposed in this section are consistent with a literal interpretation of both agreements. In other words, there is no need to renegotiate either. The proposed solutions would require only modest changes at the national and/or on the supranational level. On the national level, Ireland would need to introduce a different category of citizenship, e.g. special protection status, which would be available to those who have no *jus sanguinis* link with

[114] Ulrich K Preuß, 'Citizenship and Identity: Aspects of a Political Theory of Citizenship' in Richard Bellamy and others (eds), *Democracy and Constitutional Culture in the Union of Europe* (Lothian Foundation Press 1997) 107, 118.
[115] Ibid 119.
[116] Kostakopoulou (note 110) 4.

Ireland. Alternatively, those who have not acquired citizenship on the basis of either *jus sanguinis* or *jus soli* could nevertheless be declared EU citizens provided they met a specified residency requirement.

4. Conclusion

The aim of this chapter was to discuss whether there is a conflict between the duty of sincere cooperation as it is established in Article 4(3) TEU and Irish citizenship law as it is applied in NI. I distinguished between people in NI who acquire Irish citizenship based on *jus sanguinis* and those who do so based on an extraterritorial *jus soli* principle. It is the latter scenario, so I argued, that creates conceptual problems, because Ireland, by definition, does not have sovereign authority over NI, which is a precondition for the application of the *jus soli* principle. Thus, to the extent that the application of Irish citizenship law in NI is based on an extraterritorial jus soli principle, it would appear that this violates the principle of sincere cooperation because it thwarts the interests of the EU, which has implications for trust and consequently the willingness to cooperate.

Nevertheless, it could be argued that the principle of sincere cooperation would not be violated if the Republic of Ireland had a clear plan or policy agenda for how it aims to achieve political reunification with NI. In that case, the disconnect between territory and sovereignty would only be temporary. However, despite the enormous political flux created by Brexit, the Irish government has not engaged in any significant planning for a possible border poll.[117] Indeed, the Republic's generally lacklustre approach to reunification suggests an intention to spread the risk of NI to the EU and other Member States with no clear

[117] Mark Bassett and Colin Harvey, 'The Future of our Shared Island. A Paper on the Logistical and Legal Questions Surrounding Referendums on Irish Unity' (*BrexitLawNI*, February 2019) <https://brexitlawni.org/library/resources/the-future-of-our-shared-island/> accessed 21 September 2019.

commitment or even a willingness to accept political or financial responsibility for a project which is first and foremost in the interest of Ireland, north and south. This is not to say that these interests cannot be transferred to the supranational level at some stage, but this must go hand in hand with a political discussion on that level.

Nevertheless, in the current political climate, I would suggest a moratorium on the implementation of my suggestion until a border poll has been conducted. There has been considerable uncertainty regarding the circumstances under which a border poll must be called by the Secretary of State.[118] It seems to me that one possible indicator for a change would be once 50% of the citizens born in NI have applied for an Irish passport. As shown above, EU citizenship, as currently conceptualised, is linked to national identity. In other words, EU citizenship is currently acquired through national identity even if, for some communities in NI, the link is tenuous. Unionist representatives are conceptually wrong to assume that EU citizenship can be claimed without first accepting de facto Irish identity.[119] By rejecting Irish identity, they are rejecting EU citizenship.

[118] GFA (note 48) sch 1, s 1.
[119] Simon Carswell, '"We Are Not Going to be Bribed Out of the United Kingdom" – Orange Order Chief' *The Irish Times* (Dublin, 10 July 2019) <www.irishtimes.com/news/ireland/irish-news/we-are-not-going-to-be-bribed-out-of-the-united-kingdom-orange-order-chief-1.3951739> accessed 21 September 2019.