Deprivation of Nationality and Democracy – A Comparative Legal Analysis of the EU Member States and the UK

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DEPRIVATION OF NATIONALITY AND DEMOCRACY

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A Comparative Legal Analysis of the EU Member States and the UK

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PREFACE

This dissertation is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the Preface and specified in the text. It is not substantially the same as any that I have submitted, or, is being concurrently submitted for a degree or diploma or other qualification at King's College London or any other University or similar institution except as declared in the Preface and specified in the text. I further state that no substantial part of my dissertation has already been submitted, or, is being concurrently submitted for any such degree, diploma or other qualification at King's College London or any other University or similar institution except as declared in the Preface and specified in the text. It does not exceed the word limit prescribed by the Dickson Poon School of Law.

ABSTRACT

Deprivation of Nationality and Democracy
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Benedikt Reinke

In their fight against Islamist terrorism, a growing number of European states and the UK has turned to depriving (suspected) terrorists of their nationality, making use of existing, amended or newly introduced provisions to this effect. This development has met with strong reservations by human-rights NGOs and much recent scholarship alike. In their view, nationality deprivation not only fails to reach its professed goals, especially the safeguarding of national security and the just punishment of terrorists, but also violates core democratic values, including the principle of non-discrimination, and human rights more broadly. Such criticism is diametrically opposed to an important voice that is rarely given full credit in the debate: that of the states themselves, as they speak through their legislations as well as the political and legal institutions that their very identity as liberal constitutional democracies entails. Implemented by elected parliaments, subject to extensive legislative and political proceedings, and scrutinized for human-right compliance by national and international courts, the deprivation regimes of these states are, I contend, too easily dismissed as mere abuses of state power. Thus, my PhD looks afresh at how and why states in Europe and the UK allow for deprivation measures, and asks whether deprivation of citizenship can be justified as a state measure that is both lawful and legitimate in a democratic system. Is there a place for nationality deprivation in a democracy?

In order to answer this question, my thesis pursues a three-step approach. First, it conducts a comparative analysis of the deprivation regimes across the EU and the UK, with a view to establishing the legal nature of nationality deprivation as a measure of either criminal or administrative law. This is not a trivial point. Often allocated by its critics to the former, and judged accordingly, nationality deprivation does indeed fall within the remits of administrative law in the very great majority of cases. As I will show, in this capacity, it marks the severing

of the legal bond that exists between state and citizen, in a non-punitive response to a citizen's exceptionally severe transgression of their civic duties. Second, my thesis looks closer at the legal relationship between state and citizen that is formalised by the bond of citizenship in Europe and the UK. What transgressions of this bond may trigger a deprivation regime? What normative understanding of citizenship do deprivation regimes presuppose? In a third and final step, my thesis reviews how the notion of a severed bond between state and citizen that underpins nationality deprivations in the EU and the UK fares against standards of lawfulness and legitimacy. While the former requires the assessment of a measure's compliance with legal principles and provisions at the national and international level, the question of legitimacy asks, in particular, to what extent nationality deprivation may be regarded just and appropriate in a democracy.

My thesis argues that the response to this question ultimately lies in the inherent link between nationality deprivation and democracy. Contrary to their critics' belief, deprivation measures in response to terrorist conduct across the EU and the UK do not generally strive to secure national security or punishment, at least not as their primary goal. Instead, they tend to share a different characteristic: they respond to acts so incompatible with the most essential values of the democratic community that they justify an individual's debarment from it. Rather than abusing democracy, deprivation regimes seek to defend and uphold it. The contentious state of the (un)democratic nature of deprivation regimes raises fundamental questions about citizenship, state authority and democracy that deserve further examination. My PhD contributes to this important enquiry.

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INTRODUCTION

'This is, I feel, worse than a prison. I think it's because at least with prison sentences you know that there will be an end, but here you don't know if there's going to be an end.'[1] With these words, Shamima Begum comments on the effects of losing[2] her British nationality.[3] The young woman, who joined ISIS in Syria as a teenager, was deprived of her nationality in 2019 and lost her final appeal in 2023.[4] Her words capture a prominent response to deprivation regimes, as punishments of an unrivalled harshness. Human-rights NGOs[5] and much recent scholarship on the matter have voiced similar criticism. Audrey Macklin, for instance, has condemned deprivation of nationality as sharing a 'certain affinity' with the death penalty because it results in the 'political death' of the individual concerned.[6]

At the same time, deprivation provisions are clearly on the rise in national legislations and have become an established part of states' counter-terrorism initiatives. Thus, in recent years, nine Member States of the European Union (MSs) plus the UK have introduced entirely new deprivation provisions to this effect. Austria, for instance, instituted a new deprivation measure in 2021, in direct response to the 2020 Vienna terrorist attacks;[7] and so did Belgium in 2015,

[1] Alexandra Topping, Shamima Begum says she understands public anger but 'is not a bad person', The Guardian (11/01/2023), available at: https://www.theguardian.com/uk-news/2023/jan/11/shamima-begum-understands-public-anger-but-not-bad-person, (last accessed: 25/03/2023).

[2] In this thesis, I will use 'deprivation of nationality', 'loss of nationality', 'denationalisation' and other related terms to refer to any form of nationality loss that occurs involuntarily. Expressions like 'deprivation regime(s)', 'deprivation measure(s)', 'deprivation provision(s)', 'deprivation decision(s)', 'the depriving state' or 'the deprived individual' are abbreviated references to the provisions, states, decisions and individuals involved in nationality deprivation.

[3] In this thesis, I will use 'nationality' and 'citizenship' (as well as 'national' and 'citizen') interchangeably. In accordance with the GLOBALCIT Glossary on Citizenship and Electoral Rights (GLOBALCIT (2020). Glossary on Citizenship and Electoral Rights. San Domenico di Fiesole: Global Citizenship Observatory, Robert Schuman Centre for Advanced Studies, European University Institute. Available at: http://globalcit.eu/glossary/) as well as Article 2 of the European Convention on Nationality, I will understand nationality (and citizenship) as '[a] legal status and relation between an individual and a state that entails specific legal rights and duties' and which 'does not indicate the person's ethnic origin'.

[4] https://www.judiciary.uk/wp-content/uploads/2023/02/Shamima-Begum-OPEN-Judgment.pdf (last accessed: 23/03/2023).

[5] See for example the work of the Institute on Statelessness and Inclusion (https://www.institutesi.org/) and of the Open Society – Justice Initiative (https://www.justiceinitiative.org/topics/citizenship) (last accessed: 23/03/2023).

[6] Audrey Macklin, "Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien," *Queen's Law Journal* 40, no. 1 (2014): 7-8.

[7] Art. 33(3) of the Federal Law concerning Austrian Nationality. See: Gerd Valchars und Rainer Bauböck, Migration und Staatsbürgerschaft, 108 (2021). See also the official explanatory remarks: 854 der Beilagen XXVII.

following the Charlie Hebdo attacks in Paris of the same year.[8] In addition, there appears to be a growing number of deprivation cases. While only 13 French nationals lost their nationality between 1973 and 2015,[9] in the four years between 2016 and 2020, a whole of 16 deprivation decisions were issued to French nationals.[10] In the UK, the rise has been even more pronounced, with 14 nationality deprivations in 2016, and 104 in the subsequent year.[11]

Contrary to current scholarship, democratically elected legislative institutions and the implementing national authorities clearly accept, even endorse, deprivation measures – and so do (human-rights) courts at the national and international level.[12] Thus, in none of the five cases concerning nationality deprivation recently brought before the European Court of Human Rights (ECtHR)[13] did the Court find issue with a state's use of deprivation powers. Indeed, the

GP - Regierungsvorlage – Erläuterungen, p. 1. Jules Lepoutre, "Citizenship Loss and Deprivation in the European Union (27 + 1)," *EUI Working Paper RSCAS 2020/29* (2020): 8.

[8] Art. 23/2(1) of the Belgian Nationality Law of 1984. See: Council of Europe – Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Withdrawing nationality as a measure to combat terrorism: a human rights-compatible approach, Doc. 14790, 7 January 2019, page 12. See also: Patrick Wautelet, "Deprivation of citizenship for 'jihadists' - Analysis of Belgian and French practice and policy in light of the principle of equal treatment," *Social Sciences Research Network* (2016): 3-4.

[9] Rachel Pougnet, Why do proposed national security measures get dropped? The four months after the Paris attacks and the French national debate on cancellation of citizenship, University of Bristol Law School Blog, 16 October 2017. Available at: https://legalresearch.blogs.bris.ac.uk/2017/10/why-do-proposed-national-security-measures-get-dropped-the-four-months-after-the-paris-attacks-and-the-french-national-debate-on-cancellation-of-citizenship/ (last accessed: 23/03/2023).

[10] Maarten P. Bolhuis and Joris van Wijk, "Citizenship Deprivation as a Counterterrorism Measure in Europe Possible Follow-Up Scenarios, Human Rights Infringements and the Effect on Counterterrorism," *European Journal of Migration and Law* 22, no. 3 (2020): 344, https://doi.org/10.1163/15718166-12340079.

[11] HM Government Transparency Report 2018: Disruptive and Investigatory Powers (July 2018, 27. The UK government has not provided more recent data (Lepoutre, "Citizenship Loss and Deprivation in the European Union (27 + 1)," 10.).

[12] Examples of recent national deprivation proceedings include: Belgium (Constitutional Court of Belgium, case no. 85/2009, judgment 14/05/2009; Constitutional Court of Belgium, case no. 122/2015, judgment 17/09/2015; Constitutional Court of Belgium, case no. 116/2021, judgment 23/09/2021); Demark (Supreme Court of Denmark, case no. 211/2015, judgment 08/06/2016; Supreme Court of Denmark, case no. 124/2018, judgment 19/11/2018), France (*Conseil constitutionnel*, decision no. 96-377 Dc of 16 July 1996; *Conseil constitutionnel*, decision no. 2014-439 QPC of 23 January 2015; Conseil d'État, decision no. 436689, 31/12/2020), UK (The Supreme Court, *R (on the application of Begum) (Respondent) v. Secretary of State for the Home Department (Appellant)*, UKSC/187, judgment 26/02/2021; The Supreme Court, *U2 v. Secretary of State for the Home Department*, SC/130/2016, judgment 19/12/2019; The Supreme Court, *R3 v. Secretary of State for the Home Department*, SC/150/2018, judgment 19/02/2021). While national courts, at times, find issue with specific aspects of deprivation decisions or the deprivation power (cf. Administrative Court of Vienna, VGW-152/089/16414/2019, decision dated 20 April 2020; Irish Supreme Court, *Damache v. Minister for Justice and Equality, Ireland And the Attorney General,* IESC 63, judgment 14/10/2020; Irish Supreme Court*, Damache v. Minister for Justice and Equality, Ireland And the Attorney General*, [2021] IESC 6, judgment 10/02/2021; Council of State, judgment of 17 April 2019, ECLI:NL:RVS:2019:990), they accept the validity of nationality deprivation, in principle.

[13] ECtHR, *K2 v. the UK*, application no. 42387/13, decision 07/02/2017; ECtHR, *Mubarak v. Denmark*, application no. 74411/16, decision 22/01/2019; ECtHR, *Ghoumid and Others v. France*, application nos. 52273/16, 52285/16, 52290/16, 52294/16 and 52302/16, judgment 25/06/2020 (final: 25/09/2020); ECtHR, *Johansen v. Denmark*, application no. 27801/19, decision 03/03/2022; ECtHR, *Laraba v. Denmark*, application no. 26781/19, decision 22/03/2022. At the time of writing this thesis, two further cases have been communicated to the ECtHR, but have not yet been decided: ECtHR, *El Aroud v. Belgium*, application no. 25491/18, filed 25 Mai 2018, ECtHR, *Soughir v. Belgium*, application no. 25491/18, filed 30 Mai 2018.

ECtHR confirmed that it was a state's prerogative, especially in the aftermath of terrorist attacks, to apply closer scrutiny to the bond of citizenship[14] and to 'take a firm stand against those who contribute to terrorist acts'.[15]

My PhD research is sparked by the discrepancy between scholarly criticism, on the one hand, and political and judicial endorsement, on the other, and it is against this background that I wish to explore the phenomenon of nationality deprivation in the EU and the UK. More specifically, I will argue in this thesis that, if certain requirements are met, nationality deprivation responding to terrorist acts is a state measure both lawful and legitimate. In my assessment, the measure does not seek to punish the individual concerned, but rather to terminate their membership in a community whose core values their terrorist acts have fundamentally violated.

In so doing, I disagree with the *communis opinio* of current scholarship that deprivation of nationality is an unjustifiable abuse of state power. These critical voices may be roughly grouped into two categories: those who object to nationality deprivation as an unjust form of punishment that is not compatible with values of liberal democracy; and those who criticise its ineffectiveness as a national-security tool and its failure to effectively combat terrorism. We have already seen the former position in Audrey Macklin's work above and it also appears in scholarship describing deprivation measures as 'extreme'[16], 'unjust and cruel'[17] manifestations of state authority, or even as outright racist. Thus, E. Tendayi Achiume suggests that deprivation regimes for terrorist conduct 'have racially, ethnically or religiously specified targets'[18]. In the view of such scholars, to quote Patti Tamara Lenard, deprivation measures 'have no place in democratic states'.[19]

The second prominent objection to nationality deprivation is its alleged failure to effectively reach national-security goals. In this view, the measure is a tool of political grandstanding 'for appearances sake'[20] and nothing but 'highly symbolic' in its 'showing [of] muscles'.[21]

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[14] ECtHR, *Ghoumid and Others v. France*, §45.
[15] ECtHR, *Johansen v. Denmark*, §50.
[16] Leslie Esbrook, "Citizenship unmoored: expatriation as a counterterrorism tool," *University of Pennsylvania Journal of international Law* 37, no. 4 (2016): 1277.
[17] Matthew J. Gibney, "Should Citizenship Be Conditional? The Ethics of Denationalization," *The Journal of Politics* 75, no. 3 (2013): 651, https://doi.org/10.1017/s0022381613000352.
[18] Amanda Brown, "Interview with Tendayi Achiume," ed. The Institute on Statelessness and Inclusion, *The World's Stateless: Deprivation of Nationality* (2020). 155.
[19] Patti Tamara Lenard, "Democracies and the Power to Revoke Citizenship," *Ethics & International Affairs* 30, no. 1 (Spring 2016 2016): 99, https://doi.org/https://doi.org/10.1017/S0892679415000635.
[20] Peter J. Spiro, "Terrorist Expatriation: All Show, No Bite, No Future," in *Debating Transformations of National Citizenship*, ed. Rainer Bauböck (Cham: Springer International Publishing, 2018), 173.
[21] Christophe Paulussen and Martin Scheinin, "Deprivation of Nationality as a Counter-Terrorism Measure: A Human Rights and Security Perspective," ed. The Institute on Statelessness and Inclusion, *The World's Stateless - Deprivation of Nationality* (2020). 225-26.

As Peter J. Spiro stresses, it is a form of 'counter-terror bravado' that 'won't advance the counter-terror agenda in any real way'.[22] Thus, scholars have criticised, more specifically, that nationality deprivation 'shoves the problem temporarily away'[23], by pushing challenging citizens 'like a hot potato'[24] from one state to another, and increases, rather than decreases, security risks. Accordingly, critics have pointed to the danger of removing former citizens from where they might be best surveyed and managed,[25] and the additional aggravation that nationality deprivation might cause in terrorist offenders 'return[ing] back home with a vengeance'.[26] In this sense, Christophe Paulussen and Martin Scheinin have argued about the UK's deprivation powers that they are not, as their requirements state, 'conducive to the public good', but 'a condition conducive to terrorism'.[27]

In order to counter such arguments, my thesis pursues a three-step approach. In Chapter One, it will demonstrate that, contrary to scholarly belief, deprivation measures responding to terrorism in the EU and the UK are not penalties of criminal law, but administrative in nature. To this end, I have surveyed the deprivation legislations applicable to terrorism across the MSs and the UK and drawn up a detailed chart of the respective provisions (see the overview table in Section IV.2). Based on this comparative assessment, my thesis examines their legal nature and concludes that, in the great majority of cases, the relevant measures are administrative in their formal classification, procedural make-up, purpose and impact on the individual concerned. In my assessment of the purpose of these deprivation measures (what I will call their 'very nature'), I will also argue that deprivation measures in the EU and the UK primarily aim to sever the bond between the state and a citizen who, by their terrorist conduct, has severely breached their civic loyalty to the state and certain fundamental values of the state community.[28]

In Chapter Two, I will shed further light on the key terms underpinning deprivation regimes applicable to terrorism, as introduced in my first chapter. Thus, I will elucidate, in

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[22] Spiro, "Terrorist Expatriation: All Show, No Bite, No Future," 173.
[23] Paulussen and Scheinin, "Deprivation of Nationality as a Counter-Terrorism Measure: A Human Rights and Security Perspective," 225-26.
[24] Paulussen and Scheinin, "Deprivation of Nationality as a Counter-Terrorism Measure: A Human Rights and Security Perspective," 225-26.
[25] Spiro, "Terrorist Expatriation: All Show, No Bite, No Future," 173.
[26] Rainer Bauböck and Vesco Paskalev, "Citizenship Deprivation - A Normative Analysis," *CEPS Paper in Liberty and Security in Europe* no. 82 (2015): 16.
[27] Paulussen and Scheinin, "Deprivation of Nationality as a Counter-Terrorism Measure: A Human Rights and Security Perspective," 226.
[28] In this thesis, I will use 'loyalty to the state', 'civic loyalty' and similar expressions as synonyms. I will also frequently use the terms 'core principles', 'vital interests' and 'fundamental values' interchangeably to refer to certain key tenets of a state and its community.

particular, the concepts of 'loyalty to the state' and the 'fundamental values' or 'vital interests' of the civic community. This serves the purpose of delineating, with greater precision, what nationality deprivation is and what kind of conduct may warrant its application. The latter is not a trivial point. Is it enough, for instance, to tear up one's passport, as Adam Gadahn has done, or to set flames to a national flag?[29] Or, turning from commission to omission, does the failure to shake a woman's hand qualify as a deprivation ground? This final example derives from recent proceedings in Denmark[30], France[31], Switzerland[32] and Germany[33] which addressed the question of whether such a refused handshake provides sufficient grounds to refuse someone's application for naturalisation.[34] As I will show in my second chapter, only the most fundamental violations of a community's most central principles, especially democracy, human rights, and the rule of law, may lead to nationality deprivation. I will also argue in this chapter that deprivation regimes, understood as responses to a violated civic loyalty, correspond to a 'liberal-republican' understanding of citizenship that attaches both rights and responsibilities to each citizen, including their commitment to the inviolability of the community's rights, liberties and core principles.

On this basis, my third chapter will turn, in detail, to the criticism raised in the scholarship, and evaluate the lawfulness and legitimacy of deprivation regimes responding to terrorism in the MSs plus the UK. The largest part of this evaluation will be dedicated to a defence of the measure's lawfulness. To this end, I will demonstrate that nationality deprivation, as introduced in my first two chapters, generally complies with central legal principles, including non-discrimination, non-arbitrariness and procedural fairness, proportionality, freedom of conscience, and international comity. As part of my proportionality assessment, I will also show that deprivation measures, in conjunction with expulsion, are effective national-security tools and may successfully serve the fight against terrorism. Of course, individual national deprivation provisions may still register as unlawful in specific cases, but there is no reason why deprivation

[29] The latter was once proclaimed as a deprivation ground by Donald Trump. Jonathan David Shaub, "Expatriation restored," *Harvard Journal on Legislation* 55, no. 2 (2018): 363-442.
[30] https://www.aa.com.tr/en/health/man-denied-danish-citizenship-over-handshake-/1747204 (last accessed: 23/03/2023).
[31] https://www.nytimes.com/2018/04/21/world/europe/handshake-citizenship-france.html (last accessed: 23/03/2023).
[32] https://www.bbc.com/news/world-europe-45232147 (last accessed: 23/03/2023).
[33] Regional administrative court of Stuttgart, judgment 07/01/2019, ref. no. 11 K 2731/18, Higher administrative court of Baden-Wuerttemberg Judgment dated 20 August 2020, ref. no. 12 S 629/19.
[34] In all of these 'handshake cases', the national courts upheld the states' refusal of citizenship acquisition. In the German case, for instance, the court of first instance and the court of appeal found that the refused handshake attested to the claimant's inability to accept 'German social norms', pursuant to Section 10(1) of the German Nationality Act.

regimes ought to be considered illegal, in principle, as scholars tend to suggest. The final part of my third chapter goes yet a step further: it argues that nationality deprivation is not only lawful, but also legitimate in a democratic system. To corroborate this point, I will root deprivation regimes responding to terrorism in the EU and the UK in a concept of 'defensive democracy'. According to this principle, if threatened, democracy may take measures to support and defend itself – and, as I will argue, nationality deprivation is one such measure.

All three chapters of this thesis will work intensely with national legislations, international legal instruments, and the jurisprudence of courts at the national and international level. In particular, they will use legal instruments, such as the European Convention on Human Rights (ECHR) or the UN Convention on the Reduction of Statelessness, and the relevant international case law in order to move from the more specific to the more abstract. While my first chapter takes its cue from a comparative assessment of individual national deprivation provisions applicable to terrorist acts, it ends by suggesting that they all share a common idea of nationality deprivation, namely, the severance of a bond of civic loyalty to certain fundamental civic principles. My second chapter flashes out this idea and its key elements, by resorting to international legal instruments that the relevant MSs and the UK subscribe to, especially the UN Convention on the Reduction of Statelessness, and the case law on the ECHR. My third chapter, in turn, takes the idea of nationality deprivation, as suggested in Chapter One and further defined in Chapter Two, and makes a case for its lawfulness and legitimacy, by drawing, once more, on international jurisprudence for corroboration, especially by the Court of Justice of the European Union and the European Commission or Court of Human Rights. As I will detail in my second chapter, this heavy reliance on international jurisprudence allows me to contemplate nationality deprivation beyond the specifics of national laws and to draw conclusions across their diversity.

It also allows me to offer a defence of deprivation regimes. Once issued, a deprivation decision certainly has very serious consequences for the individual concerned, and Shemima Begum's words quoted above are a testament to this personal impact. Nonetheless, as this thesis will show, deprivation measures are lawful and legitimate since they do not apply to just any kind of behaviour: they respond to exceptionally severe violations of a society's key principles, especially its democratic constitution and commitment to human rights and the rule of law. And terrorism and its support constitute violations of precisely this kind. Hence, as the CJEU and the ECtHR confirm, nationality deprivation is a valid response to terrorist conduct and a legitimate element in a state's democratic self-defence.

CHAPTER ONE:
THE LEGAL NATURE OF NATIONALITY DEPRIVATION

I. Research questions and aim

This first chapter of this thesis explores the legal nature of nationality deprivation, a measure that has gained increasing significance in the MSs and the UK as a counter-terrorism tool. More and more frequently, these states have established legal regimes that allow them to exclude a citizen who has been involved in terrorist acts from their communities, at least in a legal and political sense. Such regimes raise fundamental questions about the lawfulness and legitimacy of nationality deprivation. In a first step towards answering these questions, this chapter examines the measure's legal nature. It asks: do deprivation regimes fall under the remit of criminal or administrative law, or something else entirely?

One might ask why such an analysis is necessary. After all, much literature on the topic does not address the legal nature of nationality deprivation in any detail. Rather, it tends to consider the measure as punitive from the start and assumes that a state's primary reason for implementing a deprivation regime is criminal punishment. As Milena Tripkovic observes, many scholars take for granted '[t]he penal nature of citizenship deprivation' and 'neither discuss comprehensively its legal qualification nor consider alternative interpretations.'[35] On the basis of this assumption, their work – often critical of deprivation measures – tends to establish why such measures fail to meet criteria for just punishment. A case in point is Audrey Macklin's criticism of nationality deprivation. She argues that the measure is illegimate because it does not satisfy the prospect of rehabilitation or reintegration.[36] This assumes that nationality deprivation is penal in nature. However, as Kay Hailbronner rightly points out, '[a]ssuming that revocation of citizenship is a (prohibited) form of punishment simply ignores the legal nature of revocation of citizenship.'[37] Irrespective of which legal nature we ultimately

[35] Milena Tripkovic, "Transcending the boundaries of punishment: On the nature of citizenship deprivation," *The British Journal of Criminology* 61, no. 4 (2021): 1045, https://doi.org/10.1093/bjc/azaa085.
[36] Audrey Macklin, "The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?," in *Debating Transformations of National Citizenship*, ed. Rainer Bauböck, IMISCOE Research Series (2018), 168. Cf. Rainer Bauböck, "Whose Bad Guys Are Terrorists?," in *Debating Transformations of National Citizenship*, ed. Rainer Bauböck, IMISCOE Research Series (2018), 201.
[37] Kay Hailbronner, "Revocation of Citizenship of Terrorists: A Matter of Political Expediency," in *Debating Transformations of National Citizenship*, ed. Rainer Bauböck, IMISCOE Research Series (2018), 199.

find most convincing, we need to inquire into the legal nature of nationality deprivation before we can make any substantive arguments for or against the measure. It is the aim of this chapter to do precisely that.

II. Overview of existing studies on nationality deprivation

This chapter seeks to establish the legal nature of states' counter-terrorism deprivation measures, by comparing and analysing such measures across the MSs and the UK. Consequently, it does not aim for a comprehensive, comparative account of the national legal regimes on citizenship deprivation. Instead, it focuses only on those national provisions that are applicable to terrorism, and intends to elucidate what they reveal about their legal nature. In addition, this chapter is comparative only in a very specific sense: it is concerned less with the kind of descriptive legal comparison espoused as a strict methodology by scholars like John C. Reitz,[38] and more so with an argumentative, thematically focused analysis of the different jurisdictions in the EU and the UK. Nonetheless, my analyses contribute to an existing corpus of (often more traditionally comparative) studies on the wider topic of citizenship deprivation. To acknowledge my debt to these studies, and my deviations from them, this section charts those that have been most influential for my research.

If we cast a historical lens on studies on citizenship deprivation, we can observe that they have changed significantly over the years. In particular, they have become increasingly interested in not only surveying deprivation legislations, but in evaluating them in a normative sense, contemplating their political and social implications, and using them as the starting point for larger arguments and policy recommendations. While the studies themselves have become more complex over the years, so has their subject matter: they clearly attest to the rising importance and intricacy of deprivation regimes across the MSs and the UK, and their close relationship with the growing relevance of terrorism in Europe and worldwide. This relevance is directly reflected in the growing interest that studies show in terrorism as a ground for nationality deprivation, and underpins the core focus of my thesis.

Early examples, such as Ivan Kerno's 1953 memorandum on 'National Legislation Concerning Grounds for Deprivation of Nationality'[39] or the surveys conducted in 1961 by the

[38] John C. Reitz, "How to Do Comparative Law," *The American journal of comparative law* 46, no. 4 (1998), https://doi.org/10.2307/840981.
[39] International Law Commission, Fifth Session, Ivan S. Kerno, Memorandum National Legislation Concerning Grounds for Deprivation of Nationality, 6 April 1953, A/CN.4/66.

Conference on the Elimination or Reduction of Future Statelessness,[40] focus on identifying a selection of countries that allow nationality deprivation and list their respective grounds for deprivation without any normative discussion. While terrorist activity certainly falls under some of the national grounds under scrutiny, it is not yet explicitly mentioned as a ground for citizenship deprivation in national legislations or plays a role in the studies themselves. In addition, these earlier studies reveal that only a very limited number of the states included have deprivation powers and that, even if they do, they are rarely applied.[41] Gerard-René de Groot's 1989 study on *Staatsangehörigkeitsrecht im Wandel* does not truly alter this *status quo*: nationality deprivation, especially on the grounds of terrorist conduct, still plays a minor role. Instead, de Groot focuses virtually exclusively on the withdrawals of nationality acquired by naturalisation (*Einbürgerung*).[42]

The next relevant studies date to the 2000s and tend to focus on a smaller selection of countries. Among those specifically about the MSs, *Acquisition and Loss of Nationality*, a 2006 publication by Rainer Bauböck, Eva Ersbøll, Kees Groenendijk and Harald Waldrauch, is particularly important. Most central for my interest in terrorist conduct as a deprivation ground is Waldrauch's examination of nationality loss 'due to disloyalty, treason or offences against the state'.[43] He observes that in seven of the 15 MSs under scrutiny[44] citizens may lose nationality if they harm 'the state's basic interests or endanger its security by committing acts such as

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[40] UN Conference on the Elimination or Reduction of Future Statelessness, *Note by the Secretary-General with annex containing observations by governments on deprivation of nationality, A/CONF.9/10, Annex, Observations by Governments on deprivation of nationality*, 3 May 1961; UN Conference on the Elimination or Reduction of Future Statelessness, *Note by the Secretary-General with annex containing observations by governments on deprivation of nationality, A/CONF.9/10.Add.1, Annex, Observations by Governments on deprivation of nationality*, 5 July 1961; ZN Conference on the Elimination or Reduction of Future Statelessness, *Note by the Secretary-General with annex containing observations by governments on deprivation of nationality, A/CONF.9/10.Add.2, Annex, Observations by Governments on deprivation of nationality*, 19 July 1961.

[41] These included at the time: France, Ireland, Luxembourg and the UK (conviction of a serious crime); Bulgaria, Greece, Italy, and Romania (hostile or harmful acts against the state); UK (disloyalty) and Ireland (unworthiness); Italy and the Netherlands (certain services to foreign nations).

[42] Gerard-René de Groot, *Staatsangehörigkeitsrecht im Wandel : eine rechtsvergleichende Studie über Erwerbs- und Verlustgründe der Staatsangehörigkeit* (Köln and Den Haag, Niederlande Heymann and T.M.C. Asser Instituut, 1989), starting p. 295 Belgium (serious failures to comply with civic duties), France (crimes against national security, offences against the constitution, criminal convictions with a prison sentence of at least 5 years), Italy (conduct abroad that aims to harm the public security, Italian interests, and Italy's name and reputation), Spain (convictions of offences against national security), and the United Kingdom (disloyal behaviour and criminal conviction with a prison sentence of at least 12 months).

[43] Harald Waldrauch, "Loss of nationality," in *Acquisition and Loss of Nationality Volume 1: Comparative Analyses* ed. Rainer Bauböck and et al. (Amsterdam: Amsterdam University Press, 2006), 206.

[44] Belgium (serious violations of obligations as a citizen), Denmark (disloyalty and crimes against the state), France (crimes against the basic interests of the state and terrorist acts), Greece (actions against the state's interests while residing abroad), Ireland (failure in one's duty of fidelity to the nation and loyalty to the state), Luxembourg (failure to fulfil one's duties as a citizen or an (attempted) violation of the laws on external and internal security of the country), and the UK (actions that are seriously prejudicial to the vital interests of the state).

disloyalty, treason, terrorism or crimes against the state'.[45] Furthermore, Waldrauch notes the then recent abolition of a deprivation power based on 'crimes against the external security of the state' in Spain and the discussion of new deprivation powers responding to terrorism in the Netherlands.[46] The latter indicates the emergent relevance of nationality deprivation as a counter-terrorism tool – in both the public discourse and in studies on the topic.

The next examination of nationality deprivation relevant for my research is a Policy Brief published by Gerard René de Groot, Maarten Vink, and Iseult Honohan on behalf of EUDO CITIZENSHIP in 2010. It surveys loss of nationality in 33 legal regimes,[47] and treats conduct most akin to terrorism under the heading of 'seriously prejudicial behaviour'. Regarding involuntary loss of nationality in response to such behaviour, the study notes that 14 of the 33 countries under scrutiny include the ground 'behaviour contrary to the interests of the state' in their provisions.[48] The authors further analyse the legal provisions of these countries with regard to whether their deprivation grounds apply to citizens irrespective of how they acquired citizenship and whether the respective domestic legal regime provides for safeguards against statelessness.[49] The question of statelessness marks an important aspect of the increasingly evaluative nature of deprivation studies, which resurfaces repeatedly in the analyses to date. Likewise, there is a growing tendency among the relevant studies to include normative discussions of nationality deprivation and its grounds. Thus, de Groot, Vink, and Honohan note that they consider deprivation powers responding to 'seriously prejudicial behaviour' as 'problematic' because 'their formulation leaves a large degree of discretion for national authorities', even if they are not a frequent state practice.[50]

Following a 2010 Policy Brief,[51] de Groot and Vink published their most comprehensive account of European citizenship loss in 2014.[52] This publication adds both detail and scope to the authors' earlier analysis and attests to the growing importance of normative evaluation in deprivation studies. Thus, de Groot and Vink point to several issues, especially of international law, that national deprivation provisions might raise. These include, in particular, concerns

[45] Waldrauch, "Loss of nationality," 206.
[46] Waldrauch, "Loss of nationality," 206.
[47] Gerard René de Groot, Maarten Vink, and Iseult Honohan, *Loss of citizenship* (2011), 5.
[48] de Groot, Vink, and Honohan, *Loss of citizenship*, 3. Of today's EU MSs (plus UK): Austria, Belgium, Bulgaria, Cyprus, Denmark, Estonia, France, Ireland, Lithuania, Malta, Romania, Slovenia, and the UK.
[49] de Groot, Vink, and Honohan, *Loss of citizenship*, 3.
[50] de Groot, Vink, and Honohan, *Loss of citizenship*, 3.
[51] Gerard-René de Groot and Maarten P. Vink, *Loss of Citizenship - Trends and Regulations in Europe*, EUDO Citizenship Observatory (Italy, 2010).
[52] Gerard-René de Groot and Maarten Peter Vink, *A Comparative Analysis of Regulations on Involuntary Loss of Nationality in the European Union* (2014).

about discrimination of naturalised citizens,[53] statelessness,[54] and legal insecurity.[55] As in their earlier study, de Groot and Vink observe that 'many of these [deprivation] provisions are old and were until recently not often applied in practice'.[56] This time, however, de Groot and Vink also point to 'political debates' in several MSs that indicate a desire 'of introducing, respectively enforcing this ground for loss' (i.e. 'seriously prejudicial behaviour') in response to the significant number of EU citizens travelling to ISIS conflict areas and joining the terrorist organisation in different capacities.[57] Here, they too note the growing relevance of deprivation measures in light of recent terrorist acts that we first encountered in Waldrauch above and indicate, for the first time, the significance of ISIS in this development. Finally, again expanding on their earlier publications, de Groot and Vink's 2014 study includes a list of policy recommendations on deprivation powers responding to 'seriously prejudicial behaviour'.[58]

The increasing relevance of deprivation powers as a counter-terrorism measure is further underlined by a survey on citizenship revocation compiled by the EU Commission in 2014.[59] While the survey does not yet reveal a notable increase in deprivation provisions across Europe, it attests to the heightened role of terrorist acts in the discourse surrounding deprivation regimes. The survey asked the MSs three questions: whether their current legal regime allowed them to deprive an individual of nationality for acts of terrorism or other serious crimes, whether they admitted statelessness as a possible consequence, and whether they had any relevant legislative plans.[60] While only seven of the 21 countries involved confirmed for their legislations the existence of deprivation powers in response to terrorist acts,[61] all other

[53] de Groot and Vink, *A Comparative Analysis of Regulations on Involuntary Loss of Nationality in the European Union*, 26.
[54] de Groot and Vink, *A Comparative Analysis of Regulations on Involuntary Loss of Nationality in the European Union*, 26.
[55] de Groot and Vink, *A Comparative Analysis of Regulations on Involuntary Loss of Nationality in the European Union*, 26.
[56] de Groot and Vink, *A Comparative Analysis of Regulations on Involuntary Loss of Nationality in the European Union*, 27.
[57] de Groot and Vink, *A Comparative Analysis of Regulations on Involuntary Loss of Nationality in the European Union*, 28.
[58] de Groot and Vink, *A Comparative Analysis of Regulations on Involuntary Loss of Nationality in the European Union*, 28.
[59] European Commission, *Ad-Hoc Query on Revoking Citizenship on Account of Involvement in Acts of Terrorism or Other Serious Crimes* (2014).
[60] European Commission, *Ad-Hoc Query on Revoking Citizenship on Account of Involvement in Acts of Terrorism or Other Serious Crimes*, 2.
[61] Belgium (convictions for serious crimes, including terrorism, and violations of a citizen's duty of loyalty to the state), Bulgaria (convictions for severe crime against the republic), Estonia (attempts to forcibly change the constitutional order of Estonia), France (convictions for acts of terrorism or for crimes or offences which threaten the fundamental interest of the State), the Netherlands (convictions for a terrorist offense or an international crime), Slovenia (conduct of serious and repeated crimes and/or membership in an organisation that attacks the constitutional order), and the United Kingdom ('deprivation needs to be conducive to the public good' or 'conduct seriously prejudicial to the vital interests of the UK').

participants but one (Italy) denied pending amendments or research carried out on the implementation of any such legislation. Over the course of only a few years, this would change significantly for several EU states.

While the 2014 Commission survey is crucial for the explicit connection it draws between citizenship deprivation and terrorist acts, it is a national survey that first dedicates a full analysis to the growing role of the IS terror group in the development of European deprivation legislation. In 2016, the Research and Documentation Services of the German Federal Parliament conducted a study on the legal regimes in selected MSs concerning nationality loss of nationals fighting for the IS terror group.[62] The study helpfully marks the growing importance of terrorism for the question of citizenship deprivation and the research interest the topic has started to attract, also at the nation-state level.

The next relevant study, 'Acquisition and Loss of Citizenship in EU Member States – Key Trends and Issues', by Maria Margarita Mentzelopoulou and Costica Dimbrava, was published by the European Parliamentary Research Service in 2018.[63] The study notes that 15 MSs are jurisdictions in which treason and disloyalty may lead to loss of nationality.[64] As grounds for loss of nationality it cites serious crimes against the state, harming the state's constitutional order and institutions, conduct of disloyalty (in act or speech), and behaviour diametrical to the state's interests.[65] The study is relevant for our concerns especially in its comments on terrorism. Thus, it observes that the deprivation powers of France and the Netherlands explicitly mention terrorist conduct.[66] More importantly, it analyses the consequences of recent terrorist attacks across Europe for the deprivation powers of MSs, and notes that a number of states have introduced or expanded deprivation powers 'in order to deter, punish and discredit terrorists.'[67] It also discusses the legal challenges of deprivation powers, including the issues of

[62] Wissenschaftlicher Dienst des Bundestages, Verlust der Staatsangehörigkeit bei IS-Kämpfern - Rechtslage in ausgewählten EU-Staaten, Sachstand, WD3-3000-270/16 (2016).
[63] Maria Margarita Mentzelopoulou and Costica Dimbrava, Acquisition and loss of citizenship in EU Member States – Key trends and issues, PE625.116 (2018).
[64] Mentzelopoulou and Dimbrava, Short Acquisition and loss of citizenship in EU Member States – Key trends and issues. These are: Belgium, Bulgaria, Cyprus, Denmark, Estonia, France, Greece, Ireland, Latvia, Lithuania, Malta, the Netherlands, Romania, Slovenia, and the United Kingdom.
[65] Mentzelopoulou and Dimbrava, Short Acquisition and loss of citizenship in EU Member States – Key trends and issues, 7.
[66] Mentzelopoulou and Dimbrava, Short Acquisition and loss of citizenship in EU Member States – Key trends and issues, 7.
[67] Mentzelopoulou and Dimbrava, Short Acquisition and loss of citizenship in EU Member States – Key trends and issues, 10.

statelessness, discrimination, insecurity of citizenship, and the ineffectiveness of deprivation of nationality as a counter-terrorism measure.[68]

In the same year, Ashurst LLP in collaboration with the Institute on Statelessness and Inclusion, The Open Society Foundation, and the Asser Institute presented a discussion paper on the global and regional trends of 'Citizenship stripping as a security measure'.[69] The paper is noteworthy for its historical analyses of legislative change. Thus, it establishes, for instance, that a number of countries introduced new deprivation powers or amended existing ones in the aftermath of 9/11 and more recent terror attacks across Europe.[70] It also discusses failed expansions of deprivation powers at the time, for example, in Germany and France.[71] More than previous studies, the paper considers the differing mechanisms of deprivation regimes and examines the competent authorities that may instigate loss of nationality and/or render the final administrative or judicial decision leading to nationality loss.[72] As one of the first studies to do so, the Ashurst paper highlights a selection of relevant cases, especially in the UK, and details how deprivation powers are exercised in certain jurisdictions.[73]

In 2020, Jules Lepoutre published an EUI Working Paper on 'Citizenship Loss and Deprivation in the European Union (27 + 1)'.[74] This paper is most extensive on the subject and contributes, once more, to the evaluative drive of the more recent studies on nationality deprivation. Lepoutre offers a particularly interesting analysis of the deprivation question, considering a European concept of citizenship. According to Lepoutre, the rules that govern nationality loss in the MSs are governed by two opposing principles.[75] Pursuant to Declaration No. 2 on nationality of a Member State made to the Treaty on European Union (TEU),[76] questions of nationality remain within the exclusive competence of the MSs, leading to a diverse body of rules governing nationality.[77] This diverse body of rules underpins the common status of European citizenship unifying all nationality laws.[78] The author concludes that the 27+1

[68] Mentzelopoulou and Dimbrava, Short Acquisition and loss of citizenship in EU Member States – Key trends and issues, 10.
[69] Ashurst LLP, Discussion Paper 1: Global and Regional Trends 2018. Please note: This paper has not been published, but I was provided a copy by the Institute on Statelessness and Inclusion with the permission to make references to the study as part of my research thesis.
[70] Ashurst LLP, Discussion Paper 1: Global and Regional Trends starting at 8.
[71] Ashurst LLP, Discussion Paper 1: Global and Regional Trends 8.
[72] Ashurst LLP, Discussion Paper 1: Global and Regional Trends starting at 8.
[73] Ashurst LLP, Discussion Paper 1: Global and Regional Trends, 15-19 (2018).
[74] Lepoutre, "Citizenship Loss and Deprivation in the European Union (27 + 1)."
[75] Lepoutre, "Citizenship Loss and Deprivation in the European Union (27 + 1)."
[76] Treaty on European Union - Declaration on nationality of a Member State, Official Journal C 191, 9/07/1992, P. 0098.
[77] Lepoutre, "Citizenship Loss and Deprivation in the European Union (27 + 1)," 1.
[78] Lepoutre, "Citizenship Loss and Deprivation in the European Union (27 + 1)," 1.

nationality laws should not be regarded as a body of unrelated fragments, but rather as 'the European rules governing loss of European citizenship.'[79] Accordingly, Lepoutre's study 'analyses, from a legal perspective, the diversity of legislation in Member States, and what binds them together, i.e., European and international legal obligations.'[80]

Even more than earlier studies, Lepoutre attests to the increasing importance of deprivation powers as a counter-terrorism measure. Thus, the author describes nationality deprivation in response to terrorism as a 'recent trend' in a number of MSs,[81] and notes that 13 European countries fundamentally reformed their nationality laws in the years leading up to 2020.[82] Among these, eight have introduced new or expanded existing deprivation powers with the aim of fighting terrorism.[83] Like other studies, Lepoutre links this development to a desire of targeting nationals who joined ISIS abroad and are now expected to return to their country of nationality.[84]

Lepoutre takes the evaluative approach of the more recent deprivation studies a step further by also addressing the relationship between democracy and deprivation – a relationship that will take a central position in my own study. Thus, he considers the 'liberal impasse' for contemporary liberal democracies between the prohibition of statelessness, on the one hand, and equality of citizenship, on the other.[85] Retaining the integrity of one will necessarily compromise the other: if a state chooses to prevent statelessness by requiring multi nationality for their deprivation powers, it challenges the principle of equality because the powers do not apply to nationals holding single nationality and *vice versa*.[86]

Most recently, in 2021, Milena Tripkovic has published a study on citizenship deprivation that is aimed not primarily at elucidating deprivation legislations across Europe, but that uses the data they provide to analyse the measure's complex legal status. Drawing on the methodology of comparative law, she assesses the legal nature of nationality deprivation and especially its punitive character.[87] In a sense, here we find the culmination of the evaluative tendency in

[79] Lepoutre, "Citizenship Loss and Deprivation in the European Union (27 + 1)," 1.
[80] Lepoutre, "Citizenship Loss and Deprivation in the European Union (27 + 1)," 2.
[81] Lepoutre, "Citizenship Loss and Deprivation in the European Union (27 + 1)," starting at 8.
[82] Lepoutre, "Citizenship Loss and Deprivation in the European Union (27 + 1)," 8. These are: Austria, Belgium, Bulgaria, the Czech Republic, Denmark, Finland, Germany, Italy, Lithuania, the Netherlands, Slovakia, Spain, and the UK.
[83] Lepoutre, "Citizenship Loss and Deprivation in the European Union (27 + 1)," 8.
[84] Lepoutre, "Citizenship Loss and Deprivation in the European Union (27 + 1)," 8.
[85] Lepoutre, "Citizenship Loss and Deprivation in the European Union (27 + 1)," 12.
[86] Lepoutre, "Citizenship Loss and Deprivation in the European Union (27 + 1)," 12.
[87] Tripkovic, "Transcending the boundaries of punishment: On the nature of citizenship deprivation," 1045. Also: Milena Tripkovic, "Renouncing criminal citizens: Patterns of denationalization and citizenship theory," *Punishment & Society* 25, no. 2 (2023), https://doi.org/10.1177/14624745221080705.And: Milena Tripkovic, "No

the relevant studies on citizenship deprivation to date: Tripkovic uses her study, in unprecedented ways, as evidence for a larger theoretical argument. While she ultimately arrives at different results, Tripkovic' methodological approach has been crucial for my thesis.

As this overview may indicate, there are several important studies on citizenship deprivation in the EU and the UK, which allow us to trace a number of significant developments in deprivation legislations: most crucially, there has been a steady increase in the number of European nations with deprivation powers, especially in the last few years and in response to terrorist acts. In 2019 alone, Germany, Denmark and Finland have reformed their deprivation regimes and introduced measures specifically targeting terrorist crime. As several studies confirm, the involvement of European nationals with ISIS warfare and the looming return of such nationals have been driving factors in this legislative trend. In addition, the last decades have seen a diversification of deprivation grounds and a greater reach in many cases. The legislative trend towards greater relevance and severity of deprivation powers, especially as a counter-terrorism measure, is ongoing.

This overview also allows us to chart a brief history of deprivation studies. They all survey deprivation grounds in a varying selection of countries; yet while the earliest publications are largely descriptive, examinations like Bauböck, Ersbøll, Groenendijk and Waldrauch (2006), de Groot and Vink (2014), Ashurst (2018), Lepoutre (2020) or Tripkovic (2021) are increasingly evaluative in their approach: they look at legislative changes and discuss their political and societal contexts, contemplate the potentially problematic implications of deprivation powers for legal security and statelessness and begin to cast a spotlight on the precise mechanisms of deprivation regimes, the relevant case law and the relationship between deprivation and democracy. It is the last three topics that my thesis will focus on in particular. More specifically, this chapter will offer a discussion of nationality deprivation in response to terrorist acts that differs from earlier studies not only in its more up-to-date account of legislative changes, but also in its dedicated examination of the measure's legal nature, considering both the domestic deprivation regimes and the relevant case law at the national and international level.

III. Methodology

This section will detail the most important aspects of methodology that inform my analysis of deprivation regimes in the MSs and the UK, especially regarding my selection of nations,

Country For 'Bad' Men: Volatile Citizenship and the Emerging Features Of Global Neo-colonial Penality," *The British Journal of Criminology* (2023), https://doi.org/10.1093/bjc/azac103, https://doi.org/10.1093/bjc/azac103.

my criteria for choosing the grounds for nationality deprivation that I look at for a particular nation, my reasons for considering (inter)national case law, and my access to information. Further below (Section V.2.), I will also discuss the methodological approach I rely on for identifying the legal nature of nationality deprivation.

1. Selection of nations

I have based my analysis on the 27 MSs and the UK because I believe that they provide a particularly interesting and understudied sample of deprivation regimes responding terrorist acts. Many of these states have seen an increase in the intensity and complexity in which they have been touched by (inter)national terrorism over the past few years.[88] ISIS plays a significant role in this development: nationals across Europe have travelled abroad to fight for the IS terror group or support the terror organisation in other capacities.[89] In addition, a number of European states have witnessed terrorist attacks committed by Jihadist terrorists.[90] This tragic prominence of terrorism allows us to analyse and compare how a relatively large group of countries, operating both individually and as a union, has responded to threats posed by their own citizens to their most fundamental values. In many cases, the response has been a revision of states' anti-terrorism legislation, including the introduction of new deprivation grounds or the amendment of existing ones.[91] The growing relevance of deprivation regimes as counter-terrorism measures across Europe makes these countries an excellent sample for my enquiry.

Beyond its timeliness, the issue of nationality deprivation in the MSs and the UK also offers an intriguing normative crux. All of these nations are democracies firmly committed to individual rights and freedoms – the very qualities that deprivation powers are often said to challenge. Indeed, the states' organisation under the umbrella of the EU binds them not only to their own constitutions and democratic systems, but also to a series of international humanitarian regimes aiming to uphold peace within Europe and to safeguard individual rights. These rights are strengthened by national courts and by the case law of the European Court of Human Rights (ECtHR) and the European Court of Justice (CJEU). European domestic legislations, including any recent counter-terrorism innovations, need to comply with national constitutional

[88] Infographic - Terrorism in the EU: facts and figures, available at: https://www.consilium.europa.eu/en/infographics/terrorism-eu-facts-figures/ (last accessed: 23/03/2023).
[89] Richard Barrett, *Beyond the Caliphate: Foreign Fighters and the Threat of Returnees*, The Soufan Center (2017), 12-13. Joana Cook and Gina Vale, *From Daeshcto 'Diaspora': Tracing the Women and Minors of Islamic State*, ICSR Report (2018), 3-4. Piotr Bąkowski and Laura Puccio, *Foreign fighters – Member State responses and EU action*, EPRS | European Parliamentary Research Service (2016), 2-3.
[90] For an example, see Europol, *European Union Terrorism Situation and Trend Report* (2018), starting at 21.
[91] Amandine Scherrer, *The return of foreign fighters to EU soil - Ex-post evaluation*, EPRS | European Parliamentary Research Service (2018), 25, 39, 41.

requirements as well as with EU law and international human-rights law subject to judicial review. Furthermore, all MSs and the UK are members of the Council of Europe[92] and signatories to the European Convention on Human Rights[93]. This supranational framework adds to the background against which the legitimacy of citizenship deprivation needs to be discussed in the EU and the UK.

While domestic laws need to comply with European rules and standards, this is also true for citizenship.[94] Regulating citizenship, especially the rules on citizenship acquisition and loss, is a policy area historically governed by the nation state.[95] However, with the growing number of international ties and treaties in recent decades, the question of citizenship has become increasingly perched between national and international law. Indeed, as early as 1930, the Convention on Certain Questions Relating to the Conflict of Nationality observes (Article 1):

> 'It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality'

Within the EU, the intertwinement between national and international concepts of citizenship is particularly acute. Thus, Article 20(1) of the Treaty on the Functioning of the European Union (TFEU) establishes a 'Citizenship of the Union', which exists in addition to national citizenship and is conditioned by it.[96] The CJEU underlined this supranational aspect of citizenship most famously in *Rottman v. Freistaat Bayern*. Stressing the importance of European citizenship, the court ruled that MSs need to observe a principle of proportionality when revoking citizenship.[97] The close intersection between national and EU law on citizenship, and

[92] For a complete list of member states, see: https://www.coe.int/en/web/about-us/our-member-states (last accessed: 23/03/2023).
[93] For a complete list of signatory states, see: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=Lu7QUODJ (last accessed: 23/03/2023).
[94] On the intertwinement of national and EU law in question of citizenship: CJEU, *Rottmann v. Freistaat Bayern*, case C-135/08, judgment 02/03/2010, §48. CJEU, *Tjebbes and Others v. Minister van Buitenlandse Zaken*, case C-221/17, judgment 12/03/2019, §30. Lepoutre, "Citizenship Loss and Deprivation in the European Union (27 + 1)," 1.
[95] CJEU, *Rottmann v. Freistaat Bayern*, §39. Lepoutre, "Citizenship Loss and Deprivation in the European Union (27 + 1)," 1. See also Chapter Two, Section IV.2 and Chapter Three, Section III.
[96] Article 20(1) of the *Treaty on the Functioning of the European Union*: 'Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.'
[97] CJEU, *Rottman v. Freistaat Bayern*, §55.

between national and European jurisdictions on citizenship legislation, adds to the appeal of making the MSs and the UK the target sample of this study.

2. Terrorism as a deprivation ground

Since this study analyses deprivation regimes across the EU and the UK, it first needs to examine the grounds leading to loss of nationality in the respective countries – a task that all deprivation studies need to undertake in some form. Most studies approach this task as follows: they first catalogue all the grounds that may lead to loss of nationality in the countries they examine and subsequently group them into overarching categories. Mentzelopoulou and Dimbrava, for instance, identify four larger categories of grounds in their 'Acquisition and loss of citizenship in EU Member States – Key trends and issues': residing abroad, acquiring of another citizenship, serving in a foreign army, displaying disloyal/treasonable conduct, and acquiring citizenship fraudulently.[98] The influential GLOBALCIT online database even distinguishes between 15 different grounds for nationality loss.[99]

My approach is a different one: because I am interested in nationality deprivation as a counter-terrorism measure, I analyse only those national grounds that relate to terrorism, without grouping them into abstract categories first. Some national provisions explicitly refer to terrorist activities; others arguably do so implicitly. This is the case, I propose, when grounds include conduct akin to terrorist behaviour. Following the definition of terrorism offered by the UN General Assembly in 2006, I understand terrorist behaviour as 'activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening territorial integrity, security of States and destabilizing legitimately constituted Governments'.[100]

Of the grounds that do not explicitly mention terrorism, but conceivably fall under the UN definition above, I discard those that, in their wording, do not match the realities of terrorism, as witnessed in the MSs and the UK in recent decades. Greece offers a helpful example: Article

[98] Mentzelopoulou and Dimbrava, Short Acquisition and loss of citizenship in EU Member States – Key trends and issues, 7. For different categorizations, see also T. Alexander Aleinikoff, "Theories of Loss of Citizenship," *Michigan Law Review* 84, no. 7 (1986): 1473. de Groot and Vink, *A Comparative Analysis of Regulations on Involuntary Loss of Nationality in the European Union*, 3. Brian Carey, "Against the right to revoke citizenship," *Citizenship Studies* 22, no. 8 (2018): 897, https://doi.org/10.1080/13621025.2018.1538319.

[99] GLOBALCIT Citizenship Law Dataset – Modes of Loss of Citizenship, available at: https://globalcit.eu/modes-loss-citizenship/ (last accessed: 23/03/2023).

[100] UN General Assembly, The United Nations Global Counter-Terrorism Strategy: *Resolution 60/288*, adopted by the General Assembly 20 September 2006 (A/RES/60/288), preambular § 7. Available at: https://www.refworld.org/docid/468364e72.html (last accessed: 24/03/2023). Cf. the preamble to the 2005 Council of Europe Convention on the Prevention of Terrorism and Andrew Walmsley, *Nationality Issues And The Denial Of Residence In The Context Of The Fight Against Terrorism - Feasibility Study*, Bureau Of The European Committee On Legal Co-Operation (CDCJ-BU) (2006), 3.

17 of Chapter B (citizenship loss) of the Greek Citizenship Code of 2004[101] establishes that a Greek citizen may lose their citizenship if they act for the benefit of a foreign country and against the interest of the Hellenic Republic, while being abroad.[102] This provision may be said to cover forms of 'terrorism' initiated by, and beneficial to, a foreign state. However, terrorism today is constituted almost exclusively by non-state players. Accordingly, the Greek provision is more likely to target other scenarios (espionage, for instance). For this reason, I consider Greece a country without a deprivation regime specifically related to terrorism.

3. Structuring the diversity of deprivation regimes

Even a first glance at the deprivation regimes related to terrorism in the EU and the UK reveals that they are rather diverse (see Section IV.2 above). Indeed, the same jurisdiction may provide several grounds applicable to terrorist conduct. This is the case in Austria, Belgium, Cyprus, Denmark, Estonia, Malta, the Netherlands, Romania, and Slovenia. Often, this results in differences both in substantive requirements and legal procedures, with different authorities initiating and rendering the deprivation decision. Denmark provides a useful example. The Act on Danish Nationality includes two relevant provisions: Article 8B(1) and Article 8B(3). Both provisions differ in substance: while the former requires a court conviction for crimes, broadly speaking, against the state and its institutions, the latter targets conduct incompatible with the state's vital interests. The procedural characteristics of both provisions differ as well. For Article 8B(1), the competent authority for initiating deprivation proceedings is the prosecutor, while the criminal court renders the deprivation decision. This decision may then be appealed to the High Court. For Article 8B(3), by contrast, the Minister of Foreign Affairs and Integration may both initiate and decide the deprivation procedure. Their decision may be challenged before administrative courts.

This example both captures the complexity of deprivation measures and indicates the methodological challenge of surveying deprivation regimes in the MSs and the UK in a comprehensive manner. One could, of course, discuss deprivation powers in accordance with any number of criteria. These include whether provisions differentiate between mono and multi citizens, whether they consider different modes of citizenship acquisition or whether they avoid statelessness. While I will return to these issues in my discussions, I have decided to analyse

[101] *Κώδικα της Ελληνικής Ιθαγένειας ΝΟΜΟΣ ΥΠ' ΑΡΙΘ. 3284/2004.*
[102] Art. 17(1)lit.b).

the relevant national measures by grouping them in accordance with three substantial categories that I have identified in the grounds they require.

The first includes provisions that require a (final) criminal court conviction for particularly severe crimes. Such provisions often explicitly mention terrorism. Thus, Article 25 No. 1 of the French Civil Code establishes that an individual may be deprived of citizenship if they are *inter alia* convicted of crimes of terrorism. The second category encompasses provisions that allow citizenship deprivation for fighting in an armed conflict and for an organisation abroad. While terrorism may be mentioned explicitly in such provisions, it is generally implicitly understood (see preceding section). Article 14.4 of the Dutch Nationality Act provides a case in point. Here, citizenship may be withdrawn if a citizen joins organisations 'that participate in a national or international armed conflict and pose a threat to national security'. The final category of deprivation provisions needs some further elaboration. It rarely mentions terrorism explicitly and refers to more abstract criteria, such as the violation of the state's fundamental values or vital interests or a lack of loyalty to the state, which may be instantiated by terrorist behaviour. Belgium, for instance, allows loss of nationality for acts that violate the 'duties of a Belgian citizen' (*devoirs de citoyen* belge, Article 23 of the Belgian Nationality Code). While Belgian legislation does not define these duties any further, the Belgian Court of Appeal, that is, the authority rendering deprivation decisions based on Article 23, confirmed in 2009 that terrorist conduct constitutes a serious violation of the duties of a Belgian citizen and thus falls within the Article's remit.[103] Treating national deprivation measures in accordance with these three categories allows me to engage with similar deprivation powers at the same time, and make more abstract observations.

4. Sources and access to information

For information about the national legal regimes of citizenship deprivation, I have relied on a combination of legal sources. The Global Citizenship Observatory (GLOBALCIT) offers a detailed database which not only includes expert reports on national citizenship laws, but also (un)official translations of their wording. While this provides an important starting point, in many cases, the GLOBALCIT translations are slightly outdated, and their reports do not yet include the most recent legislative amendments responding to the rising number of terrorist threats in many MS. In such cases, I have identified relevant legislative changes by translating

[103] Wautelet, "Deprivation of citizenship for 'jihadists' - Analysis of Belgian and French practice and policy in light of the principle of equal treatment," 2. See also Louise Reyntjens, "Citizenship deprivation under the European convention-system: A case study of Belgium," *Statelessness & Citizenship Review* 1, no. 2 (2019): 271.

the most recent consolidated versions of the domestic citizenship law from the respective parliamentary websites. Recent cases of international courts, especially the case law of the ECtHR, often also point to legislative innovations, since they generally include a section on the law from which the dispute arises.[104] The continually updated country profiles of the ECtHR, available for each signatory state of the ECHR, has been particularly helpful for the identification of relevant cases. Finally, my research draws on recent scholarship that discusses national deprivation regimes in response to terrorist crimes.[105]

Since I am not a legal expert for many countries in this study nor, in most cases, fluent in their languages to the extent that I could read their legal sources in the original, my research depends on the translations provided by the respective country experts, on scholarly analyses of domestic law and on court decisions that review national legislation.

5. Historical context

Finally, I would like to note that my analysis in this first chapter focusses on national legislations as they are currently in force. That is to say that I am taking a synchronic, rather than diachronic approach in my assessment of deprivation regimes applicable to terrorism across the EU and the UK. As my overview of such regimes will show, there are relevant provisions that have existed for a significant period of time. This is true, for instance, for part of the Belgian deprivation legislation. However, as I have indicated above, a large number of deprivation provisions applicable to terrorism has been introduced only recently, and even for those that have existed for longer, the application to terrorism is a new development. By contrast, the practice of excluding members from a political community is not a novel one of course. While a detailed discussion of this practice through time exceeds the scope of this thesis, let me give a brief sketch of its key historical developments and comment on how they affect my examinations in this thesis.

One of the earliest precursors of modern-day denationalisation is the 'ostracism' that was practiced in ancient Athens. It allowed the banishment of citizens, by popular vote, from the

[104] See, for example: ECtHR, *Mubarak v. Denmark*.
[105] See, for example: Sandra Mantu, "'Terrorist' citizens and the human right to nationality," *Journal of Contemporary European Studies* 26, no. 1 (2018): starting at 35, https://doi.org/10.1080/14782804.2017.1397503.
Matthew J. Gibney, "'A Very Transcendental Power': Denaturalisation and the Liberalisation of Citizenship in the United Kingdom," *Political studies* 61, no. 3 (2013), https://doi.org/10.1111/j.1467-9248.2012.00980.x.
Louise Reyntjens Reyntjens, "Citizenship deprivation under the European convention-system: A case study of Belgium."

democratic community, at least for a certain amount of time.[106] Also the Middle Ages knew variants of political banishment, but, at this point, authority over such measures no longer lay with the people. Instead, the King, as the divine ruler, had the unchallenged power to banish his subjects.[107] The practice of political exclusion gained its perhaps darkest examples of authoritarian use – and abuse – during the Nazi Regime. Thus, the deprivation powers established by the Law of 14 July 1933 and its accompanying ordinance of the same date[108] became central instruments in Germany's endeavour to implement a 'pure' or 'Aryan' people by excluding those who, according to Nazi propaganda, did not fit this standard. The close association of denationalisation with authoritarian rule continued in the German Democratic Republic, where it was used to dispose of those who (publicly) challenged party policy.[109] More recently, mass denationalisations in Syria, Myanmar or the Dominican Republic that targeted specific citizens based on their religion and/or ethnicity[110] have done little to rehabilitate the measure's reputation.

In light of this problematic history, it is crucially important to base any discussion of nationality deprivation on a firm condemnation of the measure's abuse, especially through authoritarian forces – and particularly so, if the discussion, like my thesis, seeks to offer a tentative defence of the measure. My defence and support of denationalisation applicable to terrorism as a lawful and legitimate state act is strictly limited to the specific democratic systems under discussion, namely the EU MSs and the UK. In these systems, the possibility of the measure's abuse – which we saw exploited above – is checked by the circumstance that the respective states are bound to comply with individual rights by national and international law, including the 1961 UN Convention and the European Convention on Human Rights. In addition, and perhaps even more importantly, in the states that are the subject of this thesis, there is a clear system of appeal and/or judicial review whereby those targeted by denationalisation may assert their rights and challenge the measure. Furthermore, as I will discuss in great detail below, nationality deprivation in these nations may only be a response to conduct that is

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[106] Aristotle, *Athenian Constitution* 43.5, as in *Aristotle in 23 Volumes*, vol. 20, ed. and trans. H. Rackham (Cambridge, MA: Harvard University Press, London: William Heinemann Ltd., 1952).
[107] Matthew J. Gibney, "Banishment and the pre-history of legitimate expulsion power," *Citizenship Studies* 24, no. 3 (2020): 277.
[108] Quoted in Lawrence Preuss, "International Law and Deprivation of Nationality," *Georgetown Law Journal* 23, no. 2 (1935): 250, 252.
[109] Christian Joppke, "Terror and the loss of citizenship," *Citizenship Studies* 20, no. 6-7 (2016): 728. Dr. Daniel Niemetz, "Wolf Biermann und seine Ausbürgerung, MDR Zeitreise, " as of 7 November 2016.
[110] Sangita Jaghai and Laura van Waas, "Stripped of Citizenship, Stripped of Dignity? A Critical Exploration of Nationality Deprivation as a Counter-Terrorism Measure," in *Human Dignity and Human Security in Times of Terrorism*, ed. Christophe Paulussen and Martin Scheinin (The Hague: T.M.C. Asser Press, 2020).

fundamentally incompatible with a democracy's core values and principles. To further explore the high threshold of requirements that any deprivation power needs to pass in order to be regarded lawful and legitimate, is the aim of the following discussions.

IV. Deprivation regimes applicable to terrorism in the MSs and the UK

1. States without deprivation powers applicable to terrorist conduct

At present, there are eleven jurisdictions in the EU and the UK that do not have deprivation powers applicable to terrorist conduct as defined above: Croatia[111], the Czech Republic[112], Greece[113], Hungary[114], Lithuania[115], Luxembourg[116], Poland[117], Portugal[118], Slovakia[119], Spain[120], and Sweden[121].

Let me add clarifications on two counts. I list Spain among those countries without relevant deprivation measures. However, if we follow Ruth Rubio Marín, Irene Sobrino, Alberto Martín Pérez, and Francisco Javier Moreno Fuentes, there appears to have been a provision repealed in 2002, which allowed citizenship deprivation for naturalised citizens in response to criminal convictions.[122] In addition, a 2020 news article reports that a dual national of Spain and Switzerland lost their Spanish citizenship in 2015 after joining ISIS.[123] However, the report fails to specify the legal provision underpinning the Spanish deprivation proceedings.

The Lithuanian Law on Citizenship constitutes a series of grounds leading to loss of nationality.[124] These include loss of nationality if grounds are discovered that would have prevented the individual from being granted or restored citizenship in the first place.[125] However,

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[111] Art. 17 under section III on terminating nationality of the Croatian Citizenship Act.
[112] Section 40 under title III on losing Czech nationality of the Czech Citizenship Act 186/2013.
[113] Articles 16-21 of Chapter B on loss of citizenship of the Greek Citizenship Code of 2004. See discussion above.
[114] §8-§9 on termination of Hungarian citizenship of the 1993 Act on Hungarian Nationality.
[115] Articles 24-26 of Chapter IV on loss of citizenship of the Law on Citizenship of 2010 (Nr. XI-1196).
[116] Art. 55-64 of Chapter IV on loss of nationality of the Law on Luxembourg nationality of 2017.
[117] Art. 46-54 of Chapter 6 on Loss of citizenship of the Law on Polish Citizenship of 2009.
[118] Art. 8-12B of Chapter III on loss of nationality of the Portuguese Nationality Act of 1981 (law no. 37/81, Diário da República no. 228/1981, Series I).
[119] §9 of Part Two on Loss of Nationality of the Act on citizenship of the Slovak Republic (law no. 40/1993).
[120] Art. 24-25 under title one of book one on Spanish and foreign individuals of the Civil Code (Royal decree of 24 July 1889).
[121] Sections 14-15 on loss of and release from citizenship of the Act on Swedish Citizenship (Act 2001:82).
[122] Ruth Rubio Marín et al., *Country Report on Citizenship Law: Spain*, EUDO Citizenship Observatory (2015), 27.
[123] SWI: "Spain sinks Swiss plan to withdraw citizenship of terror suspect", 2020, available at: https://www.swissinfo.ch/eng/spain-sinks-swiss-plan-to-withdraw-citizenship-of-terror-suspect/45842332 (last accessed: 23/03/2023).
[124] Art. 24 no. 1) - no. 6).
[125] Art. 24 no. 6).

loss of citizenship pursuant to Article 24(6) appears to be only applicable to scenarios in which these circumstances, while discovered later, already existed at the time when citizenship was granted. Thus, nationality deprivation does not appear applicable to someone committing a terrorist offence after having been granted Lithuanian citizenship.

2. States with deprivation powers applicable to terrorism

17 countries in the EU and the UK possess deprivation powers applicable to terrorist conduct: Austria, Belgium, Bulgaria, Cyprus, Denmark, Estonia, Finland, France, Germany, Ireland, Italy, Latvia, Malta, the Netherlands, Romania, Slovenia, and the UK. The table in the next few pages gives an overview of their most central elements.

State	Applicable law	Substantive requirements [if recent: *year of introduction]	Criminal conviction required?	Type of deprivation decision	Competent authority	Review procedure	Applicability, regardless of mode of citizenship acquisition?	Protection against statelessness?
AT	Federal Law concerning Austrian Nationality (1985 Nationality Act) Art. 26 No. 3	Active voluntary participation in combat operations abroad on behalf of an organised armed group as part of an armed conflict (Art. 33(2)) [*2015]	No	Administrative decision (Art. 39)	Power to initiate deprivation proceedings (PtiDP): *ex officio* or by the Federal Minister of Interior (Art. 35) Power to render deprivation decisions (PtrDD): Provincial Government (Art. 39)	Administrative court proceedings	Yes	Yes
		Final criminal conviction of terrorist offenses under Austrian Criminal Code with prison sentence (Art. 33(3)) [*2021]	Yes					
BE	Belgian Nationality Law of 1984 Art. 22(1) No. 7	Serious violations of the duties of a Belgian citizen (Art. 23(1) No. 2)	No	Judgment (Art. 23(1))	PtiDP: public prosecutor (*ministère public*) (Art. 23(2)) PtrDD: court of appeal (*Cour d'appel*) (Art. 23(3))	Judicial appeal proceedings	No	Yes
		Criminal conviction carrying a prison sentence of at least five years without suspension for certain crimes under the Belgian Penal Code and the Aliens Act including acts of terrorism and crimes against national security[126] (Art.23/1(1)No.1) [*2012]	Yes	Judgment (Art. 23/1(1)-(3))	PtiDP: public prosecutor (*ministère public*) (Art.23/1(1)-(3)) PtrDD: judge of first instance (*le juge*) (Art.23/1(1)-(3))			
		Criminal conviction carrying a prison sentence of at least five years for crime facilitated by possessing Belgian nationality (Art.23/1(1)No.2) [*2012]			PtiDP: public prosecutor (*ministère public*) (Art.23/1(1)-(3)) PtrDD: judge of first instance (*le juge*) (Art.23/1(1)-(3))			

[126] Please note: Art. 23/1(1) establishes a time limit of ten years that excludes loss of nationality if the crimes have been committed more than ten years after obtaining Belgian nationality. Exceptions to this time limit: crimes of serious violations of international humanitarian law.

State	Applicable law	Substantive requirements [if recent: *year of introduction]	Criminal conviction required?	Type of deprivation decision	Competent authority	Review procedure	Applicability, regardless of mode of citizenship acquisition?	Protection against statelessness?
BE	Belgian Nationality Law of 1984 Art. 22(1) No. 7 (*continued*)	Criminal convictions carrying a prison sentence of at least five years for crimes listed under Book II of the *Code penal*, especially terrorist offences. (Art. 23/2(1)) [*2015]	Yes	Judgment (Art. 23/2(1)-(3)))	PtiDP: (*ministère public)* (Art. 23/2(1)) PtrDD: judge of first instance (*le juge*) (Art. 23/2(1))	Judicial appeal proceedings	No	Yes
BG	Bulgarian Citizenship Act	Criminal conviction of a serious crime against the state while being abroad (Art. 24)	Yes	Decree (Art. 34 and Art. 36)	PtiDP: Chief Prosecutor or the Minister of Justice in consultation with the Citizenship Council at the Ministry of Justice (Art. 31 and Art. 33) PtrDD: President of the Republic of Bulgaria (Art. 36 Bulgarian Citizenship Act and Art. 98 No. 9 of the Bulgarian Constitution)	No[127]	No	Yes
						No[128]	No	Yes
CY	The Civil Registry Law Of 2002	Lack of loyalty to the law or contempt for democracy demonstrated in words or actions (Art. 113(3) lit. a)	No	Decree (Art. 113(1)-(3), (5)-(10))	PtiDP: Council of Ministers (Art. 113(3) and (5)) Right to review deprivation measure: to the Independent Citizenship Deprivation Examination Committee (Art. 113(5)-(9)) PtrDD: Council of Ministers (Art. 113(3) and (10))	N.a.	No	No
		Criminal conviction including for serious criminal offense carrying a prison sentence of at least five years (Art. 113(3) lit. d)	Yes					

[127] See *Foundation for Access to Rights, Institute on Statelessness and Inclusion and European Network on Statelessness, Joint Submission to the Human Rights Council at the 36th Session of the Universal Periodic Review – Bulgaria*, Third Cycle, April/May 2020, §22.
[128] See preceding footnote.

State	Applicable law	Substantive requirements [if recent: *year of introduction]	Criminal conviction required?	Type of deprivation decision	Competent authority	Review procedure	Applicability, regardless of mode of citizenship acquisition?	Protection against statelessness?
CY	The Civil Registry Law Of 2002 (*continued*)	Arrest warrant issued by EUROPOL or INTERPOL (Art. 113(3) lit. e)	No	Decree (Art. 113(1)-(3), (5)-(10))	PtiDP: Council of Ministers (Art. 113(3) and (5)) Right of the addressee to review impending deprivation measure: to the Independent Citizenship Deprivation Examination Committee (Art. 113(5)-(9)) PtrDD: Council of Ministers (Art. 113(3) and (10))	N.a.	No	No
DE	German Nationality Act Section 17(1) No. 5	Active participation in fighting for a terrorist organisation abroad (Section 28(1) No. 2) [*2019]	No	No constituting state act of loss of nationality itself (*ex lege*)	*Ex-lege* loss of German nationality is determined (*festgestellt*) by the supreme *Land* authority (Section 28(3) in conjunction with section 30)[129]	Appeal to administrative courts	Yes	Yes
DK	Act on Danish Nationality	Convictions for crimes, broadly speaking, against the state and its institutions (§8B(1))	Yes	Court order (§8B(1))	PtiDP: Prosecutor PtrDD: Criminal Court (§8B(1))	Appeal to High Court	Yes	Yes
		Conduct that is seriously detrimental to the vital interests of the country (§8B(3)) [*2019]	No	Administrative decision (§8B(3))	PtiDP: Minister of Foreign Affairs and Integration (§8B(3)) PtrDD: Minister of Foreign Affairs and Integration (§8B(3))	Complaint before the Copenhagen City Court[130]		

[129] I take these provisions to mean that the competence of the *Land* authority is limited to determining whether the requirements of the grounds have been met and citizenship been lost *ex lege*. It does not, in my view, have discretionary authority to assess whether loss of nationality should have occurred.
[130] For details of the complaint procedure, see Art. 8F of the Act on Danish Nationality.

State	Applicable law	Substantive requirements [if recent: *year of introduction]	Criminal conviction required?	Type of deprivation decision	Competent authority	Review procedure	Applicability, regardless of mode of citizenship acquisition?	Protection against statelessness?
EE	Estonian Citizenship Act of 1995 §22 No.2	Attempts to forcefully change the constitutional order (§ 28(1) No. 3)	No	Administrative order (§28(1) No. 3))	PtiDP: Government of the Republic (§28(1) No. 3)) PtrDD: Government of the Republic (§28(1) No. 3))	Judicial appeal proceedings[131]	No	No
		Criminal conviction for serious crimes against the state (§ 28(1°1 No.1)) [*2020]	Yes	Administrative order (§ 28(1°1))	PtiDP: Government of the Republic (§ 28(1°1)) PtrDD: Government of the Republic (§ 28(1°1))			
		Joining a paramilitary foreign organisation that threatens public order or national security (§ 28(1°1 No.2)) [*2022]	No					
Fl	Finnish Nationality Act of 2003	Court conviction of at least five years imprisonment for committing or attempting to commit a crime, including crimes violating vital interests of Finland (§33a) [*2019]	Yes	Decision (§33a and §34a)	PtiDP: Finnish Immigration Service (§33a) PtrDD: Finnish Immigration Service (§33a)	Appeal to administrative courts[132]	Yes	Yes
FR	Civil Code	Court convictions for certain criminal conduct involving attacks against the French Republic and its fundamental interests including acts of terrorism (Art. 25 No. 1)	Yes	By decree (Art. 25)[133]	PtiDP: French government requiring assent from the *Conseil d'Etat* (Art. 25) PtrDD: French government (Art. 25)	Appeal to administrative courts	No	Yes

[131] I deduce the existence of such a right from §15 of the Estonian Constitution.
[132] Sections 41, 42 of the Finnish Nationality Act of 2003.
[133] The decree needs to meet the additional requirements set out for administrative decisions in Articles 27 to 27-3.

State	Applicable law	Substantive requirements [if recent: *year of introduction]	Criminal conviction required?	Type of deprivation decision	Competent authority	Review procedure	Applicability, regardless of mode of citizenship acquisition?	Protection against statelessness?
IE	Irish Nationality and Citizenship Act of 1956	Conduct contrary to a citizen's 'duty of fidelity to the nation and loyalty to the State' (Section 19(1) lit. b)	No	Act of the Minister for Justice (Section 19)	PtiDP: Minister for Justice issuing a notice of the revocation which may trigger an inquiry constituting a Committee of Inquiry. (Section 19(1)-(3) and (5)) PtrDD: Minister for Justice (Section 19(1))	Judicial appeal proceedings	No	No
IT	Italian Citizenship Law (Act No. 91 of 5 February 1992)	Final conviction for certain crimes under Italian Criminal Law, including terrorist crimes (Article 10-bis) [*2018]	Yes	By decree (Article 10-bis)	PtiDP: Minister of the Interior (Art. 10-bis) PtrDD: President of the Republic (Art. 10-bis)	Judicial appeal proceedings	No	No
LV	Latvian Citizenship Law Section 22 No 2	Acts aiming to violently overthrow the Latvian government or otherwise attempting to (violently) damage the political system of Latvia (Section 24(1) No. 4)	No[134]	Administrative decision (Section 24(5))	PtiDP: Administrative authority (Section 24(5)) PtrDD: Administrative authority (Section 24(5))	Judicial appeal proceedings	Yes	Yes
		Providing support to countries or individuals who have committed grave crimes, such as crimes against humanity, and threatening the territorial integrity, sovereignty, and independence or the constitutional structure of democratic countries. Also applicable if the individual has committed these acts (Section 24(1) No. 5) [*2022]		Administrative decision (Section 24(5))	PtiDP: Administrative authority (Section 24(5)) PtrDD: Administrative authority (Section 24(5))	Judicial appeal proceedings		

[134] It appears that Section 24(1) No. 4 does not require criminal convictions for the acts listed by the provision. See the official English translation at: https://likumi.lv/ta/en/en/id/57512-citizenship-law (last accessed: 15 February 2023).

State	Applicable law	Substantive requirements [if recent: *year of introduction]	Criminal conviction required?	Type of deprivation decision	Competent authority	Review procedure	Applicability, regardless of mode of citizenship acquisition?	Protection against statelessness?
MT	Maltese Citizenship Act	Disloyalty shown by act or speech to the President or government of Malta (Article 14(2) lit. (a))	No	Administrative Order (Art. 14(2) and Art. 15(1))	PtiDP: Minister needs to give notice which may trigger inquiry proceedings involving the establishment of a committee of inquiry (Art. 14(4)-(5) PtrDD: Minister (Art. 14(2))	N.a.	No	No
		Convictions for committing certain crimes and at least 12 months prison sentence (Article 14(2) lit.(c))	Yes					Yes
NL	Nationality Act of the Netherlands	Final criminal court convictions for certain offences under the Dutch Criminal Code including terrorist crimes (Art. 14(2)) [*2010/2016]	Yes	Decision (Art. 14)	PtiDP: Minister of Security and Justice (Art. 14(2)) PtrDD: Minister of Security and Justice (Art. 14(2))	Judicial appeal proceedings	Yes	Yes
		Joining an organisation abroad that participates in combats of national or international armed conflicts and has been deemed a threat to national security. (Art. 14(4)) [*2017]	No		PtiDP: Minister of Security and Justice (Art. 14(4)) PtrDD: Minister of Security and Justice (Art. 14(4))	Direct appeal to administrative court (Art. 22a)		
RO	Act on Romanian Citizenship Art. 24 lit. a)	Committing particularly grievous acts that are harmful to the interests of the Romanian State or to the prestige of Romania when abroad (Art. 25(1) lit. a))	No	Order (Art. 32(5))	PtiDP: the Board of Citizenship at the National Citizenship Authority (Art. 32(1)-(4)) PtrDD: chairperson of the National Citizenship Authority (Art. 32(5))	Appeal proceedings at administrative courts (Art. 32(7))	No	No
		Involvement with terrorist groups or to have supported them, in any form, or has committed other acts that are a threat to national security (Article 25(1) lit. d))						
Sl	Citizenship Act of The Republic of Slovenia Art. 17 No.3	Activities are harmful to the international or other interests of the Republic of Slovenia (further specified) (Article 26)	No	Administrative decision	PtiDP: Administrative Unit (Art. 27) PtrDD: Administrative Unit (Art. 27)	Judicial appeal proceedings	Yes	Yes

State	Applicable law	Substantive requirements [if recent: *year of introduction]	Criminal conviction required?	Type of deprivation decision	Competent authority	Review procedure	Applicability, regardless of mode of citizenship acquisition?	Protection against statelessness?
Sl	Citizenship Act of The Republic of Slovenia Art. 17 No.3 (continued)	Membership in an organisation engaged in activities to overthrow the constitutional order of the Republic of Slovenia (no. 1)	No	Administrative decision	PtiDP: Administrative Unit (Art. 27) PtrDD: Administrative Unit (Art. 27)	Judicial appeal proceedings	Yes	Yes
		Prosecutions of criminal offences and offences against public order (no. 3)	Yes[135]					
UK	British Nationality Act 1981	Deprivation is conducive to the public good (Section 40(2))	No	Order (Section 40(2))	PtiDP: Secretary of State complying with the requirement of giving notice to the individual concerned (Section 40(5)) PtrDD: Secretary of State (Section 40(2))	Judicial appeal proceedings	Yes	Yes
		Conduct that is seriously prejudicial to the vital interests of the United Kingdom (Section 40(4a))					Yes	Yes

[135] Only the second alternative of Art. 26 No. 3 ('if they have been sentenced to a term of imprisonment in Slovenia') appears to require a court conviction.

3. Categories of deprivation powers applicable to terrorism

In accordance with my methodological considerations above (see Section III.3), I will consider deprivation regimes in three categories of provisions. This section gives a brief overview of the national provisions in each.

i. Requirement of a (criminal) court conviction for severe crimes

The first category of deprivation provisions consists of measures that require a (criminal) conviction for particularly severe crimes, often explicitly including terrorism. The table on the next two pages gives an overview of the relevant provisions in the MSs and the UK.

State	Provision	Substantive requirements: criminal court conviction for committing certain crimes	Prison sentence required?	Deprivation as part of criminal court proceedings?	Time limit applicable to deprivation measures?
AT	Art. 33(3)	Crimes of and related to terrorism: §278b to §278g and §282a.	Yes: no minimum sentence	No	No
BE	Art.23/1(1) No. 1	Crimes of and related to terrorism under the Belgian Penal Code: articles 101 to 112, 113 to 120bis, 120quater, 120sexies, 120octies, 121 to 123, 123ter, 123quater, paragraph 2, 124 to 134, 136bis, 136ter, 136quater, 136quinquies, 136sexies and 136septies, [4 ...] 4 331bis, 433quinquies to 433octies, 477 to 477sexies and 488bis. And certain crimes (e.g. Human trafficking) under the Aliens Act: articles 77bis, 77ter, 77quater and 77quinquies.	Yes: minimum of 5 years	Yes	Yes: crimes need to be committed within 10 years after obtaining citizenship. Exception: crimes of serious violations of international humanitarian law.
	Art.23/1(1) No. 2	Criminal conviction carrying a prison sentence of at least five years for crime facilitated by possessing Belgian nationality.	Yes: minimum of 5 years	Yes	Yes: crimes need to be committed within 10 years after having obtained citizenship.
	Art. 23/2(1))	Crimes carrying a prison sentence of at least five years for crimes listed under Book II of the *Code penal*, especially terrorist offences.	Yes: five years	Yes	No
BG	Art. 24	Serious crimes against the state while being abroad.	No	No	No
CY	Art. 113(3) lit. d)	Serious criminal offense carrying a prison sentence of at least five years.	Yes: 5 years if convicted of serious criminal offence[136]	No	Yes: sentencing for crime needs to occur within 10 years after having obtained citizenship
DK	§8B(1)	Crimes of Parts 12 and 13 of the Criminal Code, which include crimes against the Danish state, its constitution, and institutions.	No	Yes	No
EE	§ 28(1°1 No.1)	Crimes against the state (§ 232, 2342, 237–2373 or 2375 of the Penal Code) as well as crimes against humanity and crimes of aggression.	No	No	No

[136] It appears that this minimum sentence requirement does not apply to other alternative offences.

FI	§33a	Certain crimes of Chapter 12 (offences of treason), Chapter 13 (offences of high treason), Chapter 34a (terrorist offences), Section 1 (1) of the Finnish Penal Code.	Yes: 5 years sentence	No	Yes: deprivation measures need to be taken within 5 years after judgment has become final
FR	Art. 25 No. 1	Crimes that constitute a violation of the fundamental interests of the Nation and crimes of terrorism.	No	No	Yes: first, crimes need to have been committed either before becoming French citizen or within 10 years of acquiring French citizenship. Second, the deprivation measure needs to be taken within 15 years of committing the crime.
IT	Art. 10-bis	Crimes of terrorism and subversion of the constitutional order (under Art. 407(2)lit.a)no.4 of the code of criminal procedure and Art. 270, 270-ter, 270-quinquies and 306 of the Penal Code).	Yes: with prison sentence of at least of 5 years or a maximum of 10 years (exceptions: Art. 270, 270-ter, 270-quinquies and 306 of the Penal Code)	No	Yes: deprivation measures needs to be taken within three years of the final criminal conviction
MT	Art. 14(2) lit.(c)	Crimes carrying a prison sentence of at least 12 months.	Yes: prison sentence of at least 12 months	No	Yes: convicted within seven years after having acquired nationality
NL	Art. 14(2)	Certain crimes including against the security of the state and against the exercise of state duties and rights (titles I to IV of the second book). Crimes of and related to terrorism (Art. 83, 134a, 205).	Yes: prison sentence of at least eight years for crimes under titles I to IV of the second book	No	No
Sl	Art. 26	Crimes prosecuted ex officio and offences against the public order.	No	No	No

ii. Requirement of fighting abroad in an armed conflict/organisation

The second category shares the communality of requiring that a citizen 'fights abroad' as part of an armed conflict/organisation. Generally, these provisions appear to target so-called (returning) foreign terrorist fighters. Consequently, these powers do not apply to domestic terrorism, but only to specific acts of terrorism committed abroad.

State	Substantive requirement
AT	Active voluntary participating in combat operations abroad on behalf of an organised armed group as part of an armed conflict
DE	Active participation in fighting for a terrorist organisation abroad
NL	Joining an organisation abroad that participates in combats of national or international armed conflicts and has been deemed a threat to national security. Deprivation needs to be in the interest of national security.

iii. Requirement of conduct incompatible with certain values or interests

The final category consists of legal provisions that refer to broader substantive requirements, which are generally characterised by conduct that is incompatible with certain values or principles. The deprivation powers in this category reveal a great variety of standards against which the conduct leading to nationality loss is measured. More specifically, these powers apply if a citizen acts against the state and its institutions, if they attempt to forcefully change a country's constitution or to violently overthrow the government and harm the political system. We may also identify several jurisdictions where the deprivation provisions refer more broadly to violations of a (civic) 'duty of loyalty to the state' or of 'vital state interests'.

State	Substantive requirement
BE	Serious violations of the duties of a Belgian citizen.
CY	Lack of loyalty to the law or contempt for democracy.
DK	Conduct that is seriously detrimental to the vital interests of the country.
EE	Attempts to forcefully change the constitutional order.
IE	Conduct contrary to a citizen's 'duty of fidelity to the nation and loyalty to the State'.
LV	Conduct aiming to violently overthrow the Latvian government or otherwise attempting to (violently) damage the political system of Latvia.
	Supporting or committing grave crimes such as crimes against humanities or acts aimed at the destruction of democratic states.
MT	Disloyalty to the President or government of Malta.
RO	Committing particularly grievous acts that are harmful to the interests of the Romanian State or to the prestige of Romania when abroad.
Sl	Activities harmful to the international or other interests of the Republic of Slovenia (further specified).
UK	Deprivation is conducive to the public good and responds to conduct that is seriously prejudicial to the vital interests of the United Kingdom.

I have only included nations in this category that place such ideas at the core of their deprivation requirements. Nations that, like France or Finland, refer to 'vital' or 'fundamental interests', but in the context of requirements of a preceding criminal conviction, I have grouped with the first category above.

V. The legal nature of deprivation regimes: criminal *vs*, administrative

Deprivation provisions differ in their substantial requirements and legal procedures across these three categories. However, they share, I propose, an important communality: their legal nature. But how may we determine the legal nature of such a state measure? Before clarifying my own approach and arguing for a particular legal nature on its basis, let me briefly present how other scholars have answered this question.

1. Scholarly theories on the legal nature of nationality deprivation

I have indicated at the beginning of this chapter (see Section I) that scholars tend to classify nationality deprivation – often critically – as a criminal punishment, but fail to scrutinize more closely if the measure is, in fact, punitive in nature. A notable exception are, in particular, the four scholarly approaches that I introduce in this section. They all take a closer look at the legal nature of nationality deprivation and make a reasoned case for how it should be interpreted.

A punishment for violating the constitutional bond

Regarding the legal nature of nationality deprivation, Shai Lavi convincingly distinguishes between two concerns. First, how do states construct their deprivation power? Second, what legal construct, if any, may justify nationality deprivation? In light of this distinction, Lavi summarises his argument as follows: 'contrary to existing administrative regulations of the practice, the revocation of citizenship can and can only be justified as punishment.'[137] Thus, he notes, on the one hand, that deprivation powers are usually implemented as administrative measures and accompanied by administrative procedures.[138] On the other hand, he argues that nationality deprivation can only be justified as a (criminal) punishment 'in response to a

[137] Shai Lavi, "Citizenship Revocation as Punishment: On the Modern Duties of Citizens and Their Criminal Breach," *University of Toronto Law Journal* 61, no. 4 (2011): 786.
[138] Lavi, "Citizenship Revocation as Punishment: On the Modern Duties of Citizens and Their Criminal Breach," 788.

fundamental breach of the duty of citizens as members of an egalitarian, free, and deliberative polity and only as long the revocation of citizenship does not leave them stateless.'[139]

Lavi bases his support of a criminal classification of deprivation measures on the concept of 'retributivism'.[140] This theory postulates, as Lavi observes, that punishment is only justified if it corresponds to the nature and magnitude of the crime committed and is, in this sense, deserved.[141] Applied to nationality deprivation, this means that the measure can only be justified if a citizen deserves this punishment for the crime they committed.[142] Thus, in Lavi's view, deprivation regimes cannot be justified for achieving 'a social end', such as 'national security or solidarity'.[143]

Regarding the crime that a citizen needs to commit to deserve nationality deprivation, Lavi argues that a citizen owes a duty *qua* citizenship and that the breach of this duty may justify nationality deprivation.[144] What he calls the 'constitutional bond' is not to be confused, Lavi stresses, with the outdated notion of a duty of allegiance; rather, it is a bond between citizens tying them to the constitution and allowing the community to exist under the democratic conditions of political equality, self-government and public deliberation.[145] A crime that fundamentally breaches the constitutional bond justifies nationality deprivation as a political punishment because it violates the community's power of self-governance and, thus, deservedly leads to the perpetrator's exclusion from their community.[146] Accordingly, Lavi considers nationality deprivation the 'proper' punishment for such a crime.[147] More specifically, he defines a fundamental breach of the constitutional bond as 'an act of public violence against civilians or state officials, performed by a citizen with the intention to fundamentally undermine public

[139] Lavi, "Citizenship Revocation as Punishment: On the Modern Duties of Citizens and Their Criminal Breach," 783.
[140] Lavi, "Citizenship Revocation as Punishment: On the Modern Duties of Citizens and Their Criminal Breach," 786.
[141] Lavi, "Citizenship Revocation as Punishment: On the Modern Duties of Citizens and Their Criminal Breach," 786.
[142] Lavi, "Citizenship Revocation as Punishment: On the Modern Duties of Citizens and Their Criminal Breach," 786.
[143] Lavi, "Citizenship Revocation as Punishment: On the Modern Duties of Citizens and Their Criminal Breach," 786.
[144] Lavi, "Citizenship Revocation as Punishment: On the Modern Duties of Citizens and Their Criminal Breach," 799.
[145] Lavi, "Citizenship Revocation as Punishment: On the Modern Duties of Citizens and Their Criminal Breach," 786.
[146] Lavi, "Citizenship Revocation as Punishment: On the Modern Duties of Citizens and Their Criminal Breach," 798.
[147] Lavi, "Citizenship Revocation as Punishment: On the Modern Duties of Citizens and Their Criminal Breach," 805.

government by intimidation or coercion.'[148] Following this definition, Lavi notes that not all terrorist acts deservedly lead to a deprivation of nationality, but only those that 'have the capacity to fundamentally undermine the possibility of self-government and which are performed with such intent'.[149]

With reference to Lavi, also Chrisitan Joppke defends a punitive classification of nationality deprivation. He does so by recognizing 'the high value of citizenship for the individual': 'only a punitive rationale, in which the involuntary loss of citizenship is the result of a special sort of "public" crime called terror, pays tribute to the constitutional importance of citizenship.'[150]

A sanction *sui generis* for breaching fundamental citizenship requirements

Milena Tripkovic offers an assessment of the legal nature of citizenship deprivation, based on her comparative analysis of the deprivation regimes of 37 European states. She argues that often '[t]he penal nature of citizenship deprivation is […] simply assumed' in scholarly discussions, while a sincere legal classification remains lacking.[151] Contrary to this approach, she reviews the purported punitive character of citizenship deprivation in light of '*key principles* of punishment', that is, principles that modern liberal democracies must follow in order to make a particular punishment a just punishment.[152]

By drawing, in particular, on the ECHR, Tripkovic identifies the following five punitive principles: legality, fair trial, individual responsibility, proportionality, and equality. She finds that deprivation regimes conflict with all of them. The principle of legality requires that criminal punishments 'only be imposed for a crime and not another kind of human conduct.'[153] Tripkovic notes that the often vague national grounds for citizenship loss undermine this principle 'in various degrees'.[154] The fair-trial principle, which guarantees that court proceedings leading to criminal punishment comply with due process,[155] may equally be threatened by deprivation regimes. Since administrative proceedings, rather than court trials, lead to deprivation

[148] Lavi, "Citizenship Revocation as Punishment: On the Modern Duties of Citizens and Their Criminal Breach," 802.
[149] Lavi, "Citizenship Revocation as Punishment: On the Modern Duties of Citizens and Their Criminal Breach," 800.
[150] Christian Joppke, "Terror and the loss of citizenship," *Citizenship Studies* 20, no. 6-7 (2016): 735, https://doi.org/10.1080/13621025.2016.1191435.
[151] Tripkovic, "Transcending the boundaries of punishment: On the nature of citizenship deprivation," 1045.
[152] Tripkovic, "Transcending the boundaries of punishment: On the nature of citizenship deprivation," 1047. Thus, Tripkovic is concerned with principles of legitimate punishment, and not just of legal punishment.
[153] Tripkovic, "Transcending the boundaries of punishment: On the nature of citizenship deprivation," 1048.
[154] Tripkovic, "Transcending the boundaries of punishment: On the nature of citizenship deprivation," 1048.
[155] Tripkovic, "Transcending the boundaries of punishment: On the nature of citizenship deprivation," 1050.

in most European countries, Tripkovic concludes that they 'seriously undermine the fair trial principle.'[156] She also sees a violation of the principle of *ne bis in idem* in jurisdictions where a judicial conviction is required, but the deprivation decisions taken in separate proceedings.[157] Additionally, Tripkovic observes that deprivation measures may violate the principle of individual responsibility, that is, the notion that only the person committing the act (or omitting an obligation) should suffer criminal punishment, if states extend the deprivation also to the individual's family.[158] In Tripkovic's view, deprivation provisions may also challenge the principle of proportionality ('the severity of punishment correspond[s] to the gravity of the crime'[159]): in many European jurisdictions, deprivation grounds respond to conduct that does not qualify as a crime under national criminal law.[160] Tripkovic argues that the absolute effect of citizenship deprivation, especially given the temporary character of most other punishments (i.e. incarceration), further jeopardizes the proportionality principle.[161] Finally, Tripkovic identifies conflicts between deprivation regimes and the principle of non-discrimination: first, deprivation measures are often applicable only to naturalised citizens; second, to prevent statelessness, deprivation measures tend to only be applicable to multi nationals; third, the lack of clear guidelines in many countries on how and in what cases to apply deprivation measures may lead to arbitrary (non-)application.[162]

Tripkovic proposes two ways of interpreting the non-compliance she notes of deprivation regimes with key punitive principles. First, even despite this non-compliance, nationality deprivation may be classified as a punishment, if not a particularly just one.[163] Second, this non-compliance indicates that nationality deprivation does not constitute a punishment.[164] Tripkovic opts for the latter, arguing that European nations have not mistakenly failed principles of punishment, but deliberately created a non-penal measure.[165] More specifically, she proposes that we understand deprivation of nationality not as a punishment, but as 'a sui generis

[156] Tripkovic, "Transcending the boundaries of punishment: On the nature of citizenship deprivation," 1050.
[157] Tripkovic, "Transcending the boundaries of punishment: On the nature of citizenship deprivation," 1050.
[158] Tripkovic, "Transcending the boundaries of punishment: On the nature of citizenship deprivation," 1051.
[159] Tripkovic, "Transcending the boundaries of punishment: On the nature of citizenship deprivation," 1051.
[160] Tripkovic, "Transcending the boundaries of punishment: On the nature of citizenship deprivation," 1052.
[161] Tripkovic, "Transcending the boundaries of punishment: On the nature of citizenship deprivation," 1052.
[162] Tripkovic, "Transcending the boundaries of punishment: On the nature of citizenship deprivation," 1053.
[163] Tripkovic, "Transcending the boundaries of punishment: On the nature of citizenship deprivation," 1053.
[164] Tripkovic, "Transcending the boundaries of punishment: On the nature of citizenship deprivation," 1054.
[165] Tripkovic, "Transcending the boundaries of punishment: On the nature of citizenship deprivation," 1054.

sanction'.[166] In her view, this sanction 'seeks to relieve the polity of those members who fail to satisfy fundamental citizenship requirements',[167] such as 'underly the status of membership.'[168]

Nonetheless, Tripkovic does not support the use of nationality deprivation for 'a number of overriding reasons', which include 'commitments to human rights', humanitarian values, prevention of statelessness, and international cooperation with other states.[169] If states decide to deprive an individual of their nationality, she asks that they do so only by means of a criminal conviction and if this conviction finds, without any doubt, that the individual has 'explicitly, profoundly and irreversibly severed ties with their fellow co-citizens and their political communities.'[170]

Christophe Paulussen supports Tripkovic' classification of nationality deprivation as a sanction and observers that the measure qualifies 'in any case' as a 'coercive measure' following the violation of 'a law, rule, or order.'[171] In addition, recognizing Sandra Mantu's work, Paulussen argues that even if one accepts the measure's aim to protect national security, its 'connection to crime and punishment' suggests a sanction requiring a punitive effect.[172] Similarly, Rebecca Kingston notes that deprivation of nationality is best understood as 'a form of penal sanction to be applied to all citizens in response to perceived crimes against public security by act or by association.'[173]

A criminal sanction for disloyal behaviour

Emanuel Gross is another key figure in the scholarship on the legal nature of citizenship deprivation.[174] He takes the nature of citizenship itself as his starting point. Gross finds that, in contemporary democracies, citizenship constitutes a 'persisting bond' or 'a special nexus', which encompasses a variety of rights and obligation for state and citizens.[175] The most

[166] Tripkovic, "Transcending the boundaries of punishment: On the nature of citizenship deprivation," 1045.
[167] Tripkovic, "Transcending the boundaries of punishment: On the nature of citizenship deprivation," 1044.
[168] Tripkovic, "Transcending the boundaries of punishment: On the nature of citizenship deprivation," 1059.
[169] Tripkovic, "Transcending the boundaries of punishment: On the nature of citizenship deprivation," 1059.
[170] Tripkovic, "Transcending the boundaries of punishment: On the nature of citizenship deprivation," 1059.
[171] Christophe Paulussen, "Stripping foreign fighters of their citizenship: International human rights and humanitarian law considerations," *International Review of the Red Cross* 103, no. 916-917 (2021): 608, https://doi.org/10.1017/s1816383121000278.
[172] Paulussen, "Stripping foreign fighters of their citizenship: International human rights and humanitarian law considerations," 608.
[173] Rebecca Kingston, "The Unmaking of Citizens: Banishment and the Modern Citizenship Regime in France," *Citizenship studies* 9, no. 1 (2005): 24, https://doi.org/10.1080/1362102042000325405.
[174] Emanuel Gross, "Defensive Democracy: Is It Possible to Revoke the Citizenship, Deport, or Negate the Civil Rights of a Person Instigating Terrorist Action against His Own State," *UMKC Law Review* 72, no. 1 (2003).
[175] Gross, "Defensive Democracy: Is It Possible to Revoke the Citizenship, Deport, or Negate the Civil Rights of a Person Instigating Terrorist Action against His Own State," 55.

essential of these are the state's duty of protection towards its citizens and the citizens' duty of loyalty towards their state.[176] Disloyalty then, which finds expression in terrorist conduct and the endangerment of the public order and national security, Gross asserts, is 'the principle ground for revoking citizenship'.[177] Gross does not regard citizenship as an absolute right, but as subject to restrictions that result from the relationship between citizen and state and, especially, among fellow citizens.[178] In reference to Alleinikoff, Gross understands citizenship as a 'membership in a common venture', a contractual agreement, which, if broken by disloyalty, calls for the revocation of what the agreement has granted, namely, citizenship.[179]

Gross argues for characterising citizenship deprivation as 'penal in nature', and asserts that it 'has both *preventive* and *deterrent* function.'[180] He refers to US case law on denationalisation to corroborate this point. As a counter-terrorism measure, deprivation regimes pursue two objectives in Gross' view: they aim, first, to punish the citizen for their disloyalty and, second, to deter others from committing terrorist acts.[181] He stresses that citizenship deprivation, as a criminal sanction, 'must be applied at the conclusion of due criminal process.'[182]

A hidden form of renunciation

I would like to present a final interpretation of the legal nature of citizenship deprivation that has gained a certain prominence in the United States. It proposes that nationality loss for terrorist conduct is a form of voluntary expatriation.[183] A practical implementation of this theory can be found in a proposed (but failed) amendment bill to §1481 of Section 349 of the US Immigration and Nationality Act, that is, the provision that establishes the grounds for nationality loss because of 'voluntarily performing' certain acts 'with the intention of relinquishing United States nationality'.[184] The bill proposed that supporting foreign terrorist organisations,

[176] Gross, "Defensive Democracy: Is It Possible to Revoke the Citizenship, Deport, or Negate the Civil Rights of a Person Instigating Terrorist Action against His Own State," 55.
[177] Gross, "Defensive Democracy: Is It Possible to Revoke the Citizenship, Deport, or Negate the Civil Rights of a Person Instigating Terrorist Action against His Own State," 57.
[178] Gross, "Defensive Democracy: Is It Possible to Revoke the Citizenship, Deport, or Negate the Civil Rights of a Person Instigating Terrorist Action against His Own State," 57.
[179] Gross, "Defensive Democracy: Is It Possible to Revoke the Citizenship, Deport, or Negate the Civil Rights of a Person Instigating Terrorist Action against His Own State," 58.
[180] Gross, "Defensive Democracy: Is It Possible to Revoke the Citizenship, Deport, or Negate the Civil Rights of a Person Instigating Terrorist Action against His Own State," 58.
[181] Gross, "Defensive Democracy: Is It Possible to Revoke the Citizenship, Deport, or Negate the Civil Rights of a Person Instigating Terrorist Action against His Own State," 60.
[182] Gross, "Defensive Democracy: Is It Possible to Revoke the Citizenship, Deport, or Negate the Civil Rights of a Person Instigating Terrorist Action against His Own State," 60.
[183] Lauren Prunty, "The Terrorist Expatriation Act: Unconstitutional and Unnecessary.
How the Proposed Legislation is Unconstitutional and Redundant," *Journal of Civil Rights and Economic Development* 26, no. 4 (2013). Peter J. Spiro, "Expatriating Terrorists," *Fordham Law Review* 82, no. 5 (2014).
[184] 8 US Code §1481.

committing or supporting hostile acts against the US, and engaging in such acts against allied forces of the US be added to the provision's grounds, and thus constitute an intention to relinquish US citizenship.[185]

Nationality revocation cases in the US attest to the same reasoning. Thus, the US Department of State decided to strip Rabbi Meir Kahane of his citizenship after he became a representative of the Israeli Parliament in 1984.[186] '[A]ctions speak louder than words', commented the Board of Appellate Review, and confirmed that 'Rabbi Kahane's voluntary acceptance of an important political post in the government of Israel is persuasive evidence of an intent to relinquish United States citizenship.'[187] The same logic has also been applied to US citizens engaging in terrorist activity against the US. Accordingly, Scott Brown, a co-sponsor of the Terrorist Expatriation Act, argues: '[i]ndividuals who pick up arms [against the US] – this is what I believe – have effectively denounced their citizenship, and this legislation simply memorializes that effort. So somebody who wants to burn their passport, well, let's help them along.'[188]

Emanuel Gross, whose interpretation of nationality deprivation as a sanction for disloyalty we have met above, supports the argument that citizenship deprivation in response to terrorism constitutes a form of voluntary renunciation: '[a] citizen's support for the focal point against which his state is fighting reflects a profound disassociation from his citizenship and embodies a hidden message of renunciation of that citizenship. Such interpretation does not undermine the basic right to citizenship as voluntary renunciation of citizenship is a part of that right.'[189]

2. My methodological approach

As this overview of scholarly theories may attest, there are differences, not only in the legal nature ascribed to nationality deprivation, but also in how this nature is determined. Both may be found more or less convincing. I find it difficult, for instance, to subscribe to theories of hidden renunciation: while engagement in terrorist acts certainly expresses a citizen's disregard, even contempt, for important state values, it hardly constitutes a positive will for denationalisation. Thus, there are points in which I disagree with the existing approaches to the

[185] Terrorist Expatriation Act, Introduced in House (05/06/2010), H.R.5237 – 111th Congress (2009-2010) All Information (Except Text).
[186] For a detailed discussion of this decision, see: Aleinikoff, "Theories of Loss of Citizenship," 1472.
[187] Aleinikoff, "Theories of Loss of Citizenship," 1472.
[188] Quoted in: Charlie Savage and Carl Hulse, "Bill Targets Citizenship of Terrorists' Allies," New York Times, 6 May 2010. Available at: https://www.nytimes.com/2010/05/07/world/07rights.html (last accessed: 23/03/2023).
[189] Gross, "Defensive Democracy: Is It Possible to Revoke the Citizenship, Deport, or Negate the Civil Rights of a Person Instigating Terrorist Action against His Own State," 76.

legal nature of nationality deprivation. However, my decision to opt for a different approach is due, most centrally, not to a disagreement with the relevant discussions, but to a lack within them: they are concerned too little with how state institutions, such as parliaments, courts and executive bodies, understand their own deprivation regimes. Tripkovic does, of course, consider national legislations, but not in their own right. Instead, she starts from the more abstract criteria of penal principles and measures national law against them. Lavi too explicitly addresses the state perspective, but he does so only briefly and against the background of a persistent warning not to submit to a positivist bias. In his words, '[t]he status of expatriation depends on a correct interpretation of the law and not on its classification in the law books'.[190] I believe, by contrast, that we gain important insights if we take the legislator's 'classification in the law books' into account as part of our interpretation process. After all, parliamentary acts do not simply spell out the law but are the final product of a complex and adversary legislative and political process. In many cases, this process is not exclusively reserved for the elected majority, but also involves controversial debates with different stakeholders, such as judicial experts, academics and NGOs. In other words, the law is, at its best, a sophisticated interpretation itself. For this reason, my approach to determining the legal nature of nationality deprivation is based on the close examination of how a given deprivation measure is framed and formulated in state legislation, parliamentary debate and judicial proceedings.

More specifically, I propose that this examination follow a particular form and order, which is suggested in the case law of the ECtHR, and especially the 2020 case of *Ghoumid and Others v. France*.[191] As I will show, the steps the Court takes in discussing the legal nature of nationality deprivation in *Ghoumid and Others v. France* as well as in its case law on punitive or criminal measures provides a useful blueprint for a more general approach to the question.

Ghoumid and Others v. France concerns the application of five individuals, Bachir Ghoumid, Fouad Charouali, Attila Turk, Redouane Aberbri and Rachid Ait El Haj, against a deprivation measure on the grounds of terrorism. Convicted of terrorist crimes in 2007 and 2008 respectively, the applicants served prison sentences and were deprived of their French citizenship by orders of the Prime Minister and approval of the *Counseil d'État* in 2015.[192] In *Ghoumid and Others v. France*, the applicants argued that the deprivation order violated the right to

[190] Lavi, "Citizenship Revocation as Punishment: On the Modern Duties of Citizens and Their Criminal Breach," 789.
[191] Press statement issued by the Registrar of the Court, *Ghoumid and Others v. France* (application nos. 52273/16, 52285/16, 52290/16, 52294/16 and 52302/16), ECHR 191 (2020), 25/06/2020.
[192] Press statement issued by the Registrar of the Court, *Ghoumid and Others v. France*, ECHR 191 (2020), 25/06/2020.

respect for private life (Article 8 ECHR) and the right not to be tried or punished twice (Article 4, Protocol No. 7 ECHR), since the order constituted a 'disguised punishment' for a crime for which they had already been convicted and sentenced by French Courts.[193]

The ECtHR's assessment of the latter point is central to our present concerns. The French government denied the applicability of Protocol No. 7, arguing that, under French law, citizenship deprivation did not constitute a punishment under criminal law, but a measure of administrative law.[194] While the applicants did not challenge the (formally) administrative character of citizenship deprivation, they held that Article 4 of Protocol No. 7, should, nevertheless, apply, considering the severity of the measure and its punitive response to an alleged lack of loyalty.[195] In weighing these positions, the ECtHR adopted the respondent's position, confirming that citizenship deprivation under French law did not constitute a criminal punishment in the meaning of Article 4 of Protocol No. 7.[196] The Court relied in its decision on a process of reasoning notably developed in *Engel and Others v. the Netherlands* (1976), where it needed to assess *inter alia* whether certain disciplinary penalties fell within the meaning of a 'criminal charge' under Article 6 ECHR.[197] On this basis, the ECtHR determined the legal nature of nationality deprivation in *Ghoumid and Others v. France* with reference to the following aspects (which I will call 'the *Engel* criteria'): first, the measure's classification under national law ('*la qualification juridique de la mesure litigieuse en droit national*'), second, its very nature ('*la nature même de celle-ci*'), and, third, the nature and degree of severity of the "sanction" ('*la nature et le degré de sévérité de la « sanction »*').[198]

Regarding the first aspect, the ECtHR noted that the French deprivation provision appears in France's Civil Code (Article 25) and not its penal code, which makes the measure an administrative sanction subject to the jurisdiction of administrative courts and not a punishment of criminal law.[199] Furthermore, the *Conseil d'État* confirmed the administrative nature of the measure ('*sanction de nature administrative*').[200] Addressing the very nature ('*nature même*') of the French deprivation measure, the Court agreed with the respondent that, while the

[193] Press statement issued by the Registrar of the Court, *Ghoumid and Others v. France*, ECHR 191 (2020), 25/06/2020.
[194] ECtHR, *Ghoumid and Others v. France,* §§55-58.
[195] ECtHR, *Ghoumid and Others v. France,* §§60-62.
[196] ECtHR, *Ghoumid and Others v. France*, §§73-74.
[197] ECtHR*, Engel and Others v. The Netherlands* (application nos. 5100/71, 5101/7, 5102/71, 5354/72, and 5370/72), judgment 08/06/1976, starting at §78.
[198] ECtHR, *Ghoumid and Others v. France*, §68.
[199] ECtHR, *Ghoumid and Others v. France*, §70.
[200] ECtHR, *Ghoumid and Others v. France*, §70.

measure may appear punitive ('*coloration punitive*'), it pursued a non-punitive objective.[201] More specifically, in the Court's assessment, the measure was a consequence of the bond between citizen and state: here, the Court followed the French government, which submitted that the deprivation merely confirmed (with legal force) the severing of the link between France and the individuals caused by their terrorist conduct – conduct that violated both their civic duty of loyalty to France ('*lien de loyauté envers la France*') and the very foundation of democracy (*le fondement même de la démocratie*).[202] In its very nature, the Court concluded, the French deprivation measure responded to a rupture of the link between France and its citizens.[203] Regarding the measure's severity as a sanction, the ECtHR acknowledged the serious consequences ('*le caractère sérieux*') that nationality deprivation may have for the individual, but weighed these effects against the violation of the democratic foundations that the deprivation measure responded to.[204] In addition, the Court observed that nationality deprivation did not, automatically, lead to expulsion from the nation.[205] Based on its considerations of all three aspects, the ECtHR found that the French citizenship deprivation measure is not a criminal punishment in the sense of Article 4, Protocol No. 7 ECHR.[206]

While I believe that the Court's approach to assessing the legal nature of nationality deprivation in *Ghoumid and Others v. France*, especially its use of the *Engel* criteria, is highly instructive, I would like to also take into consideration other relevant case law of the ECtHR. This includes, in particular, the Court's assessments of provisions in the Convention that address punitive or criminal measures, but which (unlike Article 4, Protocol No. 7 ECHR) have not been raised in *Ghoumid and Others v. France*. Such assessments do not concern nationality deprivation but are helpful, I propose, in developing a tool kit for delineating punitive from non-punitive measures. This tool kit may then be used to analyse the legal nature of deprivation regimes. In addition, provisions that do not yet appear in the ECtHR case law on nationality deprivation, may of course do so in the future.

Important examples of ECHR provisions that address punitive or criminal measures and appear in the ECtHR case law (unrelated to nationality deprivation) are Articles 6 and 7. As I mentioned above, the concept of a 'criminal charge' in Article 6 gave rise to the Court's development of the original Engel criteria in *Engel and Others v. the Netherlands* (1976), which

[201] ECtHR, *Ghoumid and Others v. France*, §71.
[202] ECtHR, *Ghoumid and Others v. France*, §71.
[203] ECtHR, *Ghoumid and Others v. France*, §71.
[204] ECtHR, *Ghoumid and Others v. France*, §72.
[205] ECtHR, *Ghoumid and Others v. France*, §72. On the distinction between nationality deprivation and expulsion, see Section V.3.iii.
[206] ECtHR, *Ghoumid and Others v. France*, §§73-73.

were re-applied in *Ghoumid and Others v. France*. Article 7 uses the notion of a 'criminal offence' and the Court has confirmed that, in this case, the *Engel* criteria may be applied to determine whether a given offence is criminal or not.[207] In addition, Article 7§1 of the Convention refers to the concept of a (criminal) penalty when it opposes the introduction of 'a heavier penalty […] than the one that was applicable when the criminal offence was committed.' The approach used by the ECtHR to determine whether a national measure constitutes a (criminal) penalty in the sense of Article 7§1 recalls the *Engel* criteria applied in *Ghoumid and Others v. France*, but it also raises important additional aspects.

Thus, the Court stresses in *S.R.L. and Others v. Italy* and elsewhere the importance of ascertaining the measure's 'nature and purpose', its characterisation under national law, the procedures involved in rendering and implementing the measure and, finally, its severity.[208] The Court's reference to the procedures involved points to a key characteristic of legal provisions which does not appear in the *Engel* criteria. In *Georgouleas and Nestoras v. Greece*, the ECtHR identifies five steps needed in the assessment of whether a measure constitutes 'a penalty within the autonomous meaning of Article 7'[209]: the Court must determine '(i) whether the fines were imposed following convictions for criminal offences; (ii) the procedure involved; (iii) the characterisation of the measure in domestic law; (iv) the nature and purpose of the measure; and (v) the severity of the measure.'[210] This process too resembles the *Engel* criteria, and it also offers an aspect that they do not include: the question of a preceding criminal conviction. Likewise, the Court's *Guide on Article 7 ECHR* suggests that a preceding criminal conviction may be a criterion for a measure's penal nature.[211] Yet, while the existence of such a conviction may indicate the criminal nature of a measure following it, the ECtHR states in *S.R.L. and Others v. Italy*, the lack of a criminal conviction does not, by itself, classify a measure as non-punitive and outside of criminal law.[212] Instead, the Court must 'go behind appearances and assess for itself whether a particular measure amounts in substance to a "penalty" within the meaning of this provision [Art. 7 ECHR]'.[213]

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[207] See for the applicable case law: ECtHR, *Žaja v. Croatia,* application no. 37462/09, judgment 04/10/2016 (final: 04/01/2017), §86.
[208] ECtHR*, G.I.E.M. S.R.L. and Others v. Italy*, applications nos. 1828/06, 34163/07, 19029/11, judgment (merits) 28/06/2018, §211 (with further case law); ECtHR, *Jamil v. France*, application no. 15917/89, judgment 08/06/1995, §31; ECtHR, *Georgouleas and Nestoras* v. Greece, application nos. 44612/13, 45831/13, judgment 28/05/2020, §32.
[209] ECtHR*, Georgouleas and Nestoras v. Greece*, §33.
[210] ECtHR*, Georgouleas and Nestoras v. Greece*, §33.
[211] Registry of the ECtHR, *Guide on Article 7 of the European Convention on Human Rights – No punishment without law: the principle that only the law can define a crime and prescribe a penalty* (30 April 2022), §11.
[212] ECtHR, *G.I.E.M. S.R.L. and Others v. Italy*, §§210-211.
[213] ECtHR, *G.I.E.M. S.R.L. and Others v. Italy*, §§210-211.

For my approach to assessing the legal nature of deprivation regimes across the EU and the UK I will draw on a slightly amended combination of the *Engel* criteria, as employed by the ECtHR in *Ghoumid and Others v. France*, and the steps developed in the ECtHR case law for establishing whether a measure constitutes a (criminal) penalty under Article 7 ECHR. In so doing, I do not suggest that provisions like Article 7 are specifically relevant to deprivation proceedings. Instead, I hope to extract from their ECtHR case law the most helpful elements for the task of determining whether a given deprivation provision is punitive or administrative in nature – and, as we have seen, the case law on Article 7 in particular is very instructive on how to identify a measure's (non-)penal nature. On this basis, my approach considers the following criteria in turn: (i) the classification of the deprivation measure in domestic law, (ii) the procedures leading to loss of nationality, (iii) the nature and purpose of the measure, and (iv) the severity of its consequences for the individual.

Let me give a brief explanation of each step. For the first, I will analyse and compare how the respective countries classify their deprivation measures: does the domestic law clarify whether the deprivation power is a measure of criminal or administrative law? Here, my response will rely on whether the deprivation powers are manifested in the nation's penal code or the law on nationality.

My second step analyses what the actual procedure leading to loss of nationality reveals about the measure's legal classification. Here, I am particularly interested in the authorities (if any) competent to initiate deprivation proceedings and render deprivation decisions. Additionally, the involvement in the deprivation procedure of the individual subjected to it might also give an indication about the measure's legal classification. Review proceedings in deprivation cases are revealing in their own right: can a given deprivation measure be challenged and, if so, how and before what authorities? As part of the second step, I will also explore how the requirement of an earlier criminal court conviction might influence the assessment of a measure's legal nature.[214]

The first and second step of my approach elucidate, as it were, the bare bones of a state's understanding on their deprivation measure. While this is an important 'starting point', as the ECtHR observes in *Engel and Others v. The Netherlands*, '[t]he indications so afforded have only a formal and relative value and must be examined in the light of the common denominator

[214] A stricter assessment to establish whether a measure constitutes a 'penalty' and falls within the scope of Art. 7 of the Convention would treat this point as a separate criterion and even start any assessment with this question. See, for example: ECtHR, *M. v. Germany*, application no. 19359/04, judgment 17/12/2009, §120; ECtHR, *Jendrowiak v. Germany*, application no. 30060/04, judgment 14/04/2011, §45.

of the respective legislation of the various Contracting States.'[215] Subsequently, the analysis needs to proceed to a consideration of the measure's 'very nature' – 'a factor of greater import', in the Court's assessment.[216]

Consequently, the third step of my approach examines what national deprivation regimes reveal about their 'very nature'. Here, I will identify the objectives that the various deprivation powers appear to pursue by studying their substantive requirements. Additionally, I will consider the official explanations accompanying the introduction or amendment of new deprivation powers and the applicable case law at the national and international level.

In my fourth and final step, I will explore what national deprivation regimes reveal about the nature and severity of the consequences they cause for the individual subjected to them. This step asks, in particular, whether the severity of the consequences of involuntary nationality loss calls for the application of legal restrictions otherwise reserved for measures of criminal law. The Court established in *Engel and Others v. The Netherlands* that the assessment of a provision's severity must consider '[t]he seriousness of what is at stake, the traditions of the Contracting States' and the importance of the rights in the ECHR impaired by the state measure.[217] In brief, the assessment must determine whether the measure 'is a particularly harsh and intrusive sanction.'[218] To this end, the applicant in *Welch v. the United Kingdom* argued, we need to 'look beyond its stated purpose and examine its real effects'.[219] However, we must also bear in mind, as the Court cautions in the same proceedings, 'that the severity of the [measure] is not in itself decisive, since many non-penal measures of a preventive nature may have a substantial impact on the person concerned.'[220]

3. A four-step analysis of the legal nature of nationality deprivation

i. Classification of nationality deprivation

As indicated above, in identifying the classification that state legislators apply to their deprivation measure, it is crucial to determine where the measure appears in national law. If we take a closer look at the relevant domestic laws across the EU and the UK, we may observe

[215] ECtHR, *Engel and Others v. The Netherlands*, §82. Similarly, in ECtHR, *Öztürk v. Germany*, application no. 8544/79, judgment 21/02/1984, §52.
[216] ECtHR, *Engel and Others v. The Netherlands,* §82.
[217] ECtHR, *Engel and Others v. The Netherlands*, §82.
[218] ECtHR, *G.I.E.M. S.R.L. and Others v. Italy*, §227.
[219] ECtHR, *Welch v. the United Kingdom*, application no. 17440/90, judgment 09/02/1995, §23.
[220] ECtHR, *Welch v. the United Kingdom*, §32; ECtHR, *M. v. Germany*, §120; ECtHR, *Jendrowiak v. Germany*, §45.

that no deprivation power is located in a penal code. Instead, all of these powers appear in the domestic laws on citizenship:

State	Location of deprivation legislation[221]
AT	Austrian Nationality Act of 1985
BE	Belgian Nationality Law of 1984
BG	Bulgarian Citizenship Act
CY	The Civil Registry Law Of 2002
DK	Act on Danish Nationality
EE	Estonian Citizenship Act of 1995
FI	Finnish Nationality Act of 2003
FR	Civil Code
DE	Nationality Act
IE	*Irish Nationality and Citizenship Act of 1956*
IT	Italian Citizenship Law: Act No. 91 of 5 February 1992
LV	Latvian Citizenship Law
MT	Maltese Citizenship Act
NL	Netherlands Nationality Act
RO	Act No. 21/1991 on Romanian Citizenship
Sl	Citizenship Of The Republic Of Slovenia Act
UK	*British Nationality Act 1981*

Only France seems to have implemented its deprivation powers in a wider legal code that encompasses provisions on questions beyond nationality.[222] Even so, however, the measure appears in a code separate from the nation's penal code.

ii. Procedural aspects of deprivation measures

This step examines the procedural frameworks of deprivation powers in the EU and the UK and analyses what they might reveal about their legal nature. To this end, I am particularly interested in the competent authorities that initiate and/or render the deprivation decision, in the procedure leading to nationality loss and the legal options available for challenging the deprivation measure.

Procedurally speaking, there are basically two categories of deprivation jurisdictions in the MSs and the UK: the first consists of the great majority of EU States, which seem to construct their deprivation powers, at least procedurally, as administrative powers. In these cases, all the

[221] For the more detailed locations, see the overview table in Section IV.2.
[222] The relevant provision appears in Section 1 on loss of French nationality of Chapter IV on loss, forfeiture, and reinstatement of French nationality under Title I bis on French nationality of Book I on people of the *Code Civil*.

procedural criteria listed above point to an administrative understanding of the respective deprivation regimes. A second category includes jurisdictions that, in my analysis, have hybrid systems. They leave at least some room for interpretation on whether their deprivation measure is administrative or criminal by nature.

First category: deprivation procedures governed by administrative law

I will outline the procedural characteristics that register as administrative in the MSs and the UK by grouping them by similarities in legal procedure. In many European countries, deprivation measures responding to terrorism are, procedurally speaking, of a relatively straightforward administrative nature: proceedings are initiated, and the final decision rendered, by a leading government official or administrative authority, the decision registers as an administrative order or decree and it may be appealed before administrative courts.

Austria, Estonia, France, Italy and the Netherlands are cases in point. Accordingly, Austria empowers the Federal Minister of Interior, or the respective Provincial Government, to initiate deprivation proceedings for both of its deprivation powers.[223] In each case, the competent authority for rendering the administrative deprivation decision is the respective Provincial Government.[224] Similarly, all three deprivation powers under Estonian law empower the Government of the Republic to deprive an individual of their nationality by way of administrative order.[225] In France too, an individual may be deprived of their nationality by decree of the French government (once it has acquired assent from the *Conseil d'Etat*).[226] Italian deprivation measures, in turn, are initiated by the Minister of the Interior[227] and implemented by administrative decree of the President of the Republic.[228] In the Netherlands, finally, deprivation measures are rendered by the Minister.[229] In all five countries, deprivation decisions may be appealed to administrative courts.[230]

The deprivation provisions of Finland, Latvia and Slovenia are very similar, if less specific, in their procedural make-up and also clearly reveal an administrative law procedure. In Finland, an administrative decision leads to nationality loss for terrorist conduct.[231] In Latvia,

[223] Art. 35 of the Austrian Nationality Act of 1985.
[224] Art. 39 of the Austrian Nationality Act of 1985.
[225] §28(1) No. 3) and §28(1°1 No 1 and 2) of the Estonian Citizenship Act.
[226] Art. 25 of the Civil Code.
[227] Art. 10-bis of the Italian Citizenship Law.
[228] Art. 10-bis of the Italian Citizenship Law.
[229] Art. 14(2) and (4) of the Nationality Act of the Netherlands.
[230] Art. 39 of the 1985 Nationality Act, §15 of the Estonian Constitution (my interpretation), Art. 29 to 29-5 of the French *Code Civil*, Art. 22a of the Nationality Act of the Netherlands.
[231] §33a and §34a of the Finnish Nationality Act of 2003.

the member of an administrative authority renders the deprivation decision, which is issued as an administrative decision.[232] In Slovenia, the decision to deprive an individual of nationality is taken by an administrative unit.[233] Again, in all of these nations, deprivation decisions are subject to judicial review before administrative courts.[234]

The deprivation regimes in Bulgaria and Romania also point to an administrative procedural nature, but they both involve a specifically designated citizenship authority in the proceedings. In Bulgaria, deprivation proceedings are initiated by the Chief Prosecutor or the Minister of Justice and subsequently communicated to the Citizenship Council at the Ministry of Justice, which consists of state representatives.[235] Based on the Council's opinion, the Minister of Justice makes a proposal to the President of the Republic of Bulgaria recommending whether or not a deprivation decree ought to be issued.[236] The deprivation decision is carried out by the President's decree.[237] The Romanian deprivation provisions empower the Board of Citizenship at the National Citizenship Authority[238] to initiate deprivation proceedings. The chairperson of the National Citizenship Authority is furthermore competent to make a deprivation order.[239] While deprivation decisions in Romania may be appealed to administrative courts,[240] Bulgaria does not appear to offer the possibility to appeal.[241]

Cyprus, Ireland, Malta and the UK also reveal an administrative framework in their deprivation procedures. However, in contrast to the other nations in this section, their deprivation provisions establish that an individual subject to deprivation proceedings must be given notice before the final deprivation decision. This allows the individual to ask for inquiry proceedings as part of the deprivation procedure.

Article 113 of Cyprus' Civil Registry Law establishes that nationality can be revoked by a decree of the Council of Ministers.[242] The Council needs to inform the individual concerned in writing about the reasons for their pending citizenship loss and their right to initiate

[232] Section 24(5) of the Latvian Citizenship Law.
[233] Art. 26, 27 and 27a of the Citizenship Act of The Republic of Slovenia.
[234] Sections 41, 42 of the Finnish Nationality Act of 2003, Section 24(5) of the Latvian Citizenship Law, Art. 26, 27 and 27a of the Citizenship Act of The Republic of Slovenia.
[235] Art. 31, 33 of Chapter 5 of the Bulgarian Citizenship Act.
[236] Art. 34 of the Bulgarian Citizenship Act.
[237] Art. 36 of the Bulgarian Citizenship Act and Art. 98 No. 9 of the Bulgarian Constitution.
[238] Art. 32(1)-(4) of the Act on Romanian Citizenship.
[239] Art. 32(5) of the Act on Romanian Citizenship.
[240] Art. 32(7) of the Act on Romanian Citizenship.
[241] *Foundation for Access to Rights, Institute on Statelessness and Inclusion and European Network on Statelessness, Joint Submission to the Human Rights Council at the 36th Session of the Universal Periodic Review – Bulgaria*, Third Cycle, April/May 2020, §22.
[242] Section 113(1) of the Civil Registry Law of 2002 N. 141(I)/2002 (Ο Περί Αρχείου Πληθυσμού Νόμος).

investigation proceedings, if these reasons are pursuant to Section 113(2) and (3).[243] These Sections also cover terrorist conduct.[244] Should the individual request such proceedings, the Council may transfer the request to the Independent Committee, which consists of a judicially experienced president and additional members at the Council's discretion.[245] Chaired by the representative of the legal service and joined by other members of Cypriot ministries, the Independent Committee assesses the case, which may involve hearing the individual, and submits an opinion to the Council of Ministers.[246] The Council issues the deprivation decision.[247]

The Irish Minister for Justice also needs to issue a notice of the deprivation proceedings to the individual involved.[248] This may trigger the constitution of a Committee of Inquiry and an inquiry process.[249] The composition of the Committee and the Minister's involvement in its constitution were challenged before the Irish Supreme Court in *Damache v. Minister for Justice and Equality, Ireland And the Attorney General* (2021) and found unconstitutional.[250] Loss of nationality in Ireland occurs by administrative act.[251]

In Malta as well, the individual subject to deprivation proceedings is notified before a final decision is rendered; they may apply for an inquiry committee.[252] The members of this committee are appointed by the Minister, who also renders the final deprivation decision.[253]

In the UK, the Secretary of State has the power to issue an order of nationality deprivation.[254] As in Cyprus, Ireland and Malta, the administrative proceedings prescribe that the individual concerned must be given notice before the issue of the deprivation order.[255] Section 40A of the British Nationality Act 1981 sets out the appeal procedure applicable to this notice. Depending on the specific circumstances (Section 40A(1),(2)), appeals are to be made to the First-tier Tribunal or to the Special Immigration Appeals Commission, followed by appeals to the Upper Tribunal and Court of Appeal.[256] In each case, the relevant court is an administrative one. The presence of the individual in the country is not required for conducting the appeal

[243] Section 113(6) of the Civil Registry Law.
[244] See the overview table in Section IV.2.
[245] Section 113(7) of the Civil Registry Law.
[246] Section 113(7)-(9) of the Civil Registry Law.
[247] Section 113(9)-(10) of the Civil Registry Law.
[248] Section 19(1)-(3) and (5) the Irish Nationality and Citizenship Act.
[249] Section 19(1)-(3) and (5) the Irish Nationality and Citizenship Act.
[250] Irish Supreme Court*, Damache v. Minister for Justice and Equality, Ireland And the Attorney General*, [2021] IESC 6.
[251] Section 19 of the Irish Nationality and Citizenship Act.
[252] Art. 14(4)-(5) of the Maltese Citizenship Act.
[253] Art. 14(2) and (4) of the Maltese Citizenship Act.
[254] Section 40(2) of the British Nationality Act 1981.
[255] Section 40(5) of the British Nationality Act 1981.
[256] Ashurst LLP, Discussion Paper 1: Global and Regional Trends 13-14.

proceedings.[257] Ireland also allows administrative appeal proceedings to challenge deprivation decisions. For Cyprus and Malta, no explicit information was available to my research regarding their options of appeal.

The procedural frame of Germany's deprivation regime for terrorist conduct (Section 28 (1) No. 2, German Nationality Act) is quite particular and hard to match to one of the preceding groups of nations. Only here, nationality deprivation does not require a separate state act. As the accompanying legislative reasons confirm, as soon as the requirements of Section 28 are met, deprivation occurs *ex lege*, that is, automatically.[258] For Germany's deprivation ground concerning terrorism (Section 28(1) No. 2), Section 28(3) in conjunction with Section 30 of the German Nationality Act establishes that loss of nationality is *festgestellt* by 'the supreme *Land* authority'. I take this wording to mean that the competence of the *Land* authority is limited to determining whether the requirements of the ground have been met and citizenship been lost *ex lege*. It does not, in my view, have discretionary authority to assess whether loss of nationality should have occurred.[259] The German *ex-lege* loss of nationality supports the assessment, I propose, that Germany understands its deprivation power as administrative in procedure. After all, German administrative law does include *ex-lege* procedures, but there are no *ex-lege* punishments elsewhere in German criminal law. Loss of nationality may be appealed before German administrative courts.

Second category: deprivation measures under hybrid regimes

There are two European jurisdictions which exhibit hybrid regimes in their deprivation procedures, sharing both administrative and criminal elements: Denmark and Belgium. Let me start from the former, which offers the interesting case of a deprivation regime that gains a more administrative procedural framework by introducing a new deprivation provision. In October 2019, the Danish government passed a law introducing additional grounds for citizenship deprivation. These grounds differ from the existing ones not only in substance, but also in procedural scope.[260] While the older provision (Article 8B(1) of the Act on Danish Nationality) requires, broadly speaking, a criminal court conviction of a crime against the Danish State and

[257] Ashurst LLP, Discussion Paper 1: Global and Regional Trends 13-14.
[258] Gesetzesentwurf der Bundesregierung – Entwurf eines Dritten Gesetzes zur Änderung des Staatsangehörigkeitsgesetzes, Drucksache 19/9736, 29 April 2019, p. 10.
[259] Cf. Philipp Wittmann, *Gesetzentwurf der Bundesregierung zum Entwurf eines Dritten Gesetzes zur Änderung des Staatsangehörigkeitsgesetzes* (BT-Drs. 19/9736, 19/10518), 21 June 2019, starting at p. 11. The CJEU judgment in *Tjebbes and others* v. *Minister van Buitenlandse Zaken* may suggest a different interpretation.
[260] Act No. 1057 of 24 October 2019. https://www.thelocal.dk/20191024/denmark-passes-law-enabling-withdrawal-of-jihadists-citizenship.

its institutions, the new provision (Article 8B(3)), allows citizenship revocation for a Danish dual citizen 'who has engaged in a course of action that seriously harms the vital interests of the country'.[261] This new provision also adds a new procedure: while, in a case of Article 8B(1), the criminal court that convicted the individual of the relevant crimes also deprives them of nationality as part of the criminal judgment, the new article authorizes the Minister of Foreign Affairs and Integration to revoke citizenship by administrative order.[262] Similarly, deprivation orders under Article 8B(1) may be appealed to the High Court; but administrative deprivation orders under Article 8(3) are subject to judicial review before administrative courts (Article 8F). The close relationship, both substantial and procedural, between criminal conviction and nationality deprivation in Article 8B(1) suggests a criminal-law classification for this first Danish deprivation power. By contrast, the new provision, Article 8B(3), appears administrative in its procedural layout. Procedurally speaking, a hybrid deprivation regime ensues.

The importance of whether a Danish deprivation decision is based on a provision rooted in criminal or administrative law cannot be underestimated: as the explanatory remarks to Law No. L 38 observe, there are not only different thresholds of criminal and administrative proceedings, but the latter may be conducted without the individual concerned being present or even in the country, which appears to have been a key motivation in introducing the new deprivation provision.[263] At the same time, the explanatory remarks note that, if a deprivation can be based on Article 8B(1), its proceedings prevail over those of the new provision.[264]

Belgium is a second jurisdiction that appears to provide deprivation provisions applicable to terrorism that differ not only in their requirements, but also in procedure. The first relevant provision under Belgian Nationality Law, Article 23(1)No.2 (violations of a duty of loyalty), establishes that the deprivation needs to be sought by the public prosecutor (*le ministère public*) and decided by a Court of Appeal (*Cour d'appel*) where the individual resides. The Court of Appeal exercises this authority in an administrative competence.[265] This is confirmed in two recent judgments by the Belgian Constitutional Court regarding nationality deprivation under Article 23(1)No.2. The individuals concerned had argued that, since the deprivation decision was issued by a Court of Appeal, and not a court of first instance (Article 23(3)), they were

[261] Elin Hofverberg, "Denmark: Government Asks Parliament to Quickly Pass Act to Administratively Revoke Danish Citizenship," 2019, accessed 23/03/2023, https://www.loc.gov/item/global-legal-monitor/2019-10-24/denmark-government-asks-parliament-to-quickly-pass-act-to-administratively-revoke-danish-citizenship/.
[262] Hofverberg, "Denmark: Government Asks Parliament to Quickly Pass Act to Administratively Revoke Danish Citizenship."
[263] *Explanatory notes to Bill no. L 38 of 22 October 2019*, §2.2.
[264] *Explanatory notes to Bill no. L 38 of 22 October 2019*, §2.2.
[265] https://www.rechtbanken-tribunaux.be/fr/bevoegdheden/comp%C3%A9tence-administrative-cour-dappel (last accessed: 23/03/2023).

deprived not only of their nationality, but also of their right to appeal the decision. The Constitutional Court denied the validity of this argument by affirming that the right to appeal only governs criminal proceedings; nationality deprivation pursuant to Article 23(1)No. 2, by contrast, was an administrative measure: 'l'article 23 en cause est une mesure de nature civile'.[266] The other two Belgian deprivation provisions responding to terrorism, Articles 23/1(1) and 23/2(1), both require criminal convictions and follow a deprivation procedure initiated by a public prosecutor (*ministère public*) and pronounced by a judge (*prononcée par le juge*). Here, nationality loss occurs as part of the criminal proceedings. Thus, we appear faced, once again, with a hybrid deprivation system.

Deprivation measures and the question of a preceding criminal conviction

As my considerations have shown, almost all nations with deprivation powers applicable to terrorism in the EU and the UK are administrative in procedure. Only Denmark and Belgium offer hybrid regimes in which individual deprivation provisions follow either administrative or criminal procedures.

One might object that this strongly administrative procedural framework of deprivation measures across the EU and the UK is challenged by the prior criminal convictions required in most deprivation grounds. Here, we may also recall that the ECtHR established the question of a preceding criminal conviction as one of its first steps in assessing whether a measure is a penalty of criminal law under Article 7 ECHR (see Section V.2 above). However, I would argue that there are fundamental differences between deprivation proceedings and the criminal proceedings they may require as substantive deprivation grounds. First, with the exception of a small number of deprivation powers, especially in Denmark and Belgium, deprivation decisions are not issued by the criminal court that also rendered the earlier criminal conviction, but by a separate institution, in many jurisdictions, by ministers or other administrative authorities, in completely separate proceedings. Second, in most cases, there is no time limit between the criminal conviction and the deprivation decision. In other words, even after a prison sentence has been served, deprivation proceedings may still be initiated. Third, while a criminal court conviction may be a requirement of deprivation proceedings, they have a different focus and address different questions. While the criminal court proceedings establish whether the individual is guilty of committing a certain crime, deprivation proceedings examine whether the

[266] Constitutional Court of Belgium, case no. 122/2015, judgment 17/09/2015, B.6.2; and: Constitutional Court of Belgium, case no. 116/2021, judgment 23/09/2021, B.4.2.

individual has been convicted of such a crime. In addition, administrative deprivation proceedings also address other issues, including the existence of citizenship(s), the ties of the individual concerned to a particular country and the effects that nationality loss may have on the individual.

Consequently, even though most deprivation powers in the EU and the UK govern proceedings in which the deprivation measure technically follows a criminal court conviction, I would still classify the deprivation proceedings themselves as administrative in procedure. The only exceptions are individual deprivation powers under Danish and Belgian Law, as detailed above.

iii. The 'very nature' of nationality deprivation

Having established that the great majority of the MSs plus the UK classifies nationality deprivation procedurally as a measure of administrative law, I will now turn to the third step of my analysis and look at what the ECtHR has called the 'very nature' (*nature même*) of nationality deprivation. The Court employs this term to refer to the measure's 'primary purpose'.[267] In this sense, this section will examine the objective of deprivation regimes responding to terrorism in the EU and the UK. More specifically, it will ask if they seek to punish the individual for their terrorist conduct or pursue a different goal. This question is of central importance because it takes us beyond the consideration of how a given national legislator constructs their deprivation regime and closer to the measure's true legal nature.

Broadly following T. Alexander Aleinikoff,[268] I propose that deprivation provisions generally have one of three purposes: first, they might seek to punish the individual concerned. Second, they might aim to protect national security and, third, they might intend to respond to a violation of a civic duty. If we start from the first and hold that this is the measure's ultimate goal, we may assume that it is based on the following reasoning: involuntary citizenship loss punishes citizens justly and proportionately for their terrorist conduct and deters them from committing similar offences in the future. In this sense, Rebecca Kingston notes that deprivation measures against terrorists could be understood 'as a form of penal sanction to be applied to all citizens in response to perceived crimes against public security by act or by association.'[269] By contrast, if a deprivation measure seeks to safeguard national security, a different

[267] ECtHR, *Ghoumid and others v. France*, §71.
[268] Aleinikoff, "Theories of Loss of Citizenship," 1473. Aleinikoff addresses citizenship loss in general. Here, I am applying the reasons he identifies to deprivation applicable to terrorism more specifically.
[269] Kingston, "The Unmaking of Citizens: Banishment and the Modern Citizenship Regime in France," 24. Cf.

rationale lies at its core: it is necessary to strip a citizen of their nationality if they commit terrorist offences, in order to safeguard public order and security. By loss of nationality, so the rationale goes, the community is made safer. Finally, a deprivation regime may be committed to respond to a citizen's violation of their inherent duty of loyalty to the state. In this case, the measure would consider a citizen's engagement in terrorist acts as incompatible with the fundamental values of the community and lacking in loyalty towards it. It would respond to both by withdrawing the citizen's nationality. In this understanding, nationality deprivation assumes, and supports, that a citizen has a civic duty not to impair the community's vital interests.

Of these three categories of purposes, the first (punishment) would naturally point towards a criminal nature of nationality deprivation. The latter two, by contrast, would more easily match a characterisation of nationality deprivation as administrative in nature. After all, both public order and the relationship between citizen and civic community are traditional concerns of administrative law. Before considering, in greater detail, which purposes deprivation measures in the EU and the UK pursue as their 'very nature', I would like to delineate more clearly the objectives of criminal and administrative law, by looking at how they are characterised in international case law.

In *Öztürk v. Germany* (1984), the responding German government describes the essential purpose of criminal law as follows: '[b]y means of criminal law, society endeavoured to safeguard its very foundations as well as the rights and interests essential for the life of the community.'[270] This definition aptly captures an important insight: in their wider goals, criminal and [preventive] administrative law are not so very different. Thus, in *M. v. Italy* (1991), the Commission observes that the common objective of both is 'to guarantee the orderly and peaceful course of social relations, not only through a body of legislation penalising unlawful acts [i.e. criminal law], but also through provisions intended to prevent the commission of such acts [i.e. administrative law]'.[271]

The difference between the two fields of law lies in their more specific pursuits. If we return to *Öztürk v. Germany,* we may gain a helpful reminder of what sets criminal law apart: the objective 'to punish as well as to deter' in response to a crime committed.[272] Of course, a criminal measure may still pursue other, more abstract goals, including the safeguarding of the

Jorunn Brandvoll, "Deprivation of nationality: Limitations on rendering persons stateless under international law," in *Nationality and Statelessness under International Law*, ed. Alice Edwards and Laura van Waas (Cambridge: Cambridge University Press, 2014), 201. Gibney, "Should Citizenship Be Conditional? The Ethics of Denationalization," 646.

[270] ECtHR, *Öztürk v. Germany*, §52.

[271] EComHR, *M. v. Italy*, application no. 12386/86, judgment 15/04/1991, p. 89.

[272] ECtHR, *Öztürk v. Germany*, §53.

community's rights and interests (see above). 'These two ends are not mutually exclusive.'[273] But the more specific aims of punishment and deterrence characterise the field the of law. Only if our analysis may positively identify these two purposes for a deprivation measure, may we consider the measure criminal in nature. By contrast, the key objective of administrative measures, especially in their preventive aspect, is to avoid the realisation of harm to the rights, values or interests of members of the civic community by aiming to restrict conduct at a time when it poses a danger to them. Administrative law, more broadly, describes the legal rules that govern the exercise of state power by public authorities, especially in areas where a governmental authority exercises power in form of administrative decisions in relation to individuals.[274] The Commission summarises the difference between criminal law penalties and preventive administrative measures as follows: 'a criminal penalty relates to an offence already committed, whereas a preventive measure is intended to reduce the risk of future offences.'[275]

This difference in purpose between criminal and administrative measures also responds to a difference in procedure: while criminal proceedings establish, first and foremost, an individual's personal guilt for a crime committed based on evidence that meets the requirements of criminal due process, administrative proceedings determine the dangerousness of the individual concerned to the community based on procedural rules that may not meet requirements of criminal due process.[276]

In this section of my analysis, I will argue that the primary purpose, that is, the 'very nature' of deprivation measures responding to terrorism in the EU and the UK matches the objectives of administrative law rather than of criminal law. After all, as I will show, the key aim of nationality deprivation is to untie the bond between the civic community and a citizen who, by their conduct, have shown that they reject the fundamental values and principles on which the democratic community is built. Thus, the objective that I described as 'allegiance' above comes closest to what deprivation measures seek to achieve. To make this point, I will consider all three purposes that I described as theoretically conceivable above – punishment, public order, and allegiance – and discuss their respective (lack of) applicability to the deprivation provisions in the MSs and the UK. Rather than contemplating each purpose in light of every national deprivation provision, I will loosely group previsions in the three categories of requirements identified in Section IV.3: requirement of a criminal court conviction, of fighting

[273] ECtHR, *Öztürk v. Germany*, §53.
[274] Jonathan Law, *A dictionary of law* (Oxford: Oxford University Press, 2015).
[275] EComHR, *M. v. Italy,* p.89.
[276] EComHR, *M. v. Italy,* p.92.

abroad in an armed conflict/organisation, and of conduct incompatible with certain values or interests. Each of these, I propose, is particularly suggestive of one of the three principle purposes (punishment, public order, and allegiance) and will take an exemplary role in my discussion of their applicability to deprivation regimes.

Nationality deprivation as a means of punishment?

Punishment is certainly one of the goals most frequently ascribed to, and criticised in, deprivation regimes responding to terrorism. Thus, the 2022 Commentary to the Principles on Deprivation of Nationality as a Security Measure issued by the Institute on Statelessness and Inclusion notes that 'the measure of deprivation of nationality is unreasonably punitive'[277] and Audrey Macklin asserts that deprivation of nationality is an 'illegitimate form of punishment.'[278] However, it is not at all clear that deprivation regimes pursue a punitive intent. This point is most convincingly made by those deprivation powers that seem, at a first glance, particularly close to a criminal agenda. As we have seen, a significant number of national deprivation powers across the EU and the UK require a preceding criminal conviction for terrorist crimes issued by a criminal court. In this light, one might argue that such deprivation proceedings are an extension of the earlier criminal conviction, with the deprivation providing the ultimate punishment. In this understanding, nationality deprivation clearly appears to seek a punitive goal. I would contend, however, that the very nature – even of such deprivation powers – is administrative. This is corroborated not only by the procedural division between the criminal court conviction, on the one hand, and the administrative deprivation measure, on the other, but also, as I will demonstrate, by the objectives the latter pursues: these are neither punishment nor deterrence.

Ghoumid and Others v. France, which I mentioned above (Section V.2), gives support to this argument. The case demonstrates that, even if a criminal conviction is required for a deprivation provision, the decision leading to nationality loss may well pursue non-punitive goals. All five applicants in *Ghoumid and Others v. France* were deprived of French citizenship in 2015, that is, long after they served their prison sentences for terrorist crimes.[279] In this light, the applicants argued that the order of citizenship revocation failed to meet the required standards of diligence and promptness, and that it was politically motivated, following the 2015

[277] Institute on Statelessness and Inclusion, Commentary to the Principles on Deprivation of Nationality as a Security Measure, §88 (2022).
[278] Macklin, "The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?," 163. Cf. Joseph H. Carens, *The ethics of immigration* (New York Oxford University Press 2013), 101.
[279] Press statement issued by the Registrar of the Court, *Ghoumid and Others v. France*, ECHR 191 (2020).

Paris terrorist attacks. The applicants' criticism of the revocation's lack of promptness implies a continuation between the earlier criminal proceedings and the later deprivation, suggesting not just a political, but also a punitive aim. Procedurally speaking, the deprivation proceedings are, of course, separate from the preceding criminal proceedings. As I have established above (Section V.2), in France – as in almost all other jurisdictions with deprivation powers responding to terrorist conduct – deprivation measures are administrative in their procedures. Following the applicants in *Ghoumid and Others v. France*, this leaves us with the question of whether the objective of such measures may still be punitive, despite their administrative procedures. This question is answered in the negative by the ECtHR's ruling on the case. The Court acknowledges the 'political connotation' of the French deprivation measure as indicative of its administrative identity: after the devastating events at Paris, the Court observed, France reassessed the 'bond of loyalty and solidarity with the state' of any citizens who were also convicted terrorists, even if they were not involved in this particular crime.[280] Thus, in the Court's interpretation, the goal of the French deprivation proceedings was to reassess the relationship between the state and the individuals concerned, but not, we may add, to effect their punishment.[281] This assessment recalls the purpose of 'loyalty' that I introduced as a possible administrative goal of deprivation regimes above. In addition, we may note that, despite its 'political connotations', the deprivation measure discussed in *Ghoumid and Others v. France* did not appear to specifically seek public deterrence: as an administrative proceeding, it lacked the kind of public prosecution that would make a deterring measure most effective.

Thus, *Ghoumid and Others v. France* supports the argument that, even if a deprivation measure requires a preceding criminal conviction, as is the case for many deprivation regimes in the EU and the UK, there generally is a separation between the criminal and the deprivation proceedings – in both procedure and goals. One might argue that this point is more difficult to make with regard to the two European jurisdictions with procedurally hybrid deprivation regimes: Belgium and Denmark.

Here, the close proximity to the criminal procedures on which the deprivation measures are based may indicate a punitive reading of the measures' legal nature. However, I will argue that, even though the deprivation decision under one of the Belgian deprivation powers is

[280] ECtHR, *Ghoumid and Others v. Fran*ce, §45.

[281] Note that the Conseil d'Etat reached a similar conclusion about nationality deprivation in 2016, when it 'accepted the argument that citizenship deprivation was an administrative sanction […] which, therefore, did not lead to a breach of the principle of non bis in idem […] as the actions of the individuals had already triggered a criminal sentencing (MA no 394.348, 8th June 2016, Conseil d'Etat, cons 10)'. (Rachel Pougnet, "Cancellation of citizenship and national security: A comparison between France and the UK" (PhD 2019), 161.).

embedded into criminal proceedings, it is still administrative in nature. There are two kinds of deprivation powers in Belgium that are applicable to terrorism: Article 23(1) No.2, responding to serious violations of the duties of a Belgian citizen, which relies on an administrative procedure, and Articles 23/1 and 23/2, which both require a preceding criminal conviction and follow a criminal procedure themselves. The latter two have been introduced into Belgian law more recently and both explicitly include terrorist offences in their grounds. Judgments of the Belgian Constitutional Court of 2015 and 2021 reveal that these two additional deprivation provisions have been introduced specifically to circumvent the tedious separation of procedures required by Article 23(1) No.2. Instead, they allow the judge convicting the criminal crimes listed as substantive requirements in Articles 23/1 and 23/2 to also deprive, by order, the individual of nationality as part of the criminal proceedings.[282] However, these judgments also confirm that deprivation of nationality does not constitute a second punishment, but rather a measure that aims to safeguard Belgian core democratic values by excluding those who, by their actions, have shown that they do not accept the fundamental rules of communal life and who have seriously violated the rights and freedoms of their fellow citizens.[283]

Similarly, the Danish deprivation regime provides another confirmation of this reading: it demonstrates that, even in a procedurally hybrid system, deprivation measures may have a non-punitive purpose – even if they are entrenched in a criminal procedure. There are two deprivation provisions applicable to terrorism in Danish law: §8B(1), which authorizes the criminal prosecutor to initiate deprivation against an individual, as part of their criminal conviction for certain crimes, broadly speaking, against the state and its institutions, and the more recently introduced §8B(3). The latter grants the Danish Minister of Foreign Affairs and Integration to deprive an individual of their nationality for conduct 'seriously detrimental to the vital interests of the country'. While §8B(1) is firmly integrated into criminal proceedings, §8B(3) is a fully separate administrative procedure.

Intriguingly, assessments by the Danish Supreme Court suggest that §8B(1), even despite its grounding in a criminal procedure, does not have a punitive objective. In 2016, the Court asserted that the relevant legislative preparatory work reveals that §8B(1), not unlike §8B(3), responds to conduct that seriously harms vital state interests.[284] Thus, even if a citizen is convicted of the crimes included in §8B(1), as part of the deprivation assessment, the criminal

[282] Constitutional Court of Belgium, case no. 122/2015, judgment 17/09/2015, B.3.5.
[283] Constitutional Court of Belgium, case no. 85/2009, judgment 14/05/2009, B.6.; Constitutional Court of Belgium, case no. 122/2015, judgment 17/09/2015, B.3.3.
[284] Supreme Court of Denmark, case no. 211/2015, judgment 08/06/2016, p. 3.

court still needs to balance the consequences of the deprivation for the individual with the seriousness of their harm to state interests.[285] Regarding the former, the court needs to consider, for instance, the individual's living circumstances and history, including their attachment to Denmark and their other country of nationality.[286] Regarding the latter, it needs to determine whether, and if so why, it is in Denmark's interest to deprive the individual of nationality. In 2018, for example, the Danish Supreme Court ruled that a defendant's crime of joining ISIS in Syria for committing terrorist attacks violated the Danish community's vital interest of protecting itself against the individual and their terrorist crimes.[287] I would argue that the Supreme Court's analysis of §8B(1) reveals that the measure is not meant to impose simply an additional punishment, even while it is firmly embedded in criminal prosecution and conviction proceedings. Instead, the criminal court's decision to deprive a person of nationality needs to consider other, non-punitive aspects, especially whether the deprivation is a proportionate measure suitable for protecting the vital interests of Denmark.

As we have seen, even those deprivation regimes in the EU and the UK that appear closest to a criminal framework rarely pursue a punitive goal. As the examples in this section suggest, their primary purpose needs to be sought elsewhere and ideas of 'loyalty' or certain 'vital interests' of the state or community appear to be promising candidates. I will discuss both in greater detail below. First, however, let me turn to a different objective that, like punishment, features particularly prominently in the scholarship and public discourse on nationality deprivation: the safeguarding of national security or public order more broadly.[288] Thus, in Peter J. Spiro's scathing assessment, deprivation regimes are nothing but 'security-related theatre'.[289]

Nationality deprivation as a means of protecting national security?

Despite the high profile of this purpose in the public consciousness surrounding nationality deprivation, it is, I argue, only applicable to a limited number of national deprivation regimes

[285] Supreme Court of Denmark, case no. 211/2015, judgment 08/06/2016, p. 4.
[286] Supreme Court of Denmark, case no. 211/2015, judgment 08/06/2016, p. 4. See also: Danish Supreme Court, case no 124/2018, judgment 19/11/2018, p. 2. Nationality deprivation shall not occur if the individual has no or only very little ties to their other country of nationality (p. 4).
[287] Supreme Court of Denmark, case no. 124/2018, judgment 19/11/2018, p. 3.
[288] See, for instance: Christopher Bertram, "Citizenship Deprivation: A Philosopher's Perspective," ed. The Institute on Statelessness and Inclusion (ISI), *The World's Stateless – Deprivation of Nationality* (2020). 134-35. Brown, "Interview with Tendayi Achiume," 155. E. Tendayi Achiume, *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, Human Rights Council (2018), 17-18. Tom L. Boekestein and Gerard-René de Groot, "Discussing the human rights limits on loss of citizenship: a normative-legal perspective on egalitarian arguments regarding Dutch Nationality laws targeting Dutch-Moroccans," *Citizenship Studies* 23, no. 4 (2019): 326-27, https://doi.org/10.1080/13621025.2019.1616448.
[289] Spiro, "Terrorist Expatriation: All Show, No Bite, No Future," 175.

responding to terrorism – and even then, it needs to be scrutinized carefully. Deprivation powers specifically introduced in response to citizens engaging in ISIS warfare are certainly suggestive of a national-security agenda. I have labelled such powers above as measures addressing citizens fighting abroad in an armed conflict/organisation and identified their existence in the legislations of Austria, Germany and the Netherlands (see Section IV.3.ii).[290]

Before turning in greater detail to the purpose that such provisions pursue as their 'very nature', I would like to briefly assert that we may disqualify them from the punitive goals addressed in the preceding section. Of course, it is theoretically conceivable to understand these measures as punitive in intent, with the deprivation offering a punishment for citizens who fought in a terrorist organisation abroad. However, again the measures' procedural make-up is instructive here: in Austria, Germany and the Netherlands, deprivation powers appliable to foreign terrorist fighters are governed by administrative state bodies, and not by criminal courts. They do not even require a preceding criminal conviction. Accordingly, their primary concern does not appear to lie with establishing personal guilt or exacting personal punishment. Consequently, such deprivation powers are more likely to fall within the remit of administrative than criminal law.

Based on this administrative assumption, let us proceed to a closer analysis of the (non-punitive) purpose that these provisions may have. Intriguingly, only in the Dutch provision, do we find an explicit reference to national security: Article 14(4) of the Nationality Act of the Netherlands establishes that, 'in the interest of national security' (*in het belang van de nationale veiligheid*), the Minister of Security and Justice may deprive a person of nationality for joining an organisation abroad that participates in (inter-)national armed conflicts and which has been deemed a threat to national security. However, the kind of threat assessment that the provision presupposes is general, rather than individual. As Tom L. Boekestein and Gerard-René de Groot observe, Article 14(4) does not require 'an individual assessment of the threat […] to public security in the Netherlands. Instead, it is the joining of a certain terrorist organisation that renders Article 14(4) applicable.'[291] Thus, the provision does not seek to safeguard the Netherlands against the specific threat that an individual may pose, but against the danger associated with the terrorist activity they have joined, in a more abstract sense.

[290] Art. 33(2) of the Federal Law concerning Austrian Nationality, Section 28(1) No. 2 of the German Nationality Act, Art. 14(4) of the Nationality Act of the Netherlands.
[291] Boekestein and de Groot, "Discussing the human rights limits on loss of citizenship: a normative-legal perspective on egalitarian arguments regarding Dutch Nationality laws targeting Dutch-Moroccans," 331.

This abstract quality of the Dutch deprivation regime is even more pronounced in the deprivation measures of Austria and Germany. Despite their comparable focus on foreign terrorist fighters, neither the Austrian nor the German deprivation power mention national security at all. In addition, they lack any reference to even a generic form of threat assessment. Of course, one might argue that such an assessment is irrelevant, since an individual who joined, and fought for, a terrorist organisation abroad always poses a potential threat to national security. But I would suggest, instead, that the absence of any explicit engagement with the harm that a returning terrorist fighter may cause in a national-security sense implies that safeguarding national security is not the provisions' primary goal. This is corroborated by the fact that neither of the two national provisions requires that the individual concerned is actually willing or able to return to Austria or Germany. The provisions are applicable irrespective of whether there is the practical possibility of a security threat through the targeted individual. If public order and national security are not their primary aim – what do these measures seek to achieve?

I will address this question by examining the Austrian and German provisions in greater detail. In the case of Austria, the official explanatory remarks on the relevant national legislation are particularly instructive. They reveal an interesting overlap between Article 33(2), that is, the deprivation provision applicable to foreign terrorist fighters, and other deprivation grounds of Article 33 which, in my assessment, do not cover terrorist activity. While Article 33(1) (services for a foreign nation) specifically requires conduct that 'severely damages the interests or the reputation' of Austria, the remarks observe that also the terrorist activity required in Article 33(2) must severely damage Austria's interests or reputation.[292] More specifically, fighting for a terrorist organisation abroad qualifies as a deprivation ground if it is diametrical to Austria's state interests, especially by violating its commitment to neutrality, and thus incompatible with a citizen's duty of loyalty (*Treuepflicht*) to the Austrian Republic.[293] Here, I propose, we find a more accurate indication of the primary purpose of Austria's deprivation provision regarding foreign terrorist fighters: rather than seeking to prevent the particular harm that such individuals may cause to national security, the provision addresses (and aims to redress), in a more abstract sense, their violation of certain key national interests in a breach of civic loyalty.

[292] The official explanatory remarks: *351 der Beilagen XXV. GP - Regierungsvorlage - Vorblatt, WFA und Erläuterungen*, p. 10.
[293] The official explanatory remarks: *351 der Beilagen XXV. GP - Regierungsvorlage - Vorblatt, WFA und Erläuterungen*, p. 10.

We may observe that a similar purpose also underpins Section 28(1) No. 2 of the German Nationality Act, which was newly added to German law in 2019. The Federal Government describes the provision's central concern as follows:

> 'Pursuant to the amendment of Section 28 of the German Nationality Act (StAG), in the future, any German who by actively participating in fighting for a terrorist organization abroad signals their turning away from Germany and her foundational values and towards a foreign power constituted by a terrorist organization shall lose German citizenship by operation of law if they also hold another citizenship.'[294]

Here, the German Government defines the terrorist activity required by Section 28(1) No. 2 as a means of giving expression to a shift in allegiance, away from German core values and towards a foreign terrorist power. Thus, it is a citizen's acting in accordance with values different from, and we may add incompatible to, the fundamental tenets of German society that leads to their loss of nationality. By contrast, the threat they might pose, in the process, to the country's security is irrelevant to the requirements of the German deprivation measure. Again, we have arrived at a more abstract sense of purpose, which exceeds the threat assessments at the core of a measure exclusively concerned with national security.

As we have seen, even those European deprivation powers that, on the surface, appear committed most clearly to a national-security agenda point, to different degrees, to a set of larger concerns: these relate, in particular, to the more abstract concept of a breached loyalty to the state and its core values. This is not to say that such measures do not also intend to safeguard national security, but generally this is only one instantiation of their larger objective to guarantee the integrity of certain fundamental values shared within the civic community.

This understanding of the safeguarding of national security as only one part of what constitutes the primary purpose and very nature of nationality deprivation is best illustrated perhaps by the deprivation regime of the UK. This moves us beyond deprivation grounds specifically relating to foreign terrorist fighters and into the realm of those provisions that I have categorized above as requiring a conduct incompatible with certain values or interests (see Section IV.3.iii). While this group of provisions will feature most prominently in my next section, it is instructive to look at the UK legislation in the present context. It provides an excellent

[294] Translated by the author. *Gesetzesentwurf der Bundesregierung – Entwurf eines Dritten Gesetzes zur Änderung des Staatsangehörigkeitsgesetzes*, Drucksache 19/9736, 29 April 2019 ('Deutsche, die durch ihre konkrete Beteiligung an Kampfhandlungen für eine Terrormiliz im Ausland zum Ausdruck bringen, dass sie sich von Deutschland und seinen grundlegenden Werten ab- und einer anderen ausländischen Macht in Gestalt einer Terrormiliz zugewandt haben, sollen künftig durch eine Ergänzung des § 28 StAG die deutsche Staatsangehörigkeit kraft Gesetzes verlieren, wenn sie noch eine andere Staatsangehörigkeit besitzen.').

example of the ways in which national-security concerns may be embedded in a wider purpose of nationality deprivation.

Section 40(2) of the British Nationality Act establishes that the Secretary of State may deprive an individual of their nationality if they are satisfied that this deprivation is 'conducive to the public good'. The Nationality Act does not define this phrase any further and, in a sense, this lack of clarification is revealing: we may note, from the start, that the UK provision speaks to the abstract quality of deprivation measures that I introduced above. Section 40(2) is specified, to a degree, by Section 40(4a), which sets out the threshold for deprivation in cases in which statelessness is a possible consequence of the deprivation measure. This section establishes that, in such cases, only conduct 'seriously prejudicial to the vital interests of the United Kingdom' may lead to nationality deprivation. Taken together, both provisions suggest that, if an individual's conduct is 'seriously prejudicial to the vital interests of the United Kingdom', their loss of nationality is 'conducive to the public good'. Yet, even so, we clearly remain in the realm of abstract purposes.

So, how may we get a sense of what might be a concrete instantiation of conduciveness to the public good? Naturally, the phrase has not remained completely undefined and UK case law may help shed further light on the issue. As noted in *Ahmed and Others v. the Secretary of State for the Home Department*,[295] the phrase 'conducive to the public good' is explained further in paragraph 55.4.4 of the policy guidance for Home Office staff on nationality deprivation:

> "'Conduciveness to the public good" means depriving in the public interest on the grounds of involvement in terrorism, espionage, serious organised crime, war crimes or unacceptable behaviours.'[296]

Thus, nationality deprivation 'conducive to the public good' is a measure that is 'in the public interest' and responds *inter alia* to terrorist activity. As the UK Supreme Court has further observed, '[i]t is not in dispute that the power may be exercised if a person is a threat to the national security of the United Kingdom.'[297] In other words, national security is an uncontested element, an established sub goal as it were, of the public good that any nationality deprivation in the UK needs to support.

[295] Upper Tribunal (Immigration and Asylum Chamber), *Ahmed and Others v. Secretary of State for the Home Department* (deprivation of citizenship), UKUT 00118 (IAC), judgment 10/02/2017, §58.
[296] Paragraph 55.4.4 of the UK Visas and Immigration Nationality Instructions: Volume 1.
[297] SIAC, *Begum v. Secretary of State for the Home Department*, SC/163/2019, judgment 22/02/2023, §29.

This understanding of Section 40(2) of the British Nationality Act is attested to, most famously perhaps, in the recent proceedings concerning the nationality deprivation of Shamima Begum. Thus, in *Begum v. Secretary of State for the Home Department* (2023), the Special Immigration Appeals Commission notes that, in this case, the Secretary of State 'decided to make a deprivation order under section 40(2) of the British Nationality Act […] on the ground that it would be conducive to the public good to do so, because her [Begum's] return to the United Kingdom would present a national security risk.'[298] Consequently, the UK's deprivation regime and the relevant national case law provide a valuable example of a more general characteristic of deprivation measures in the EU and the UK: they may well seek to safeguard national security, but as their overarching purpose they tend to pursue more abstract goals relating to the values and welfare of the civic community.

Let me add a final observation to my evaluation of national security as a potential aim of deprivation regimes. As we have just seen, there are certainly instances of deprivation provisions in which national security and public safety provide important, if generally subordinated, goals. And yet, as I have indicated above, these goals are very commonly considered as the key objective pursued by deprivation measures across the board. This frequent misconception is rooted, I propose, in an imprecision that often appears in the relevant scholarship, especially in literature criticising the alleged ineffectiveness of nationality deprivation as a national-security tool. I will engage with this criticism, in detail, in Chapter Three (Section III.3.ii). Such scholarship tends to treat deprivation decisions and the expulsion orders that may follow upon them as a single entity. Hence, the safeguarding of national security, a main objective of physically removing an individual from a state's territory, is often assumed to be the joint purpose of both state acts. However, in virtually all MSs and the UK, nationality deprivation and expulsion or deportation are procedurally and substantively very much distinct from one another.[299] The latter may, of course, succeed the former (and it commonly does), but this is, by no means, a necessity. In *Ahmed and Others v. Secretary of State for the Home Department* (2017), the responsible UK Court emphasises the difference between the two measures as follows:

> 'A deprivation of citizenship order – emphatically – does not equate to either removal or deportation of the affected subject from the United Kingdom. Both removal and

[298] SIAC, *Begum v. Secretary of State for the Home Department*, §10.
[299] See: ECtHR, *Johansen v. Denmark*, §54; ECtHR, *Ghoumid and Others v. France*, §50.

> deportation are governed by other statutory regimes entailing specified procedures, requirements and rights.'[300]

Likewise, the Irish Supreme Court observes in *Damache v. Minister for Justice and Equality, Ireland And the Attorney General* (2021) that the deportation of an individual deprived of Irish nationality 'would involve the invocation of an entirely separate statutory procedure and the making of an entirely separate decision and order'.[301] And in *Ghoumid and Others v. France* (2020), the ECtHR notes that 'the loss of French nationality had not in itself affected their [the applicants'] right to reside in France, and that their removal would require a separate decision'; in particular, 'the loss of French nationality does not automatically entail deportation'.[302] Thus, we may conclude this section by acknowledging that a central ground for the widespread assumption that nationality deprivation pursues a national-security agenda is, in fact, a mistaken belief in the identity of deprivation and expulsion decisions.

Nationality deprivation as a means of responding to violations of a civic duty of loyalty?

We have already seen that many deprivation powers in the MSs plus the UK, while they may appear to seek punishment or public security as their primary objectives, actually follow purposes that are both larger and more abstract in nature – and which reveal concerns pertaining to administrative, rather than criminal law. As we have noted, these purposes include, in particular, a sense of civic allegiance and the integrity of certain core principles. Just how characteristic such purposes are of the very nature of nationality deprivation becomes apparent if we turn to the significant number of deprivation provisions in the EU and the UK that explicitly refer to related ideas at the very core of their deprivation grounds. Thus, deprivation requirements in Denmark, Romania, Slovakia and the United Kingdom mention the violation of the state's '(vital) interests'.[303] Finland and France also refer to 'vital' or 'fundamental interests', albeit within their requirements for a preceding criminal conviction. Cyprus, Ireland and Malta introduce concepts of a violated civic 'loyalty' or 'fidelity', and Belgium speaks of 'serious violations of the duties of a Belgian citizen'. Estonia and Latvia refer to the violent overthrow of the political system and democracy, in particular. Latvia's grounds even reach beyond its own nation, mentioning 'crimes against humanity' and 'acts aimed at the destruction of

[300] *Ahmed and Others v. Secretary of State for the Home Department*, §30.
[301] Irish Supreme Court*, Damache v. Minister for Justice and Equality, Ireland And the Attorney General*, [2021] IESC 6, §70.
[302] ECtHR, *Ghoumid and Others v. France*, §39, §50. See also: ECtHR, *Johansen v. Denmark*, §§44ff.,72ff.
[303] For these nations' full deprivation grounds, see Section IV.3.iii. For the precise legal references, see the overview table in Section IV.2 above.

democratic states'. Cyprus also includes a wider 'contempt of democracy' among its deprivation grounds.

I propose that all of these national deprivation requirements share a certain pattern: they establish nationality deprivation as a response to a citizen's violation of principles that are so integral to the state and the civic community that their violation signals a fundamental incompatibility between the citizen's acts and the nation. This pattern presupposes a duty (loyalty or allegiance) on the part of a nation's citizen, and established by the very fact of citizenship, to behave in certain ways – at least to the extent that harm is avoided to the nation's core principles.

In this light, we may ask what primary purpose a deprivation measure pursues that responds to a citizen's transgression of the state's core principles. In order to approach this question, I suggest that we turn to the Belgian deprivation regime as a particularly useful illustration. As we have already seen, there are three different provisions in the Code of Belgian Nationality that allow nationality loss for terrorist conduct (Articles 23(1) No. 2, 23/1(1) and 23/2(1)). Most interesting for our present concerns is Article 23(1) No.2, which establishes that a citizen may lose nationality if they seriously violate their duties as a Belgian citizen.

In the context of deprivation proceedings in 2009, the Belgian Constitutional Court described the value of Article 23(1) No. 2 as follows:

> 'Deprivation of nationality makes it possible to ensure the respect […] for the duties obligatory for any Belgian citizen and to exclude these Belgians from the national community when they show, by their conduct, that they do not accept the fundamental rules of communal life and seriously infringe the rights and freedoms of their fellow citizens.'[304]

Three aspects in the Court's assessment are particularly instructive, I propose, for a more general understanding of the true character and purpose of deprivation regimes responding to terrorism. First, the Court emphasises that nationality deprivation may ensure citizens' respect for the duties existing as obligations for all Belgian citizens. Thus, it points to the idea of a civic duty or loyalty which I have introduced as a characteristic of many deprivation regimes, especially those that, like Belgium, refer to more abstract principles in their substantive grounds:

[304] Translated by the author. Constitutional Court of Belgium, case no. 85/2009, judgment 14/052009, B.6. And: Constitutional Court of Belgium, case no. 122/2015, judgment 17/09/2015, B.3.3. ('La déchéance de nationalité permet d'assurer le respect […] des devoirs qui incombent à tout citoyen belge et d'exclure ces Belges de la communauté nationale lorsqu'ils montrent par leur comportement qu'ils n'acceptent pas les règles fondamentales de la vie en commun et portent gravement atteinte aux droits et libertés de leurs concitoyens').

derived from citizenship itself, such a duty is automatically applicable to all citizens. Second, the Court links this civic duty to the acceptance of a communal life that is governed by fundamental rules and which safeguards the rights and freedoms of the members of the civic community. With the possible exception of Malta, which refers to a 'disloyalty towards the President or government' in its deprivation grounds,[305] nations in the EU and the UK understand a citizen's loyalty as owed, not to a state leader, but to the civic community and the state's core principles. Here we may recall the prominent mention of fundamental values and vital interests in the national deprivation requirements.

Finally and most importantly, the Court underlines that nationality deprivation allows the exclusion of citizens who do not accept the central rules, rights and freedoms of the community. While the measure does not necessarily lead to an individual's physical expulsion from the nation,[306] it does exclude them from the full participation in, and enjoyment of, their citizen rights. It severs, as it were, the bond of rights and obligations established by citizenship, which the terrorist conduct of the individual concerned had violated in the first place.[307] This severance of the civic bond captures, I propose, the primary purpose and very nature of the great majority of deprivation regimes responding to terrorism in the EU and the UK.

Let me stress that the severance concerned does not, in my opinion, support a retributive reading. I have already argued that nationality deprivation is not punitive in intent. Still, one might contend that there is a clear cause-and-effect relationship that suggests a retributive agenda on the state's part: after all, nationality deprivation follows, as a direct state response with severe repercussions, on an individual's behaviour. However, the measure's purpose is concerned less with the effects caused for the individual breaching their civic duty than with those caused for the community this duty is owed to. By excluding a particular individual from full civic participation, it seeks to protect the integrity of the community and strengthen the bond of citizenship itself. This focus on the relationship between state and citizen and the prevention of harm to the civic community clearly indicates an administrative concern.

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[305] Article 14(2) lit.(a) of the Maltese Citizenship Act.

[306] See the preceding Section.

[307] Kay Hailbronner's comments on citizenship deprivation suggest a similar understanding of the measure, when they describe nationality deprivation as an 'untying of the bond of citizenship', responding to a citizen's abandonment of their 'attachment to a community by attacking the very fundament of that community' (Hailbronner, "Revocation of Citizenship of Terrorists: A Matter of Political Expediency," 199.). A related idea also appears in Rainer Bauböck und Vesco Paskalev's assertion that, rather than pursuing punishment as its primary purpose, '[c]itizenship deprivation aims instead at asserting the conditions for membership status' (Rainer Bauböck and Vesco Paskalev, "Cutting genuine links: a normative analysis of citizenship deprivation," *Georgetown Immigration Law Journal* 30, no. 1 (2015): 57.).

Thus, we may summarize the result of the third step of my analysis of the legal nature of nationality regimes as follows: just like their classification in national law and their procedural make-up, in almost all cases, also their very nature points to an administrative quality.

iv. Severity of deprivation measures

My fourth and final step in determining the legal nature of nationality deprivation takes a step back and asks whether we need to reconsider our previous findings, that is, the administrative quality of the measure's legislative classification, procedure and purpose, in the light of its severity. Let us briefly recall the origin of the severity criterion: like most other steps of my approach to determining the legal nature of nationality deprivation, it takes inspiration from the *Engel* criteria developed by the ECtHR. These criteria were used by the Court to establish whether a given national measure registers as a penalty limited by the rights enshrined in Articles 6 and 7 ECHR. The severity criterion offers a corrective that extends the restrictions reserved in these Articles for measures of criminal law to non-criminal measures of a similarly intrusive effect. For our concerns, this raises the following question: even though nationality deprivation has emerged as non-criminal from the analyses so far, does the severity of its consequences for the individual concerned necessitate that we regard it as criminal after all?

Put differently, this question prompts us to take, for a moment, the perspective of the individual faced with the loss of their nationality. They may not care whether this is the result of a measure theoretically fitting the characteristics of administrative law, but they will certainly care about the measure's impact on their personal life – and this may well feel like a punishment. The harshness of nationality deprivation for the individual concerned has been raised before international courts. Thus, in *Ghoumid and Others v. France,* the applicants acknowledge that citizenship deprivation is (formally) an administrative act, but they argue that it needs to be subject to restrictions otherwise reserved for criminal provisions, due to its severity and punitive element.[308] This legal argument is part of a wider critique of nationality deprivation: voices in the literature and the judiciary have expressed their opposition against the measure's consequences for the individual and its violation of legal principles, including the principle of non-discrimination. While I will address the latter in the lawfulness assessment of my third chapter, I will only consider, at this point, the severity of the implications of nationality loss for the individual.

[308] ECtHR, *Ghoumid and Others v. France*, §§60-62.

Let me present the relevant criticism in some more detail, especially its concern with the measure's absolute effect and critics' espousal of narratives of nationality deprivation as a (political) death sentence. The words of Chief Justice Warren, joined by Justices Black, Douglas, and Whittaker, at the Supreme Court of 1958 capture the problematic effects of nationality deprivation with great eloquence:

> 'There may be involved no physical mistreatment, no primitive torture. There is, instead, the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights and, presumably, as long as he remained in this country, he would enjoy the limited rights of an alien, no country need do so, because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. [Footnote 34] In short, the expatriate has lost the right to have rights.'[309]

In addition to highlighting the devastating legal effects of citizenship loss as the 'total destruction of the individual's status in organized society', the Supreme Court also acknowledges the measure's social and psychological implications:

> 'This punishment is offensive to cardinal principles for which the [US] Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated.'[310]

More recently, Maarten P. Bolhuis and Joris van Wijk have stressed that citizenship deprivation has 'far-reaching […] consequences for the individual concerned'[311]; and Audrey Macklin has criticised the measure as leading to an individual's 'political death':

> 'A citizen stripped of nationality and banished from the territory is, for all intents and purposes, dead to the state. Once outside the territory, the state has neither legal claim nor legal duty in respect of the former citizen, and is relieved of any obligation to object if another state tortures, renders or kills one of its nationals.'[312]

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[309] *Trop v. Dulles*, 356 US 86 (1958), at 101.
[310] *Trop v. Dulles*, 356 US 86 (1958), at 102.
[311] Bolhuis and van Wijk, "Citizenship Deprivation as a Counterterrorism Measure in Europe Possible Follow-Up Scenarios, Human Rights Infringements and the Effect on Counterterrorism," 351.
[312] Macklin, "The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?," 168.

Leslie Esbrook's criticism goes yet a step further: it likens nationality deprivation to the death penalty. In her view, both constitute 'extreme forms of State power.'[313] T. Alexander Aleinikoff also condemns denationalisation as the utter destruction of 'a person's conception of self.'[314]

At least some of these arguments appear less pressing if a given deprivation power is limited by safeguards against statelessness, for instance, by only applying to multi nationals – as is the case for many deprivation regimes applicable to terrorism in the EU and the UK.[315] However, this approach is not unproblematic either. Here we may think of the potential discrimination between birth-right and naturalised citizens or the devastating effects that multi nationals may suffer, in Macklin's view, if they are one-sidedly deprived of one of their nationalities.[316] Nonetheless, the exclusion of statelessness as a possible consequence certainly removes at least some of the severity that critics have ascribed to nationality deprivation.

In addition, as I have emphasised above (see Section V.3.iii), deprivation decisions are distinct from expulsion orders, which require fully separate legal procedures. Thus, the immediate connection between a citizen's 'stripping of nationality' and their 'banishment from the territory' that we find, for instance, in Macklin's criticism above is not quite that immediate. In fact, while nationality deprivation may initiate a series of proceedings ultimately leading to deportation, it is equally possible that it is not followed by an order for expulsion at all. Thus, the ECtHR observes in *Ghoumid and Others v. France* that 'as the case stands […] no deportation order has been issued'.[317] In such instances, the life of the individual deprived of nationality may still resemble its former shape, at least to a certain extent. In the words of the ECtHR, in the same case, 'the consequence of the deprivation of nationality for the applicants' private life is confined to the loss of an element of their identity'.[318] This possible outcome of deprivation measures is well captured in the idea of a 'relatively normal life' which appears in an anonymous quote mentioned by Matthew Gibney on a related matter.[319]

Cf. Macklin, "Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien," 7-8.
[313] Esbrook, "Citizenship unmoored: expatriation as a counterterrorism tool," 1277.
[314] Aleinikoff, "Theories of Loss of Citizenship," 1495. See also the Dissenting Opinion of Judge Pinto De Albuquerque in the case of ECtHR, *Ramadan v. Malta*, application no. 76136/12, judgment 21/06/2016, starting at p. 25.), which stresses the impact of nationality deprivation on a person's identity. On the 'the importance of having a nationality for an individual's (private) life', see also Reyntjens, "Citizenship deprivation under the European convention-system: A case study of Belgium," 269.
[315] See the overview table in Section IV.2 above.
[316] Macklin, "The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?," 170.
[317] ECtHR, *Ghoumid and Others v. France*, §49.
[318] ECtHR, *Ghoumid and Others v. France,* §49.
[319] Gibney, "Should Citizenship Be Conditional? The Ethics of Denationalization," 652.

Even if we disregard the issues of statelessness and expulsion, however, we are still left with some of the harshness so vividly described by the US Supreme Court and scholars like Bolhuis, van Wijk, Macklin, Esbrook and Aleinikoff. Especially the notion of a destruction of the individual's political and social identity remains. What are we to make of this in the light of the severity criterion? I propose that, despite the undoubted seriousness of the measure's consequences, its severity does not warrant a reconsideration of the legal nature of nationality deprivation, from administrative to criminal. This is due to two reasons. First, severe consequences, by themselves, do not justify the correction of the measure's legal nature. If we recall what the ECtHR observes about the severity criterion, we are reminded that 'this factor is not in itself decisive, since many non-penal measures of a preventive nature may have a substantial impact on the person concerned'[320]. Here, we might think of a set of related scenarios, including the refusal of a person's citizenship acquisition or the denial of their visa application or request to enter a particular country. All of these state measures are unquestionably administrative. And yet, their effects for the individuals concerned may be devastating. Indeed, we may wonder if the consequences of a punitive measure are necessarily always more severe – and whether this comparison is, in every case, applicable and useful. In the case of the denial of a person's citizenship, for instance, the grounds for denial do not have to be subject to criminal law at all. Thus, in the so-called handshake-cases,[321] applicants were denied citizenship in several cases across Europe because they refused to shake a woman's hand demonstrating a disregard for gender equality. Naturally, the failure to shake someone's hand is not a criminal offence. Thus, there are cases in which administrative measures are not only exceptionally severe in their effects, but in which they exceed the bounds of criminal law. Likewise, there is no denying the potentially substantial impact of nationality deprivation, but, in my view, this still does not provide sufficient grounds for considering nationality deprivation responding to terrorism a measure that is criminal in nature.

This does not change if we presuppose a thicker understanding of citizenship or national belonging, which is where my second reason becomes relevant. Here, I would like to stress that I am only concerned with deprivation powers applicable to terrorist conduct. In this particular context, I find Emanual Gross' assessment convincing that the criticism of the utter destruction of an individual's political and social identity does not apply due to the specific

[320] See for example: ECtHR, *Balsamo v. San Marino*, application nos. 20319/17 and 21414/17, judgment 08/10/2019, §66. I will discuss these issues further in my third Chapter (Section III.3.iv).
[321] Cf. *Introduction*.

conduct to which the deprivation measure responds.[322] Gross argues that, by engaging in terrorist activity against their community, the individual has replaced a part of this identity, on their own accord, with 'terrorism' and its acts and ideologies.[323] And, as we have seen, those targeted by counter-terrorism deprivation regimes in the EU and the UK do engage precisely in acts that seriously harm their communities and their principles and values. In such cases, to paraphrase Gross, the identity that the deprivation measure is said to destroy, is no longer truly existent. Similarly, the ECtHR has noted in *Ghoumid and Others v. France* that the applicant's terrorist activities 'show that their attachment to France and its values is of little importance for them in the construction of their personal identity'.[324] This has implications for how we must assess the severity of the 'destruction' caused by nationality deprivation. Even in a terrorist context, loss of nationality is of course not inconsequential. But its harshness does not amount, in my view, to the extent necessary to revise its legal status. Thus, we may conclude that also the severity test confirms that the true legal nature of nationality deprivation is administrative.

VI. Conclusions

This first chapter has conducted a detailed analysis of the deprivation regimes in the MSs and the UK with a view to determining their legal nature. To this end, I have established first that most legislations in the MSs plus the UK include deprivation provisions applicable to terrorism and suggested that they may be grouped into three categories, in accordance with their substantive grounds: those requiring an individual's (i) criminal court conviction for severe crimes, (ii) fighting abroad in an armed conflict or organisation and (iii) conduct incompatible with certain core values or interests. On this basis, I have proceeded to the central focus of this chapter, the assessment of the legal nature of such provisions, considering, in particular, whether they may be regarded as measures of criminal or administrative law. My assessment has been based on four consecutive steps, which I have developed in light of the ECtHR case law touching on nationality deprivation and the definition of (non)punitive measures under the ECHR. This analysis addressed, in turn, (i) the classification of deprivation measures in national law, (ii) the procedures leading to loss of nationality, (iii) the primary purpose or 'very nature' of the measures, and (iv) the severity of deprivation measures for the individual

[322] Gross, "Defensive Democracy: Is It Possible to Revoke the Citizenship, Deport, or Negate the Civil Rights of a Person Instigating Terrorist Action against His Own State," 58.
[323] Gross, "Defensive Democracy: Is It Possible to Revoke the Citizenship, Deport, or Negate the Civil Rights of a Person Instigating Terrorist Action against His Own State," 58.
[324] ECtHR, *Ghoumid and Others v. France*, §50. See also ECtHR, *Johansen v. Denmark*, §70.

concerned. This final step was intended as a corrective, in case the severity of the consequences of nationality loss needed to lend additional weight to a criminal interpretation of the measure.

My considerations revealed that, aside from very few exceptions, deprivation provisions in the EU and the UK are administrative in their legal classification and procedure. Their primary purpose became apparent as largely of an administrative nature as well. Even though punishment and national-security concerns may appear to be key deprivation objectives, my analysis could show that, in most cases, nationality deprivation aims to achieve larger, more abstract goals. As I argued, these include, in particular, the severance of the bond between the civic community and a citizen who has engaged in conduct incompatible with the core values and principles of that community. Thus, in my analysis, deprivation regimes became apparent as committed to the idea of a citizen's inherent duty and loyalty to (the inviolability of) certain civic principles. As such, they revealed a primary purpose closely tied to the relationship between citizen, state and civic community – a concern very much characteristic of administrative law. The administrative legal nature that my considerations revealed for deprivation measures in the EU and the UK did not have to be revised in light of the measure's severity.

CHAPTER TWO:
NATIONALITY DEPRIVATION AND THE IDEA OF LOYALTY TO THE STATE

I. Research questions and aim

My first chapter examined the deprivation powers in the EU and the UK that are applicable to terrorism. It revealed that, rather than constituting punitive measures of criminal law, almost all of these provisions are administrative in their legal nature. We also noted that they tend to pursue a common goal as their 'very nature': in concert with the concerns of administrative law, they seek to respond to a shift in the relationship between citizen and state ensuing from the citizen's engagement in terrorist conduct, which is incompatible with the civic community and its core values and interests. The response of deprivation measures consists in the severance of the bond between the citizen and the state community. We observed that such an understanding of nationality deprivation presupposes the idea of a citizen's duty of loyalty to the inviolability of certain state principles, that is, their obligation not to conduct themselves in a manner incompatible with them.

These findings raise two sets of questions. First, how may we understand the 'duty of loyalty' presupposed in deprivation regimes and what are the 'core principles' it applies to? And second: Why should the breach of this loyalty and the violation of these principles justify a deprivation measure and the severance of the citizenship bond? These questions lie at the core of my second chapter. More precisely, in its largest part, this chapter will take a closer look at what has been variously described, in the scholarship and the relevant legislation and case law, as a 'civic duty or obligation' or a citizen's 'duty of loyalty to the state'. What do such concepts imply? My response to this question will also examine the values, interests or principles that they are meant to safeguard, and the conduct thus owed by individual citizens. As we will see, in democratic states, like the MSs and the UK, civic duties of loyalty and the conduct they require, relate, in particular, to the integrity of the foundations of democracy. The final section of my chapter, in turn, explores on what rationale we may base an argument justifying that the violation of certain civic principles, and a citizen's disloyalty in this sense, may lead to a loss of nationality and the legal severance of the civic bond it implies. As will become

apparent, this justification is inextricably tied to how we understand the idea of citizenship, especially in a democratic context. Here, I will review contemporary theories of citizenship and discuss their relevance for a better understanding of nationality deprivation.

Let me add a brief example to illustrate the key concerns of this chapter. Addressing the introduction of subsection 4a of Section 40 of the British Nationality Act 1981, which adds a new aspect to British deprivation legislation, Lord Taylor of Holbeach makes the following comments:

> 'People who have chosen to become British have taken an oath in which they pledge to respect the UK's rights and freedoms, uphold the UK's democratic values and fulfil their duties and obligations as British citizens. Despite this oath, some act in a way that is seriously prejudicial to the vital interests of the United Kingdom.'[325]

Here, Lord Tayler of Holbeach assumes the existence of a direct link between British citizenship and an 'oath' or 'pledge' to the UK's 'rights and freedoms', its 'democratic values' and 'vital interests' more broadly. From this link, he derives justification for the UK's deprivation power: whoever acts 'seriously prejudicial' to the principles enshrined by the citizenship oath, will lose their citizenship. This chapter asks, in a first step, what is meant by the key concepts Lord Taylor uses and enquires, in a second, whether his initial assumption of a link is valid and a suitable justification for nationality deprivation.

II. Preliminary considerations on the idea of a duty of loyalty

Before we turn to a more detailed analysis of what a duty of loyalty to the state might constitute, we need to acknowledge that this is not an unproblematic concept, especially in the democratic context that frames the jurisdictions of the MSs and the UK. Whenever a democratic state restricts the rights and freedoms of their citizens – and a civic duty of loyalty, like any duty, constitutes a restriction – democracy itself is challenged, to a degree. Even more so if this duty prescribes the adherence to state institutions and (moral) convictions. As we will see in Chapter Three (Section III.4), critics have argued that this constitutes a violation of the principle of freedom of conscience. And others have readily pointed out that the requirement of an unquestioning and unconditional commitment to the state recalls totalitarian regimes. In

[325] House of Lords, *Debates*, c1170 (17th April 2014). Also quoted in: Pougnet, "Cancellation of citizenship and national security: A comparison between France and the UK," 126.

the words of George P. Fletcher, '[e]xcessive demands of loyalty mark the tyrannical state.'[326] History provides many dark examples of such loyalty requirements.

Thus, any argument in support of a civic duty of loyalty needs to be carefully justified and distinguished from authoritarian forms of civic allegiance. In this sense, Anna Stilz cautions her readers not to confuse her support of a liberal concept of state loyalty with 'supererogatory displays of patriotism – dying for one's country – nor for political loyalty at all costs'.[327] Similarly, I would also like to stress the distinction between a 'duty of loyalty to the state', as I use and study it, and the sentiments of patriotism, including 'love of one's country, identification with it, and special concern for its well-being and that of compatriots'.[328] Furthermore, as we will see in this chapter, the kind of civic duty I am concerned with constitutes a loyalty in a 'minimal' sense.[329] Such a loyalty, Christian Joppke asserts, does not pose 'an inordinate expectation'.[330] It does not require the personal conviction that the duties owed are somehow ideologically superior to others. Nor does it require the active support of particular values or interests: it only constitutes an obligation not to impair them. Finally, this duty does not establish loyalty to specific government leaders, but to the inviolability of fundamental state principles independent of the government in power at a given time.[331] For this distinction, I rely on the case law of the ECtHR, which we will explore in detail below and which also differentiates between a legitimate 'duty of loyalty to the state', on the one hand, and an illegitimate 'duty of loyalty to the government', on the other.[332]

Even in a minimal sense, a civic duty of loyalty might be considered a challenge to liberal conceptions of democracy. If one takes liberalism to mean, in Liav Orgad's words, 'to obey the law and otherwise be left alone',[333] ideas of a civic duty of loyalty – even if only as a commitment to the inviolability of certain core principles – become problematic. However, a comparison with the duty to obey the law may be instructive here. As Anna Stilz argues, this duty is 'an obligation that binds only those persons who stand in some special institutional

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[326] George P. Fletcher, *Loyalty: An Essay on the Morality of Relationships* (New York: New York: Oxford University Press, 1995), 59.
[327] Anna Stilz, *Liberal loyalty: freedom, obligation, and the state* (Princeton: Princeton: Princeton University Press, 2009), vii.
[328] Igor Primoratz, "Patriotism", The Stanford Encyclopedia of Philosophy (Spring 2019 Edition), Edward N. Zalta (ed.), https://plato.stanford.edu/archives/spr2019/entries/patriotism/ (last accessed: 25/03/2023).
[329] Fletcher, *Loyalty: An Essay on the Morality of Relationships*, starting at 41.
[330] Joppke, "Terror and the loss of citizenship," 738.
[331] On the possible exception of Malta, see Art. 14(2)a of the Maltese Citizenship Act.
[332] ECtHR, *Tănase v. Moldova*, application no. 7/08, judgment 27/04/2010, §166. See Chapter Two, Section IV.3, for a more detailed discussion of the judgment.
[333] Liav Orgad, "Liberalism, Allegiance, and Obedience: The Inappropriateness of Loyalty Oaths in a Liberal Democracy," *Canadian Journal of Law & Jurisprudence* 27, no. 1 (2015): 100, https://doi.org/10.1017/s084182090000624x.

relationship – those who fall within the territorial domain of a given state.'[334] I propose that the duty of loyalty to the state that I am concerned with also requires a 'special institutional relationship': the bond of citizenship. Only those who are a state's citizens are bound to the special duty that, if broken, calls for nationality deprivation. As I will discuss in the final section of this chapter, this presupposes a particular understanding of citizenship that is, nonetheless, very much compatible with democratic principles. While less agreeable perhaps to a 'liberal' perspective in the above sense, it comes closer to what David Cameron has described as a 'muscular liberalism' in the face of Islamic extremism:[335]

> 'Frankly, we need a lot less of the passive tolerance of recent years and a much more active, muscular liberalism. A passively tolerant society says to its citizens, as long as you obey the law, we will just leave you alone. It stands neutral between different values. But I believe a genuinely liberal country does much more; it believes in certain values and actively promotes them. Freedom of speech, freedom of worship, democracy, the rule of law, equal rights regardless of race, sex or sexuality. It says to its citizens, this is what defines us as a society: to belong here is to believe in these things. Now, each of us in our own countries, I believe, must be unambiguous and hard-nosed about this defence of our liberty.'[336]

While the kind of loyalty at stake in this thesis does not demand an individual's active belief in particular values, it does require their non-violation. To co-opt Cameron's slogan above, 'to belong here is not to harm these things'.

III. Methodology and outline of the analysis

The task of determining how we should best understand the concept of a duty of loyalty to the state is not a straightforward one. This difficulty is captured well in *Tănase v. Moldova* (2010), a case in which the ECtHR had to assess restrictions to rights in the light of a 'duty of loyalty to the state'. While both the applicants and the respondent referred to this concept, the Court observed, neither of them provided a clear definition.[337] In order to avoid the same mistake, this chapter seeks to elucidate what a civic duty of loyalty might be, as a key concept in the context of nationality deprivation responding to terrorist acts in the EU and the UK.

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[334] Stilz, *Liberal loyalty: freedom, obligation, and the state*, 4.
[335] David Cameron, PM's speech at Munich Security Conference, 5 February 2011. The transcript of the speech is available at: https://www.gov.uk/government/speeches/pms-speech-at-munich-security-conference (last accessed: 25/03/2023).
[336] Cameron, PM's speech at Munich Security Conference, 5 February 2011.
[337] ECtHR, *Tănase v. Moldova*, §165. Reference to a duty of loyalty as part of the naturalisation proceedings is made in: ECtHR, *Petropavlovskis v. Latvia*, application no. 44230/06, judgment 13/01/2015 (final: 01/06/2015), §85.

Despite the challenge of the task, there are different ways in which it could be approached, in principle. One might turn, for instance, to the individual legislations of the MSs and the UK and consider what a duty of loyalty might specifically mean for each state in the light of a state's constitutional history. This approach certainly has its merits since it promises a precise mapping of national deprivation provisions to the loyalty and values most central to each individual nation. However, it also has a significant drawback: it carries the risk of getting lost in a complex multitude of national laws and systems, to the extent that it is hard to make out any common traits that characterise deprivation regimes responding to terrorist conduct across the EU and the UK. And yet, a key result of my preceding chapter was precisely that these regimes share a common pattern across their diversity: they tend to respond to a citizen's fundamental violation of their civic duty of loyalty to the community's core principles by severing the bond between the state and that citizen. Thus, to place a more central focus on the common ground between the MSs and the UK, I have decided for a different approach. I will explore the notions of a 'duty of loyalty to the state' and its 'vital interests or values', by turning to international legal instruments that engage with, and elucidate, these concepts, especially the 1961 UN Convention on the Reduction of Statelessness and the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as to the relevant explanatory material and international case law. This allows me to make more abstract observations on the matter and move, more clearly, from the examination of individual deprivation legislations in the MSs and the UK to the idea of nationality deprivation underlying their various national provisions.

More specifically, I will examine three different legal sources in this chapter to clarify the meaning of the key concepts underpinning nationality deprivation for terrorist conduct in the EU and the UK. I will begin by considering Article 8(3) of the 1961 UN Convention, which refers explicitly to a 'duty of loyalty to the state' and conduct 'seriously prejudicial' to the state's 'vital interests' in its deprivation provision. Here, my analysis will focus, in particular, on the Article's drafting history. This allows us to learn from the international controversies before the adoption of the actual Convention about the concepts of a civic duty of loyalty, vital state interests and the conduct violating them. Subsequently, I will look at UN expert opinions on Article 8(3), especially the 2013 UNHCR Expert Meeting on the article and the UNHCR Guidelines on Statelessness No. 5. Both offer definitions and additional explanations for many of the key terms involved. During my considerations of the drafting history and expert interpretations of Article 8(3), I will also make cursory reference to the 1997 European Convention on Nationality. Article 7(1)lit.d of the European Convention refers to 'conduct seriously prejudicial to the vital interests of the State Party' as an admissible deprivation ground and clearly

recalls the wording of Article 8(3) of the UN Convention. However, the treatment of our key concepts is considerably briefer, both in the European Convention itself and in its explanatory legal material. For this reason, I have given a more central position in my research to the UN Convention. With the third legal source I will consider in this chapter, we move to a slightly different area: the understanding of civic loyalty as it emerges in the case law on the ECHR. Here, I will discuss a selection of international cases that explicitly review national measures responding to violations of a duty of loyalty to the state ('loyalty cases'). In the process, I will pay special attention to early examples of the case law of the EComHR and the ECtHR in which the themes of a duty of loyalty to fundamental state interests, especially to democratic values, appear with particular prominence.

Before beginning my analyses of these sources, I would like to briefly address two objections that could be raised regarding my approach: first, one might object that the international legal instruments I rely on for elucidating the central terms of deprivation measures in the EU and the UK suggest an ideal, especially in their commitment to human rights, that the individual national provisions may not abide by; and, second, one might argue that the 1961 Convention and its drafting history at the core of my chapter derive from a bygone era irrelevant to modern-day concepts on nationality deprivation. With regard to the former, let me point out that I have deliberately chosen to examine the UN Convention and the ECHR (and its case law), not just for their thematic relevance for the key concepts involved, but also because the deprivation regimes I examine in this thesis are legal measures implemented by parties to these very same legal instruments. In a sense, these instruments reveal a minimum consensus shared by all of them. Many of the 17 MSs plus the UK with deprivation powers applicable to terrorism have subscribed to the UN Convention[338] and all of them have signed the ECHR. Of course, national deprivation provisions may still, at times, fall short of the aspirations embraced in these instruments, their explanatory institutions and relevant jurisprudence, but we cannot automatically assume they do. Rather, I propose, there is an argument to be made that the deprivation regimes of the MSs and the UK are consistent with the ideal postulated in these instruments, at least to the extent that they may be evaluated with reference to this standard. And we will see that, in this chapter, it will sometimes be necessary to not just clarify what deprivation powers are like, but to formulate requirements of what they ought to be like, in order to conform with instruments like the UN Convention or the ECHR and the democratic systems these powers are part

[338] Parties to the Convention: Austria (signatory state), Bulgaria, Denmark, Finland, France (signatory state), Germany, Ireland, Latvia, the Netherlands, Romania, the UK (signatory state) (https://www.unhcr.org/media/32358 (last accessed: 23/03/2023)).

of. This anticipates some of the concerns of my third chapter, which will be dedicated primarily to the legitimacy and lawfulness of nationality deprivation.

Regarding the second objection, that is, the anachronism of looking at the 1961 UN Convention and its drafting history to understand deprivation regimes today, I would like to emphasise their continued relevance. Of course, the Convention is, to a certain extent, a product of its time. Especially its explicit concern with the reduction of statelessness points to an issue far more central to earlier deprivation measures: when the drafting of the Convention began in 1952, multi nationality was considered something states needed to prevent,[339] with the result that denationalisation often inevitably led to statelessness. By contrast, most states with deprivation regimes today have implemented legal safeguards against statelessness.[340]

And yet, Article 8(3) of the Convention is the result of a rich drafting history that, in its often highly contentious discussions, exceeds questions of statelessness by far. Indeed, the controversies surrounding the article almost caused the entire conference and Convention to fail. They necessitated the development, not only of a comparative study on national deprivation powers, but also of a designated working group tasked with the drafting of a provision acceptable to all delegations. In addition, we may note that the very introduction of Article 8(3) indicated a move beyond the concerns of statelessness. After all, the initial draft of the Convention did not include any exceptions to the general ban on statelessness (see Article 8(1)). However, as I will show, while the national delegations largely endorsed this ban, they did not accept such a restrictive approach towards deprivation regimes and state sovereignty. Arguably, the same understanding of nationality deprivation as an expression of state sovereignty is more relevant today than ever. Not incidentally, we live at a time that has seen an unprecedented increase in the number and complexity of deprivation regimes in the MSs and the UK.[341] And there are several states that are parties to the 1961 Convention and did not have deprivation regimes at the time, but which do so now. Here we may think of Austria, Germany, Denmark, and the Netherlands, for instance.

The European Convention on Nationality (ECN) of 1997 also attests to an important continuation of (inter)national concerns regarding nationality deprivation across the decades. Thus, Article 7(1) of the ECN, like Article 8(1) of the 1961 UN Convention, establishes a general ban on nationality deprivation. Again like the earlier convention, the ECN includes

[339] *Yearbook of the International Law Commission 1953, Volume I, Summary records of the fifth session 1 June - 14 August 1953*, 183rd Meeting, 8 July 1953, §8.
[340] See the overview table in Section IV.2 of Chapter One.
[341] See the overview table in Section IV.2 of Chapter One.

exceptions to this rule: while no longer accepting deprivation measures leading to statelessness (Article 7(3) ECN),[342] it allows the signatory states to implement deprivation powers in response to 'conduct seriously prejudicial to the vital interests of the State Party' (Article 7(1)lit.d). The ECN does not refer to a 'duty of loyalty',[343] but its almost identical description of the conduct leading to deprivation suggests the continuities between both conventions – and between the discourses surrounding nationality deprivation at both times.

Finally, (inter)national case law also corroborates the continued relevance of the UN Convention and supports the larger point that an earlier date of origin does not preclude the validity of legal instruments and arguments concerning nationality law. A recent case before the Irish High Court, *Damache v. Minister for Justice and Equality, Ireland And the Attorney General* (2019), offers a helpful example. In this case, the High Court reviewed the deprivation decision against Ali Charaf Damache, which was based on the grounds that 'he had failed in his duty of loyalty to the nation and fidelity to the State, having pleaded guilty to a terrorist offence.'[344] In its assessment, of whether a (failed) duty of loyalty to the state proved a non-arbitrary deprivation ground, the High Court referred to Article 8 of the UN Convention:

> 'The wording of art. 8 of the UN Convention underlines the important point that the duty of loyalty to a state encompasses the obligation not to conduct oneself in a manner seriously prejudicial to the vital interests of that state. Thus, for example terrorist activity, conspiracy or assistance could in principle be taken to be a breach of the duty of loyalty to the state.'[345]

As the Court's comments indicate, the 1961 Convention may still provide crucial guidance for deprivation cases responding to terrorism today. In particular, it offers a useful source for the concepts of a 'duty of loyalty to the state' and what the High Court has termed the 'obligation not to conduct oneself in a manner seriously prejudicial to the vital interests of that state'. The CJEU has also relied on the UN Convention in a closely related recent case, corroborating yet again the continued relevance of the legal instrument. Thus, in *Rottmann v. Freistaat Bayern* (2010), the Court bases its acknowledgment of the general legitimacy of a state's withdrawal of nationality if it was fraudulently acquired exclusively on the UN Convention: 'That conclusion relating to the legitimacy, in principle, of a decision withdrawing naturalisation adopted

[342] The single exception allowed by Article 7(3) ECN is fraudulent conduct.
[343] The CJ-NA decided not to include this terminology in Article 7(1) ECN (Committee of Experts on Nationality, *Report of 14 January 2003 on Conditions for the Acquisition and Loss of Nationality to the Council of Europe* (CJ-NA (2002) 1 (2003), §48.
[344] *Damache v. Minister for Justice and Equality, Ireland And the Attorney General*, [2019] IEHC 444, § 17.
[345] *Damache v. Minister for Justice and Equality, Ireland And the Attorney General*, [2019] IEHC 444, §§ 57-58.

in circumstances such as those in the main proceedings is borne out by the relevant provisions of the Convention on the reduction of statelessness'.[346]

Even beyond the UN Convention, we may note that international courts do not deny the continued validity of older legal sources in nationality law. The judgment of the ECtHR in *Petropavlovskis v. Latvia* (2015) provides a case in point. The applicant in this case had been refused Latvian citizenship by way of naturalisation on the basis that he failed to meet the requirement of loyalty to the state. He argued before the ECtHR that the reliance of the Latvian state on case law from the 1920s and 1950s, which supported the nation state's exclusive competence in nationality matters, no longer reflected 'the situation of international law'.[347] Today, he stressed, 'there was an emerging international consensus that nationality laws and practice had to be consistent with general principles of international law',[348] which limited the nation state's authority in the case at hand. By contrast, the Court observed that '[i]n accordance with international law, decisions on naturalisation […] are matters primarily falling within the domestic jurisdiction of the State,' and confirmed the relevance of the 'traditional understanding' of nationality (law) that the older case law had suggested.[349]

In light of the preceding considerations, I believe that it is well warranted to look at international legal instruments, and especially the 1961 UN Convention on the Reduction of Statelessness as well as its drafting history and expert interpretations, to gain a better understanding of the key concepts underpinning deprivation regimes in the EU and the UK today.

IV. Historical analysis: international conventions and case law regarding a 'duty of loyalty to the state'

1. Article 8(3) of the 1961 Convention on the Reduction of Statelessness

While paragraph 1 of Article 8 establishes a prohibition of nationality deprivation if it leads to statelessness, paragraphs 2 and 3 introduce exceptions to this general rule. These pertain to certain cases of conduct inconsistent with a duty of loyalty to the state (8(3)lit.(a)) and/or transfer of allegiance to another state (8(3)lit.(b)). In accordance with letter a, if a citizen engaged in conduct inconsistent with their civic duty of loyalty, the existing deprivation powers of a Contracting state may lead to statelessness if they comply with certain formal and legal

[346] CJEU, *Rottmann v. Freistaat Bayern*, §52.
[347] ECtHR, *Petropavlovskis v. Latvia*, §48.
[348] ECtHR, *Petropavlovskis v. Latvia*, §48.
[349] ECtHR, *Petropavlovskis v. Latvia*, §80.

requirements.[350] Article 8(3)lit.(a) provides two scenarios that constitute 'conduct inconsistent with a citizen's loyalty to the state': their link to another state established either by their provision of services to that state or their reception of emolument from it; and behaviour which is 'seriously prejudicial to the vital interests of the state.'[351] As such, the Article allows the following conclusions: first, the 1961 Convention acknowledges that citizens owe a duty of loyalty and allegiance to their state; and, second, it recognises that not just any conduct violating this duty justifies citizenship deprivation leading to statelessness, but only conduct that is also 'seriously prejudicial' to certain fundamental state interests. Unfortunately, the Convention does not define the requirements of a 'duty of loyalty to the state' or 'conduct that is seriously prejudicial to the vital interests of the state' in any more detail. But, as we will see, its drafting history allows us to gain a much better understanding of both.

i. The International Law Commission: drafting history until 1959[352]

The drafting of the 1961 Convention followed a series of international law events, starting from a recommendation made by the Working Party on an International Convention on Human Rights, which had been established during the 1947 session of the International Commission on Human Rights.[353] The Working Party recommended to 'give early consideration to the position of persons who do not enjoy the protection of any State'[354]. As a result, the International Commission adopted a resolution which emphasised the need to give consideration to their protection and status.[355] Following two UN studies on the current situation of stateless persons and the existing legal regimes, the UN Economic and Social Council urged the International Law Commission (ILC) to draft a convention on statelessness.[356] Additionally prompted by a

[350] These include the submission of a declaration signifying *inter alia* that the ratification or accession of the relevant deprivation grounds already existed in national law at the time of signature (Article 8(3)), and the exercise of deprivation powers only 'in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body' (Article 8(3) and (4) of the 1961 Convention on the Reduction of Statelessness). So far, ten states have submitted declarations under Article 8(3) (Luca Bücken and Gerard de Groot, "Deprivation of nationality under Article 8(3) of the 1961 Convention on the reduction of statelessness," *Maastricht journal of European and comparative law* 25, no. 1 (2018): 42, https://doi.org/10.1177/1023263X17754036.).

[351] Article 8(3)lit.(a)(ii) 1961 Convention.

[352] For a summary of the drafting history, see: *History of the two draft conventions, one dealing with the elimination of future statelessness and the other with the reduction of future* statelessness, prepared by the International Law Commission, A/CONF.9/6 (25 March 1959).

[353] *Report Of The Commission On Human Rights Second Session, 2 December to 17 December 1947* (E/600), §16.

[354] *Report Of The Working Party On An International Convention On Human Rights, 11 December 1947 (E/CN4/56)*, p. 15 under 2.

[355] *Report Of The Commission On Human Rights Second Session, 2 December - 17 December 1947* (E/600), § 46.

[356] UN Economic and Social Council (ECOSOC), *Resolution 319 (XI): Refugees and stateless persons*, 16 August 1950 (E/RES/319, XI); *Report of the second session of the Commission on Human Rights, Resolutions of 1 and 2*

note on the Elimination of Statelessness prepared by the Secretariat,[357] the ILC began their work on a convention on eliminating statelessness at its 124th meeting, on 13 July 1951.[358] The ILC relied on special rapporteurs, a position first held by Manley O. Hudson, assisted by Dr. Paul Weis, and later resumed by Roberto Córdova. The rapporteurs' drafting reports and working documents included not only two Draft Conventions – Part 1, on the Elimination of Future Statelessness, and Part 2, on the Reduction of Future Statelessness[359] – but also an analysis comparing the national grounds for nationality deprivation, and their changes since 1930, prepared by Ivan S. Kerno[360].

Hudson's working paper on 'Statelessness' of 1952 offers a first reference to 'disloyalty' as a deprivation ground that, in the rapporteur's assessment, was becoming increasingly relevant at the time. He describes the concept as follows:

> 'Disloyalty is considered to consist in evasion of military service, illegal emigration, refusal to return on request of the authorities, hostile association, desertion from the armed forces, committing of treason or of other activities prejudicial to the interests of the State.'[361]

Importantly, Hudson delineates the meaning of civic disloyalty with reference to 'activities prejudicial to the interests of the state', which he exemplifies with a number of stark violations of a citizen's commitment to their state, including high treason and desertion. Hudson further distinguishes between denationalisation on grounds of disloyalty, which is implemented by an individual decision and 'usually permissive', from collective denationalisation on political,

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March 1948 (E/749), 116. D. For a detailed overview of the history leading up to the UN Economic and Social Council Resolution 319 A and B (XI), see Guy S. Goodwin-Gill, "Convention on the Reduction of Statelessness," *United Nations Audiovisual Library of International Law* (2011).

[357] *Elimination of Statelessness – Note prepared by the Secretariat on Nationality including statelessness*, dated 31 May 1951 (A/CN.4/47).

[358] *Yearbook of the International Law Commission 1951, Volume I, Summary records of the third session 16 May - 27 July 1951*, 124th Meeting, 13 July 1951, §§2-3.

[359] The Draft Conventions are part of Córdova's *Report on the Elimination or Reduction of Statelessness*, dated 30 March 1953 (A/CN.4/64). Hudson and Weis issued the *Report on Nationality, Including Statelessness*, dated 21 February 1952 (A/CN.4/50). Annex I 'Nationality in General', Annex II 'Nationality of Married Persons', Annex III: working paper on 'Statelessness'.

[360] *Memorandum on the National Legislation Concerning Grounds for Deprivation of Nationality by Ivan S. Kerno*, dated 6 April 1953 (A/CN.4/66) and an *Analysis of Changes in Nationality Legislation of States since 1930 by Ivan S. Kerno,* dated 6 April 1953 (A/CN.4/67).

[361] *Yearbook of the International Law Commission 1952, Volume II, Documents of the fourth session including the report of the Commission to the General Assembly, Document A/GN.4/50, Report by Manley O. Hudson, Special Rapporteur*, 21 February 1952, Annex III.

racial or religious grounds.'[362] For the latter, he refers to legal instruments under Nazi Germany that allowed mass denationalisation on racial grounds.[363]

Regarding the Draft Conventions themselves, the first Article relevant to nationality deprivation and discussed at an ICL Meeting was Article 6 of the Draft Convention on the Elimination of Future Statelessness:[364]

Draft Convention on the Elimination of Future Statelessness (1953)
Article 6
1. No State shall deprive any person of its nationality by way of penalty.
2. No State shall deprive any person of its nationality on any other ground unless such a person, at the time of deprivation, acquires the nationality of another State.

The Article distinguishes between nationality deprivation by way of penalty (1) and on other grounds (2). Special rapporteur Córdova observed that, under no circumstances, should deprivation be applied as a sanction, even if it did not result in statelessness.[365] Consequently, the Article's first paragraph applies to nationality deprivation in general and is not limited to cases that would otherwise lead to statelessness.[366] During the first ICL discussions, Article 6 was considered 'one of the most important in the whole draft', while also raising 'the most serious objections'.[367] In particular, there emerged a divide between those members of the Commission who criticised nationality deprivation as a repressive measure violating one of the most fundamental individual rights, and those who believed that banning deprivation measures would unduly violate vital state interests.[368]

[362] *Yearbook of the International Law Commission 1952, Volume II, Documents of the fourth session including the report of the Commission to the General Assembly, Document A/GN.4/50, Report by Manley O. Hudson, Special Rapporteur*, 21 February 1952, Annex III.
[363] *Yearbook of the International Law Commission 1952, Volume II, Documents of the fourth session including the report of the Commission to the General Assembly, Document A/GN.4/50, Report by Manley O. Hudson, Special Rapporteur*, 21 February 1952, Annex III.
[364] The discussion took place on 13 July 1953, at the 214th Meeting (*Yearbook of the International Law Commission 1953, Volume I, Summary records of the fifth session 1 June - 14 August 1953*, 214th Meeting, 13 July 1953, starting at §1). For the text of the Convention, see the *Report on the Elimination or Reduction of Statelessness by Roberto Cordova, Special Rapporteur*, dated 30 March 1953 (A/CN.4/64).
[365] *Yearbook of the International Law Commission 1953, Volume I, Summary records of the fifth session 1 June - 14 August 1953*, 214th Meeting, 13 July 1953, §2.
[366] *Yearbook of the International Law Commission 1953, Volume I, Summary records of the fifth session 1 June - 14 August 1953*, 214th Meeting, 13 July 1953, §2.
[367] *Yearbook of the International Law Commission 1953, Volume I, Summary records of the fifth session 1 June - 14 August 1953*, 214th Meeting, 13 July 1953, §5.
[368] For example: *Yearbook of the International Law Commission 1953, Volume I, Summary records of the fifth session 1 June - 14 August 1953*, 214th Meeting, 13 July 1953, §17.

Considering these discussions, the drafting committee proposed the following amendments to the initial deprivation provision:[369]

Draft Convention on the Elimination of Future Statelessness, revised by the Drafting Commission (1953)
Article 7
The Parties shall not deprive their nationals of nationality by way of penalty so as to render them stateless.
Article 8
The Parties shall not deprive any person or group of persons of their nationality on racial, ethnical, religious, or political grounds, so as to render them stateless.

The new Article 7 is very similar to the old Article 6, aside from its explicit reference to the inadmissibility of statelessness as a deprivation result. Article 8, by contrast, constituted a completely new addition of 'an important point.'[370] Here, we may recall Hudson's considerations above, which stressed the importance of avoiding what we might call discriminatory deprivation.

Shortly after the text of the two new provisions had been agreed upon,[371] there is a first mention and discussion of the terminology 'vital interests of the state', albeit in a different context. The phrase appeared in clause 7 of the preamble of the Draft Convention, which read: 'Whereas no vital interests of States are opposed to the total elimination of statelessness'.[372] The members of the Commission were divided about the acceptability of this clause to prospective signatory states.[373] Hersch Lauterpacht attempted to close the divide by stressing that '[t]here was a clear distinction between the vital interests and the important interests of States'[374] – a distinction that would become relevant, once again, for the meaning of 'vital interests of the state' pursuant to Article 8(3) of the 1961 Convention. When still no agreement could be reached, Córdova proposed an alternative wording for clause 7, which was

[369] *Yearbook of the International Law Commission 1953, Volume I, Summary records of the fifth session 1 June - 14 August 1953*, 218th Meeting, 17 July 1953, §§8, 69, 85.
[370] *Yearbook of the International Law Commission 1953, Volume I, Summary records of the fifth session 1 June - 14 August 1953*, 218th Meeting, 17 July 1953, §7.
[371] *Yearbook of the International Law Commission 1953, Volume I, Summary records of the fifth session 1 June - 14 August 1953*, 218th Meeting, 17 July 1953, §§83,85.
[372] *Yearbook of the International Law Commission 1953, Volume I, Summary records of the fifth session 1 June - 14 August 1953*, 219th Meeting, 20 July 1953, §1.
[373] *Yearbook of the International Law Commission 1953, Volume I, Summary records of the fifth session 1 June - 14 August 1953*, 219th Meeting, 20 July 1953, §§6,12.
[374] *Yearbook of the International Law Commission 1953, Volume I, Summary records of the fifth session 1 June - 14 August 1953*, 219th Meeting, 20 July 1953, §6.

subsequently adopted: 'Whereas it is desirable, by international agreement, to render impossible legal situations which give rise to statelessness.'[375]

The members of the Commission discussed several more versions of Article 7 on nationality deprivation.[376] This resulted in the ICL's adoption of two Draft Conventions – on the Elimination of Future Statelessness and on the Reduction of Future Statelessness, respectively – at its 234th meeting in 1953.[377] The two conventions included the following versions of Article 7[378]:

Draft Convention on the Elimination of Future Statelessness (1953)	**Draft Convention on the Reduction of Future Statelessness (1953)**
Article 7	Article 7
The Parties shall not deprive their nationals of nationality by way of penalty if such deprivation renders them stateless.	1. The Parties shall not deprive their nationals of nationality by way of penalty, if such deprivation renders them stateless, except on the ground that they voluntarily enter or continue in the service of a foreign country in disregard of an express prohibition of their State.
	2. In the case to which paragraph 1 above refers, the deprivation shall be pronounced by a judicial authority acting in accordance with due process of law.

While Article 7 of the Draft Elimination Convention establishes that nationality deprivation by way of penalty is not permissible if it results in statelessness, the corresponding Article of the Draft Reduction Convention allows the exception of a citizen engaging in services for a foreign nation in violation of an explicit prohibition by their state of citizenship. It also establishes the importance of due process in such cases.

In a subsequent stage, governments were invited to comment on the draft conventions adopted by the ILC. 15 governments followed the invitation.[379] While some did not identify conflicts between their own laws and the proposed conventions, others expressed either their willingness to change their national laws in accordance with the draft conventions or their reluctancy to restrict their nationality laws in this way. For our concerns, especially those national submissions are of interest that rejected the draft conventions due to fundamental conflicts with

[375] *Yearbook of the International Law Commission 1953, Volume I, Summary records of the fifth session 1 June - 14 August 1953*, 219th Meeting, 20 July 1953, §§34,37.
[376] For example: *Yearbook of the International Law Commission 1953, Volume I, Summary records of the fifth session 1 June - 14 August 1953*, 222nd Meeting, 23 July 1953, §100.
[377] *Yearbook of the International Law Commission 1953, Volume I, Summary records of the fifth session 1 June - 14 August 1953*, 234th Meeting, 7 August 1953, §94.
[378] *Official Records of the General Assembly, Eighth Session*, Supplement No. 9 (A/2456).
[379] *Comments by Governments on the Draft Convention on the Elimination of Future Statelessness and on the Draft Convention on the Reduction of Future Statelessness,* A/CN.4/82 and Add. 1-8.

their national deprivation powers.[380] A common theme in these submissions is the states' reluctance to restrict their sovereignty, especially when a citizen acted against certain state interests. Belgium, for example, objected to Article 8 (no deprivation on racial, ethnical, religious, or political grounds), criticising its prevention of nationality deprivation on political grounds and in response to 'activities designed to overthrow the State or its institutions'.[381] Here, we may identify a (national) shift in focus: away from the exclusive concern with the prohibition of discriminatory deprivation, especially in the aftermath of fascist regimes, that underpinned Hudson's comments above and the very introduction of Article 8, and towards a stronger foregrounding of national sovereignty.

In light of these discussions, at its 275th Meeting, the ILC adopted revised versions of the two conventions. They contained the following provisions on nationality deprivation:[382]

Draft Convention on the Elimination of Future Statelessness (1959)	**Draft Convention on the Reduction of Future Statelessness (1959)**
Article 8 (previously Article 7)	Article 8 (previously Article 7)
A Party may not deprive its nationals of their nationality by way of penalty or on any other ground if such deprivation renders them stateless.	1. A Party may not deprive its nationals of their nationality by way of penalty or on any other ground if such deprivation renders them stateless, except on the ground mentioned in article 7, paragraph 3, or on the ground that they voluntarily enter or continue in the service of a foreign country in disregard of an express prohibition of their State. [Article 7(3): A natural-born national shall not lose his nationality, so as to become stateless, on the ground of departure, stay abroad, failure to register, or on any other similar ground. A naturalised person may lose his nationality on account of residence in his country of origin for the period specified by the law of the Party which granted the naturalization.]
	2. In the cases to which paragraph 1 above refers, the deprivation shall be pronounced in accordance with due process of law which shall provide for recourse to judicial authority.
Article 9 (previously Article 8)	Article 9 (previously Article 8)
A Party may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds.	A Party may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds.

[380] These include Australia, Belgium, Canada, the Netherlands, Sweden, the U.S.. Cf. *Comments by Governments on the Draft Convention on the Elimination of Future Statelessness and on the Draft Convention on the Reduction of Future Statelessness*, A/CN.4/82 and Add. 1-8.
[381] *Comments by Governments on the Draft Convention on the Elimination of Future Statelessness and on the Draft Convention on the Reduction of Future Statelessness*, A/CN.4/82 and Add. 1-8, 2. Belgium.
[382] UN Conference on the Elimination or Reduction of Future Statelessness. *Text of the Draft Conventions on the Elimination of Future Statelessness and on the Reduction of Future Statelessness prepared by the International Law Commission at its Sixth Session*, dated 20 March 1959 (A/CONF./L.1), p.5.

ii. Conference on the Elimination or Reduction of Future Statelessness 1959-1961

On the basis of these draft conventions, the Conference on the Elimination or Reduction of Future Statelessness was convened from 1959 to 1961. The Conference ultimately led to the adoption of the 1961 Convention. The aim of the Conference was to conclude the drafting process by seeking to align the nationality laws of states with 'different conceptions of national allegiance and citizenship'.[383] This entailed the crux of balancing its goal to eliminate or reduce statelessness, on the one hand, against states' interest to retain national legislation, on the other.[384] In the words of the UK representative: 'The Conference should be aware of two dangers. First, in its eagerness to eliminate statelessness altogether, it might draw up a convention which only a few States would be prepared to sign. Secondly, in its desire to achieve some practical result, it might prepare an instrument which many States would sign and ratify, but which would improve the condition of stateless persons only in a very small degree.'[385] Later, this would be described as the conflict between 'purely academic considerations' and the 'practical solutions' acceptable to governments.[386]

During the first part of the Conference, the two draft conventions were examined, discussed and amended, which highlighted the difficulty of finding common ground regarding the contentious issue of nationality deprivation.[387] The state representatives discussed, in particular, amendments that added criteria introducing exemptions from the general ban of nationality deprivation in draft Article 8, such as convictions for disloyal acts.[388] After the German representative had introduced an amendment that would have allowed each state to rely on exceptions introduced into their legislations before adopting the conventions, an amendment jointly submitted by Canada and the UK established an exemption on grounds of 'national security and public order (*ordre public*)'.[389] As part of the discussions on this amendment, it was also proposed to replace 'public order' with 'the interests of the state'[390]. However, at this point, the phrase was criticised as too broad because 'all national legislation purported to be in the interests of the State.'[391] After debating different alternatives of how to overcome the gridlock

[383] UN Conference on the Elimination or Reduction of Future Statelessness. *Summary Records of the Plenary Meetings*, 1st meeting, 24 March 1959 (A/CONF.9/SR.1), p. 3.
[384] *Summary Records of the Plenary Meetings*, 2nd meeting, 25 March 1959 (A/C0NF.9/SR.2), p. 2.
[385] *Summary Records of the Plenary Meetings*, 2nd meeting, 25 March 1959 (A/C0NF.9/SR.2), p. 2.
[386] *Summary Records of the Plenary Meetings*, 2nd meeting, 25 March 1959 (A/C0NF.9/SR.2), p. 4.
[387] For example: *Summary Records of the Plenary Meetings*, 8th Meeting, 15 April 1959 (A/CONF.9/SR.8). For a summary of the results of this first part of the Conference, see: *Organization and work of the conference during the period from 24 March - 17 April 1959*, 9 August 1961 (A/CONF.9/12).
[388] For example: *Summary Records of the Plenary Meetings*, 8th Meeting, 15 April 1959 (A/CONF.9/SR.8), p.1.
[389] *Summary Records of the Plenary Meetings*, 14th Meeting, 18 April 1959 (A/CONF.9/SR.14), p. 3.
[390] *Summary Records of the Plenary Meetings*, 14th Meeting, 18 April 1959 (A/CONF.9/SR.14), p. 6.
[391] *Summary Records of the Plenary Meetings*, 14th Meeting, 18 April 1959 (A/CONF.9/SR.14), p. 6.

on Article 8 to no avail, the Conference followed the UK's proposal to adjourn.[392] It also endorsed a resolution proposing 'to reconvene the Conference at the earliest possible time in order to continue and complete its work.'[393] Concluding the Conference, the President observed that it had failed due to 'the gap between the two basic philosophies represented' and that he hoped the Conference would 'realise the need to compromise.'[394]

Following the Conference's difficulties in agreeing on a provision regarding nationality deprivation, the participating states were subsequently asked 'to indicate the grounds for deprivation of nationality which each, for its part, would deem it essential to retain.'[395] A total of 21 states submitted their responses.[396] On this basis, the plenary meetings resumed in 1961. While the Acting President acknowledged the achievements made during the first part of the Conference, he recommended that the provision on nationality deprivation (Article 8) 'should be given priority'.[397] What was described as 'complicated discussions'[398] ensued. To make the adoption of a Convention possible nonetheless, it was agreed that a provision be drafted by a designated Working Group on the issue of nationality deprivation,[399] creating a 'single text' to unify the different opinions.[400]

On 23 August 1961, at the 20th plenary meeting of the Conference, the President announced the Working Group's new draft of Article 8. In the assessment of Peter Harvey, the Working Group's Rapporteur, this draft was a compromise that took into account the diverse views expressed in the Working Group and at the Conference.[401] It reads as follows:[402]

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[392] *Summary Records of the Plenary Meetings*, 14th Meeting, 18 April 1959 (A/CONF.9/SR.14), p. 16.
[393] *Summary Records of the Plenary Meetings*, 14th Meeting, 18 April 1959 (A/CONF.9/SR.14), p. 18.
[394] *Summary Records of the Plenary Meetings*, 14th Meeting, 18 April 1959 (A/CONF.9/SR.14), p. 18.
[395] UN Conference on the Elimination or Reduction of Future Statelessness. *Note by the Secretary-General with annex containing observations by governments on deprivation of nationality*, dated 9 June 1961 (A/CONF.9/10), §5.
[396] UN Conference on the Elimination or Reduction of Future Statelessness. *Note by the Secretary-General with annex containing observations by governments on deprivation of nationality*, dated 9 June 1961 (A/CONF.9/10), §6. And: UN Conference on the Elimination or Reduction of Future Statelessness. *Additional observations by Governments on deprivation of nationality*, 5 July 1961 (A/CONF.9/10/Add.1-3).
[397] *Summary Records of the Plenary Meetings*, 15th Meeting, 15 August 1961 (A/CONF.9/SR.15), p. 2.
[398] *Summary Records of the Plenary Meetings*, 15th Meeting, 15 August 1961 (A/CONF.9/SR.15), p. 2 (15 August 1961).
[399] *Summary Records of the Plenary Meetings*, 19th Meeting, 21 August 1961 (A/CONF.9/ SR.19), p.11.
[400] *Summary Records of the Plenary Meetings*, 15th Meeting, 15 August 1961 (A/CONF.9/SR.15), p. 5.
[401] *Summary Records of the Plenary Meetings*, 20th Meeting, 23 August 1961 (A/CONF.9/SR.20), p. 2.
[402] Text of Article 8 as prepared by the UN Conference on the Elimination or Reduction of Future Statelessness. *Working Group appointed by the Conference*, 23 August I961 (A/CONF.9/L.86).

Text of Article 8 as prepared by the Working Group appointed by the Conference
1. A contracting State shall not deprive a person of its nationality if such deprivation would render him stateless.
2. Notwithstanding the provisions of paragraph 1, a person may be deprived of the nationality of a Contracting State:[403] (a) in the circumstances in which, under paragraphs 4 and 5 of article 7, it is permissible that a person should lose his nationality; (b) where the nationality has been obtained by misrepresentation or fraud.
3. Notwithstanding the provisions of paragraph 1, a Contracting State may retain the right to deprive a person of his nationality, if at the time of signature, ratification or accession it specifies its retention of such right on one or more of the following grounds, being grounds existing in its national law at that time: (a) that the person, inconsistent with his duty of loyalty to the Contracting State, (i) has, in disregard of an express prohibition by the Contracting State rendered or continued to render services to, or received or continued to receive emoluments from, another State, or (ii) has conducted himself in a manner seriously prejudicial to vital interests of the State; (b) that the person has taken an oath, or made a formal declaration, of allegiance to another State, or given definite evidence of his determination to repudiate his allegiance to the Contracting State.
4. Nothing in the previous paragraph shall prejudice the right of a Contracting State to enact subsequent legislation embodying grounds for deprivation not less favourable to the individual than those specified at the time of signature, ratification or accession.
5. A Contracting State shall not exercise a power of deprivation permitted by paragraph 2, 3 or 4 except in accordance with a procedure established by law, which shall provide for a fair hearing by a court or other completely independent and impartial body.

Most important for our concerns is the formulation of Article 8(3). It is the first draft of the Convention's deprivation provision to mention 'a duty of loyalty to the state' and 'conduct seriously prejudicial to vital interests of the state'. Both recall the terminology of Hudson's 1952 working paper, but, compared to earlier considerations of the deprivation provision, here, 'vital' has been added as a qualifier to 'interests of the state'. We have been alerted to the significance of this addition in Lauterpacht's comments above, on clause 7 of the preamble. Furthermore, the drafting discussions of the new Article 8(3) reveal that the requirement 'inconsistent with his duty of loyalty to the Contracting State' (Article 8(3)lit.a) is of 'considerable importance' and needs to be understood as 'a limitation on the provisions immediately following': only conduct that falls under (i) or (ii) *and* meets the additional standard of being 'inconsistent with his duty of loyalty' justifies a deprivation of nationality leading to statelessness.[404] The 21st plenary meeting of the Conference, on 24 August 1961, provided a first definition of the phrase 'vital interests of the state' (Article 8(3)lit.a.(ii)). While it was observed that the precise meaning of this phrase depended on 'the philosophical concepts of the person and the State',[405] according to the drafter's intent, it described the 'essential function of the State'

[403] The Working Group decided not to distinguish between deprivation grounds applicable to naturalised and birth-right citizens (*Summary Records of the Plenary Meetings*, 20th Meeting, 23 August 1961 (A/CONF.9/SR.20), p. 3.
[404] *Summary Records of the Plenary Meetings*, 20th Meeting, 23 August 1961 (A/CONF.9/SR.20), p. 8.
[405] *Summary Records of the Plenary Meetings*, 21st Meeting, 24 August 1961 (A/CONF.9/SR.21), p. 13.

which consisted in 'safeguarding its integrity and its external security and in protecting its constitutional foundations.'[406]

The draft article was voted on as a whole, rather than separately on each of its paragraphs, because 'it constituted a compromise between all the schools of thought.'[407] It was adopted, in the version quoted above, at the 22nd meeting of the Conference.[408] The Convention in its entirety was adopted as 'The 1961 Convention on the Reduction of Statelessness' at the 25th meeting of the Conference, on 28 August 1961, by 21 votes to none, with 7 abstentions.[409]

2. UN Expert opinions on a 'duty of loyalty to the state', 'vital interests of the state' and 'conduct seriously prejudicial' to such interests

In order to further elucidate the meaning of what the 1961 Convention has termed 'conduct seriously prejudicial to vital interests of the state' in violation of a 'duty of loyalty to the state' it is instructive to examine, not only the drafting history that has yielded these particular phrases, but also the UN expert opinions issued on the topic. Of particular interest are the summary findings of the 2013 UNHCR Expert Meeting on the 1961 Convention and the UNHCR Guidelines on Statelessness No. 5.[410]

As a general requirement, the Expert Meeting observes that Article 8(3) of the 1961 Convention needs to comply with Article 15(2) of the Universal Declaration of Human Rights, which establishes principles against the arbitrary deprivation of nationality.[411] In this light, any deprivation measure pursuant to Article 8(3) needs to be prescribed by law, applied indiscriminately, and in pursuit of a legitimate aim proportionate to the underlying state interest.[412] Regarding the meaning of 'a duty of loyalty to the state' and 'conduct seriously prejudicial to the vital interests of the state', the Expert Meeting as well as the Guidelines stress the necessity of a narrow scope of interpretation: the provisions established by Article 8(3) are 'drafted with

[406] *Summary Records of the Plenary Meetings*, 21st Meeting, 24 August 1961 (A/CONF.9/SR.21), p. 13.
[407] *Summary Records of the Plenary Meetings*, 21st Meeting, 24 August 1961 (A/CONF.9/SR.21), p. 13.
[408] *Summary Records of the Plenary Meetings*, 22nd Meeting, 25 August 1961 (A/CONF.9/SR.22).
[409] *Summary Records of the Plenary Meetings*, 25th Meeting, 28 August 1961 (A/CONF.9/SR.25), p. 3.
[410] UNHCR, *Expert Meeting Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality Summary Conclusions* (2013). UNHCR, *Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness*, May 2020 (HCR/GS/20/05). I will also make cursory reference, when relevant, to the Council of Europe, *Explanatory Report to the European Convention on Nationality*, 6.XI.1997, starting from §58.
[411] UNHCR, *Expert Meeting Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality Summary Conclusions*, §15.
[412] UNHCR, *Expert Meeting Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality Summary Conclusions*, §§16-19.

restrictive language and, as exceptions to a general rule, […] to be interpreted narrowly'.[413] Their primary intent is not to give free reign to deprivation regimes, but to allow deprivation in a small number of specific cases. Furthermore, the Guidelines emphasise that any exercise of the exceptions established by Article 8(3) needs to comply with the state's existing human rights obligations.[414] In addition, they stress that nationality deprivation is meant to be an instrument subsidiary to 'other less intrusive means' for protecting a state's vital interests.[415]

More specifically, the Guidelines describe the meaning of a 'duty of loyalty to the state' as the 'firm and constant support to the State as a whole (as opposed to a specific part of the State or a specific Government in power at a given time)'.[416] Regarding the conduct referred to in Article 8(3) as a deprivation ground, the Guidelines note that 'clear evidence' is required to prove inconsistency with the duty of loyalty to the state.[417] In addition, because of the exceptional character of Article 8(3), both Guideless and Expert Meeting observe that 'a very high threshold' needs to be met for conduct to qualify as 'seriously prejudicial to the vital interests of the state'.[418] The Expert Meeting adds the clarification that '[t]he ordinary meaning of both "seriously prejudicial" and "vital interests" indicate that the conduct covered by this exception must threaten the foundations and organization of the State'.[419]

Let us regard both terms in some more detail. As the Expert Meeting and the Guidelines reveal, 'seriously prejudicial' qualifies the character of the individual's actions as having the 'capacity to impact negatively [on] the State.'[420] Furthermore, the Guidelines specify, conduct and harm caused must be 'fundamentally related': 'remote support that does not materially

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[413] UNHCR, *Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness*, starting at §46. UNHCR, *Expert Meeting Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality Summary Conclusions*, §53. Council of Europe, *Explanatory Report to the European Convention on Nationality*, §58.

[414] UNHCR, *Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness*, starting at §46.

[415] UNHCR, *Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness*, §62.

[416] UNHCR, *Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness*, §57.

[417] UNHCR, *Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness*, §57.

[418] UNHCR, *Expert Meeting Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality Summary Conclusions*, §68. UNHCR, *Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness*, §61.

[419] UNHCR, *Expert Meeting Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality Summary Conclusions*, §68.

[420] UNHCR, *Expert Meeting Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality Summary Conclusions*, §68. UNHCR, *Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness*, §61.

affect whether or not the harm in question would occur is not "seriously prejudicial."'[421] In addition, the harmful acts must have occurred before the deprivation decision; 'acts potentially occurring in the future' do not qualify.[422] Regarding the 'vital interests' of a state, both Expert Meeting and Guidelines assert that these go beyond 'national interests' and set 'a considerably higher threshold'.[423] The Guidelines add that a state's 'vital interests' intimately relate to its 'essential function', which consists in safeguarding 'its integrity and external security' and protecting 'its constitutional foundations'.[424]

Based on the high thresholds thus established, the Expert Meeting concludes, 'criminal offences of a general nature', however serious, do not fall under the scope of Article 8(3).[425] Only the severest violations against the state may qualify. These include 'treason, espionage and – depending on their interpretation in domestic law – "terrorist acts"'.[426] National definitions of 'terrorism' require a sufficient level of severity in order to fall within the remit of Article 8(3). Such a high standard is generally met, the Guidelines assert, if actions qualify as terrorist acts under the definition set out in the UN General Assembly *Resolution 60/288* of 2006.[427] Here, terrorism is defined as constituting 'activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening territorial integrity, security of States and destabilizing legitimately constituted Governments'.[428] As indicated in Section III.2 of Chapter One, this definition underpins my understanding of terrorism in this thesis. The Guidelines also recommend that domestic deprivation laws for terrorist conduct meet certain legal criteria, for instance, they should be publicly available and foreseeable in their legal

[421] UNHCR, *Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness*, §61.
[422] UNHCR, *Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness*, §63.
[423] UNHCR, *Expert Meeting Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality Summary Conclusions*, §68. UNHCR, *Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness*, §62.
[424] UNHCR, *Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness*, §62. Cf. Council of Europe, *Explanatory Report to the European Convention on Nationality*, §67.
[425] UNHCR, *Expert Meeting Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality Summary Conclusions*, §68. Council of Europe, *Explanatory Report to the European Convention on Nationality*, §67.
[426] UNHCR, *Expert Meeting Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality Summary Conclusions*, §68.
[427] UNHCR, *Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness*, §64.
[428] UN *Resolution 60/288*, preambular §7. Cf. the preamble to the 2005 Council of Europe Convention on the Prevention of Terrorism and Walmsley, *Nationality Issues And The Denial Of Residence In The Context Of The Fight Against Terrorism - Feasibility Study*, 3.

implications for the individual.[429] In addition, the Guidelines discuss states' responsibilities in the fight against terrorism and note that, in cases of foreign terrorist fighters, states 'should effectively investigate and prosecute those individuals' in order to prevent 'a sense of impunity.'[430] At the same time, they caution against the use of deprivation measures if this would 'negatively impact the peace and security of other States'.[431]

3. 'Loyalty cases': the case law of the ECtHR on a 'duty of loyalty to the state'

In the third and final step of my analysis of the key concepts underpinning deprivation regimes, I will approach the idea of a civic duty of loyalty towards certain vital interests of the state from a different angle. The inviolability of democratic values is, no doubt, a vital interest of the states governing the deprivation measures at the core of this thesis. Focusing on this vital interest, in particular, I will examine a selection of international cases that attest to the complex relationship between a state's requirement of a civic loyalty to democratic values, on the one hand, and citizens' constitutional freedoms, on the other. As we will see, in all of these cases, the international courts (ECtHR or EComHR respectively) acknowledge this complexity, but recognize, nonetheless, the legitimacy of a state's loyalty requirement towards its foundational principles, especially its democratic ideas and values.

Historically speaking, such cases originate from disputes concerning 'loyalty clauses', which secured the allegiance of civil servants. In Germany, such clauses oblige civic servants, to this day, to subscribe to the free democratic basic order as established by the German Basic Law. It is instructive to have a look at such traditional loyalty cases, before turning to the most common case type regarding the idea of loyalty today: cases concerning naturalisation proceedings and deprivation measures. The more traditional cases are a useful starting point for studying the central characteristics and criteria of loyalty cases more broadly.

To this end, let us start by considering four cases that were brought before the EComHR or ECtHR against the Federal Republic of Germany in order to challenge German 'loyalty clauses'. In the first, *Glasenapp v. The Federal Republic of Germany* (1984),[432] a German school teacher and civic servant filed an application with the EComHR challenging the

[429] UNHCR, *Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness*, §65.
[430] UNHCR, *Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness*, §68.
[431] UNHCR, *Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness*, §67.
[432] EComHR, *Glasenapp v. The Federal Republic of Germany*, application no. 9228/80, report 11/05/1984.

revocation of her appointment at a German grammar school.[433] The revocation was based on her support of the Communist Party of Germany (*Kommunistische Partei Deutschlands*), which constituted, in the view of the German government, a violation of her duty of loyalty to the free democratic order and her signed declaration as a civil servant to protect and advocate these values.[434] In this particular case, the EComHR concluded that the revocation of the applicant's appointment violated her right to freedom of expression:[435] the applicant's duty of loyalty as a civil servant interfered with her right to freedom of expression because it made the exercise of her teaching job 'conditional on the opinions she held or expressed'.[436]

The Commission arrived at this conclusion, based on a detailed assessment of the notion of a civil servant's 'duty of loyalty' to the state. It established, in particular, that such a duty needed to be (i) prescribed by law, (ii) in pursuit of a legitimate aim and (iii) regarded as necessary in a democratic society.[437] I will only look at the latter two since they are most central for my research. Regarding the question of a legitimate aim, the German government argued that, by restricting the right to freedom of opinion and expression of civil servants, German national legislation pursued the goal of safeguarding the free democratic basic order, as a consequence of the experiences under the Nazi regime.[438] This constituted a legitimate aim, in the Commission's view: not only did the preamble to the European Convention on Human Rights indicate that the protection of democracy was directly linked to the protection of individual rights pursuant to Article 10(2) ECHR, but Article 17 ECHR, which seeks to prevent any misuse of the Convention's rights in the attempt to destroy democracy, additionally supported the validity of the German aim.[439]

In order to also comply with the requirement of being necessary for a democratic society, the German duty of loyalty needed to respond to 'a pressing social need' and be proportionate (Article 10 ECHR).[440] The Commission did not consider these requirements met in the case at hand.[441] It acknowledged that Germany's strict loyalty clauses for civil servants had to be read in light of its history, which saw the demise of the Weimar Republic, in part, because of a civic service that did not accept the Republic's constitutional democracy.[442] As a consequence,

[433] EComHR, *Glasenapp v. Germany*, §20.
[434] EComHR, *Glasenapp v. Germany*, starting at §§19 and 69.
[435] EComHR, *Glasenapp v. Germany*, §129.
[436] EComHR, *Glasenapp v. Germany*, §69.
[437] EComHR, *Glasenapp v. Germany*, §78.
[438] EComHR, *Glasenapp v. Germany*, §86.
[439] EComHR, *Glasenapp v. Germany*, §§88-89.
[440] EComHR, *Glasenapp v. Germany*, §90.
[441] EComHR, *Glasenapp v. Germany*, §90.
[442] EComHR, *Glasenapp v. Germany*, §96.

Germany implemented a civil service law that would require 'active loyalty' to the constitutional system.[443] While the Commission accepted the state's aim 'to achieve the ultimate protection of the rule of law and the democratic system' (confirmed by Article 17 ECHR), it also recognised the importance of safeguarding individual democratic freedoms against 'overzealous' state expectations.[444] Thus, in reviewing the proportionality of the German loyalty requirement, the Commission found that the applicant's (mis-)conduct did not relate to her professional position as a teacher.[445] It concluded that '[t]he operation of loyalty control in the present case did not correspond to a "pressing social need" and the response of the control mechanism was disproportionate, and it follows that it was not necessary in a democratic society.'[446]

Vogt v. Germany (1995)[447] is the second loyalty case that I wish to discuss. Like *Glasenapp v. The Federal Republic of Germany*, it pertains to the dismissal of a German teacher and civil servant, in response to her political activities as the member of a communist party (*Deutsche Kommunistische Partei = DKP*).[448] The dismissal had been based on a violation of her duty of loyalty under the Civil Service Act of the Lower Saxony, which stated that civil servants 'must by their entire conduct bear witness to the free democratic constitutional system within the meaning of the Basic Law and act to uphold it'.[449] This *Länder* provision is complemented by similar provisions in federal law and by decrees implemented by the governments of the *Länder*.[450] These included, in particular, legislation that established that membership in political parties that oppose Germany's constitutional order conflicted with a civil servant's duty of loyalty.[451] The applicant contended that neither her membership in the *DKP* nor her individual political conduct constituted a violation of her 'duty of political loyalty', especially since the *DKP* had not been declared unconstitutional by the German Federal Constitutional Court.[452]

In its review of the compliance of the German state measure with the applicant's right to freedom of expression, the ECtHR explored, like the EComHR in the earlier case, whether the dismissal of the applicant pursued a legitimate aim. As part of its argument, the Court made reference to the principle of a 'democracy capable of defending itself' (*wehrhafte*

[443] EComHR, *Glasenapp v. Germany*, §96.
[444] EComHR, *Glasenapp v. Germany*, §§110, 111.
[445] EComHR, *Glasenapp v. Germany*, §116.
[446] EComHR, *Glasenapp v. Germany*, §128.
[447] ECtHR, *Vogt v. The Federal Republic of Germany*, application no. 17851/91, judgment 26/09/1995.
[448] ECtHR, *Vogt v. Germany*, §41.
[449] ECtHR, *Vogt v. Germany*, starting at §62.
[450] ECtHR, *Vogt v. Germany*, §§25-33.
[451] ECtHR, *Vogt v. Germany*, starting at §30.
[452] ECtHR, *Vogt v. Germany*, §55.

Demokratie)[453] – a principle that will become very important for my argument later on. As the Court detailed, this principle had been implemented in German civil service law in response to the constitutional failings that enabled the rise of the Nazi regime.[454] In the German understanding, 'the civil service is the guarantor of the Constitution and democracy'; it must not just 'bear witness to', but 'actively uphold' the free democratic basic order.[455] The Court noted that this 'entails for all civil servants the duty to dissociate themselves unequivocally from groups that attack and cast aspersions on the State and the existing constitutional system.'[456] Like the EComHR before, the Court concluded that the aim of the German loyalty requirement, that is, safeguarding national security, preventing disorder and protecting the rights of others, was legitimate.[457]

The Court also acknowledged that, in principle, 'a democratic State is entitled to require civil servants to be loyal to the constitutional principles on which it is founded'; but it added that 'the absolute nature of the duty as construed by the German courts' was 'striking', since it applied, in equal measure, to civil servants' professional and private life.[458] It was 'always owed, in every context.'[459] Again like the EComHR, the Court read the German loyalty requirement in light of its history; and it also took note of the country's political situation at the time.[460] The Court concluded that '[t]hese circumstances understandably lent extra weight to this underlying notion ['democracy capable of defending itself'] and to the corresponding duty of political loyalty imposed on civil servants.'[461] Nonetheless, it concurred with the earlier judgment of the EComHR, yet again, in its concluding assessment that the teacher's dismissal from her job was not 'necessary in a democratic society'.[462] Despite her membership in the *DKP*, the ECtHR did not consider the applicant's views contrary to Germany's constitutional order, and her dismissal was thus an undue interference with her right to freedom of expression and association.[463]

In *Otto v. Germany* (2005), we encounter a third example of a complaint brought before the ECtHR against Germany, challenging the state's restriction of an individual's rights based

[453] ECtHR, *Vogt v. Germany*, §51.
[454] ECtHR, *Vogt v. Germany*, §51.
[455] ECtHR, *Vogt v. Germany*, §51.
[456] ECtHR, *Vogt v. Germany*, §58.
[457] ECtHR, *Vogt v. Germany*, §51.
[458] ECtHR, *Vogt v. Germany*, §59.
[459] ECtHR, *Vogt v. Germany*, §59.
[460] ECtHR, *Vogt v. Germany*, §59.
[461] ECtHR, *Vogt v. Germany*, §59.
[462] ECtHR, *Vogt v. Germany*, starting at §60.
[463] ECtHR, *Vogt v. Germany*, §61.

on their duty of loyalty and the principle of a 'democracy capable of defending itself'.[464] Here, however, the outcome is a different one, even though the case scenario shares many of the characteristics of the earlier two cases: the applicant had been employed as a civil servant (here: on the police force of the *Land* of Baden-Wuerttemberg) and member of a political party considered problematic, but not declared unconstitutional at the time (here: *Partei der Republikaner*, 'Party of the Republicans').[465] He had been informed that he did not qualify for additional promotion on the police force since his membership in the *Partei der Republikaner*, which pursued anti-constitutional goals according to Baden-Wuerttemberg state authorities and courts, attested to his lack of 'suitability'.[466]

As in the preceding cases, the applicant argued that the state's acts constituted a 'disproportionate interference with his rights to freedom of expression and assembly'.[467] In response, again as in the cases above, the Court examined whether the state's interference was (i) prescribed by law, (ii) in pursuit of a legitimate aim and (iii) regarded as necessary in a democratic society. In the process, it noted that there was a relevant provision in the Baden-Wuerttemberg Public Servant Act ('prescribed by law'), which the German state relied on and which constituted that membership in a political party pursuing anti-constitutional goals 'was not compatible with the applicant's duty of loyalty.'[468] Thus, the Court asserted that 'the present restriction of freedom of expression ultimately derived from civil servants' duty of political loyalty'[469], a concept that was rooted in the principle of a 'democracy capable of defending itself'.[470] On this basis, as in the earlier cases, the ECtHR confirmed the legitimacy of the state's aim. It observed, more specifically, that 'it is a legitimate aim in any democratic society to have a politically neutral police force'.[471]

While the Court's assessment so far concurred with the findings of the other two 'loyalty cases' above, it arrived at a different decision regarding the democratic necessity of the state's refusal to promote in the present case. For the necessity question, the ECtHR had to decide whether the aim of the state's measure was not disproportionate to the restrictions caused by it to the applicant's right to the freedom of expression.[472] The Court found that a 'fair balance'

[464] ECtHR, *Otto v. The Federal Republic of* Germany, application no. 27574/02, decision 24/11/2005, under 1.
[465] ECtHR, *Otto v. Germany*, under A: the *Partei der Republikaner* was under scrutiny by Länder authorities for the protection of the constitution (*Verfassungsschutzämter*).
[466] ECtHR, *Otto v. Germany*, under A.
[467] ECtHR, *Otto v. Germany*, under B.
[468] ECtHR, *Otto v. Germany*, under B.1.a).
[469] ECtHR, *Otto v. Germany*, under B.1.b).
[470] ECtHR, *Otto v. Germany*, under B.1.b).
[471] ECtHR, *Otto v. Germany*, under B.1.b).
[472] ECtHR, *Otto v. Germany* 5, under B.1.c).

had been struck: the state did not overstep its margin of discretion when it decided not to consider the applicant for additional promotion in light of his active membership in a political party suspected of pursuing anti-constitutional aims.[473] Furthermore, the Court highlighted, in support of the proportionality of the state's interference, that the applicant had not been removed from his employment, but only denied additional promotion, in a very advanced phase of this service and after he had been promoted before.[474] The Court concluded 'that this complaint must be rejected as manifestly ill-founded'.[475]

In *Erdel v. Germany* (2007), the ECtHR was faced with another related case against the Federal Republic of Germany. Once again, the German requirement of a duty of loyalty to the free democratic basic order was at issue,[476] and, as in *Otto v. Germany*, the Court decided the case, in favour of the German state. Like Otto, the applicant in the present case was a member of the *Partei der Republikaner*.[477] Unlike the former applicant, however, he was not a civil servant, but a lawyer who also held the position of lieutenant on the military reserve list.[478] He was ordered to serve in the German army on 5 May 1997.[479] A few months later, however, this order was revoked in response to the applicant's active membership in the *Partei der Republikaner*, due to the party's ongoing investigation for pursuing anti-constitutional aims.[480]

In its assessment, the Court found the requirement 'prescribed by law' to be satisfied,[481] and noted, in particular, that the applicable German law (Article 49 of the German Code of Administrative Procedure, in conjunction with Section 8 of the Soldiers Act) 'provides that a soldier must recognise the free democratic order within the meaning of the Basic Law and act at all times in such a way as to uphold it.'[482] Thus, very much akin to civil servants, German soldiers have to comply with a duty of loyalty to the nation's democratic constitution and principles. The Court also confirmed the legitimate aim of the state's revocation of the call-up order. In support of this decision, it recalled the state's reasons for the revocation: against the backdrop of several recent offences committed by soldiers, the measure was 'necessary in order to prevent any future criminal offences with a right-wing extremist background being committed from within the German army, which was founded on the notion that it was the guarantor

[473] ECtHR, *Otto v. Germany*, under B.1.c).
[474] ECtHR, *Otto v. Germany*, under B.1.c).
[475] ECtHR, *Otto v. Germany*, under B.
[476] ECtHR, *Erdel v. Federal Republic of. Germany*, application no. 30067/04, 13/02/2007.
[477] ECtHR, *Erdel v. Germany*, under A.
[478] ECtHR, *Erdel v. Germany*, under A.
[479] ECtHR, *Erdel v. Germany*, under A.
[480] ECtHR, *Erdel v. Germany*, under A.
[481] ECtHR, *Erdel v. Germany*, under B.1.
[482] ECtHR, *Erdel v. Germany*, under B.1.

of the Constitution and democracy.'[483] As in the earlier loyalty cases, the Court identified the reasoning behind the German state measure as the principle of a 'democracy capable of defending itself'.[484] Based on the acknowledgment that it was any democracy's legitimate aim to have 'a politically neutral army', the Court found that Germany's decision to revoke the call-up order pursued two legitimate aims, within the meaning of Article 10(2) ECHR: it was 'in the interests of national security' and acted 'for the prevention of disorder or crime'.[485] In a final step, the Court determined that the state's revocation of the call-up order was 'necessary in a democratic society and did not unduly violate the applicant's right to freedom of expression because it was not disproportionate.[486] Here, the Court drew a direct comparison to *Vogt v. Germany*, and stressed that, in the present case, '[t]he applicant is not a professional soldier, but a practising lawyer. Unlike Mrs Vogt, he was therefore not threatened with losing his livelihood by the revocation of his call-up order as a reserve officer.'[487]

As we have seen, in all four of these more traditional loyalty cases, the ECtHR (or EComHR) recognized, in principle, the validity and legitimate aim of a duty of loyalty owed to the state by civil servants or other individuals with a special relationship to it. The Court did so, in particular, in light of the principle of a 'democracy capable of defending itself'. To requote the Court's words in *Vogt v. Germany*, 'a democratic State is entitled to require civil servants to be loyal to the constitutional principles on which it is founded'.[488] While the Court thus clearly acknowledges such a duty in general, it does not consider every kind of state interference warranted by a specific violation of this duty. Thus, in the Court's assessment, a civil servant's or soldier's membership in a political party under investigation by state authorities justified the state's denial of an additional promotion or military reserve service, but not the termination of a person's professional contract and only source of income.

The cases we will turn to now differ notably from the earlier ones. As we saw, the more traditional loyalty cases all concern a duty of loyalty that the state demands from a limited group of individuals to whom it is linked by a particularly close and special relationship. By contrast, the subsequent cases consider the idea of a duty of loyalty to the state that applies, not

[483] ECtHR, *Erdel v. Germany*, under B.1.
[484] ECtHR, *Erdel v. Germany*, under B.1. By then, this principle had been subject to several ECtHR proceedings, including *Vogt v. Germany* and *Otto v. Germany* (as discussed above) and ECtHR, *Ždanoka v. Latvia*, application no. 58278/00, judgment 16/03/2006.
[485] ECtHR, *Erdel v. Germany*, under B.1.
[486] ECtHR, *Erdel v. Germany*, under B.1.
[487] ECtHR, *Erdel v. Germany,* under B.1.
[488] ECtHR, *Vogt v. Germany*, §59.

just to a specific subset of a state's citizens, but to all its nationals. What is at stake here is a direct link between 'citizenship' and 'loyalty'.

The first relevant case is *Tănase v. Moldova*. The applicant, a dual national of Romania and Moldova, complained that an amendment to the Moldovan Electoral Code (Law No. 273) unduly restricted his rights of standing for election to the Parliament, because it required that multi nationals renounced their other nationalities upon their election to Parliament.[489] Regarding the provision's legislative aim, Moldova submitted 'that it pursued the legitimate aims of ensuring loyalty, defending the independence and existence of the State and guaranteeing the security of the State.'[490] In an explanatory note to the amendment, the state offered a more comprehensive account of its reasoning:

> '[P]ersons holding other nationalities have political and legal obligations towards those States. This fact could generate a conflict of interest in cases in which there are obligations both towards the Republic of Moldova and towards other States, whose national a particular person is. In view of the above, and with a view to solving the situation created, we consider it reasonable to amend the legislation in force so as to ban holders of multiple nationalities from public functions'.[491]

The Constitutional Court of Moldova followed this explanation in a judgment of 2009, which found the amendment constitutional and recognised its legitimate aim of ensuring loyalty to the state.[492]

In its assessment of the challenged Moldovan provision, the Court examined whether it violated Article 3 of Protocol No. 1 (Right to free elections) alongside Article 14 ECHR (Prohibition of discrimination).[493] In order to determine whether the amendment's interference with the applicant's right to free elections amounted to a violation of these articles, the Court discussed in particular the legitimacy of the aim that the Moldovan government pursued with the provision in question.[494] Here, the Court recalled both the government's justification, including its loyalty requirement, and the decision of the Moldovan Constitutional Court, as quoted above.[495] On this basis, the ECtHR addressed the centrality of a duty of loyalty in the state's reasoning (as well as the applicant's), but observed that a clear definition by either party was

[489] ECtHR, *Tănase v. Moldova,* §§78-80.
[490] ECtHR, *Tănase v. Moldova,* §137.
[491] ECtHR, *Tănase v. Moldova,* §39.
[492] ECtHR, *Tănase v. Moldova,* §56.
[493] ECtHR, *Tănase v. Moldova,* §§ 94, 95.
[494] ECtHR, *Tănase v. Moldova,* starting at §164.
[495] ECtHR, *Tănase v. Moldova,* §164.

missing.[496] As a consequence, the Court examined the concept in some detail. It referred to what appeared as common ground in the present proceedings, namely that this duty of loyalty 'is linked to the existence and independence of the State and to matters of national security.'[497] The Court also noted that the Moldovan loyalty oath, which is taken as part of certain nationality acquisition proceedings, includes a pledge 'to respect the Constitution and the laws of the State and to refrain from action which would prejudice the interests and territorial integrity of the State'.[498]

In addition, the Court offered its own approach to defining 'loyalty to the state'. First, it distinguished between loyalty to the state and loyalty to the government, and established, very clearly, that only the former could qualify as a legitimate aim for restricting electoral rights protected by the ECHR.[499] Next, it stressed the importance of elections and political pluralism: in accordance with the rule of law and democracy, elections were essential to ensure 'the accountability of the government in power',[500] and elected Members of Parliaments played a key role in 'ensuring pluralism and the proper functioning of democracy'.[501] Against this background, the Court subsequently defined a legitimate duty of loyalty to the state as encompassing 'respect for the country's Constitution, laws, institutions, independence and territorial integrity.'[502] It stressed, however, that such a duty of loyalty must not be interpreted as preventing political change, in compliance with the laws in place, and opposing different political views, in particular, from minority groups.[503] The Court concluded that '[a]fundamental aspect of democracy is that it must allow diverse political programmes to be proposed and debated, even where they call into question the way a State is currently organised, provided that they do not harm democracy itself'.[504] Despite the Court's acknowledgment of the legitimacy of a carefully defined duty of loyalty to the state, especially if it seeks to safeguard 'democracy itself', the Court did not find that the Moldovan amendment Law no. 273 qualified as the pursuit of a legitimate aim in this sense.[505] In particular, it considered the provision disproportionate in its interference with ECHR rights and freedoms.[506]

[496] ECtHR, *Tănase v. Moldova,* starting at §165.
[497] ECtHR, *Tănase v. Moldova,* §165.
[498] ECtHR, *Tănase v. Moldova,* §165.
[499] ECtHR, *Tănase v. Moldova,* §166.
[500] ECtHR, *Tănase v. Moldova,* §166.
[501] ECtHR, *Tănase v. Moldova,* §166.
[502] ECtHR, *Tănase v. Moldova,* §167.
[503] ECtHR, *Tănase v. Moldova,* §167.
[504] ECtHR, *Tănase v. Moldova,* §167.
[505] ECtHR, *Tănase v. Moldova,* §170.
[506] ECtHR, *Tănase v. Moldova,* starting at § 171.

While *Tănase v. Moldova* thus indicates important links between a duty of loyalty to the state and a state's defence of democracy, this connection gains in prominence in the second relevant case, the proceedings of *Petropavlovskis v. Latvia*. Here, the role of citizenship also clearly enters the picture. In this case, the applicant challenged the refusal of the state of Latvia to grant him citizenship by way of naturalisation.[507] He suggested that the state's refusal of his naturalisation was a punitive measure responding to his political activism and criticism of the government, especially his protests against a recent education reform.[508] Thus, in the applicant's view, the refusal constituted an arbitrary state act, in violation of his rights to freedom of expression and to freedom of assembly and association under the ECHR.[509]

By contrast, the Latvian Cabinet of Ministers justified its refusal to grant naturalisation as follows: while the applicant met other legal requirements of naturalisation, his actions failed to demonstrate 'loyalty to the Republic of Latvia.'[510] At the time, under Latvian Citizenship Law (Section 18, in connection with Section 12(1) no.6), those applying for naturalisation had to sign a pledge that they will be 'loyal only to the Republic of Latvia' and 'undertake to comply with the Constitution and laws of the Republic of Latvia in good faith', using their 'best endeavours to protect them', while 'defend[ing] the independence of the Latvian State' and striving to 'increase the prosperity of the Latvian State and of the people'.[511] In light of this loyalty requirement and the principle of 'democracy capable of protecting itself', the Cabinet argued, in administrative national proceedings brought by the applicant, that state authorities were allowed to refuse citizenship to an individual whose conduct was incompatible with the state's democratic values.[512] In *Petropavlovskis v. Latvia*, the state re-asserted that the applicant's actions undermined 'the fundamental values of democratic society' and were thus 'incompatible with the fundamental values of the Republic of Latvia as a democratic State'.[513]

The applicant refused these arguments on two counts. First, he challenged the state's exclusive competence with regard to questions of nationality.[514] To this end, as discussed earlier in this chapter (Section III), he relied on the argument that the case law[515] attesting to such an

[507] ECtHR, *Petropavlovskis v. Latvia,* §3.
[508] ECtHR, *Petropavlovskis v. Latvia,* §§3, 8.
[509] ECtHR, *Petropavlovskis v. Latvia,* §§ 46, 49, 50.
[510] ECtHR, *Petropavlovskis v. Latvia,* §16.
[511] ECtHR, *Petropavlovskis v. Latvia,* §31.
[512] ECtHR, *Petropavlovskis v. Latvia,* §17.
[513] ECtHR, *Petropavlovskis v. Latvia,* §§63, 64.
[514] ECtHR, *Petropavlovskis v. Latvia,* starting at §48.
[515] The relevant case law includes the advisory opinion of the ICJ on Nationality Decrees Issued in Tunisia and Morocco (Permanent Court of International Justice, Advisory Opinion on the Nationality Decrees issued in Tunis and Morocco of 7 February 1923) and the Nottebohm Case (International Court of Justice, Nottebohm (*Liechtenstein v. Guatemala*) Case, Second Phase Judgment of April 6th, 1955).

exclusive competence was no longer applicable. Instead, there was 'an emerging international consensus that nationality laws and practice had to be consistent with general principles of international law, in particular human rights law.'[516] Second, the applicant opposed the state's assertion that his conduct violated his loyalty to the Latvian state. Here, he distinguished, like the ECtHR in *Tănase v. Moldova*, between loyalty to the State and loyalty to the government.[517] While he recognized the former, in principle, he opposed that a state may, on the basis of this concept, restrict opposing political views if 'expressed in compliance with the law'.[518]

In its judgment, the Court emphasised the democratic importance of the rights to freedom of expression and association which the applicant had invoked: 'The Court has recently reiterated that pluralism, tolerance and broadmindedness are hallmarks of a "democratic society".'[519] At the same time, the Court asserted that, in order to protect democracy, a compromise needed to be reached between individual rights and state interests. After all, there also needed to be a protection, as enshrined by Article 17 ECHR, against those who relied on the protection of the Convention 'in order to weaken or destroy the ideals and values of a democratic society.'[520] On the basis of the Court's emphasis of the necessary balance between individual and state rights, let us turn to its comments regarding the idea of a duty of loyalty to the state.

In this regard, the Court observed that domestic jurisdictions, Latvian law in this case, generally included conditions and requirements for acquiring nationality through naturalisation.[521] In this context, the Court asserted, 'the nature of the bond between the State and the individual concerned' is determined by the community's understanding of it.[522] The Court noted further that many jurisdictions established as a naturalisation requirement that applicants needed to take 'an oath of allegiance whereby the individual pledges loyalty to the State.'[523] In reference to *Tănase v. Moldova*, the Court stressed, like the applicant before, that only a loyalty to the state and the principles on which it is founded (rather than to a given government) could provide a legitimate basis for restricting rights under the ECHR.[524] Such a loyalty was not contrary, in principle, to the Convention.[525]

[516] ECtHR, *Petropavlovskis v. Latvia,* §48.
[517] ECtHR, *Petropavlovskis v. Latvia,* §§50, 53.
[518] ECtHR, *Petropavlovskis v. Latvia,* §53.
[519] ECtHR, *Petropavlovskis v. Latvia,* §70.
[520] ECtHR, *Petropavlovskis v. Latvia,* §§70-72.
[521] ECtHR, *Petropavlovskis v. Latvia,* §84.
[522] ECtHR, *Petropavlovskis v. Latvia,* §84.
[523] ECtHR, *Petropavlovskis v. Latvia,* §84.
[524] ECtHR, *Petropavlovskis v. Latvia,* §84.
[525] ECtHR, *Petropavlovskis v. Latvia,* §85.

More specifically, the Court gave the following response to the applicant's argument that Latvia's loyalty requirement violated his freedom of expression and assembly: because 'any person seeking to obtain Latvian citizenship through naturalisation' needed to satisfy the loyalty requirement, this 'cannot be regarded as a punitive measure capable of interfering with freedom of expression and of assembly.'[526] In particular, the Court did not find a violation of Articles 10 and 11 ECHR, because the applicant was not prevented in any form from expressing his opinion or exercising his right to freedom of assembly, as a consequence of the state's refusal to grant citizenship.[527]

The ECtHR judgment in *Petropavlovskis v. Latvia* is crucial for our concerns because it acknowledges the close relationship between loyalty and citizenship, at least as far as naturalisation is concerned. In the Court's assessment, it is a state's prerogative to require from its prospective citizens loyalty to the state and its founding principles, including especially democratic ideas and values. As we turn to the third relevant case debated before the ECtHR, *Ghoumid and Others v. France* (2020), the concept of a loyalty to the state becomes relevant in a different way: here, we move from loyalty requirements in the context of naturalisation to loyalty requirements in the context of nationality deprivation.

We have already encountered this case in Chapter One, where it provided a helpful set of criteria to distinguish nationality deprivation from a punitive measure (Section V.2). As we saw in the earlier chapter, the five applicants in this case challenged their nationality deprivation order by the French state because it constituted, in their view, a politically motivated punishment, in addition to their preceding convictions and prison sentences for terrorist acts.[528] As such, the applicants argued, it posed an undue violation of their right not to be tried or punished twice (Article 4, Protocol No. 7 ECHR) and of their right to respect for private life (Article 8 ECHR).[529] In its defence of the deprivation measure, France argued that it was not a punitive act (which the ECtHR accepted, as we saw in Section V.2 of Chapter One). Instead, the applicants' conduct confirmed their identification with principles diametrically opposed to French values ('radicalement contraires aux principes républicains français')[530] and incompatible with their duty of loyalty to the French nation. It constituted 'un défaut de loyauté vis-à-vis de la

[526] ECtHR, *Petropavlovskis v. Latvia,* §85.
[527] ECtHR, *Petropavlovskis v. Latvia,* §§86, 87.
[528] ECtHR*, Ghoumid and Others v. France*, §32.
[529] ECtHR*, Ghoumid and Others v. France*, §32.
[530] ECtHR*, Ghoumid and Others v. France*, §39.

nation française'.[531] This breach of loyalty, in the state's view, justified the applicants' legal exclusion from the community of French citizens.

The ECtHR accepted this submission,[532] and made explicit relevance to the duty of loyalty to the state in its judgment: when assessing whether the deprivation decrees unduly and arbitrarily violated the applicants' right to private life, the Court observed that France had just suffered a series of violent terrorist attacks and recognized that such tragic events allowed a state to review, with greater firmness, the bond of loyalty and solidarity between itself and dual nationals who had been convicted of acts related to terrorism.[533] As I detailed in my first chapter (Section V.2), this recognition also extended to France's understanding of the deprivation measure as a legal confirmation of the severance of the link between itself and the applicants, caused by their terrorist conduct, which violated their duty of loyalty to France ('lien de loyauté envers la France') and its democratic foundations.[534]

The Court returned to the idea of a duty of loyalty once again, when it examined the consequences of the deprivation decree for individuals concerned.[535] Here, it recognised states' position that those who act grossly contrary to the bond established by nationality should benefit no longer from a relationship which they so actively fight.[536] In this context, the Court accepted the arguments made by the public rapporteur (*le rapporteur public*) before the *Conseil d'État*, who assessed that the conduct of the applicants attested to their rejection of the bond established by nationality and that French values were not part of how they constructed their personal identities.[537]

The Court's acknowledgment in *Ghoumid and Others v. France* (2020) of the civic bond that underpins both nationality deprivation and the idea of a duty of loyalty to the state, which the measure protects, adds importantly to the considerations of loyalty requirements that we encountered in the ECtHR case law so far. We have already seen that such a loyalty, in order to be legitimate, needs to attach to the state, in a more abstract sense, and its foundational principles and democratic constitution. Such 'vital interests' of the state are invoked explicitly in the final case that I wish to briefly discuss in this section*: Johansen v. Denmark* (2022). This case also allows us to establish a direct link to the preceding sections of this thesis since it treats

[531] ECtHR*, Ghoumid and Others v. France*, §39.
[532] ECtHR*, Ghoumid and Others v. France,* §§39, 45.
[533] ECtHR, *Ghoumid and Others v. France*, §45.
[534] ECtHR, *Ghoumid and Others v. France*, §71.
[535] ECtHR, *Ghoumid and Others v. France*, §49.
[536] ECtHR, *Ghoumid and Others v. France*, §50.
[537] ECtHR, *Ghoumid and Others v. France*, §§15, 50.

the concept in light of the 1997 European Convention on Nationality, which, as we have seen, draws on the 1961 UN Convention in this regard.

Like *Ghoumid and Others v. France*, *Johansen v. Denmark* concerns a case of nationality deprivation. The applicant, a dual national of Tunisia and Denmark, had been convicted of terrorist crimes and sentenced to four years of imprisonment by the District Court of Frederiksberg.[538] Under 8b(1) of the Danish Nationality Act, the District Court would also have been competent to deprive the applicant of nationality as part of his criminal proceedings, but it did not decide to do so.[539] The decision was subsequently appealed by the prosecution first to the court of appeal, the High Court of Eastern Denmark,[540] and then to the Danish Supreme Court.[541] Unlike the preceding courts, The Danish Supreme court deprived the applicant of his nationality, and ordered his expulsion from Denmark with a permanent re-entry ban.[542]

Before the ECtHR, the applicant argued that the nationality deprivation and the expulsion decision violated his rights under Article 8 ECHR.[543] During the international proceedings, both the Danish government and the applicant made submissions regarding the question of whether the applicant's conduct, that is, his acts of terrorism, were 'prejudicial to vital interests of the state', pursuant to Article 7(1)lit.d of the 1997 European Convention on Nationality.[544] The applicant argued that his actions did not qualify as such, but only constituted criminal conduct of a 'general nature', which was not covered by Article 7 ECN.[545] By contrast, the government contended that his 'very serious terrorist offence' was 'by its very nature […] highly detrimental to the country's vital interests.'[546] The government's assessment relied on the preamble to the Council of Europe Convention on Prevention of Terrorism, and asserted 'that terrorism constituted a threat to democracy, the enjoyment of human rights and the social and economic development.'[547] The government also observed that the legal regimes of several European states provided deprivation powers in response to terrorist crimes because they were considered them incompatible with vital interests of the state.[548]

[538] ECtHR, *Johansen v. Denmark,* §§2-12.
[539] ECtHR, *Johansen v. Denmark*, §12.
[540] ECtHR, *Johansen v. Denmark,* §§13, 14.
[541] ECtHR, *Johansen v. Denmark,* §§15, 16.
[542] ECtHR, *Johansen v. Denmark,* §16.
[543] ECtHR, *Johansen v. Denmark,* §29.
[544] ECtHR, *Johansen v. Denmark,* starting at §34.
[545] ECtHR, *Johansen v. Denmark,* §39.
[546] ECtHR, *Johansen v. Denmark,* §34.
[547] ECtHR, *Johansen v. Denmark,* §34.
[548] ECtHR, *Johansen v. Denmark,* §34.

The Court's assessment was comparatively brief, and noted that its competence was limited to determining the compliance of national measures with the ECHR, but did not extend to 'interpret[ing] or review[ing] compliance with other international conventions', such as the ECN.[549] While the Court thus did not review the parties' arguments, in substance, it confirmed that the deprivation decision was 'in accordance with the law', as set out in Danish legal provisions,[550] and added observations of a more general nature. In particular, as part of its denial of the 'arbitrariness' of the deprivation decisions, the Court stressed that terrorist crimes posed 'a grave threat to human rights' and acknowledged a states' prerogative 'to take a firm stand against those who contribute to terrorist acts, which it cannot condone in any circumstances'.[551] Thus, while not offering a substantial interpretation of conduct 'prejudicial to vital interests of the State', pursuant to Article 7(1)lit.d ECN and Article 8(3)lit.a(ii) of the 1961 UN Convention, the ECtHR stresses that terrorist acts violate human rights more broadly and, we may add, even more specifically the narrower concerns of individual states' 'vital interests'. In both cases, following the ECtHR's imperative, the state needs to offer firm opposition. With this final observation, we have moved into the realms of a normative assessment of deprivation measures, which we will return to in the third chapter of this thesis.

4. Interim conclusion: towards a definition of civic loyalty and the conduct it requires

My first chapter argued that, at their core, deprivation measures applicable to terrorism in the EU and the UK aim to sever the bond towards one of their citizens in response to that citizen's engagement in conduct incompatible with that state's most vital interests and values. Such a response presupposed, I suggested, the idea of a citizen's duty of loyalty towards the state and the inviolability of its core principles. This first part of my second chapter aimed to further elucidate the underlying key concepts of a civic duty of loyalty, a state's vital interests and conduct incompatible with them. To this end, this chapter has analysed three different legal sources: the drafting history and expert opinions on Article 8(3) of the 1961 UN Convention, which explicitly lists, as a deprivation ground, conduct that is 'seriously prejudicial to vital interests of the state' and inconsistent with a citizen's 'duty of loyalty to the state'; and cases before the ECtHR in which the Court explored, and defended, the legitimacy of carefully defined national concepts of civic loyalty ('loyalty cases').

[549] ECtHR, *Johansen v. Denmark,* §46.
[550] ECtHR, *Johansen v. Denmark,* §47.
[551] ECtHR, *Johansen v. Denmark,* §50.

The drafting history of Article 8(3), and especially its controversies, could attest to the crucial conflict that underpins all of these concepts, and nationality deprivation more broadly: they are somewhat precariously placed between considerations meant to safeguard individual rights and freedoms, on the one hand, and the security of the state and its core principles, on the other. More specifically, my analysis of the drafting process reveals that, in the drafters' intent, the article's reference to a state's 'vital interests' points to its 'essential function' of protecting its integrity, security and constitutional foundations. This is confirmed by expert opinions. These stress that conduct may only qualify as 'seriously prejudicial' to these interests if it threatens the very foundations and organisation of a given state. In their view, this deliberately creates a very high threshold: in accordance with the 1961 Convention, nationality deprivation on such grounds ought to be a justified exception, not the rule. Regarding a 'duty of loyalty to the state', the expert opinions endorse an equally restrictive interpretation. Such a duty, they assert, describes the consistent 'support to the state as a whole', and not to a particular state government. In a very similar sense, the ECtHR has distinguished, in several 'loyalty cases', between loyalty towards the state and loyalty towards the government and firmly established that only the former may provide a legitimate aim for a state measure restricting individual rights. We saw the Court assert, in particular, that legitimate civic loyalty may never conflict with democratic principles of pluralism. In addition, as the more traditional 'loyalty cases' suggested, not any kind of violation of a civic duty of loyalty may warrant the same severity in a state's response. Here, we return to the high thresholds established by the UN expert opinions above. If these thresholds were met, however, the ECtHR acknowledged, in all the 'loyalty cases' we considered, the state's prerogative to formulate loyalty requirements regarding its founding principles. These include, in particular, democratic ideas and values, in accordance with the principle of a 'democracy capable of defending itself'. Furthermore, the naturalisation and deprivation cases before the ECtHR revealed that the Court recognizes the link of a legitimate civic loyalty to the bond of citizenship, especially in the context of a state's opposition to terrorist acts.

Relying on these interpretations of the key terms involved, I would like to propose what I understand by a 'duty of loyalty to the state' as a central assumption of deprivation regimes in the MSs and the UK. I firmly agree with the restrictive approach towards civic loyalty postulated in all three legal sources above. This regards both the entity to which loyalty is owed and the kind of conduct that this loyalty may require from an individual. Regarding the former, I will go yet a step further than the distinction made by the expert opinions and the ECtHR between loyalty to the state and loyalty to the government, and postulate that only the civic

community, as the unit encompassing all citizens, can legitimately require their compliance with its fundamental values and ideas. In addition, I am following the importance that the ECtHR, in particular, has given to democratic principles in the context of a duty of loyalty to the state. Thus, I subscribe to what Shai Lavi has termed a 'modern duty of citizenship', which is based on democratic core values, including equality, freedom and deliberation.[552] I find Lavi's analysis of this duty as a 'democratic constitutional bond' particularly instructive.[553] This bond between the citizens 'is the ground of their legal and political co-existence' and resides in a 'commitment […] to the principle in accordance with which individuals constitute themselves as members of a polity'.[554] In other words, democratic self-governance is a defining element of a legitimate 'duty of loyalty to the state', as I understand it. In this sense, nationality deprivation would constitute a response to the violation of a state community's fundamental principles as established in democratic self-governance.

Regarding the conduct owed by a citizen's duty of loyalty, I would also like to endorse a restrictive approach. First, let me stress that the kind of loyalty suggested in deprivation regimes is always a commitment of omission: by this duty, the individual is not obliged to do something, but rather not to do something. More specifically, they are committed to the inviolability of certain principles. There is, to return to Shai Lavi, 'merely an obligation not to undermine the legal democratic order.'[555] In addition, following the ECtHR's assessment as well as the expert opinions on the 1961 Convention, we may assert that only the most severe breaches of this civic loyalty and the most clearly apparent attacks on the community's central principles – that is, only conduct 'seriously prejudicial' to both – may justify deprivation of nationality. After all, the measure is an extreme state intervention that should only apply to subversive behaviour of an exceptional severity. Both the drafting history and the expert opinions on Article 8(3) of the 1961 Convention suggest that such behaviour includes, in particular, acts threatening a state's 'constitutional foundations'.[556] As I will re-emphasize below, in their precise details, these foundations need to be identified for each individual state, in accordance

[552] Lavi, "Citizenship Revocation as Punishment: On the Modern Duties of Citizens and Their Criminal Breach," 796.
[553] Lavi, "Citizenship Revocation as Punishment: On the Modern Duties of Citizens and Their Criminal Breach," 796.
[554] Shai Lavi, Citizenship Revocation As Punishment: On The Modern Duties Of Citizens And Their Criminal Breach, The University of Toronto Law Journal, Vol. 61, no. 4, Constitutionalism and the Criminal Law (Fall 2011), 796.
[555] Shai Lavi, Citizenship Revocation As Punishment: On The Modern Duties Of Citizens And Their Criminal Breach, The University of Toronto Law Journal, Vol. 61, no. 4, Constitutionalism and the Criminal Law (Fall 2011), 796.
[556] See, for instance, UNHCR, *Guidelines on Statelessness No. 5: Loss and Deprivation of Nationality under Articles 5-9 of the 1961 Convention on the Reduction of Statelessness*, §62.

with its specific constitutional make-up and history. In more general terms, however, and as a useful definition in a minimal sense, we may identify what different MSs and the UK jointly regard as their 'constitutional foundations'.

In this sense, I suggest that we turn to Article 2 TEU for instructive guidance. As the provision reveals, the democratic foundations shared among European states include respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. In light of this minimal working definition of 'constitutional foundations' in a European context, I suggest that terrorism generally qualifies as conduct violating these foundations. This would concur with observations made by the Guidelines on the 1961 Convention that I included in my considerations above. However, as the Guidelines have stressed, not every definition of terrorism meets the severity required. Thus, I would like to return, once more, to the definition of terrorism provided by the UN General Assembly *Resolution 60/288* of 2006. As I indicated in my first chapter, this definition also underpins my identification of deprivation regimes applicable to terrorism. It defines 'acts, methods and practices of terrorism' as:

> 'activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening territorial integrity, security of States and destabilizing legitimately constituted Governments'.[557]

In light of my working definitions above, the UN understanding of terrorist activity unequivocally meets the high thresholds for conduct 'seriously prejudicial' to a civic community's constitutional foundations in the MSs and the UK. Indeed, the target areas it ascribes to terrorism repeat, almost *verbatim*, several of the national foundations we identified, for instance, human rights, fundamental freedoms and democracy. The use of the UN definition of terrorism as a reference point has two added advantages: first, as I mentioned above (Chapter Two, Section IV.2), expert opinions on the 1961 Convention also endorse this definition as particularly applicable to the Convention's deprivation grounds; second, the definition derives from an international law instrument and thus provides a certain consensus across different nations. Both aspects make the definition particularly suitable for the understanding of nationality deprivation advocated in this thesis.

Terrorism under the UN definition thus clearly falls within the required remit of a valid deprivation ground across the EU and the UK, but can we be more specific than that? Or, asked

[557] UN *Resolution 60/288*, preambular §7.

differently: can we delineate more precisely what conduct unequivocally meets the UN definition and thus provides a legitimate deprivation ground that clearly violates the constitutional foundations of a given MS or the UK? I would argue that this is possible only to a limited extent if we intend, as this thesis does, to make observations across the diversity of European and UK constitutions. By its very definition, the violation of a state's constitutional foundations is dependent, in its particular characteristics, on the specific constitution we are talking about.

In addition, generalisations are more easily possible in those cases in which an individual's involvement in terrorism is relatively straightforward, for instance, when there is clear proof of their active fighting for a terrorist organisation or their carrying out of a terrorist attack. Such instances generally constitute violations of civic loyalty such as qualify as deprivation grounds in all relevant national deprivation regimes. Conduct more indirectly linked to terrorism, by contrast, needs closer and more specific analysis. Belgian case law provides a useful example: while the Belgian Constitutional Court generally considers terrorism a valid deprivation ground, Belgium did, at least initially, not regard the provision of logistical help to a terrorist group that did not target Belgium a violation of a Belgian citizen's duty warranting denationalisation.[558] Legislation in Austria, by contrast, clearly includes also the financial support of a terrorist group as an admissible deprivation ground.[559] What registers as critical severity in an act potentially harming a state's core principles is intrinsically tied to the state in question.

The difficulty of making generalisations about deprivation grounds becomes visible also if we turn to a different UK example. As I have argued so far, involvement in terrorism, at least in its more straightforward instantiations, is a valid cause for denationalisation across the EU and the UK. But it is not, of course, the only valid cause. The differences between the kinds of behaviour that may trigger deprivation decisions provide additional support for the importance of considering individual national constitutions if we want to move from a more general to a more specific assessment of deprivation grounds. Thus, we may note that the denationalisation legislation of the UK, while largely employed in deprivation proceedings concerning terrorism,[560] has also been used in a very different scenario: as a response to grave sexual offences committed against young girls by men holding both British and Pakistani citizenship in *Ahmed and Others vs. the Secretary of State* (2017). The perpetrators' conduct not only led to their criminal convictions but was also considered a valid deprivation ground. The 'serious

[558] Wautelet, "Deprivation of citizenship for 'jihadists' - Analysis of Belgian and French practice and policy in light of the principle of equal treatment."
[559] See Article 33(3) Austrian Nationality Act in connection with Section 278d Austrian Criminal Code.
[560] Lepoutre, "Citizenship Loss and Deprivation in the European Union (27 + 1)," 9.

organised crime' they committed was regarded as so fundamentally harmful to the UK that denationalisation was deemed 'conducive to the public good'.[561]

This case illustrates, once more, the complexity of pinpointing exactly the kind of behaviour that may, or may not, qualify as a deprivation ground in a given nation. Thus, in this section, I have attempted to outline the more general traits that characterize valid deprivation grounds applicable to terrorism in the EU and the UK. Unfortunately, a more minute analysis of the various specific acts that may lead to denationalisation in each individual nation exceeds the scope of this thesis. However, given the centrality of individual state constitutions for understanding individual deprivation regimes, it is clear that constitutional make-up, more generally, and especially the ways in which a state conceives of citizenship are crucial to the very idea of nationality deprivation. With this in mind, let us turn to a more thorough examination of the nexus between denationalisation and citizenship.

V. Nationality deprivation and citizenship

As I have argued, there are certain key ideas that underpin deprivation regimes applicable to terrorism in the MSs and the UK, including a civic duty of loyalty, the inviolability of certain state interests, and conduct 'seriously prejudicial' to them. This chapter has been dedicated to exploring these terms in greater detail and supplying working definitions for them. In this light, nationality deprivation has become apparent as the response to a particular kind of behaviour, namely, conduct that severely breaches a citizen's obligation to honour the inviolability of principles that constitute the very foundations of the civic community. In the EU and the UK, these are, in particular, democracy, human rights and the rule of law. As we have also seen, terrorism (in its 2006 UN definition) is a prime example of the conduct that violates such principles to the extent that nationality deprivation may ensue, as the state's response. The final section of this chapter takes its cue from the following question: why should there be a civic duty of loyalty in the first place that, if breached in the way described, may lead to nationality deprivation? The answer I propose is that this loyalty is rooted in (and justified by) the special relationship constituted by citizenship – a relationship that is both formally severed at the moment of deprivation and fundamentally harmed, I would argue, by the conduct I have just described. This argument is not self-evident. Much rather, it presupposes a certain kind of understanding of the idea of citizenship. So, in order to be able to truly address the question of the justifiability of nationality deprivation – a question that will take centre stage in Chapter Three

[561] Ahmed and Others (deprivation of citizenship) [2017] UKUT 00118 (IAC).

–, we first need to have a closer look at citizenship as a concept and the ways in which it relates to citizenship deprivation.

The centrality of citizenship to discussions of nationality deprivation, and especially to any normative assessment of the measure, becomes quickly apparent if we consider some of the statements made by politicians regarding deprivation measures. Thus, in 2020, when he introduced an amendment to the Estonian Citizenship Act that would allow deprivation for 'other serious crimes against the state', Mart Helme, the Estonian Minister of the Interior, asserted that '[h]olding Estonian citizenship is an honour and someone who has opposed their country should not have it.'[562] A very similar idea of citizenship appears in the words of Hilary Clinton, who described US citizenship, in 2010, as 'a privilege' that is jeopardized if US citizens engage in terrorism[563]. Related notions have also been prominent in statements by Theresa May in which she justified denationalisation measures aimed at suspected British jihadists.[564] Finally, when introducing new deprivation legislation in 2014, also Christ Alexander, Canada's Citizenship and Immigration Minister at the time, described citizenship along very similar lines: '[c]itizenship is not a right; it is a privilege'.[565] This, however, is not the only view that politicians have taken on the issue. Thus, if we keep our focus on Canada, we may observe that Prime Minister Justin Trudeau, in his limitation of deprivation powers under the Strengthening Canadian Citizenship Act,[566] advocated a rather different understanding of citizenship: 'as soon as you make citizenship for some Canadians conditional on good behavior, you devalue citizenship for everyone.'[567] Instead, for Trudeau, a 'Canadian is a Canadian is a Canadian.'[568]

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[562] Riin Oeselg, The government approved an amendment to the Citizenship Act, Ministry of the Interior, 25 June 2020. Available at: https://www.siseministeerium.ee/en/news/government-approved-amendment-citizenship-act (last accessed: 26/03/2023).

[563] Hillary Rodham Clinton quoted in: Charlie Savage and Carl Hulse, Bill Targets Citizenship of Terrorists' Allies, The New York Times (6 May 2010). Available at: https://www.nytimes.com/2010/05/07/world/07rights.html (last accessed: 26/03/2023).

[564] https://www.theguardian.com/politics/2013/dec/23/theresa-may-strips-citizenship-britons-syria (23/12/2013; Last modified: 14/04/2018).

[565] https://www.cbc.ca/news/politics/new-citizenship-rules-target-fraud-foreign-terrorism-1.2525404 (6 February 2014; Last updated: 25 September 2015). On related privilege-based interpretations of citizenship in the statements of politicians, see also Macklin, "Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien," 40.

[566] Laura van Waas and Sangita Jaghai-Bajulaiye, "All citizens are created equal, but some are more equal than others," *Neth Int Law Rev* 65, no. 3 (2018): 426, https://doi.org/10.1007/s40802-018-0123-8.

[567] Justin Trudeau, Townhall Meeting in July 2015; Quoted in: Vice News, 'A Canadian Is a Canadian': Liberal Leader Says Terrorists Should Keep Their Citizenship, 28 September 2015; Available at: https://www.vice.com/en/article/7xaxby/a-canadian-is-a-canadian-liberal-leader-says-terrorists-should-keep-their-citizenship (last accessed: 25/03/2023).

[568] Justin Trudeau, Townhall Meeting in July 2015; Quoted in: Vice News, 'A Canadian Is a Canadian': Liberal Leader Says Terrorists Should Keep Their Citizenship, 28 September 2015.

This brief selection of statements may highlight the need for taking a closer look at the concept of citizenship: both supporters and opponents of deprivation powers rely on the idea of citizenship for support; yet, in the process, they embrace very different concepts of it. So, in this section, I will disentangle the different notions of citizenship relevant to the idea of citizenship deprivation, and analyse which concept of citizenship, if any, may justify the kind of civic loyalty that, as I have shown, is central to deprivation regimes applicable to terrorism in the EU and the UK. The necessity of a close examination of citizenship prior to any substantial discussion of deprivation powers is emphasised not only by the public statements I have listed above, but also in the relevant scholarship. Thus, Shai Lavi has called for a 'deeper understanding of the legal structure of citizenship'.[569] And in his early writing on the UK, the US, and Israel, he has identified four different models:[570] citizenship as security[571], citizenship as a social contract[572], citizenship as an ethnonational bond[573], and citizenship as a civic notion[574]. Rainer Bauböck and Vesco Paskalev as well have stressed the importance of considering deprivation policies against a careful examination of citizenship 'that can be defended from within broader theories of justice and democracy.'[575] Instead of situating the concept within specific jurisdictions, they have postulated that such a 'conception would have to be sufficiently general to be applicable to different national contexts and acceptable to different constitutional traditions.[576]

In light of this two-fold motivation to have a closer look at citizenship, let us do precisely that. Naturally, a comprehensive account of the more general meaning and significance of citizenship exceeds the scope of this thesis. As Laura van Waas has pointed out, in reference to Linda Kerber's description of the task, the matter of citizenship is certainly one of 'the largest

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[569] Lavi, "Citizenship Revocation as Punishment: On the Modern Duties of Citizens and Their Criminal Breach," 806.
[570] Shai Lavi, "Punishment and the Revocation of Citizenship in the United Kingdom, United States, and Israel," *New Criminal Law Review* 13, no. 2 (2010): 409, https://doi.org/10.1525/nclr.2010.13.2.404.
[571] Lavi, "Punishment and the Revocation of Citizenship in the United Kingdom, United States, and Israel," 409-13.
[572] Lavi, "Punishment and the Revocation of Citizenship in the United Kingdom, United States, and Israel," 413-17.
[573] Lavi, "Punishment and the Revocation of Citizenship in the United Kingdom, United States, and Israel," 417-22.
[574] Lavi, "Punishment and the Revocation of Citizenship in the United Kingdom, United States, and Israel," 423-25.
[575] Bauböck and Paskalev, "Cutting genuine links: a normative analysis of citizenship deprivation," 61.
[576] Bauböck and Paskalev, "Cutting genuine links: a normative analysis of citizenship deprivation," 61.
For the centrality of the concept of citizenship for discussions of nationality deprivation, see also Gross, "Defensive Democracy: Is It Possible to Revoke the Citizenship, Deport, or Negate the Civil Rights of a Person Instigating Terrorist Action against His Own State," 51.

questions of democracy'.[577] And, in the 'Introduction' to *The Oxford Handbook of Citizenship*, Ayelet Shachar, Rainer Bauböck, Irene Bloemraad, and Maarten Vink stress that a full analysis of the 'multifaceted and protean dimensions of citizenship' requires 'a multidisciplinary and comparative approach'.[578] In addition, they emphasise that articulating 'a single definition of citizenship, […] would be either a hopeless task or a sectarian project given the proliferation of meanings and uses of the term.'[579] Consequently, I will limit my considerations to the conceptions of citizenship most relevant to deprivation powers applicable to terrorism, as I have characterised them so far.

In this context, we may identify a spectrum of different views that spans the ground, broadly speaking, between the following two extremes. On one end of the spectrum, citizenship is regarded as the absolute and inalienable right of the citizen. Here, we may think of Hannah Arendt's famous adage of 'the right to have rights',[580] implying what Jonathan David Shaub has termed 'a sacred view of citizenship as a 'kind of "super-right" – one that cannot be balanced away.'[581]. In a very similar sense, Chief Justice Earl Warren of the US Supreme Court, joined by Justices Hugo Black and William O. Douglas, has emphasised the importance of citizenship in *Perez v. Brownell* as follows:

> 'Citizenship is man's basic right, for it is nothing less than the right to have rights. Remove this priceless possession and there remains a stateless person, disgraced and degraded in the eyes of his countrymen.'[582]

Such approaches to citizenship have gained particular momentum in the aftermath of totalitarian regimes and their abuses of deprivation powers. The perspective on citizenship they embrace has been described, more generally, as 'rights-based' or as taking a 'rights

[577] Laura van Waas, "Stolen citizenship," ed. Émilien Fargues and Iseult Honohan, vol. 2021/23, *Revocation of Citizenship: The New Policies of Conditional Membership* (European University Institute, 2021). 36.
Linda K. Kerber, "The Meanings of Citizenship," *The Journal of American History* 84, no. 3 (1997), https://doi.org/10.2307/2953082.
[578] Ayelet Shachar et al., "Introduction: Citizenship—Quo Vadis?," in *The Oxford Handbook of Citizenship*, ed. Ayelet Shachar et al. (Oxford University Press, 2017), 6.
[579] Shachar et al., "Introduction: Citizenship—Quo Vadis?," 6.
[580] Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt, 1973), 267. Hannah Arendt, "The rights of man ; what are they?." *In Modern Review,* (1949). Cf. Alison Kesby, "The Right to have Rights as Citizenship," in *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press, 2012). Jean-Yves Pranchère and Justine Lacroix, "The 'right to have rights': Revisiting Hannah Arendt," in *Human Rights on Trial: A Genealogy of the Critique of Human Rights*, ed. Jean-Yves Pranchère and Justine Lacroix, Human Rights in History (Cambridge: Cambridge University Press, 2018).
[581] Shaub, "Expatriation restored," 432.
[582] *Perez v. Brownell*, 356 US 44 (1958).

perspective'.[583] Such perspectives may go hand in hand with an 'individual choice' view, which, in the assessment of Rainer Bauböck and Vesco Paskalev, foregrounds the central role of the citizen 'in the attribution or change of citizenship'[584]. In this view, citizenship is 'an individual entitlement […] held against the State'.[585]A particular instantiation of a rights-based approach is Patti Tamara Lenard's notion of democratic citizenship. Rooted in the democratic principles of inclusiveness and equality,[586] this notion understands citizenship as a secure status that provides an 'equal basic package of rights' to which all status holders are entitled.[587]

On the other end of the spectrum are views that regard citizenship as a privilege kindly granted and governed by the state. Here we may recall, once again, the statements made by politicians like Christ Alexander, who embrace the idea that '[c]itizenship is not a right; it is a privilege'.[588] In such a view, the distribution of citizenship 'emanates from the patron (here a government minister) and can be rescinded from an undeserving beneficiary (here the citizen) at the former's discretion.'[589] Accordingly, such concepts of citizenship have also been describes as following a 'state discretion view', since the state is the sole authority on the acquisition or withdrawal of citizenship, in this case.[590] At their extreme, such ideas view citizenship in the context of nationality deprivation exclusively as a 'tool for managing security risks'[591]. Privilege-based approaches to citizenship also tend to ascribe to the state the right to regulate citizen behaviour to a much greater extent. Thus, these approaches generally postulate that citizenship does not only constitute citizen rights, but also citizen duties.[592]

Between the two ends of this spectrum lies a variety of different perspectives, which all, in one way or another, regard citizenship as a reciprocal relationship between citizen and state. Most characteristic of this middle ground are concepts of citizenship based on the idea of a contract or agreement[593] that stipulates rights and obligations for both sides. The centrality of a such a 'Social Contract' to the functioning of a civic community has been famously

[583] Aleinikoff, "Theories of Loss of Citizenship."
[584] Bauböck and Paskalev, "Cutting genuine links: a normative analysis of citizenship deprivation."
[585] Bauböck and Paskalev, "Cutting genuine links: a normative analysis of citizenship deprivation," 63.
[586] Patti Tamara Lenard, "Patti Tamara Lenard Replies," *Ethics & International Affairs* 30, no. 2 (2016): 271, https://doi.org/10.1017/S0892679416000149.
[587]Lenard, "Patti Tamara Lenard Replies," 271.
[588] https://www.cbc.ca/news/politics/new-citizenship-rules-target-fraud-foreign-terrorism-1.2525404 (6 February 2014; Last updated: 25 September 2015). On related privilege-based interpretations of citizenship in the statements of politicians, see also Macklin, "Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien," 9.
[589] Macklin, "The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?," 165.
[590] Bauböck and Paskalev, "Cutting genuine links: a normative analysis of citizenship deprivation."
[591] Lavi, "Punishment and the Revocation of Citizenship in the United Kingdom, United States, and Israel," 409.
[592] Lavi, "Punishment and the Revocation of Citizenship in the United Kingdom, United States, and Israel," 423.
[593] For this 'contractarian' understanding of citizenship, see Aleinikoff, "Theories of Loss of Citizenship." Lavi, "Punishment and the Revocation of Citizenship in the United Kingdom, United States, and Israel," 413.

embraced, of course, by Jean-Jacques Rousseau, to whom we will return below. Mitja Žagar's description of citizenship nicely captures the reciprocity at the core of contract-based approaches: '[f]or an individual, this [citizenship] is a very important status that entitles an individual to certain – especially political – rights and establishes certain obligations of a state to this individual (e.g., diplomatic protection of its citizen abroad). On the other hand, citizenship creates duties and obligations of a citizen in relation to his/her state.'[594] Closely linked to such ideas of citizenship is the 'consent perspective', which sees citizenship as fundamentally relying on the mutual consent of individual and the state.[595]

A specific subcategory of contract- and consent-based approaches highlights the state's existence, not as an abstract entity of removed institutions, but as the sum of all citizens: a civic community. As Shai Lavi asserts, one central element of citizenship is that it 'designates membership in the legal and political community'.[596] In accordance with such a 'communitarian perspective'[597] on citizenship, the reciprocal contractual relationship between citizen and state is, more accurately, a relationship between a citizen and their fellow citizens. All individual rights and obligations are granted by, and owed to, the civic community.

Even if we understand the state as, first and foremost, a community, we are faced with a challenge that ultimately underpins all concepts of citizenship, but perhaps especially those that foreground its reciprocal nature: how does one mediate between state or civic community and the individual citizen? Mitja Žagar describes this task as the crux of striking 'a proper balance between the interests of states and the interests of individuals.'[598] In a rights-based understanding of citizenship, there is little question that the balance tilts towards the latter. In a privilege-based understanding the opposite is the case: here, the state's interests and authority generally take precedent. The more the balance shifts towards the state, the more there are obligations attached to citizens' rights. Since citizenship deprivation, as we have seen, presupposes a duty of loyalty to the state or, more precisely, to its most fundamental values, deprivation regimes clearly operate under the assumption that certain obligations may be placed on a

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[594] Mitja Žagar, *Citizenship - Nationality: A Proper Balance Between The Interests Of States And Those Of Individuals, 1st European Conference On Nationality "Trends And Developments In National And International Law On Nationality"* (Strasbourg: 18 And 19 October 1999), Conf/Nat (99) Pro 1 Proceedings Confnat, 103.
[595] Aleinikoff, "Theories of Loss of Citizenship," 1488.
[596] Lavi, "Citizenship Revocation as Punishment: On the Modern Duties of Citizens and Their Criminal Breach," 790-91.
[597] Aleinikoff, "Theories of Loss of Citizenship." Christian Barry and Luara Ferracioli, "Can Withdrawing Citizenship Be Justified?," *Political studies* 64, no. 4 (2016): 1057, https://doi.org/10.1177/0032321715606569.
[598] Mitja Žagar, *Citizenship - Nationality: A Proper Balance Between The Interests Of States And Those Of Individuals, 1st European Conference On Nationality "Trends And Developments In National And International Law On Nationality",* 93-94.

citizen. This makes citizenship deprivation intrinsically problematic for rights-based approaches to citizenship. Not only because they oppose the idea of civic obligation, but because there is hardly a more striking limitation of a citizen's rights than the deprivation of citizenship itself. To a privilege- and state-centred approach, by contrast, deprivation regimes are far more acceptable since such approaches already presuppose the existence of obligations and the necessity of curtailing citizens' rights.

Thus, one might conclude that deprivation regimes generally presuppose a privilege-based understanding of citizenship. And we have seen that many politicians on the matter precisely use such kind of language. However, as we have also seen in my examinations of the key concepts involved in nationality deprivation, for the measure to be legitimate in a democratic state, it needs to be an exceptional state measure carefully considered in each case, and its exercise may only be justified by the most striking violations of the community's fundamental principles. Following such an understanding of nationality deprivation, we need to acknowledge that it not only presupposes a certain level of state authority and individual obligation, but also places important limits on both. Similarly, in assessing deprivation regimes, the CJEU has found that 'it is legitimate for a Member State to wish to protect […] the reciprocity of rights and duties, which form the bedrock of the bond of nationality.'[599] Thus, I propose, deprivation regimes are suited best to an understanding of citizenship that belongs to the middle ground sketched above.

More precisely, I would argue, they suggest an understanding of citizenship that combines elements of both '(civic) republican' and 'liberal' discourses. In the former, I am drawing on terminology developed by Knight Abowitz and Jason Harnish and applied to denationalisation by Patrick Sykes.[600] According to Sykes, a 'civic republican discourse' assumes that 'an implicit social contract' underpins the citizenship relationship, from which a certain duty of loyalty to the state, as the collective of citizens, arises.[601] We find a particularly instructive analysis of such a discourse in Iseult Honohan's work on 'Liberal and Republican Conceptions of Citizenship'.[602] Yet, while Honohan develops his understanding of 'republican' citizenship in opposition to 'liberal' citizenship, I will argue against their incompatibility. Indeed, I propose, if

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[599] CJEU, *Tjebbes and Others v. Minister van Buitenlandse Zaken*, §33. See also CJEU, *Rottmann v. Germany*, §51.

[600] Patrick Sykes, "Denaturalisation and conceptions of citizenship in the 'war on terror'," *Citizenship Studies* 20, no. 6-7 (2016): 752, https://doi.org/10.1080/13621025.2016.1191433.
Kathleen Knight Abowitz and Harnish Jason, "Contemporary Discourses of Citizenship," *Review of Educational Research* 76, no. 4 (2006): 657, https://doi.org/10.3102/00346543076004653.

[601] Sykes, "Denaturalisation and conceptions of citizenship in the 'war on terror'," 752.

[602] Iseult Honohan, "Liberal and Republican Conceptions of Citizenship," in *The Oxford Handbook of Citizenship*, ed. Iseult Honohan et al. (Oxford: Oxford University Press, 2017), 83-109 .

we understand liberalism in a broader and more communitarian sense, both discourses may support deprivation measures as conceptualized in this thesis.

Liberal citizenship, in the traditional, narrow sense used by Honohan, encompasses many of the aspects that I have treated under the heading of 'rights-based' approaches above; only that it focuses less on the rights provided by citizenship than on their freedom from state interference. Thus, Honohan describes liberal citizenship as promoting a state that is restrained in its power to restrict citizens in their rights and freedoms, on the basis that diverging views and conduct of citizens are protected by a strong emphasis of the principle of equality.[603] Here, we may recall Patti Lenard's notion of 'democratic citizenship' above or think of scholarship endorsing 'liberal-democratic' ideas of citizenship, such as Janie Pélabay and Réjane Sénac' advocacy for a citizenship in which 'individual liberties and the fundamental rights of all human beings will be respected.'[604] In all of these traditional variations of liberal citizenship, as Honohan observes, the emphasis on citizens' freedom from state interference precludes the requirement of their commitment to certain state values or interests.[605] After all, following a traditional liberal doctrine, citizen obligations towards the state must be kept to a minimum: largely restricted to a basic obedience to the law,[606] they ought not to 'affect the character or identity of the individual'.[607] Thus, as I have argued for rights-based approaches above, deprivation regimes and their assumption of civic loyalty are largely at odds with a traditional liberal perspective on citizenship.

Such regimes are very much compatible, however, with a different, less narrow sense of liberty: one that values the freedom not only of individual citizens, but of the citizenry as a whole. This understanding of liberty is engrained in Honohan's republican citizenship and entails a very different assessment of citizens' rights and obligations: here, the greatest freedom for all is achieved by 'legal and political institutions that establish a secure public status of legal and political equality.'[608] These institutions, in turn, are not considered as separate from the civic community, as an interfering state power, but as a vital expression of the citizenry in a

[603] Honohan, "Liberal and Republican Conceptions of Citizenship," 87.
[604] Janie Pélabay and Réjane Sénac, "Citizenship revocation: a stress test for liberal democracy," *Citizenship Studies* 23, no. 4 (2019): 390, https://doi.org/10.1080/13621025.2019.1616453.
[605] Honohan, "Liberal and Republican Conceptions of Citizenship," 87.
[606] Honohan, "Liberal and Republican Conceptions of Citizenship," 91. Cf. Orgad, "Liberalism, Allegiance, and Obedience: The Inappropriateness of Loyalty Oaths in a Liberal Democracy," 100.
[607] Honohan, "Liberal and Republican Conceptions of Citizenship," 91.
[608] Honohan, "Liberal and Republican Conceptions of Citizenship," 88. As such, Honohan's republican citizenship also recalls the 'muscular liberalism' envisaged by David Cameron, which I referred to at the beginning of this chapter (David Cameron, the PM's Speech at Munich Security Conference, 5 February 2011. The transcript of the speech is available at: https://www.gov.uk/government/speeches/pms-speech-at-munich-security-conference (last accessed: 23/04/2023)).

communitarian sense. Accordingly, Honohan observes that republican citizenship constitutes a legal status based on 'intersubjective recognition of equality, and entails the active commitment, or civic virtue, of citizens:'[609] to secure the civic goods of collective freedom and self-government, these goods have to be recognised and upheld, legally and socially, by the citizens as common values of the society.[610] Along very similar lines, Shai Lavi has argued that '[c]itizens in a free and democratic state have a unique duty to the constitution as a bond between self-governing citizens.'[611]

In this light, I propose that a concept of citizenship that is both republican in Honohan's sense and liberal in a broader, communitarian understanding is best suited to accommodating the kind of deprivation regime that I have argued to exist in the MS and the UK, and especially their acknowledgment of a civic duty towards the fundamental interests of a state community. I will refer to this concept of citizenship as 'liberal-republican' in this thesis. This does not mean that I want to suggest that all states I consider subscribe to republicanism or liberalism in all of their variants, but that their deprivation measures suggest a kinship to the particular republican and liberal traits that I have detailed in the preceding paragraph.

We find additional support for a liberal-republican perspective on citizenship, especially as a valid ground for a citizen's exclusion from the citizenry, in historical writing on political philosophy. As Matthew Gibney has argued, in this context, we might turn to Thomas Hobbes, Cesare Beccaria or Immanuel Kant.[612] Perhaps even more interesting for our present purposes, I suggest, are the ideas developed by Jean-Jacques Rousseau in 'The Social Contract'. Rousseau's work helpfully engages with the question of how, and under what circumstances, restrictions of individual freedoms through state authority may be justified.[613] In his assessment, 'all legitimate authority among men must be based on covenants.'[614] Such social contracts, as Rousseau argues, are the key to forming a 'union of separate men', which seeks to defend 'the person and goods of each member with the collective force of all, and under which each

[609] Honohan, "Liberal and Republican Conceptions of Citizenship," 85.
[610] Honohan, "Liberal and Republican Conceptions of Citizenship," 90.
[611] Lavi, "Citizenship Revocation as Punishment: On the Modern Duties of Citizens and Their Criminal Breach," 796-97.
[612] Gibney, "Should Citizenship Be Conditional? The Ethics of Denationalization," 648. Thomas Hobbes, in particular, takes a prominent role in recent scholarship on nationality deprivation. Thus, both Emanuel Gross and David Miller draw on Hobbesian political and social theory in their justifications of deprivation measures:
Gross, "Defensive Democracy: Is It Possible to Revoke the Citizenship, Deport, or Negate the Civil Rights of a Person Instigating Terrorist Action against His Own State," 53. David Miller, "Democracy, Exile, and Revocation," *Ethics & International Affairs* 30, no. 2 (2016): 266-67, https://doi.org/10.1017/S0892679416000137.
[613] Jean-Jacques Rousseau, *The Social Contract* (Penguin Books, 2004), 2.
[614] Rousseau, *The Social Contract*, 7.

individual, while uniting himself with the others, obeys no one but himself, and remains as free as before.'[615] He further details the essentials of this social pact as follows: '[e]ach of us puts into the community his person and all his powers under the supreme direction of the general will; and as a body, we incorporate every member as an invisible part of the whole'.[616] Such is the 'reciprocal commitment'[617] that, in Rousseau's view, needs to characterise the relationship between individual and community.

Naturally, an individual may not always want to follow the 'supreme direction of the general will': as Rousseau argues, the community, as the sum of all individuals cannot have any interests or will contrary to theirs;[618] the individual, by contrast, may have interests that differ from the general will. In such cases, Rousseau observes, 'subjects will not be bound by their commitment unless means are found to guarantee their fidelity.'[619] Binding the individual to the general will, even against their diverging private interests, is essential to setting all individuals free, including the individual pursuing opposing private interests. Such freedom is 'the necessary condition […] which alone bestows justice on civil contracts – without it, such contracts would be absurd, tyrannical and liable to the grossest abuse'.[620] If an individual breaks their commitment to the community, by acting contrary to the general will and the society's law,

> 'he becomes by his deed a rebel and a traitor to the nation; by violating its law, he ceases to be a member of it; indeed, he makes war against it. And in this case, the preservation of the state is incompatible with *his* preservation; […] And since he has accepted such membership, if only by his residence, he must either be banished into exile as a violator of the social pact or be put to death as a public enemy'.[621]

As Rousseau's second alternative clearly illustrates, his writing is, of course, somewhat removed from the realities of modern-day European democracies: thankfully, capital punishment is no longer a viable option in this context. In addition, democracies in the MSs and the UK are all representative, while the ideal that Rousseau envisaged, was the direct self-government of the people.[622] Nonetheless, his writing captures ideas that resurface in a liberal-republican

[615] Rousseau, *The Social Contract*, 14.
[616] Rousseau, *The Social Contract*, 16.
[617] Rousseau, *The Social Contract*, 17.
[618] Rousseau, *The Social Contract*, 18-19.
[619] Rousseau, *The Social Contract*, 19.
[620] Rousseau, *The Social Contract*, 19-20.
[621] Rousseau, *The Social Contract*, 38.
[622] Rousseau, *The Social Contract*. III, chapter 15.

understanding of citizenship as detailed above – and in the kind of nationality deprivation that such an understanding may support. A key element in all three is the notion of a special reciprocal relationship between individual citizens and their community. This relationship seeks the good of all people, including liberty and equality, through the individuals' binding commitment to a shared set of interests and values (the 'general will', in Rousseau's terminology). If an individual violates these interests and values, they also violate the relationship that constitutes their membership in the civic community in the first place. As a consequence, to requote Rousseau, 'he ceases to be a member'. As I have argued, deprivation regimes applicable to terrorism in the EU and the UK respond to such a cessation of membership, following from a citizen's terrorism against the very foundations of the democratic society, by legally severing the bond to the individual in question.

VI. Conclusions

At its core, this chapter has pursued the goal of examining and elucidating the central elements that, as I have argued in my first chapter, characterise nationality deprivation for terrorist acts across the MSs and the UK. These elements include, in particular, (i) the idea of a citizen's duty of loyalty to the state, (ii) the inviolability of certain state principles and (iii) the kind of behaviour that might breach both loyalty and principles so severely that it qualifies as a deprivation ground. I have approached their analysis through the lens of three different legal sources. The first two of these – the drafting history of the 1961 UN Convention and the relevant UN expert opinions – pertained to the interpretation of Article 8(3) of the 1961 Convention, which explicitly mentions, in the context of a deprivation provision, a citizen's 'duty of loyalty to the state' and the idea of its violation through conduct 'seriously prejudicial to vital interests of the state'. The third legal source I have considered was a selection of international cases tried before the EComHR or ECtHR in which the validity of a civic duty of loyalty was explicitly at stake ('loyalty cases').

All three sources have revealed that, in order to be acceptable in a democratic context as well as under both the 1961 Convention and the ECHR, a citizen's duty of loyalty must be understood as the support, not of a particular government or leading ideology, but of certain fundamental tenets of the civic community. As we have seen, in the context of the EU and the UK, such tenets include, in particular, democracy, human rights and the rule of law. In my discussions, I have additionally stressed that the loyalty in question is a commitment to the non-violation of these principles, rather than to their active endorsement. My legal sources also revealed that conduct qualifying as a deprivation ground 'seriously prejudicial' to these values

must be a crime of exceptional severity that threatens the most basic pillars of the democratic society. We have seen that terrorist activity of sufficient gravity and subversiveness offers a case in point. In the light of these considerations as well as my first chapter, nationality deprivation has become apparent as the state's formal severance of the ties to one of its citizens in response to their fundamental breach of the obligation shared by all citizens not to violate the community's most essential values and interests.

In the final section of this chapter, I have acknowledged that this understanding of nationality deprivation presupposes a specific understanding of citizenship. After all, not all concepts of citizenship support the notion of civic obligation, much less of a citizen's duty of loyalty to state values. As I have argued, deprivation regimes are most suitably located in the context of a liberal-republican discourse on citizenship, which requires citizens' commitment to the inviolability of the rights, liberties and democratic self-government of the civic community.

As these conclusions confirm, and my methodological considerations indicated from the start, this chapter has moved beyond the classification and characterisation of the individual deprivation regimes of the MSs and the UK that formed the beginning of this thesis. Instead, it has been concerned with shedding further light on the shared idea – and ideal – of nationality deprivation underpinning these various national provisions. In this sense, I have used the legal sources at the core of this chapter to establish what kind of 'duty of loyalty to the state', what kind of 'vital interests or values' and what kind of 'seriously prejudicial' conduct deprivation regimes could conceivably rely on, if we presuppose that they generally (intend to) also comply with the international instruments that their implementing states have subscribed to. While this does not prove the compliance of each national deprivation provision with this standard, nor seeks to do so, I propose that it offers a possible version of a deprivation regime responding terrorism in the EU and the UK – a version that is close enough to at least most of the actual deprivation powers in the MSs and the UK to be representative. It is this representative version of nationality deprivation that I will scrutinize more closely in the next chapter, evaluating its lawfulness and legitimacy in light of the often stark criticism levelled against the measure.

CHAPTER THREE:
THE LAWFULNESS AND LEGITIMACY OF DEPRIVATION REGIMES

I. Research questions and aim

My first two chapters have shown that nationality deprivation for terrorism in the MSs and the UK has, by its legal nature, an administrative quality: in particular, I have argued that it aligns with administrative law, rather than criminal law, in its legal classification, procedures, purpose and consequences. More specifically, nationality deprivation has become apparent, in the great majority of cases, as a state's formal severance of the bond to one of its citizens in response to that citizen's breach of a duty of loyalty arising from the relationship of citizenship itself, if understood in a liberal-republican sense. As we have seen, in this understanding, a citizen's loyalty is owed to the civic community, as a commitment not to violate its most foundational principles, such as its democratic constitution and the rule of law. A violation of this duty, for instance through terrorist acts harming the very essentials of democratic society, ruptures the legal bond established by citizenship and fulfils the requirements of deprivation regimes.

Against this background, the third and final chapter of my thesis addresses the following two research questions: Can nationality deprivation, as defined above, qualify as a lawful state measure, especially in relation to the individual it targets? And, if so, how can a state defend its employment of this undoubtedly intrusive measure, as both a lawful exercise of state power and a legitimate one? In contemplating possible responses to these questions, this chapter seeks to critically review, and defend, the findings of my first two chapters against arguments that challenge the lawfulness and legitimacy of deprivation measures. On this basis, I will propose a tentative endorsement of deprivation regimes applicable to terrorist acts, by relying on a concept of 'defensive democracy'. This concept provides, I will argue, sufficient justification, not only for maintaining national deprivation legislations in a democratic system, but for employing them in support of democracy itself.

II. Methodology and preliminary considerations

The consideration of both the lawfulness and the legitimacy of nationality deprivation raises an important methodological question: what is the appropriate standard against which deprivation regimes need to be measured? The necessity of identifying such a standard is vividly captured in the following response offered by Kay Heilbronner to Audrey Macklin's criticism of deprivation measures:

> 'She argues primarily with illegitimacy. As a lawyer I have some difficulty with this term. If it is not illegal, what are the criteria for illegitimacy or immorality? Her personal idea of how democratic states should behave? That of course may be an acceptable political reasoning, provided I learn more about its ideological premises which I may share or not.'[623]

I fully agree that it is important to acknowledge, and differentiate between, the distinctive meanings of lawfulness, on the one hand, and legitimacy, on the other. Accordingly, in this chapter, I will work from the following definitions. Regarding the question of lawfulness, I will assume that it explores the compliance of a given deprivation measure with the law, that is, more specifically, with the procedural and substantive requirements of national and international legislation. My assessment of lawfulness, in this sense, will focus primarily on the legal relationship between the depriving state and the individual subjected to the deprivation measure. By contrast, the question of legitimacy, in my understanding, opens a much wider field and establishes whether a state measure can require obedience from the people, especially the individual concerned, because it meets the standard of a just authority. As Paul Cliteur and Afshin Ellian observe, a legal system is legitimate if it is not only 'in accordance with the law', but 'in keeping with principles of justice'.[624]

As the exchange between Macklin and Hailbronner may indicate, scholarship arguing for or against nationality deprivation generally relies, most heavily, on considerations of legitimacy. Such arguments tend to evaluate the measure as 'fair', 'just' or 'moral', or (more commonly) their opposites, based on a range of different perspectives. Especially social and political scientists tend to draw on a broad array of fundamental concepts in order to make

[623] Hailbronner, "Revocation of Citizenship of Terrorists: A Matter of Political Expediency," 199.
[624] Paul Cliteur and Afshin Ellian, A New Introduction to Jurisprudence: Legality, Legitimacy and the Foundations of the Law (London: Routledge, 2019), 1. On 'legitimacy' in the context of deprivation regimes, see also Bauböck and Paskalev, "Cutting genuine links: a normative analysis of citizenship deprivation," 45.

normative claims about deprivation regimes. These concepts include democracy,[625] (il)liberalism,[626] populism/extremism[627], (in)justice/invidiousness,[628] symbolism[629], comity[630], and racism/xenophobia[631]. In addition, the morality of deprivation regimes often takes a central role in such arguments. Thus, Leslie Esbrook opposes nationality deprivation as a morally 'highly problematic' and 'extreme form[…] of State power'[632]; and Mercedes Masters and Salvador Santino F. Regilme Jr. have challenged the moral legitimacy of deprivation powers due to their utter lack of 'underlying political logics'.[633]

Perhaps the greatest majority of scholars, however, measure the legitimacy of nationality deprivation by its perceived (non-)compliance with liberal democracy. We have already touched upon such evaluations of deprivation regimes in the preceding chapters: for instance, when we examined the severity of deprivation measures in Chapter One (Section V.3.iv) or when we noticed the incompatibility between many liberal conceptions of citizenship and the idea of nationality deprivation in Chapter Two (Section V). Let me offer a slightly more

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[625] Gibney, "Should Citizenship Be Conditional? The Ethics of Denationalization," 651. Gross, "Defensive Democracy: Is It Possible to Revoke the Citizenship, Deport, or Negate the Civil Rights of a Person Instigating Terrorist Action against His Own State," 55. Lenard, "Patti Tamara Lenard Replies," 79. Ben Herzog, "The Democratic Roots of Expatriations," Ethics int. aff 30, no. 2 (2016): 262, https://doi.org/10.1017/S0892679416000125.

[626] Bertram, "Citizenship Deprivation: A Philosopher's Perspective," 193-96. Gibney, "Should Citizenship Be Conditional? The Ethics of Denationalization," 650. Pélabay and Sénac, "Citizenship revocation: a stress test for liberal democracy," 390.

[627] Liora Lazarus and Benjamin J. Goold, "Security and Human Rights: Finding a Language of Resilience and Inclusion," in Security and Human Rights, ed. Benjamin J. Goold and Liora Lazarus, Hart Studies in Security and Justice (Oxford: Hart Publishing, 2019), 9. Esbrook, "Citizenship unmoored: expatriation as a counterterrorism tool," 1276.

[628] Gibney, "Should Citizenship Be Conditional? The Ethics of Denationalization," 650. Bauböck and Paskalev, "Cutting genuine links: a normative analysis of citizenship deprivation," 49.

[629] Herzog, "The Democratic Roots of Expatriations," 264.

[630] Joppke, "Terror and the loss of citizenship," 743. Bauböck and Paskalev, "Cutting genuine links: a normative analysis of citizenship deprivation," 52. Guy S. Goodwin-Gill, "Mr Al-Jedda, Deprivation of Citizenship, and International Law," *Revised draft of a paper presented at a Seminar at Middlesex University* (2014): 12-13. Institute on Statelessness and Inclusion*, Draft Commentary to the Principles on Deprivation of Nationality as a Security Measure* (2020). 90, 91. Colin Yeo, Some citizens are more equal than others, 18 April 2019, available at: https://www.counselmagazine.co.uk/articles/some-citizens-are-more-equal-than-others (last accessed: 23/03/2023). Miller, "Democracy, Exile, and Revocation," 269.

[631] Christophe Paulussen, "Towards a Right to Sustainable Security of Person in Times of Terrorism? Assessing Possibilities and Limitations Through a Critical Evaluation of Citizenship Stripping and Non-Repatriation Policies," *Journal of Conflict and Security Law* 26, no. 1 (2021): 219-49, https://doi.org/10.1093/jcsl/kraa022. Joppke, "Terror and the loss of citizenship," 745-46. Brown, "Interview with Tendayi Achiume," 155. Aziz Z. Huq, "The Uses of Religious Identity, Practice, and Dogma in in 'Soft' and 'Hard' Counterterrorism.," in *Security and Human Rights*, ed. Benjamin J. Goold and Liora Lazarus, Hart Studies in Security and Justice (Oxford: Hart Publishing, 2019), 77-98. Tufyal Choudhury, "The radicalisation of citizenship deprivation," *Critical Social Policy* 37, no. 2 (2017): 225-44, https://doi.org/10.1177/0261018316684507, https://journals.sagepub.com/doi/abs/10.1177/0261018316684507. Achiume, *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, 17-18.

[632] Esbrook, "Citizenship unmoored: expatriation as a counterterrorism tool," 1277.

[633] Mercedes Masters and Salvador Santino F Regilme, Jr., "Human Rights and British Citizenship: The Case of Shamima Begum as Citizen to Homo Sacer," *Journal of Human Rights Practice* 12, no. 2 (2020): 2, https://doi.org/10.1093/jhuman/huaa029, https://doi.org/10.1093/jhuman/huaa029.

detailed account of the scholarly criticism of deprivation regimes that argues for its illegitimacy in a liberal democratic context. As Matthew Gibney has argued, nationality deprivation poses three distinctive challenges for liberal-democracy advocates.[634] First, it entails the danger that a person deprived of nationality may become stateless, which violates liberal values as an 'unjust and cruel' consequence.[635] In his view, this also breaches the liberal democratic belief in 'the importance of consent […] and each individual's right to citizenship somewhere.'[636] Such violations may also be considered an attack on human rights more broadly, as Alec Pronk has argued among others.[637] Second, Gibney asserts, nationality deprivation violates 'the principle of equal citizenship', by treating groups of citizens differently and thus unfairly.[638] As my overview table in Section IV.2 of Chapter One reveals, many states distinguish between mono and multi nationals as well as between different modes of citizenship acquisition in the applicability of deprivation measures. In this sense, Patti Tamara Lenard has also argued that deprivation measures violate equality, the basis for any democracy.[639] Third, Gibney has suggested that nationality deprivation is incompatible with liberal democracy due to its arbitrariness.[640]

Other scholars have argued in opposition to such criticism and still firmly rely on the principles and values of liberal democracy. Thus, in Christian Joppke's view, if a citizen's terrorist convictions have proven that they are at war, not just against the state, but also against its citizens, the principles of liberal democracy might 'require the withdrawing of citizenship from someone to whom it is at best a tactical weapon.'[641] Similarly, Emanual Gross has postulated that individual and community in democratic societies are linked by a 'social charter' that, if endangered by an individual citizen, demands 'to remove these dangerous persons from the group and deprive them of their citizenship'.[642] On a more cautious but related note, Peter H. Schuck observes that there are instances in which the institutions and practices of liberal

[634] Gibney, "Should Citizenship Be Conditional? The Ethics of Denationalization," 651.
[635] Gibney, "Should Citizenship Be Conditional? The Ethics of Denationalization," 651.
[636] Matthew J. Gibney, "'A Very Transcendental Power': Denaturalisation and the Liberalisation of Citizenship in the United Kingdom," *Political Studies* 61, no. 3 (2012): 641, https://doi.org/10.1111/j.1467-9248.2012.00980.x.
[637] Alec Pronk, "Legitimizing Illiberal Practices: Denaturalization in the United Kingdom" (Master Leiden University 2017), 2.
[638] Gibney, "Should Citizenship Be Conditional? The Ethics of Denationalization," 641, 52.
[639] Tamara Lenard, "Democracies and the Power to Revoke Citizenship," 79.
[640] Gibney, "Should Citizenship Be Conditional? The Ethics of Denationalization," 652.
[641] Christian Joppke, "Terrorists Repudiate Their Own Citizenship," in *Debating Transformations of National Citizenship*, ed. Rainer Bauböck (Cham: Springer International Publishing, 2018), 183.
[642] Gross, "Defensive Democracy: Is It Possible to Revoke the Citizenship, Deport, or Negate the Civil Rights of a Person Instigating Terrorist Action against His Own State," 51-55.

democracy are 'more precious' than an individual's claim to citizenship.[643] He stresses, however, that nationality deprivation needs to comply with strict substantive and procedural safeguards and be carefully limited only to 'the most extreme, unmitigated attacks on the nation's security'.[644] To add a final, somewhat different voice to this group: even though he rejects nationality deprivation, in principle, Ben Herzog does not consider it 'necessarily undemocratic' for a state to use this measure with the 'aim to regulate national allegiance.'[645] More precisely, he argues that while deprivation regimes may be said to conflict with democratic values, such as efficacy, ethical justification, or progressiveness, they may serve other democratic goals instead: '[l]aws are often passed in a democracy because they are politically viable or beneficial for gaining public support, and not just because they are the least harmful policy option available.'[646] In this sense, deprivation measures may offer a 'powerful symbolic tool'[647] in a democratic society.

As this brief overview may indicate, liberal democracy has played a crucial role in arguments both for and against the legitimacy of nationality deprivation. This highlights, I suggest, an important difficulty of legitimacy-based approaches: they tend to be slightly more general in nature, and often are, to a greater extent, a matter of personal perspective. Here, we might recall Hailbronner's words above: 'If it is not illegal, what are the criteria for illegitimacy or immorality? Her personal idea of how democratic states should behave?'. In addition, as we have seen, legitimacy arguments often invoke a vast range of fundamental concepts deeply entrenched in political theory. Their concrete legal implications are often unclear and subject to severe contestation from various political views. In response to this difficulty, my chapter approaches scholarly evaluations of nationality deprivation, whenever possible, from the vantage point of (un)lawfulness. Not only does my primary expertise, as a lawyer, lie with legal questions, but, I suggest, many scholarly points that appear legitimacy-based, on the surface, do in fact point to questions of lawfulness and may be distilled into legal arguments.

Let me present two examples of my approach. As we have seen, deprivation regimes have been characterised as an immoral and overbearing exercise of state power, marking the measure's illegitimacy. To requote Leslie Esbrook's assessment, citizenship deprivation is an

[643] Peter H. Schuck, "Should Those Who Attack the Nation Have an Absolute Right to Remain Its Citizens?," in *Debating Transformations of National Citizenship*, ed. Rainer Bauböck (Cham: Springer International Publishing, 2018), 177-79.
[644] Schuck, "Should Those Who Attack the Nation Have an Absolute Right to Remain Its Citizens?," 177-79.
[645] Herzog, "The Democratic Roots of Expatriations," 261.
[646] Herzog, "The Democratic Roots of Expatriations," 262.
[647] Herzog, "The Democratic Roots of Expatriations," 264.

'extreme form […] of State power'.[648] This legitimacy-driven argument may be translated into legal terms as follows: nationality deprivation unduly violates the legal principles of proportionality, non-arbitrariness, and, more broadly, the rule of law. It is the legal translation of Esbrook's claim that my chapter will address (see Section III.2 und 3 below). Similarly, I propose, Matthew Gibney's criticism that deprivation measures conflict with 'the principle of equal citizenship'[649] may be recast as the question of whether such measures violate the legal principle of non-discrimination. I will address this question as a matter of (un)lawfulness, in Section III.1 below.

To conclude my preliminary considerations, I will give a brief outline of the kinds of arguments concerning nationality deprivation that I will not examine in this chapter. These are, in particular, views that may be disregarded in light of the findings of my preceding chapters. One such view is the challenge of deprivation measures as punitive state acts. For an example, let us turn to Patti Tamara Lenard, once more: one of her central claims is that deprivation measures effect an undue penalty, especially of those who have already been punished for a particular crime. Thus, she argues that citizenship revocation laws, in many cases, violate criminal-law principles of non-arbitrariness and due process as well as the prohibition of double jeopardy (*ne bis in idem*): in her view, their frequent requirement of a preceding criminal conviction unfairly singles out former offenders and results in a harsh, second punishment for the same crime.[650] Lenard's points may be valid in the rare cases in which nationality deprivation is, in fact, applied as a (criminal) punishment.[651] However, as I have argued in Chapter One (Section V), the very great majority of deprivation powers applicable to terrorism in the MSs and the UK does not qualify as a punitive measure, but is best understood as a measure of administrative law. Thus, I will not discuss arguments suggesting the criminal nature of

[648] Esbrook, "Citizenship unmoored: expatriation as a counterterrorism tool," 1277.
[649] Gibney, "Should Citizenship Be Conditional? The Ethics of Denationalization," 641, 52.
[650] Tamara Lenard, "Democracies and the Power to Revoke Citizenship," 81-82.
[651] In this sense, it has variously been argued that nationality deprivation, applied as a criminal punishment, jeopardises principles of criminal justice, such as *ne bis in idem*. Cf. *Parliamentary Assembly of the Council of Europe – Committee on Legal Affairs and Human Rights, Withdrawing nationality as a measure to combat terrorism, a human rights-compatible approach* (7 January 2019), 3. Institute on Statelessness and Inclusion, *Draft Commentary to the Principles on Deprivation of Nationality as a Security Measure*, 48.
Bauböck and Paskalev, "Cutting genuine links: a normative analysis of citizenship deprivation," 71-72. Boekestein, Revoking the nationality of convicted jihadists in the Netherlands: an issue of double jeopardy?, available at: https://globalcit.eu/revoking-the-nationality-of-convicted-jihadists-in-the-netherlands-an-issue-of-double-jeopardy/ (last accessed: 23/03/2023). Tom Boekestein, Deprivation of Dutch Citizenship and Double Jeopardy: recent developments, available at: https://globalcit.eu/deprivation-of-dutch-citizenship-and-double-jeopardy-recent-developments/ (last accessed: 23/03/2023). Louise Reyntjens, Ghoumid v. France: A Problematic Seal of Approval, OxHRH Blog, June 2020), http://ohrh.law.ox.ac.uk/ghoumid-v-france-a-problematic-seal-of-approval/ (last accessed: 23/03/2023).

deprivation regimes in this chapter, or evaluate deprivation powers against the principles of just punishment.

The second set of arguments that I will pass over in my subsequent considerations pertains to the often-vocal criticism of nationality deprivation as a violation of the absolute and inalienable right of citizenship. As I have detailed in Chapter Two (Section V), what Jonathan David Shaub has termed the 'sacred view of citizenship as a 'kind of "super-right" – one that cannot be balanced away'[652] is characteristic of a rights-based understanding of citizenship. Those subscribing to such an understanding often harshly criticise the very idea of nationality deprivation as the devastating destruction of the legal and social person of the individual concerned. Here, we may recall Section V.3.iv of Chapter One, where I quoted Chief Justice Earl Warren of the US Supreme Court on the severe consequences of nationality deprivation as 'the total destruction of the individual's status in organized society'.[653] By contrast, as I have argued in my second chapter, my assessment of deprivation regimes works with a less absolute understanding of citizenship and follows instead a liberal-republican conception. This approach fully acknowledges the importance and significance of citizenship to the individual, but also recognizes the link and interdependence between such a personal value and the good of the community. Thus, the liberal-republican idea of citizenship that I rely on does include civic obligations which, if breached, may entail involuntary citizenship loss. Since this understanding, by necessity, clashes with a rights-based approach, I will not discuss such challenges to the lawfulness (or legitimacy) of nationality deprivation in this chapter.

III. The lawfulness of nationality deprivation

In light of my preliminary considerations, I will now proceed to a detailed analysis of the lawfulness of deprivation measures in the EU and the UK. I will do so by assessing scholarly arguments against nationality deprivation as well as the relevant case law, especially the jurisprudence of the ECtHR and the CJEU. The return to international case law has several benefits for our inquiry: it allows us to consider the applicants' arguments, which may often be paired with key traits of the scholarly criticism of deprivation regimes, alongside their judicial analyses. Both helpfully illustrate not only what an abstract legal debate on the lawfulness of deprivation measures may look like, but also how it applies to the concrete scenario of the case at hand. In addition, international case law generally also reviews the relevant domestic

[652] Shaub, "Expatriation restored," 432.
[653] *Trop v. Dulles*, 356 US 86 (1958), at 101.

legislation as well as the preceding national court judgments. Thus, it enables us to take into consideration a broader range of national views.

Before using this valuable source for an in-depth evaluation of the lawfulness of nationality deprivation, I would like to make a more general point: contrary to a common objection against deprivation regimes,[654] there is no general ban on nationality deprivation in international law. To make this argument, critics of the measure often refer to provisions, such as Article 15 of the Universal Declaration of Human Rights (UDHR), Article 12(4) of the International Covenant on Civil and Political Rights (ICCPR), Article 7 of the European Convention on Nationality (ECN), and Article 8 of the 1961 UN Convention on the Reduction of Statelessness. However, these international legal instruments do not support such a restrictive reading: while they clearly limit national deprivation powers, they do not prohibit them in general.

Article 15(1) UDHR establishes that '[e]veryone has the right to a nationality' and subsection (2) adds that '[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality'. In the context of a lawfulness assessment, we must note that the UDHR is not a legally binding document; it only formalises a strong commitment by the signatory states.[655] Given such a commitment, the qualification of 'arbitrariness' suggests, I propose, that non-arbitrary citizenship deprivation is, in principle, permissible. In addition, I would argue that a 'right to a nationality' does not imply the right to a specific nationality of one's choosing. Thus, in my reading, situations in which a multi national loses one of their nationalities due to a non-arbitrary deprivation decision would not violate Article 15(1) UDHR. I would propose a similar reading of Article 12(4) ICCPR ('No one shall be arbitrarily deprived of the right to enter his own country'), with the qualification that, here, the focus lies on (re)entry rather than nationality as such.

As I have discussed in detail in Chapter Two (Section III), Article 7 ECN and Article 8 of the 1961 Convention do express a general ban on nationality deprivation, but they also include the exception that states may deprive individuals of nationality if their conduct is 'seriously prejudicial to the vital interests of the State' (see Article 7(1)lit.d ECN and Article 8(3)lit.a(ii) 1961 Convention). While the ECN only allows this exception if statelessness is not a possible consequence (Article 7(3) ECN), the 1961 Convention even accepts this outcome, for both birth-right and naturalised citizens.[656] One might add that nationality deprivation, in my

[654] Paulussen, "Towards a Right to Sustainable Security of Person in Times of Terrorism? Assessing Possibilities and Limitations Through a Critical Evaluation of Citizenship Stripping and Non-Repatriation Policies," 224. Macklin, "Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien," 10-11.
[655] https://www.ohchr.org/en/issues/srhrdefenders/pages/declaration.aspx (last accessed: 23/03/2023).
[656] Carey, "Against the right to revoke citizenship," 897.

understanding, cannot truly clash with the ECN or the 1961 Convention. After all, my second chapter has been drawing on both in order to arrive at a definition of nationality deprivation in the first place.

Consequently, deprivation of nationality is, in principle, permissible under international law.[657] However, as we have seen in the exceptional applicability of the measure in the ECN and the 1961 Convention, the explicit prohibition of statelessness in the UDHR and the ECN as well as the additional requirement of non-arbitrariness, mentioned in the UDHR and the ICCPR, international law instruments only allow deprivation measures if certain legal standards are met. As we have seen, these include, in particular, non-arbitrariness and a limit on statelessness.[658]

Similar to the approach of international legal instruments, both the ECtHR and the CJEU acknowledge, in principle, a state's prerogative to decide whether, and if so under what circumstances, it allows nationality deprivation. Accordingly, in the five deprivation cases concerning terrorist conduct that the ECtHR has ruled on to date, the Court never found issue with a state's general right to implement deprivation proceedings.[659] This position is rooted in the principle of state sovereignty, which allows the state exclusive authority in areas that touch upon its core elements. Scholars have questioned the applicability of state sovereignty to matters of nationality. Thus, Audrey Macklin refers to 'the [misguided] popular belief that excluding noncitizens is the ultimate prerogative of sovereignty';[660] and other critics, especially those not only opposing deprivation regimes, but also restrictive approaches to nationality and immigration more broadly, have shared this view. Here, we might think of Reg Whitaker's condemnation of strict national border controls as a 'desire to reaffirm traditional national sovereignty'.[661] By contrast, international case law confirms that all matters of nationality fall, in principle, within the remit of a state's sovereignty. A famous example is the Nottebohm Case

[657] See also: Bauböck and Paskalev, "Cutting genuine links: a normative analysis of citizenship deprivation," 53. Esbrook, "Citizenship unmoored: expatriation as a counterterrorism tool," 1300-01.
[658] On these limitations of deprivation measures, see also Mantu, "'Terrorist' citizens and the human right to nationality," 31.
[659] ECtHR, *K2 v. the UK*; ECtHR, *Mubarak v. Denmark*; ECtHR, *Ghoumid and Others v. France*; ECtHR, *Johansen v. Denmark*; ECtHR, *Laraba v. Denmark*. In addition, there are currently two proceedings pending before the ECtHR (*El Aroud v. Belgium*, application no. 25491/18, filed 25 Mai 2018; *Soughir v. Belgium*, application no. 25491/18, filed 30 Mai 2018). For the position of the CJEU, see: CJEU, *Tjebbes and Others v. Minister van Buitenlandse Zaken*, §30. CJEU, *Rottmann v. Freistaat Bayern*, §43.
[660] Audrey Macklin, "Borderline Security," in The Security of Freedom, ed. Daniels Ronald, Macklem Patrick, and Roach Kent (Toronto: University of Toronto Press, 2016), 389.
[661] Reg Whitaker, "Refugees: The security dimension," Citizenship Studies 2, no. 3 (1998): 414, https://doi.org/10.1080/13621029808420692. See also: Lucia Zedner, "Citizenship Deprivation, Security and Human Rights," *European Journal of Migration and Law* 18, no. 2 (2016): 241, https://doi.org/10.1163/15718166-12342100.

(*Liechtenstein v. Guatemala*) of 1955, where the judgment of the ICJ has asserted states' authority concerning the regulation of nationality. As we have seen in Chapter Two (Sections III and IV.3), this ruling has also been supported by the ECtHR in *Petropavlovskis v. Latvia* (2015). And the CJEU makes a very similar point in *Rottmann v. Freistaat Bayern* (2010): 'according to established case-law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality'.[662] Thus, Dimitry Kochenov is certainly right when he describes 'the freedom of states to decide who their nationals are' as 'one of the holiest emanations of the principle of state sovereignty'.[663] Naturally, this does not mean that states are without legal restraints when it comes to their implementation of deprivation powers. Here, we may recall the restrictions invoked in the legal instruments above. In addition, the ECtHR and CJEU have also established tests which they use to determine the lawfulness of a given national deprivation measure.

In the case of the ECtHR, this test derives from the Court's approach to the related scenario of a citizen's challenge against the refusal of their citizenship acquisition. For a relevant case, let us return, once again, to *Petropavlovskis v. Latvia*[664]. Here, the applicant argued that the state's refusal of his naturalisation violated Articles 10, 11 and 13 ECHR.[665] The ECtHR denied the applicant's claim, by observing that 'decisions on naturalisation […] are matters primarily falling within the domestic jurisdiction of the State',[666] and neither the ECHR nor its protocols provide for a right 'to acquire or retain a particular nationality'.[667] However, the Court also noted that the state was nonetheless bound by the Convention in its decision,[668] and its refusal to grant citizenship needed to qualify as neither arbitrary nor in breach of Article 8 ECHR (right to private life) in its consequences for the individual.[669] This assessment notably differs from the position held by the EComHR in *Family K. and W. v. the Netherlands* (1985). Here, the Commission merely observed that the ECHR does not grant the right to acquire a particular nationality and that the applicant thus could not rely on the Convention to oppose the state's refusal of citizenship.[670] The ECtHR has applied the same reasoning it developed for

[662] CJEU, *Rottmann v. Freistaat Bayern*, §39.
[663] Dimitry Kochenov, "Double Nationality in the EU: An Argument for Tolerance," Article, *European Law Journal* 17, no. 3 (2011): 323, 27, https://doi.org/10.1111/j.1468-0386.2011.00553.x.
[664] See also: ECtHR, *Riener v. Bulgaria*, application no. 46343/99, 23/05/2006 (final: 23/08/2006), §151 with further references.
[665] ECtHR, *Petropavlovskis v. Latvia*, §3.
[666] ECtHR, *Petropavlovskis v. Latvia*, §80.
[667] ECtHR, *Petropavlovskis v. Latvia*, §73.
[668] ECtHR, *Petropavlovskis v. Latvia*, §73. See also: ECtHR, *Riener v. Bulgaria*, §151 with further references.
[669] ECtHR, *Karassev and family v. Finland*, application no. 31414/96, decision 12/01/1999, p. 10-11.
[670] EComHR, *K. and W. v. the Netherlands,* application no. 11278/84, decision 01/07/1985, p. 220.

naturalisation cases also to the voluntary renunciation of citizenship[671] and – most importantly for our concerns – to deprivation proceedings. Indeed, the Court has explicitly linked its position on the acquisition of citizenship and its deprivation in *Ramadan v. Malta*:[672] 'there is no reason to distinguish between the two situations [acquisition and loss of citizenship] and the same test should therefore apply'.[673] Thus, in the Court's assessment, deprivation measures also need to be examined for violations of the Convention, especially due to their arbitrariness or harmful consequences to the right of private life pursuant to Article 8 ECHR.[674]

The CJEU applies a slightly different approach. This difference arises from the Court's acknowledgement of the circumstance that a national citizenship deprivation may jeopardise the status and rights of the individual's Union citizenship, as protected by Article 20(1) TFEU. In *Rottmann v. Freistaat Bayern*, the CJEU ruled on the question of whether EU law prevents a MS from revoking (fraudulently acquired) citizenship if this results in the citizen's statelessness.[675] The Court found that while each MS may, in principle, establish the legal requirements for acquisition and loss of their citizenship,[676] the citizen's status as an EU citizen granted them important rights, pursuant to Article 20(2) TFEU.[677] Thus, in the view of the CJEU, a MS' decision to withdraw an individual's national citizenship needed to account, not only for the measure's consequences at the national level, but also at the level of the EU.[678] In order to assess these consequences, the CJEU conducts a proportionality test for national deprivation measures, an assessment that the ECtHR only requires for an expulsion order and not for the initial deprivation proceedings. As part of its proportionality test, the CJEU considers the relationship between loss of nationality and 'the gravity of the offence committed', the time between naturalisation decision and nationality loss and, finally, whether it is possible for the individual concerned to recover their original nationality.'[679] According to the CJEU, loss of EU citizenship is only lawful if such a proportionality test reveals that the measure does not constitute an unproportionate interference with the rights and interests of EU citizens.[680]

[671] ECtHR, *Riener v. Bulgaria*, §§153-154.
[672] ECtHR, *Ramadan v. Malta*, §85.
[673] ECtHR, *Ramadan v. Malta*, §85.
[674] ECtHR, *Ramadan v. Malta*, §85.
[675] For a discussion, see: Gerard-René de Groot and Maarten Peter Vink, "Best Practices in Involuntary Loss of Nationality in the EU," *CEPS Paper in Liberty and Security in Europe* no. 73 (2014): 3.
[676] CJEU, *Rottmann v. Freistaat Bayern*, §43.
[677] CJEU, *Rottmann v. Freistaat Bayern*, §55.
[678] CJEU, *Rottmann v. Freistaat Bayern*, §55.
[679] CJEU, *Rottmann v. Freistaat Bayern*, §56.
[680] de Groot and Vink, "Best Practices in Involuntary Loss of Nationality in the EU," 3.

In brief, both courts accept the existence of national deprivation measures, in principle, but they subject them to scrutiny for compliance with international law: whereas the ECtHR applies a test of arbitrariness and considers the consequences of deprivation measures, especially with a view to establishing their compliance with Article 8 ECHR, the CJEU reviews the measure in accordance with a proportionality principle. Interestingly, the ECtHR regards 'arbitrariness […] a stricter standard than that of proportionality'.[681] In my examination of the lawfulness of deprivation regimes, I will combine aspects of both standards. Thus, a proportionality assessment as well as the question of arbitrariness, especially regarding procedural fairness, will feature prominently in my analyses. I will also address the consequences of nationality deprivation as part of my proportionality assessment. Aside from these aspects, I will evaluate deprivation measures in light of other legal principles that appear particularly prominently in scholarly discussions of deprivation regimes. This yields the following criteria that I will use to determine the lawfulness of deprivation measures: compliance with the principles of 1. non-discrimination; 2. non-arbitrariness and procedural fairness; 3. proportionality; 4. freedom of conscience; and, finally, 5. international comity.

1. The principle of non-discrimination

One of the most prominent aspects in scholarly discussions about nationality deprivation is the measure's alleged violation of the principle of non-discrimination. The central criticism, in this case, is that deprivation powers unduly create different 'classes'[682] or 'tiers'[683] of citizens. As we have seen in my first chapter (see the overview table in Section IV.2), several MSs and the UK distinguish in their deprivation regimes between citizens according to (i) whether they have acquired their citizenship by birth or naturalisation and (ii) whether they are mono or multi nationals. Some states, for instance the UK, also combine these two criteria. As a consequence, citizens of a particular group – especially multi nationals who have acquired citizenship by naturalisation – are more likely to fall within the scope of deprivation regimes than others. Mono nationals, in particular, often formally benefit from limits against statelessness.

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[681] ECtHR, *K2 v. the UK*, §61.
[682] Paulussen, "Towards a Right to Sustainable Security of Person in Times of Terrorism? Assessing Possibilities and Limitations Through a Critical Evaluation of Citizenship Stripping and Non-Repatriation Policies," 226.
van Waas and Jaghai-Bajulaiye, "All citizens are created equal, but some are more equal than others," 420.
[683] Institute on Statelessness and Inclusion, *Draft Commentary to the Principles on Deprivation of Nationality as a Security Measure*, 42. The UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Amicus Brief (23 October 2018): available at: https://www.ohchr.org/Documents/Issues/Racism/SR/Amicus/DutchImmigration_Amicus.pdf, §§36ff (last accessed: 23/03/2023).

Critics have asserted that this poses a conflict with liberal or constitutional democracy because it violates citizens' equality of status.[684] According to Christopher Bertram, this equality encompasses both equality of enjoyment of rights and equality before the law.[685] In Bertram's view, nationality deprivation 'undermines equality within the class of supposedly equal citizens because of the way the commitment not to render people stateless actually only protects certain citizens and not everyone'.[686] In this assessment, deprivation measures give preferential treatment to mono nationals in a discriminatory fashion. We find a similar position in the Amicus Brief to the Dutch Immigration and Naturalisation Service by E. Tendayi Achiume, the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance. Here, Achiume observes that the differentiation between mono and multi nationals creates 'discriminatory tiers of citizenship' incompatible with human-rights law.[687] Similarly, the Institute on Statelessness and Inclusion has emphasised that deprivation distinctions based on the number of nationalities or the mode of citizenship acquisition 'dangerously result in two different tiers of citizenship'.[688] Such arguments assert that the distinction between different citizen groups in deprivation regimes violates equality principles and clashes, in particular, with a citizen's legal right of non-discrimination.

The ECtHR has a long-standing history of jurisprudence on questions of discrimination, which may help us define the concept more precisely and identify its specific legal requirements. Article 14 ECHR establishes a prohibition of discrimination:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

In *Biao v. Denmark* (2016), the ECtHR explains that, for state conduct to qualify as discriminatory under Article 14, it needs to make 'differences in treatment based on an identifiable characteristic, or "status"', such as race, national or social origin and birth.[689] In addition, such

[684] Bertram, "Citizenship Deprivation: A Philosopher's Perspective," 193-96.
[685] Bertram, "Citizenship Deprivation: A Philosopher's Perspective," 193-96.
[686] Bertram, "Citizenship Deprivation: A Philosopher's Perspective," 193-96. Cf. Carey, "Against the right to revoke citizenship," 901. Tamara Lenard, "Democracies and the Power to Revoke Citizenship," 73.
[687] The UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Amicus Brief (23 October 2018), §§36ff.
[688] Institute on Statelessness and Inclusion, *Draft Commentary to the Principles on Deprivation of Nationality as a Security Measure*, 42.
[689] ECtHR, *Biao v. Denmark*, application no. 38590/10, judgment 24/05/2016, §89.

differential treatment needs to occur in 'analogous, or relevantly similar, situations'.[690] If these criteria are met, the Court observes, the state act registers as a discrimination only 'if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.'[691] Based on the Court's comments in *Biao v. Denmark*, arguments of discrimination thus need to establish four different points: (i) a difference in treatment, (ii) an identifiable characteristic, (iii) an analogous situation, and (iv) the absence of an objective and reasonable justification.

The Court applied these criteria, for instance, in the 1991 case of *Moustaquim v. Belgium*. Here, the applicant, a Moroccan national and Belgian resident, submitted that his deportation order violated the principle of non-discrimination protected by Article 14.[692] In support of his submission, the applicant argued that the deportation he was subject to, as a non-Belgian and non-EU citizen, did not apply to Belgian and EU citizens.[693] In its judgment, the Court found that the applicant's deportation was not a discriminatory state act. In the Court's assessment, the applicant had not been in a situation comparable to Belgian and EU citizens, because he was not a Belgian and EU citizen. Consequently, there was no necessity of his equal treatment by the Belgian state or his equal enjoyment of the rights protected by the Convention.[694] In addition, the Court referred to Article 3 of Protocol No. 4 (P4-3) and noted that, unlike the applicant, Belgian citizens 'have a right of abode in their own country and cannot be expelled from it'.[695] With regard to EU nationals, the Court observed that they did receive better treatment than the applicant, since they could not be deported, but it found that this difference in treatment was justified.[696] The 'objective and reasonable justification' for this difference, the Court argued, lay in Belgium's membership in the 'special legal order' of EU Member States.[697]

Based on the ECtHR criteria for identifying discrimination, we will consider below whether nationality deprivation does indeed constitute a discriminatory state act. Before we do so, however, I would like to briefly present two related charges frequently levelled against deprivation measures, often as part of a broader critique of their allegedly discriminatory

[690] ECtHR, *Case of Biao v. Denmark*, §89.
[691] ECtHR, *Case of Biao v. Denmark*, §89.
[692] ECtHR, *Moustaquim v. Belgium*, application no. 12313/86, 18/02/1991, §48.
[693] ECtHR, *Moustaquim v. Belgium*, §48.
[694] ECtHR, *Moustaquim v. Belgium*, §49.
[695] ECtHR, *Moustaquim v. Belgium*, §49.
[696] ECtHR, *Moustaquim v. Belgium*, §49.
[697] ECtHR, *Moustaquim v. Belgium*, §49.

nature: accusations of exclusionism and racism. Thus, critics have argued that nationality deprivation violates 'the idea of inclusive citizenship for all'.[698] More specifically, the measure's distinction between different groups of citizens has been condemned as fostering racism and xenophobia. Christopher Bertram pursues precisely such an argument. Stressing the role that nationality deprivation has played in authoritarian regimes, such as Nazi-Germany, and their pursuit of 'ethnic and racial purity',[699] he suggests that also modern-day governments implement deprivation powers with racist and exclusionist intent. In official 'narratives', he claims, this true motive is often veiled by 'proxy' objectives, such as safeguarding national security against terrorist threats, or responding to failed duties of loyalty.[700] These state narratives, he argues, often promote the idea of a state in which individuals acting contrary to the people, or just differently from them, lose their position within the state, excluding especially those from minority and migration backgrounds.[701] Rachel Pougnet offers a case in point, when she quotes Marine Le Pen in order to highlight the populist and racist rhetoric of deprivation policies: 'How many Mohamed Merah in the boats, planes, which arrive every day in France full of immigrants? How many Mohamed Merah amongst the children of non-assimilated immigrants?'[702]

E. Tendayi Achiume takes a similar position on deprivation regimes and argues that, even as they pursue objectives like national security, they might 'have racially, ethnically or religiously specified targets'.[703] Here, she is concerned, in particular, with legislations in the MSs that allow nationality deprivation for (suspected) terrorists if they also hold other citizenships.[704] Regarding these legislations, she argues that, 'in most of these places [EU jurisdictions], another EU nationality does not count as an additional nationality': only those EU citizens who do not have another EU citizenship as their other nationality are threatened by European deprivation measures.[705] Thus, she asserts, EU citizens also holding 'North African and other so called "non-western" nationalities' are 'disproportionately' targeted by counter-

[698] Ernst M.H. Hirsch Ballin, "Restoring Trust in the Rule of Law," *Tilburg Law School Research Paper*, no. 04 (2018). Ernst Hirsch Ballin, "Restoring Trust in the Rule of Law," in *Human Dignity and Human Security in Times of Terrorism*, ed. Christophe Paulussen and Martin Scheinin (The Hague: T.M.C. Asser Press, 2020). Gibney, "Should Citizenship Be Conditional? The Ethics of Denationalization," 651.
[699] Christopher Bertram, "The Power to Deprive – Introduction," ed. The Institute on Statelessness and Inclusion (ISI), *The Wordl's Stateless – Deprivation of Nationality* (2020). 131.
[700] Bertram, "The Power to Deprive – Introduction," 134-35.
[701] Bertram, "The Power to Deprive – Introduction," 134.
[702] Pougnet, "Cancellation of citizenship and national security: A comparison between France and the UK," 133-34.
[703] Brown, "Interview with Tendayi Achiume," 155.
[704]Brown, "Interview with Tendayi Achiume," 157.
[705] Brown, "Interview with Tendayi Achiume," 157.

terrorism deprivation laws.[706] On this basis, she considers many European deprivation regimes racist.[707] I would like to emphasise that, in my research, I could not find any legislative support for the claim that EU jurisdictions favour multi nationals holding other EU citizenships. It is my understanding that no deprivation power in the MSs that requires an additional nationality attaches qualifying criteria to this nationality. In other words, such powers apply equally to all multi nationals, irrespective of whether their other nationalities lie within the EU or outside.

Achiume and other scholars have also suggested that deprivation powers, while not openly discriminating against certain religions, nations or races, may nonetheless have a 'disproportionate effect on marginalised racial, national and religious groups', especially on individuals of Islamic belief.[708] In Achiume's assessment, this is the case, in particular, if deprivation measures arise from 'overbroad policies ostensibly rooted in national security concerns [which] permit arbitrary enforcement – including arbitrary deprivation of citizenship'[709] Similarly, Audrey Macklin criticises that the relatively small number of individuals deprived of nationality in the UK almost exclusively consists of male Muslim multi nationals;[710] and Tufyal Choudhury observes that citizenship laws of the UK have resulted in 'a hierarchy among British citizens', in which Muslim citizens are in danger of being seen as 'the barbaric Other' if their commitment to British values comes under scrutiny.[711] Related arguments have also been made about other European states. Thus, Christian Joppke has noted that French deprivation practices appear to primarily target French nationals with North African background.[712] Likewise UN research has argued that Dutch deprivation measures disproportionately affect minority groups, and lead to loss of nationality primarily for dual nationals of the Netherlands and Turkey or Morocco.[713]

In light of such criticism of the perceived discrimination of nationality deprivation, and its racist and exclusionist aspects, let us turn to a more detailed analysis of the extent to which the measure may indeed be regarded as discriminatory. To this end, I will examine the two key

[706] Brown, "Interview with Tendayi Achiume," 157.
[707] Brown, "Interview with Tendayi Achiume," 157.
[708] Achiume, *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, 17-18. See also: Huq, "The Uses of Religious Identity, Practice, and Dogma in in 'Soft' and 'Hard' Counterterrorism.," 77-98. Choudhury, "The radicalisation of citizenship deprivation," 225-44. Masters and Regilme, "Human Rights and British Citizenship: The Case of Shamima Begum as Citizen to Homo Sacer," 3.
[709] Achiume, *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, 17-18.
[710] Macklin, "Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien," 7.
[711] Choudhury, "The radicalisation of citizenship deprivation," 225.
[712] Joppke, "Terror and the loss of citizenship," 745-46.
[713] The UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Amicus Brief (23 October 2018), §§47ff.

distinctions that deprivation regimes make between citizens and evaluate their discriminatory force: i. the difference between citizens according to their different modes of citizenship acquisition, and ii. the difference between citizens with different numbers of nationalities.

i. Difference in the mode of citizenship acquisition: birth-right citizens *vs*. naturalised citizens

As we regard the distinction made in deprivation measures between citizens who have acquired their citizenship in different ways, we may make two initial observations: first, this distinction usually differentiates between birth-right and, broadly speaking, naturalised citizens; and second, only the latter tend to fall within the scope of deprivation regimes in the MSs and the UK. I agree that this distinction creates two classes of citizenship; but does it create a discrimination, in a legal sense?

To answer this question, we first need to observe that, for instance, Article 5(2) of the ECN constitutes an obligation for the signatory states to refrain from discriminatory treatment between nationals based on how their citizenship was obtained. If we return to the ECtHR criteria for discrimination above, we may thus identify a characteristic of discriminatory distinction (mode of citizenship acquisition), which leads to a difference in treatment ((non)deprivation of nationality) in an analogous situation (status of national citizenship, identical deprivation requirements). This leaves us with the question of whether there is an objective and reasonable justification for the difference made between the treatment of birth-right and naturalised citizens in deprivation regimes.

Two justifications have been offered in the national case law to date. The first assumes that there is a difference between citizenship acquired by birth and by naturalisation or, more specifically, between the bond they each create between citizen and civic community. Article 23 of the Belgian Nationality Law offers an example of a deprivation legislation distinguishing between different modes of citizenship acquisition – and, as we will see, of precisely this justification. As I mentioned earlier (for instance, in Section IV.3.iii of Chapter One), the Belgian provision establishes involuntary loss of nationality, *inter alia*, for a citizen's serious failures in their duties as a Belgian citizen (Article 23(1)No.2: 's'ils manquent gravement à leurs devoirs de citoyen belge').[714] It only applies to citizens who have acquired nationality by way of naturalisation (pursuant to Article 12bis). By contrast, those who have acquired Belgian citizenship by birth right, that is, by birth or adoption to Belgian parents or by birth to non-

[714] Art.23(1)No.2 of the Belgian Nationality Law.

nationals meeting certain additional residence requirements (under Article 11), may not lose their nationality pursuant to Article 23.

Helpfully for our concerns, the Belgian Constitutional Court has already addressed the question of whether the ensuing distinction qualifies as a discrimination. In 2009, a Court of Appeal submitted a preliminary question to the Court, asking whether the exclusion of certain citizens pursuant to Article 23, based on their mode of citizenship acquisition, violated Articles 10 and 11 of the Belgian Constitution, especially the principle of non-discrimination.[715] In response, the Constitutional Court found that the unequal applicability of Article 23, on the basis of how citizenship had been acquired, was within the discretionary power of the legislator and justified.[716] More specifically, the Court argued that the distinction between birth-right and naturalised citizens reflected a difference in their respective bonds of citizenship: in contrast to birth-right citizens, naturalised citizens did not have a similarly close and long-standing relationship with the Belgian community.[717] In this context, the Court also pointed to Belgian naturalisation proceedings, in which behaviour violating Belgian civic duties prevented an individual from acquiring citizenship.[718] In the Court's assessment, the legislator extended the same requirement that it applied to the acquisition of citizenship also to its loss, for those who had initially gained their citizenship by naturalisation.[719] Overall, the Constitutional Court thus found that the differentiation of the Belgian deprivation legislation did not violate citizens' right of non-discrimination.[720]

We may find another example of a deprivation measure distinguishing between birth-right and naturalised citizens in the French deprivation regime, which is established by Articles 25 and 25(1) of the French Civil Code. As we will see, the differential treatment of both citizen groups in the French regime relies on a different rationale. Introduced in 1996, Article 25(1) allows the French state, in Patrick Wautelet's words, 'to deprive a citizen of its nationality as a counterterrorism tool'.[721] Like Belgium, France limits nationality deprivation to naturalised citizens: Article 25(1) establishes that convictions for certain criminal conduct, involving attacks against the French Republic and its fundamental interests or acts of terrorism, may lead

[715] Constitutional Court of Belgium, case no. 85/2009, judgment 14/05/2009, I. Objet de la question préjudicielle et procedure and B.2.1.
[716] Constitutional Court of Belgium, case no. 85/2009, B.7-8.
[717] Constitutional Court of Belgium, case no. 85/2009, B.8.
[718] Constitutional Court of Belgium, case no. 85/2009, B.9.
[719] Constitutional Court of Belgium, case no. 85/2009, B.9.
[720] Constitutional Court of Belgium, case no. 85/2009, B.11.
[721] Wautelet, "Deprivation of citizenship for 'jihadists' - Analysis of Belgian and French practice and policy in light of the principle of equal treatment," 49-74.

to citizenship deprivation for naturalised French citizens.[722] Unlike its Belgian counterpart, however, the French deprivation regime appears to suggest that the differential treatment of naturalised citizens is only desirable for a certain period after the naturalisation. Thus, Article 25(1) requires that the citizen's conduct qualifying for deprivation needs to occur before their acquisition of French citizenship or within ten years afterwards. Furthermore, the deprivation decree can only be issued within ten years after the acts have been committed. In cases of particularly severe crimes, including terrorist acts, the ten-year exclusion period is extended to 15 years.

The case of Ahmed Sahnouni, tried before the French Constitutional Court in 2015, reveals the justification that underpins the differential treatment of birth-right and naturalised citizens pursuant to Article 25(1) of the French Civil Code. Sahnouni, a Moroccan citizen who acquired French citizenship by naturalisation in 2003, received a seven-year prison sentence for membership in a terrorist organisation and was subsequently deprived of his French citizenship in May 2014.[723] Sahnouni challenged the legality of the deprivation decree by arguing that Article 25(1) was unconstitutional since its exclusive applicability to naturalised citizens violated the principle of equality enshrined in Article 6 of the 1789 Declaration of the Rights of Man and the Citizen. Like the Belgian Constitutional Court, the Conseil constitutionnel found that the differential treatment of naturalised and birth-right citizens was justified. Unlike its Belgian counterpart, the French Court based its reasoning on the legislator's aim to support the fight against terrorism.[724] In an earlier judgment, the Court had ruled that the inequality caused by Article 25(1) between birth-right and naturalised citizens did not violate the principle of equality, provided that there was a time limit after which naturalised citizens, just like birth-right citizens, were protected from citizenship deprivation.[725] In its 2015 judgment, the Court established that the principle of non-discrimination was not violated if a legal act fell short of this

[722] François Hollande proposed an amendment to the French deprivation legislation, which would have extended its applicability to birth-right citizens who were also multi nationals. However, the proposal failed since no agreement could be reached between the Assemblée Nationale and the Sénat, in part because the increased equality established by the amendment for all French citizens was still limited by the dual-nationality requirement, unless both chambers were prepared to accept statelessness as a possible outcome (which the Sénat was not). Lepoutre, "Citizenship Loss and Deprivation in the European Union (27 + 1)," 11-12. Kim Willsher, Hollande drops plan to revoke citizenship of dual-national terrorists, The Guardian, 30 March 2016; available at: https://www.theguardian.com/world/2016/mar/30/francois-hollande-drops-plan-to-revoke-citizenship-of-dual-national-terrorists?CMP=share_btn_link (last accessed: 23/03/2023). Mantu, "'Terrorist' citizens and the human right to nationality," 37.

[723] https://www.france24.com/en/20150123-court-backs-strip-jihadist-french-nationality-morocco-terrorism-conseil-constitutionnel. https://www.icj.org/december-january-icj-e-bulletin-on-counter-terrorism-and-human-rights-no-89/ (last accessed: 23/03/2023).

[724] Conseil constitutionnel, decision no. 2014-439 QPC, §13.

[725] Conseil constitutionnel, decision no. 96-377 Dc, §23.

principle for public interest reasons,[726] under the condition that the unequal treatment was proportionate to the aim the act pursued.[727] In this light, the Court ruled that, while the exclusive applicability of Article 25(1) to naturalised citizens constituted an unequal and discriminatory treatment, in principle,[728] it still did not qualify as such due to its nature as a counter-terrorism tool, 'given the serious intrinsic gravity of offences of terrorism'.[729]

We may conclude that the Constitutional Courts of both Belgium and France acknowledge that the distinction made in deprivation regimes between birth-right and naturalised citizens constitutes an unequal treatment, but that each considers this inequality justified – the Belgian Court due to a perceived difference between the citizenship bond in both cases (an argument that we may see at work also in the French deprivation measure, at least within its time frame of applicability), and the French Court due to the significance of deprivation powers in the fight against terrorism. I do not find either of these justifications particularly convincing. While there is a point to be made for some kind of distinction between birth-right citizens and naturalised citizens if the latter only had their citizenship for a relatively short period of time, – and the French time limit appears to do precisely that – it is certainly difficult to argue for a general difference in the bond between the civic community and a birth-right or naturalised citizen respectively, as the Belgian Constitutional Court appears to do.

If we understand nationality deprivation, as I am suggesting in this thesis, as a response to a citizen's transgression of their duty of loyalty towards the civic community and its core principles, it appears necessary that we extend this duty, as far as possible, to every citizen, irrespective of how they acquired their citizenship in the first place. It is not the specific mode of citizenship acquisition that constitutes such a duty, but citizenship itself. In this light, I would argue that deprivation regimes ought to apply equally to birth-right and naturalised citizens. Furthermore, I propose, the question of a citizen's precise ties to the civic community, including the period of time for which they have held their citizenship, may enter a deprivation decision at a different point. Rather than distinguishing in its applicability between birth-right and naturalised citizens, a deprivation measure may analyse the precise circumstances of the individual concerned when it assesses, for instance, the impact that a deprivation is likely to have for them and their family. And, we have seen for Finland above, many deprivation legislations include such an examination of personal circumstances.

[726] Conseil constitutionnel, decision no. 96-377 Dc, §23.
[727] Conseil constitutionnel, decision no. 96-377 Dc, §23.
[728] Conseil constitutionnel, decision no. 96-377 Dc, §23.
[729] Conseil constitutionnel, decision no. 96-377 Dc, §23.

ii. Difference in the number of citizenships held: mono nationals *vs.* multi nationals

As I have indicated above, there is another distinction made by many deprivation regimes that has given rise to vocal accusations of discrimination: the distinction between mono and multi nationals. The requirement of an additional nationality appears in most, but not all, deprivation powers in the MSs and the UK.[730] We have already seen that this form of differentiation has often been considered discriminatory because it creates two classes of citizens: while one is protected from nationality deprivation [mono nationals], the other does not enjoy the same security of citizenship [dual citizens].

In light of the ECtHR criteria above, the hallmark for deciding whether this differential treatment does indeed constitute a discrimination is yet again the existence of an objective and reasonable justification. The reason most prominently offered for the distinction between mono and multi nationals in deprivation regimes is the necessity to prevent statelessness. Following this reasoning, a multi national deprived of one of their nationalities still has other nationalities to fall back on. Some, but not all, justifications along these lines also point to an international-law requirement to prevent statelessness.

Judiciary decisions, in particular, appear to draw on this rationale. For an example, we may think, once again, of *Islam v. Secretary of the State for the Home Department*. Here, the Court found that the distinction made in the deprivation provision of the UK between multi and mono nationals 'clearly' amounted to a discrimination.[731] However, it characterised this discrimination as 'plainly justifiable' since it was an expression of the UK's aim to comply with the obligation under international law to prevent statelessness.[732] Similarly, the Netherlands have defended their deprivation distinction between mono and multi nationals, and argued that the aim to prevent statelessness made the 'divide' between Dutch nationals who hold one nationality and those who hold more than one a legitimate one.[733]

The judicial characterisation of the differential treatment of mono and multi nationals as a justifiable discrimination has met with strong opposition in the literature. As we have seen above, many scholars have criticised the two-tier system of citizenship that this treatment creates. More specifically, critics have variously condemned the notion that the imperative to prevent statelessness is a sufficient reason for the discriminatory application of deprivation

[730] See the overview table in Section IV.2 of Chapter One. The following MSs do not have such a requirement: Cyprus, Estonia, Ireland, Italy, Malta (for one of its deprivation powers), and Romania.
[731] The High Court of Justice, *Islam v. Secretary of the State for the Home Departmen*t, no: CO/1802/2019, judgment 07/08/2019, EWHC 2169 (Admin), §41.
[732] *Islam v. Secretary of the State for the Home Department*, §41.
[733] Translation by van Waas and Jaghai-Bajulaiye, "All citizens are created equal, but some are more equal than others," 422.

measures to certain citizens. Accordingly, the Institute on Statelessness and Inclusion has asserted that the prevention of statelessness 'cannot be a legal justification or defence for exposing dual nationals to citizenship stripping'.[734] More specifically, Christophe Paulussen has challenged the proportionality of deprivation measures exclusively applied to multi nationals. In particular, he has argued that there are obviously less intrusive alternative measures available, such as incarceration, that are applied to mono nationals who otherwise meet the requirements of deprivation.[735] Others have found issue with the strong reliance on international-law obligations that the judicial justification suggests. Thus, Tom L. Boekestein and Gerard-René de Groot have argued that compliance with international law, in the matter of statelessness as well as regarding other concerns, cannot justify every form of discrimination.[736] Otherwise, states could simply circumvent the binding nature of human rights, by making international treaties that require them to do so.[737] In addition, like many critics mentioned above, the authors suggest that deprivation regimes do not actually pursue the aim they claim to pursue: in their view, states' true objective for their discriminatory deprivation powers is the protection of national security, not the prevention of statelessness.[738] However, as Boekestein and de Groot stress, this objective does not justify the need for treating citizens differently based on the number of citizenships they hold.[739] Finally, Audrey Macklin has drawn attention to what she considers the mistaken belief that no undue burden is placed on the individual if a multi national loses one of their nationalities.[740] In her view, only an external, statist perspective may suggest such an interchangeability of nationalities; the internal, individual perspective, by contrast, may reveal very different degrees of personal attachment and identification regarding each nationality.[741]

[734] Institute on Statelessness and Inclusion, *Draft Commentary to the Principles on Deprivation of Nationality as a Security Measure*, 42.
[735] Paulussen, "Towards a Right to Sustainable Security of Person in Times of Terrorism? Assessing Possibilities and Limitations Through a Critical Evaluation of Citizenship Stripping and Non-Repatriation Policies," 227.
[736] Boekestein and de Groot, "Discussing the human rights limits on loss of citizenship: a normative-legal perspective on egalitarian arguments regarding Dutch Nationality laws targeting Dutch-Moroccans," 326-27.
[737] Boekestein and de Groot, "Discussing the human rights limits on loss of citizenship: a normative-legal perspective on egalitarian arguments regarding Dutch Nationality laws targeting Dutch-Moroccans," 326-27.
[738] Boekestein and de Groot, "Discussing the human rights limits on loss of citizenship: a normative-legal perspective on egalitarian arguments regarding Dutch Nationality laws targeting Dutch-Moroccans," 326-27.
[739] Boekestein and de Groot, "Discussing the human rights limits on loss of citizenship: a normative-legal perspective on egalitarian arguments regarding Dutch Nationality laws targeting Dutch-Moroccans," 326-27.
[740] Macklin, "The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?," 170.
[741] Macklin, "The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?," 170.

By contrast, other scholars have offered support for the distinction between mono and multi nationals in deprivation regimes.[742] As its critics have indicated, supporters of the distinction often refer to international law for justification. Accordingly, Christian Joppke stresses that the differentiation between mono and multi nationals 'is no deliberate discrimination but unavoidable consequence of abiding by international law';[743] and David Miller notes that, while 'offend[ing]' the principle of equality, it does necessarily constitute an unjust discrimination.[744] Others have gone beyond international-law arguments in their defence of the distinction and proposed that it follows a true difference in affiliation and opportunities. Thus, Christian Barry and Luara Ferracioli have questioned whether it is possible to be 'politically loyal to more than one state',[745] suggesting that multi nationals may be conflicted in their civic loyalties in ways that mono nationals are not. Here, we might find a version of the Belgian Constitutional Court's assertion that there are differences in the civic bonds attached to birth-right and naturalised citizens. Matthew has approached the difference between multi and mono nationals from a different angle. As he argues, holding an additional nationality entitles its holder to benefits that a mono national does not enjoy.[746] These benefits include, in particular, the possibility to leave one of their countries of nationality 'should they adjudge the country undesirable or insecure', making them 'less reliant' on a particular country's circumstances and 'less in need of the same kind of absolute protection for their citizenship.'[747] In this sense, multi nationality is a sign of privilege, and not of inequality.[748] Indeed, as Ben Herzog has suggested, one might even say that the possession of multiple citizenships, and not citizenship revocation, violates the principle of political equality.[749] Following such an understanding, nationality deprivation would, in a sense, counterbalance the existing difference between multi and mono nationals.[750] In addition, while undoubtedly 'a multicultural value', Herzog asserts, multi nationality is not a 'democratic right' that may not be withdrawn.[751]

In light of the arguments on both sides, we may certainly conclude that the question of whether the distinction between mono and multi nationals in deprivation regimes is ultimately

[742] Joppke, "Terror and the loss of citizenship," 745. Gibney, "Should Citizenship Be Conditional? The Ethics of Denationalization," 655. Herzog, "The Democratic Roots of Expatriations," 261. Barry and Ferracioli, "Can Withdrawing Citizenship Be Justified?," 1063. Miller, "Democracy, Exile, and Revocation," 268.
[743] Joppke, "Terror and the loss of citizenship," 745.
[744] Miller, "Democracy, Exile, and Revocation," 268.
[745] Barry and Ferracioli, "Can Withdrawing Citizenship Be Justified?," 1063.
[746] Gibney, "Should Citizenship Be Conditional? The Ethics of Denationalization," 655.
[747] Gibney, "Should Citizenship Be Conditional? The Ethics of Denationalization," 655.
[748] Herzog, "The Democratic Roots of Expatriations," 261.
[749] Herzog, "The Democratic Roots of Expatriations," 261.
[750] Gibney, "Should Citizenship Be Conditional? The Ethics of Denationalization," 655.
[751] Herzog, "The Democratic Roots of Expatriations," 261.

justifiable or discriminatory is a challenging one. I agree that this differentiation poses an unequal treatment and would argue that the most convincing point in its opposition is Christophe Paulussen's proportionality argument. By contrast, positions denying the validity of international-law obligations, or the credibility of national justifications that draw on them, rely on the, I believe, unsubstantiated assumption that national deprivation regimes abuse international law for their own agendas. Naturally, such an abuse is theoretically possible (and would be highly problematic), but we cannot simply assume its existence as a driving force behind national and international legislation, without further evidence. Paulussen, by contrast, makes a valid observation, in my view, when he notes that the availability of less intrusive measures for mono nationals suggests that nationality deprivation is an unnecessarily severe state act applied to multi nationals. However, as I will detail in my proportionality assessment below (Section III.3), arguments of the act's intrusiveness can only be made in relation to the aim it pursues. As I have proposed in the first two chapters, nationality deprivation responding to terrorist acts in the MSs and the UK aims to formally sever the bond between a citizen and the civic community in response to that citizen's violation of their duty of loyalty towards the community's most fundamental principles. Contrary to aims like punishment, such an aim cannot truly be achieved by alternative means, which denies the possibility of a less intrusive option.

Following my line of argument, in theory, nationality deprivation should be applied equally to mono and multi nationals, because it is, I believe, the suitable response to conduct that is, as we have seen, 'seriously prejudicial' to a state's core values and interests. This means that I am not truly convinced by arguments that defend, in substance, the distinction between mono and multi nationals, as somehow reflecting their different affiliation to the state or counterbalancing the different benefits that may attach otherwise to multi nationality. As in the preceding section, I would argue that such considerations, if they should indeed be relevant to a given deprivation deliberation, could also enter the deliberation at a different point. There is no need for them to determine who a deprivation regime is applicable to, in the first place. Consequently, in my view, the only true and decisive argument for exempting mono nationals, but not multi nationals, from deprivation measures is the prevention of statelessness, in accordance with international-law principles. The ensuing inequality, I propose, is a necessary evil or, put differently, a justifiable discrimination.

There is one concern that these considerations have not addressed so far: the common accusation that the exclusive application of deprivation measures to multi nationals disproportionately affects certain demographics and thus qualifies as a racist practice. In this regard, I would like to observe that the (unfortunate but necessary) requirement of multi nationality is

most likely to apply to individuals with a background of migration. This too, I would argue, is unfortunate, but hard to avoid. At the same time, however, I would like to stress that multi nationality (and, by extension, a migration background) are preconditions of deprivation regimes, but not deprivation grounds: only those multi nationals who engage in acts so severe that they seriously threaten the very foundations of democratic society are affected by the kinds of deprivation regimes explored in this thesis.

2. The principles of non-arbitrariness and procedural fairness

Another key aspect of the scholarly criticism of deprivation powers is their alleged failure to comply with the rule of law. As a core element of liberal democracy, this principle encompasses, in particular, the prohibition of arbitrariness and the principle of proportionality. While I will consider the latter in a separate section below, the former will be central to my considerations in the next few paragraphs. As Matthew Gibney observes, a 'concern about denationalization has been that it is arbitrary and thus an illegitimate exercise of state power.'[752] This concern follows the imperative established in international law and jurisprudence that nationality deprivation must not be arbitrary. Thus, Article 15(2) UDHR establishes that '[n]o one shall be arbitrarily deprived of his nationality'. And we have seen that the principle of non-arbitrariness is equally enshrined in Article 12(4) ICCPR. In addition, the principle poses an important first criterion for the ECtHR's assessment of the lawfulness of deprivation measures, especially in light of Article 8 ECHR (right to respect for private life). As part of its arbitrariness test, the ECtHR considers whether a deprivation measure is based on a domestic legal provision and fulfils its requirements, adheres to procedural safeguards and allows the possibility of appeal, and meets standards of diligence and swiftness.[753] In addition, the UN Report on Human Rights and Arbitrary Deprivation of Nationality (2013), in concert with contributions from UNHCR, has stressed the multifaceted nature of the question of arbitrariness, which asks, at its core, whether a given deprivation measure threatens values such as appropriateness, justice and predictability.[754] Both descriptions of (non)arbitrariness intersect in their concern for what we may call the principle of procedural fairness, which covers both the necessity of procedural safeguards and appeal options mentioned by the ECtHR as well as the broader notions of justice and predictability of the UN considerations. Since scholarly criticism of the

[752] Gibney, "Should Citizenship Be Conditional? The Ethics of Denationalization," 652.
[753] For a comprehensive account, see: ECtHR, *Mubarak v. Denmark*, §63.
[754] Human Rights Council, *Human Rights and Arbitrary Deprivation of Nationality. Report of the Secretary-General*, 19 December 2013 (A/HRC/25/28), fn. 4.

arbitrary nature of deprivation regimes also tends to focus on their lack of procedural justice, my arbitrariness evaluation will address, in particular, it's the relationship of nationality deprivation to procedural fairness.

Before turning to this evaluation in greater detail, let me briefly address a preliminary concern. The precision of the wording of deprivation provisions is an important precondition to a fair and non-arbitrary legal procedure, especially in light of the predictability demanded in the UN Report. Peter H. Schuck and Kay Hailbronner have stressed the high thresholds that deprivation powers must meet in this regard. In Schuck's words, deprivation grounds must be 'scrupulously-defined and highly specific […]; mere malignant thoughts will not suffice';[755] and Hailbronner asserts that 'hard questions arise with the formulation of a precise and judicially reviewable provision authorising the executive to revoke citizenship.'[756] As we have seen in my first chapter, deprivation powers in the MSs and the UK that are applicable to terrorist conduct exhibit a variety of different requirements (see Chapter One, Section IV.2). As illustrated by the three different categories of grounds I have identified, deprivation requirements may range from the more specific (preceding criminal convictions for specific crimes, fighting for a foreign combat organisation abroad) to the more abstract (violation of civic duties of loyalty). However, as we have seen in Chapter Two, even the latter may be defined with greater precision if we turn to the extensive case law at the national and international level and draw on the expertise of international institutions and legal instruments.[757] So while there appears to be scope for greater precision in the formulation of some national deprivation provisions, they clearly capture the fundamental nature and severity of the conduct required.[758]

As such, deprivation measures applicable to terrorism fulfil, in particular, the UN requirement of predictability, at the very least to the extent that they may not be opposed for confounding an individual's reasonable expectations of the consequences of their actions. This has been confirmed by the ECtHR in *Johansen v. Denmark* (2022). As we have seen in Chapter Two (Section IV.3), in this case, the Court denied the applicant's submission that his terrorist offences only constituted crimes of a 'general nature' that did not meet the high threshold of nationality deprivation. By contrast, the Court asserted that 'terrorist violence, in itself, constitutes a grave threat to human rights', and the deprivation decision was 'to a large extent a result of the applicant's own choices and actions'.[759] Based on this assessment, as well as considering

[755] Schuck, "Should Those Who Attack the Nation Have an Absolute Right to Remain Its Citizens?," 177.
[756] Hailbronner, "Revocation of Citizenship of Terrorists: A Matter of Political Expediency," 199.
[757] Cf. Hailbronner, "Revocation of Citizenship of Terrorists: A Matter of Political Expediency," 199.
[758] Schuck, "Should Those Who Attack the Nation Have an Absolute Right to Remain Its Citizens?," 177.
[759] ECtHR, *Johansen v. Denmark*, §50.

the relevant procedural requirements and safeguards, the ECtHR concluded that the deprivation decision was 'not arbitrary' in this case.[760]

Based on these initial considerations, let us turn to the evaluation of the procedural fairness of deprivation measures. In this regard, the following four issues have been the focus of scholarly criticism and (inter)national case law. First, the precise reasons underlying a deprivation decision are often kept secret for national security reasons.[761] Second, the individual subject to deprivation proceedings is frequently not able to attend review proceedings in person. After all, nationality deprivation may occur while the individual concerned is outside the depriving state's territory; in addition, an exclusion order may prevent the individual from re-entry. Third, due to the administrative nature of deprivation measures, the applicable standard of evidence is often accused of being lower than for criminal-law measures. And, finally, scholars often argue that deprivation cases fail to offer sufficient possibilities for appeal and review.

The first issue, that is, a state's secrecy for national security reasons has been raised before the CJEU, albeit in a slightly different context. In *ZZ v. Secretary of State for the Home Department,* the Court analysed the meaning of the phrase 'contrary to the interests of State security', with regard to an EU Directive. The Directive established an exemption to a state's obligation to fully and precisely inform an individual of the grounds leading to a restriction-of-movement decision, if the disclosure was contrary to national security.[762] Regarding the compliance of the exemption with Articles 47 (right to effective remedy and fair trial) and 52(1) (scope of guaranteed rights) of the EU Charter of Fundamental Rights, the Court made the following observations. It noted that a restriction of Article 47 on grounds of national security needed to 'respect the essence of the fundamental right in question', and comply with the principle of proportionality.[763] This included, in particular, its necessity and pursuit of a legitimate aim recognized under EU law.[764] While the Court acknowledged the importance of an individual's right to effective judicial protection, it also recognised that, in exceptional cases, the state may have a legitimate interest not to fully and precisely disclose information that would threaten national security.[765] In such cases, the Court underlined the necessity for strong procedural safeguards, implemented by national courts, with regard to both the grounds justifying

[760] ECtHR, *Johansen v. Denmark*, §51.
[761] See for example: UK Court of Appeal (Civil Division), *S1, T1, U1 and V1 v. Secretary of State for the Home Department*, judgment 16/06/2016, EWCA Civ 560, §§25, 26.
[762] CJEU*, ZZ v. Secretary of State for the Home Department*, judgement of 4/6/2013, case C-300/11, §50.
[763] CJEU, *ZZ v. Secretary of State for the Home Department*, §51.
[764] CJEU, *ZZ v. Secretary of State for the Home Department*, §51.
[765] CJEU, *ZZ v. Secretary of State for the Home Department*, §§53-57.

secrecy and the actual state measure.[766] It also emphasised the need to keep any restriction to an individual's right to an effective defence 'to that which is strictly necessary.'[767] In addition, the Court asserted that a state's invocation of secrecy for security reasons must not prevent the individual from contesting evidence or 'have the effect of denying the person concerned his right to be heard and, therefore, of rendering his right of redress […] ineffective'.[768]

In brief, state secrecy due to national-security reasons is not, *per se*, a violation of EU law, even if it applies to a measure significantly curtailing individual rights; but it does need to meet certain conditions. Transferred to the situation of nationality deprivation, this judgment allows the following conclusion: if it can be guaranteed that a deprivation measure, despite secrecy for national-security reasons, satisfies proportionality requirements (see next section), ensures the implementation of procedural safeguards, and keeps any restriction to an individual's right to defence as little as possible, a state's limited disclose of the information pertaining to the deprivation decision is lawful. We may find additional corroboration for this conclusion in national legislation. Article 8B(4) of the Danish Act on Nationality for instance, explicitly confirms that, in deprivation cases, secrecy is admissible 'for security reasons', in principle.

The second aspect of procedural fairness often criticised in deprivation proceedings regards the question of an individual's right to be present when the deprivation decision is rendered or during subsequent review proceedings. This challenge to the measure's procedural fairness has also found its way into the court room. A case in point is the deprivation case of *K2 v. the United Kingdom*, tried before the ECtHR in 2017. Here, the applicant argued that the principle of fairness as well as EU law required his presence in the UK during the SIAC appeal proceedings, and that his exclusion from them 'was so procedurally unfair as to be legally insupportable.'[769] The Court addressed this argument as follows. First, it established that the British SIAC appeal procedures generally satisfied the procedural safeguard requirements under Article 8 ECHR: in particular, the evidence had been presented sufficiently to the applicant, he was represented by legal counsel and Special Advocates were appointed as part of the appeal proceedings.[770] Second, the Court reviewed the applicant's claim that, due to his expulsion at the time, he could neither effectively exercise his right to be present during the appeal proceedings, nor communicate, without risk, with his lawyer in the UK for conducting the appeal

[766] CJEU, *ZZ v. Secretary of State for the Home Department*, starting at §57.
[767] CJEU, *ZZ v. Secretary of State for the Home Department*, §64.
[768] CJEU, *ZZ v. Secretary of State for the Home Department*, §65.
[769] ECtHR, *K2 v. the United Kingdom*, §§10&16.
[770] ECtHR, *K2 v. the United Kingdom*, §55.

proceedings.[771] The ECtHR did not find this argument convincing. It noted that physical absence from appeal proceedings, by itself, did not constitute arbitrariness under Article 8 ECHR, and did not oblige a state, more specifically, to repatriate an expulsed national in order to grant physical presence.[772] In addition, the Court acknowledged that Article 8 might be impaired in situations 'where there exists clear and objective evidence that the person was unable to instruct lawyers or give evidence while outside the jurisdiction'; but it did not identify such a situation in the case at hand.[773] The Court also pointed out that the procedural difficulties challenged by the applicant did not result from the deprivation and exclusion measures, but from the applicant's flight from the UK, where the appeal proceedings would later take place.[774] Consequently, we may conclude, more generally, that, if sufficient procedural safeguards are in place that allow an effective appeal, an individual's absence from their deprivation or review proceedings does not render the deprivation decision arbitrary.

A third aspect of procedural fairness that has been challenged in deprivation cases relates to the standard of evidence. As we have seen in Chapter One, in the great majority of cases, deprivation measures applicable to terrorism in the EU and the UK qualify as administrative in nature and follow the procedures of administrative law. Critics have argued that, as a consequence, these measures fail to comply with the high standard of evidence required for criminal measures, and only meet the allegedly lower evidence requirements of administrative acts.[775] A very brief reply to this argument would be to point out that deprivation measures, precisely since they are administrative acts, do not need to adhere to criminal-law standards. A more detailed rebuttal might stress that the evidence standards followed in deprivation proceedings are not so very different from those of criminal law. In fact, we have seen in Chapter One (Section IV.3.i) that a significant portion of national deprivation provisions require a criminal conviction for certain particularly severe crimes as at least one of their deprivation grounds. In such cases, the criminal conviction that provides the key grounds for nationality deprivation has to meet the evidence standards of criminal law and thus transfers them, as it were, to the deprivation proceedings. And also for those national provisions that do not include criminal convictions in their deprivation grounds, prior convictions often play a central role in the deprivation proceedings. Belgium and Ireland, for instance, both have deprivation grounds of a more abstract quality (Belgium: 'Serious violations of the duties of a Belgian citizen', Ireland:

[771] ECtHR, *K2 v. the United Kingdom,* §56.
[772] ECtHR, *K2 v. the United Kingdom*, §57.
[773] ECtHR, *K2 v. the United Kingdom*, §§57-59.
[774] ECtHR, *K2 v. the United Kingdom*, §60.
[775] See, for instance: Gibney, "Should Citizenship Be Conditional? The Ethics of Denationalization," 652.

'Conduct contrary to a citizen's duty of fidelity to the nation and loyalty to the State'),[776] and still criminal convictions feature prominently in their case law on deprivation measures.[777] Thus, the same logic of a transfer of evidence standards applies. This is an important counter-argument also for those who, like Tom L. Boekestein and Gerard-René de Groot, have argued that deprivation provisions including criminal convictions adhere to a higher standard of evidence than those that do not.[778] Finally, we may wonder how substantial the qualitative difference between the evidence standards of administrative and criminal law truly is. While, in the latter, a court needs to be convinced by evidence of guilt beyond reasonable doubt, in the former, an administrative authority needs to be satisfied that the evidence establishes that certain grounds are met. Now, one might argue that the criminal-law standard provides a higher threshold since cases of uncertainty must lead to acquittal (*in dubio pro reo*), but, also in administrative law, uncertainty would need to inform the administrative decision and, of course, this decision would also be subject to judicial review.

A fourth aspect of procedural fairness often considered at issue in deprivation measures concerns their possibility for review proceedings. And, indeed, there are instances that might suggest that this is a particular issue of deprivation regimes. A case in point is the Irish review system for deprivation proceedings, which was found failing 'the high standards of natural justice applicable to a person facing such severe consequences' by the Irish Supreme Court in *Damache v. Minister for Justice and Equality* (2019/2020).[779] In this case, the applicant challenged the constitutionality of the review procedure available under Sections 19(2) and (3) of the Irish Nationality and Citizenship Act. According to this procedure, an individual notified of a pending decision to revoke their nationality may initiate an inquiry process, involving a Committee of Inquiry.[780] However, to quote the Court's judgment of the applicant's summary, 'the Minister makes the proposal to revoke, is in effect a party to the inquiry and then makes the final decision having of course for good measure also appointed the members of the committee of inquiry.'[781] While the Court did not challenge the appropriateness of the deprivation

[776] For the precise provisions, see the overview table in Section IV.2 of Chapter One.
[777] See, for example: *Damache v. Minister for Justice and Equality, Ireland And the Attorney General,* [2020] IESC 63, §17. Belgian Constitutional Court, judgment 23/09/2021, case no. 116/2021; Belgian Constitutional Court, judgment 14/05/2009, case no. 85/2009; Belgium Constitutional Court, judgment 17/09/2015, case no. 122/2015.
[778] See Boekestein and de Groot, "Discussing the human rights limits on loss of citizenship: a normative-legal perspective on egalitarian arguments regarding Dutch Nationality laws targeting Dutch-Moroccans," 323-24. The scholars make this argument in their discussion of the two Dutch deprivation provisions.
[779] *Damache v. Minister for Justice and Equality, Ireland and the Attorney General*, [2020] IESC 63, §134.
[780] Section 19(1)-(3) and (5) the Irish Nationality and Citizenship Act.
[781] *Damache v. Minister for Justice and Equality, Ireland and the Attorney General*, [2019] IEHC 444, §44.

measure itself, given the applicant's terrorist crimes,[782] or found that the members of the Committee of Inquiry, in the present case, were dependent on the Minister in their assessment,[783] it stressed that 'an individual facing the prospect of revocation of a Certificate of Naturalisation must be entitled to a process which provides minimum procedural safeguards including an independent and impartial decision-maker'.[784]

This statement gives vivid expression to the importance of procedural safeguards in deprivation proceedings, and certainly highlights the shortcomings of the Irish review procedure – but it does not, in my view, point to a larger issue in deprivation regimes in the EU and the UK. As the overview table in Section IV.2 of Chapter One reveals, all MSs and the UK provide for review options in deprivation proceedings and, at least based on the submissions of the individuals subjected to deprivation proceedings and the relevant Court judgments, procedural safeguards are hardly ever a particular concern in the case law relating to nationality deprivation. Indeed, in the five recent cases before the ECtHR that dealt with deprivation measures in response to terrorism, the Court expressly analysed the available review proceedings and always found them up to standard. Thus, the ECtHR notes, almost *verbatim*, in *Laraba v. Denmark* (2022) and *Mubarak v. Denmark* (2019), that 'the applicant had an opportunity to contest the prosecuting authorities' request to strip him of his Danish citizenship before the domestic courts at two levels of jurisdiction, and he has not alleged any procedural shortcomings in this regard'.[785] As a consequence, in each case, the Court was 'satisfied that the applicant was afforded the procedural safeguards required by Article 8 of the Convention'.[786] Similarly, in *Ghoumid and Others v. France*, the ECtHR observes that 'the applicants were afforded substantial procedural safeguards'.[787]

Based on the preceding paragraphs of this section, we may stress, once more, how important it is for deprivation regimes to provide sufficient procedural safeguards, including options for independent review. In particular, the authority making the deprivation decision should be clearly distinct from the reviewing body. Only with such 'robust'[788] procedures in place can deprivation measures meet the requirements of procedural fairness and non-arbitrariness at the core of our lawfulness assessment. We may also observe that, contrary to scholarly opinion, deprivation regimes do not generally appear to violate this requirement. Of course,

[782] *Damache v. Minister for Justice and Equality, Ireland and the Attorney General*, [2020] IESC 63, §132.
[783] *Damache v. Minister for Justice and Equality, Ireland and the Attorney General*, [2019] IEHC 444, §134.
[784] *Damache v. Minister for Justice and Equality, Ireland and the Attorney General*, [2019] IEHC 444, §134.
[785] ECtHR, *Laraba v. Denmark*, §17; ECtHR, *Mubarak v. Denmark*, §65.
[786] ECtHR, *Mubarak v. Denmark*, §65.
[787] ECtHR, *Ghoumid and Others v. France*, §47. See also ECtHR, *K2 v. the UK*, starting at §54.
[788] Schuck, "Should Those Who Attack the Nation Have an Absolute Right to Remain Its Citizens?," 177.

there may be exceptions in individual national provisions – we have seen the Irish example – but procedural unfairness and arbitrariness are by no means the rule in deprivation decisions, or a necessary characteristic of deprivation regimes.

3. The principle of proportionality

In the preceding section, we have considered the importance of non-arbitrariness, and the procedural requirements at its core, as well as the extent to which they are threatened by deprivation proceedings in the EU and the UK. The principle of proportionality is another aspect that plays a significant role in lawfulness assessments of deprivation measures – especially by the CJEU. As we have seen above, while the ECtHR especially focuses on (non)arbitrariness, the CJEU relies most heavily on proportionality considerations in its evaluations of deprivation regimes.

The principle of proportionality requires that a given deprivation measure i. pursues a legitimate aim, ii. is effective in reaching this aim, and iii. provides the least intrusive option to do so, and iv. is proportionate to the aim it pursues in the impact it has on the individual concerned ('proportionality in the narrower sense').[789] Accordingly, Tom L. Boekestein and Gerard-René de Groot summarize the essentials of a proportionality assessment as follows: it 'requires a normative evaluation of the measure in light of the narrow margin of appreciation, taking into account its factual impact, effectiveness and the availability of appropriate alternatives.'[790]

i. Legitimate aim

Let me begin our proportionality analysis by examining the legitimacy of the aim that deprivation measures pursue. As the very wording suggests, here, the concerns of lawfulness and legitimacy intersect. Consequently, this section anticipates a small portion of the final part of this chapter, which is dedicated more fully to the legitimacy of deprivation regimes.

Regarding the aim of nationality deprivation, I suggest that we return to the findings of my first chapter. As this chapter proposed, the purpose or 'very nature' of most deprivation regimes applicable to terrorism in the EU and the UK is the severance of the legal bond to one of their citizens in response to that citizen's fundamental violation of their civic commitment to the

[789] See for example: Paulussen, "Stripping foreign fighters of their citizenship: International human rights and humanitarian law considerations," 610.
[790] Boekestein and de Groot, "Discussing the human rights limits on loss of citizenship: a normative-legal perspective on egalitarian arguments regarding Dutch Nationality laws targeting Dutch-Moroccans," 327.

core principles of democratic society. This most immediate aim of deprivation regimes is closely linked to what we might call their wider objective, which lies in the safeguarding of the core values that a citizen's loyalty needs to attach to. So before turning to the legitimacy of the former, let us also consider the validity of the latter. As we have seen in the 'loyalty cases' of Chapter Two (Section IV.3), the EComHR as well as the ECtHR have frequently confirmed that a state's commitment to protecting the key tenets of constitutional democracy is a legitimate aim – to the extent that states may require a civic duty of loyalty to these tenets. Here, we may recall the foundational judgment of the Commission in *Glasenapp v. The Federal Republic of Germany* (1984), which acknowledged the legitimacy of a state's goal to protect democracy, as well as to safeguard its national security, prevent crime and disorder, and safeguard the rights of others.[791] In this context, the Commission also pointed to the applicability of Article 17 ECHR: '[w]here a Government seeks to achieve the ultimate protection of the rule of law and the democratic system the Convention itself recognises in Article 17 the precedence which such objectives take'.[792] In later judgments by the ECtHR, the Commission's endorsement of an 'effective political democracy',[793] would also be described as the valid principle of a 'democracy capable of defending itself'.[794]

We saw that the same sentiments also underpinned the more recent ECtHR proceedings of *Ghoumid and Others v. France* (2020). This judgment is even more relevant to our present concerns since it exhibits a judicial endorsement of the more immediate aim pursued by nationality deprivation, precisely in the terms I introduced in my first chapter. Thus, as we have seen, the Court acknowledges the goal of the French government to break ties with individuals who, through their terrorist conduct, violate their loyalty to the state and its democratic foundations.[795] Similarly, also the CJEU has observed that 'it is legitimate for a Member State to wish to protect the special relationship of solidarity and good faith between it and its nationals and also the reciprocity of rights and duties, which form the bedrock of the bond of nationality'.[796] It is equally 'legitimate', in the Court's view, for the state to decide 'that the absence, or the loss, of any such genuine link entails the loss of nationality'.[797] More specifically, the ECtHR emphasises in *Ghoumid and Others v. France* that, if a citizen threatens this special

[791] EComHR, *Glasenapp v. Germany*, §§88-110. ECtHR, *Vogt v. Germany*, §51. ECtHR, *Erdel v. Germany*, under B.1. ECtHR, *Tănase v. Moldova*, §165.
[792] EComHR, *Glasenapp v. Germany*, §110. ECtHR, *Petropavlovskis v. Latvia*, §§70-72.
[793] EComHR, *Glasenapp v. Germany*, §88.
[794] ECtHR, *Vogt v. Germany*, §51. ECtHR, *Otto v. Germany*, under 1. ECtHR, *Erdel v. Germany*, under B.1
[795] ECtHR, *Ghoumid and Others v. France*, §50.
[796] CJEU, *Tjebbes and Others v. Minister van Buitenlandse Zaken*, §33. Here, the Court also refers CJEU, *Rottman v. Freistaat Bayern*, case C-135/08, judgment 02/03/2010, §51.
[797] CJEU, *Tjebbes and Others v. Minister van Buitenlandse Zaken*, §35.

relationship through terrorist acts, the state may apply closer scrutiny to the bond of loyalty and solidarity between itself and that citizen, especially in the aftermath of terrorist attacks.[798] After all, as the Court confirms in *Johansen v. Denmark* (2022), it is a state's responsibility 'to take a firm stand against those who contribute to terrorist acts'.[799] In this light, I propose, we may conclude that both the more direct aim of nationality deprivation, the severance of a violated bond of civic loyalty, as well as its broader objective of safeguarding democracy in the face of terrorism constitute legitimate state goals.

ii. Effectiveness

In this section, I will discuss whether deprivation of nationality is, in principle, capable of achieving both its more immediate aim and its wider objective. The latter, that is, the measure's broader intent to safeguard democracy, has often been characterised as part of a single-minded pursuit to protect national security against terrorist threats[800] – a goal that, in the minds of its critics, nationality deprivation fails to achieve. Before addressing this scholarly objection more thoroughly, let me emphasise that I do not believe that deprivation regimes generally aim to protect national security as their primary goal. As I have demonstrated in my first chapter (Section V.3.iii), national security and public order are central concerns only of a relatively small number of deprivation legislations in the EU and the UK – indeed, they appear explicitly only in the Dutch provisions. And, as we have seen, even in such cases, national security tends to provide the 'subgoal' of a larger objective committed to the upholding of certain fundamental values and the safeguarding of democracy in a more abstract sense that points beyond the assessment of a person's immediate and concrete threat to public safety. Nonetheless, the idea of nationality deprivation as a national-security tool is exceptionally prominent in the discourses surrounding the measure, not least of all in the arguments of those who deny its effectiveness in this regard. As I have suggested in Chapter One (Section V.3.iii), this prominence derives from the common misconception that there is hardly any distinction between deprivation measures and the expulsion orders that may follow upon them. However, as I have stressed, denationalisation and deportation are procedurally distinct and the latter only commonly, but

[798] ECtHR, *Ghoumid and Others v. France*, §45.
[799] ECtHR, *Johansen v. Denmark*, §50.
[800] See, for instance: Bertram, "Citizenship Deprivation: A Philosopher's Perspective," 134-35. Brown, "Interview with Tendayi Achiume," 155. Achiume, *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance*, 17-18. Boekestein and de Groot, "Discussing the human rights limits on loss of citizenship: a normative-legal perspective on egalitarian arguments regarding Dutch Nationality laws targeting Dutch-Moroccans," 326-27. Spiro, "Terrorist Expatriation: All Show, No Bite, No Future," 175.

not necessarily, succeeds the former. And yet, given the frequency of the immediate association of both measures in the scholarship and of their joint assessment as ineffective national-security tools, let me engage with the relevant criticism in some detail, before discussing the effectiveness of nationality deprivation in the terms of this thesis.

A variety of scholars have argued that nationality deprivation is not an effective national-security measure nor particularly suitable as a counter-terrorism strategy. Thus, according to Laura van Waas and Sangita Jaghai as well as others, there is no conclusive evidence corroborating that nationality deprivation has an 'impact on the threat of terrorist attacks'[801] or that it is particularly effective as a deterrent for potential future crime.[802] Indeed, it has been argued that today's 'global' terrorists do not care about being deprived of their 'Western' nationalities.[803] In addition, critics point out that there are other, more effective measures available, such as restricting an individual's freedom of movement by withdrawing their passport, including the individual on a no-fly list, implementing close surveillance, and prosecuting as well as incarcerating the individual.[804] As many have asserted, nationality deprivation is not only lacking in effectiveness: it creates, rather than reduces, national security risks. Here, arguments have suggested, in particular, that individuals subjected to deprivation proceedings might become more vulnerable to extremist influences, especially if they saw themselves stranded abroad,[805] or felt that they were 'unjustly singled out' as members of a minority group treated as 'second-class citizens'.[806] Scholars have argued that both might cause feelings of alienation and discrimination, and thus fuel sentiments that were 'drivers of terrorism.'[807] As a result, once expelled, such individuals might instruct others in the country to carry out terrorist attacks,[808] or they might themselves 'return back home with a vengeance.'[809] After all, as Louise

[801] van Waas and Jaghai-Bajulaiye, "All citizens are created equal, but some are more equal than others," 424-25.
[802] Macklin, "The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?," 171. Matthew J. Gibney, "Expanding Deprivation of Nationality Powers in the Security Context: Global Trends," ed. The Institute on Statelessness and Inclusion, *The World's Stateless: Deprivation of Nationality* (2020). 222. Sangita Jaghai and Laura van Waas, "Stripped of Citizenship, Stripped of Dignity? A Critical Exploration of Nationality Deprivation as a Counter-Terrorism Measure," in *Human Dignity and Human Security in Times of Terrorism*, ed. Christophe Paulussen and Martin Scheinin (The Hague: T.M.C. Asser Press, 2020).
[803] Vesco Paskalev, "It's Not About Their Citizenship, it's About Ours," in *Debating Transformations of National Citizenship*, ed. Rainer Bauböck (Cham: Springer International Publishing, 2018), 186.
[804] Jaghai and van Waas, "Stripped of Citizenship, Stripped of Dignity? A Critical Exploration of Nationality Deprivation as a Counter-Terrorism Measure."
[805] Jaghai and van Waas, "Stripped of Citizenship, Stripped of Dignity? A Critical Exploration of Nationality Deprivation as a Counter-Terrorism Measure."
[806] Paulussen and Scheinin, "Deprivation of Nationality as a Counter-Terrorism Measure: A Human Rights and Security Perspective," 225-26.
[807] Paulussen and Scheinin, "Deprivation of Nationality as a Counter-Terrorism Measure: A Human Rights and Security Perspective," 225-26.
[808] van Waas and Jaghai-Bajulaiye, "All citizens are created equal, but some are more equal than others," 424-25.
[809] Bauböck and Paskalev, "Citizenship Deprivation - A Normative Analysis," 16.

Reyntjens has stressed among others, a deprived individual expelled from their former state of nationality was not physically prevented from returning, for instance, if they entered the country illegally with a counterfeit passport,[810] or due to the absence of border checks in the Schengen-Area.[811] In addition, scholars have pointed out that nationality deprivation leading to expulsion might cause additional security risks since surveillance and prosecution were considerably more difficult when a potential perpetrator of future terrorist acts was removed from a state's territory.[812]

The objections I have mentioned so far have all stressed the ineffectiveness of nationality deprivation as a safeguard against security threats for the depriving country itself. Others have focussed more strongly on what they regard as the problematic effects of nationality deprivation for the receiving country and for security in a more global sense. Thus, Christophe Paulussen and others have argued that deprivation measures simply export security risks from one state to another.[813] Alongside Audrey Macklin, Laura van Waas, Sangita Jaghai, and the Institute on Statelessness and Inclusion, Paulussen has also stressed the need to look beyond individual nations: a more cooperative and holistic approach to international security required the move away from a 'traditionally' national perspective and towards a concept of 'Sustainable Security', as proposed, for instance, by the Oxford Research Group.[814] In this sense, deprivation of nationality has been argued to ignore the global reach of terrorism which easily surpassed state borders.[815] In light of such criticism, scholars have argued that the efficacy of

[810] Reyntjens, "Citizenship deprivation under the European convention-system: A case study of Belgium," 280. van Waas and Jaghai-Bajulaiye, "All citizens are created equal, but some are more equal than others," 424-25. Boekestein and de Groot, "Discussing the human rights limits on loss of citizenship: a normative-legal perspective on egalitarian arguments regarding Dutch Nationality laws targeting Dutch-Moroccans," 323.
[811] Reyntjens, "Citizenship deprivation under the European convention-system: A case study of Belgium," 280. Paulussen, "Towards a Right to Sustainable Security of Person in Times of Terrorism? Assessing Possibilities and Limitations Through a Critical Evaluation of Citizenship Stripping and Non-Repatriation Policies," 228-30.
[812] Bauböck and Paskalev, "Citizenship Deprivation - A Normative Analysis," 16. Paulussen, "Towards a Right to Sustainable Security of Person in Times of Terrorism? Assessing Possibilities and Limitations Through a Critical Evaluation of Citizenship Stripping and Non-Repatriation Policies," 228-30. van Waas and Jaghai-Bajulaiye, "All citizens are created equal, but some are more equal than others," 424-25. Carey, "Against the right to revoke citizenship," 901. Institute on Statelessness and Inclusion & EUI Global Citizenship Observatory*, 'Instrumentalising Citizenship – In the Fight against Terrorism', Global Comparative Analysis of Legislation on Deprivation of Nationality as a Security Measur*e (2022). 6; Institute on Statelessness and Inclusion, *Draft Commentary to the Principles on Deprivation of Nationality as a Security Measure*, 50, 91.
[813] Paulussen, "Towards a Right to Sustainable Security of Person in Times of Terrorism? Assessing Possibilities and Limitations Through a Critical Evaluation of Citizenship Stripping and Non-Repatriation Policies," 220-21. van Waas and Jaghai-Bajulaiye, "All citizens are created equal, but some are more equal than others," 424-25.
[814] Paulussen, "Towards a Right to Sustainable Security of Person in Times of Terrorism? Assessing Possibilities and Limitations Through a Critical Evaluation of Citizenship Stripping and Non-Repatriation Policies," 241. Also in support of a global view of security: Macklin, "The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?," 171.
[815] van Waas and Jaghai-Bajulaiye, "All citizens are created equal, but some are more equal than others," 424-25. Institute on Statelessness and Inclusion & EUI Global Citizenship Observatory, *'Instrumentalising Citizenship – In the Fight against Terrorism', Global Comparative Analysis of Legislation on Deprivation of Nationality as a*

nationality deprivation as a risk-management tool was surely 'very limited'[816], and likely to entail 'grave risks'.[817] In the words of Tom L. Boekestein and Gerard-René de Groot, the measure 'may be overly simplistic and create a false sense of security.'[818] Thus the true motivation for deprivation measures has been identified elsewhere: in the symbolic projection of a tough stance against terrorism.[819]

Prominent as it may be, such criticism is not the only view taken in the scholarly literature. Emanuel Gross, for instance, has supported the effectiveness of nationality deprivation, followed by expulsion, as a crucial part of a counter-terrorism strategy:

> 'Only deporting this person and distancing him from his fellow citizens reduces the risk of his assisting terrorists to harm the citizens of the state of which he is a national and in which he resides.'[820]

Both national and international courts have also confirmed the measure's efficacy. Thus, in *U2 v. Secretary of State for the Home Department* (2019), the UK Court found that the argument that nationality deprivation and expulsion safeguarded national security was 'self-evidently right' because it enabled the state to keep an individual posing a severe threat to its security outside its borders.[821] The Court also addressed the claim that the measure was counter-productive in its impact on national security, which we saw voiced by many scholars above. Here, it stressed, in particular, that the security benefits of removing a dangerous individual from a state's territory outweighed the potential security risks that limited surveillance options might create in this case: 'the most effective way of managing the risk' an individual posed was removing it.[822] After all, the Court stressed, '[i]t seems to us obvious that no amount of conditions, or careful watching of a person who is in the United Kingdom, can achieve the assurance of knowing that they are outside the UK permanently.'[823] In this context, we may think of

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Security Measure, 6. Also: Institute on Statelessness and Inclusion, *Draft Commentary to the Principles on Deprivation of Nationality as a Security Measure*, 50, 91.

[816] Paulussen, "Towards a Right to Sustainable Security of Person in Times of Terrorism? Assessing Possibilities and Limitations Through a Critical Evaluation of Citizenship Stripping and Non-Repatriation Policies," 228-30.

[817] Zedner, "Citizenship Deprivation, Security and Human Rights," 241.

[818] Boekestein and de Groot, "Discussing the human rights limits on loss of citizenship: a normative-legal perspective on egalitarian arguments regarding Dutch Nationality laws targeting Dutch-Moroccans," 323.

[819] Jaghai and van Waas, "Stripped of Citizenship, Stripped of Dignity? A Critical Exploration of Nationality Deprivation as a Counter-Terrorism Measure."

[820] Gross, "Defensive Democracy: Is It Possible to Revoke the Citizenship, Deport, or Negate the Civil Rights of a Person Instigating Terrorist Action against His Own State," 51.

[821] *U2 v. Secretary of State for the Home Department*, SC/130/2016, §142.

[822] *U2 v. Secretary of State for the Home Department*, SC/130/2016, §144.

[823] *U2 v. Secretary of State for the Home Department*, SC/130/2016, §144.

terrorist acts committed in the MSs and the UK by individuals on terrorism watch-lists: In addition, the Court observed that nationality deprivation and expulsion made it more difficult for the individual to communicate with others hoping to act on the same extremist view within the country.[824] Furthermore, the Court also rejects the argument that safeguarding national security can be equally achieved by prosecuting the individual upon their return.[825]

If we focus, for a moment, only on the notion of the removal of a dangerous individual from a state's territory, and leave aside the preceding deprivation decision, we may mind find additional corroboration for the effectiveness of expulsion in legislation that deals, more generally, with the deportation of criminal non-citizens. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004[826] offers a case in point. It regulates EU citizens' 'right to move and reside freely within the territory of the Member States',[827] as well as the circumstances that allow a MS to restrict this right, including the possibility of expelling a national from a different MS from its territory.[828] The Directive explicitly mentions public security as a valid justification for expulsion,[829] suggesting the effectiveness that such a measure might have. Naturally, also in this case, strict procedural safeguards need to be met, including the principle of proportionality and the consideration of the individual's degree of integration.[830] Similarly, the deportation of non-EU non-nationals is generally permissible in the MSs for reasons of national security. If we accept – as the EU Directive does – that deportation can be an effective tool for non-nationals threatening national security, surely it must be just as effective for former nationals posing the same kind of threat.

The preceding two paragraphs provide, I propose, convincing arguments for the effectiveness of nationality deprivation followed by expulsion in the following two regards: they corroborate, first, that removing a national-security threat from the nation affected does increase national security and, second, that the limited surveillance options this may entail are still to

[824] The Supreme Court, *AL JEDDA v. the Secretary of State for the Home Department*, SC/66/2008, judgment 07/04/2009, starting at §28.
[825] *U2 v. Secretary of State for the Home Department*, §144.
[826] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, pp. 77–123.
[827] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, OJ L 158, 30.4.2004, pp. 77–123, recital 1.
[828] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, OJ L 158, 30.4.2004, pp. 77–123, recitals 22-27 and Art. 27-33.
[829] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, OJ L 158, 30.4.2004, pp. 77–123, recital 22 and Art. 27.
[830] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, OJ L 158, 30.4.2004, pp. 77–123, recitals 23-26 and Art. 27-33.

be preferred over the existence of a national-security threat within the nation, where it might still escape even the most comprehensive surveillance, as experience has shown. This leaves us with several aspects of criticism yet to be discussed. Let me address them in turn. First, lack of evidence for a particular phenomenon is no proof of its absence. Thus, the argument that there is no particular evidence for the impact of nationality deprivation on terrorism or as a deterrent force is not something, I propose, that we need to engage with much further. Regarding the latter, I would just like to stress, with Kay Hailbronner, that any deterrence is most likely to result from the practical implications of nationality loss: scholars are certainly right to stress that terrorists may care very little about denationalisation in an emotional sense. However, they will certainly 'care about the possibilities that a Canadian, US, British or German passport conveys with visa-free international travel, free entry and residence in their 'home' country and diplomatic protection if something does not go quite as smoothly as expected.'[831] Second, scholarly references to the greater effectiveness of alternative measures, such as incarceration, appear to suggest that deprivation measures preclude criminal prosecution and sentencing. However, as I have emphasised in Chapter One (Section V), this is not the case: in particular, nationality deprivation does not replace (or constitute) punishment. Third, scholars' observation that deprivation may lead to feelings of alienation which, in turn, might fuel terrorist activity may very well be accurate, in certain cases; but given the fact that individuals qualifying for nationality deprivation have already committed terrorist crimes of an exceptional severity and subversiveness for the very foundations of a particular nation, we may assume that they are already extremely, and arguably irreversibly, alienated from that nation. Fourth, I do not believe that the possibility of the illegal return of an individual deprived of their nationality and expelled is a valid argument to deny the measures' effectiveness. After all, based on such grounds, we would have to deny the efficacy of a great many laws just because people may (and do) break them. In addition, such people are, of course, liable to prosecution.

Similarly, the legal regimes of the MSs and the UK also regularly include provisions criminalising re-entry if an individual's expulsion is accompanied by a re-entry ban. Here, we may turn, for instance, to Section 35 of the Danish Aliens Act or to Section 11 of the German Residence Act. The more specific question of the enforceability of re-entry bans within the Schengen-Area has been addressed by an expert opinion submitted by Daniel Thym to the German Federal Parliament (Bundestag) in 2019. Thym's opinion refers to the possibility for

[831] Hailbronner, "Revocation of Citizenship of Terrorists: A Matter of Political Expediency," 200. Similarly: Joppke, "Terror and the loss of citizenship," 744.

German state authorities, under the German Nationality Act, to refuse non-German citizens entry to German territory.[832] Regarding the effective control of such bans in the Schengen-Area, Thym observes that Regulation (EU) 2016/399 of the European Parliament and of the Council prohibits that an individual, after their deportation from a particular MS in the Schengen-Area, re-enters that state via a third MS: Article 14(1) of the Regulation, in conjunction with Article 6(1)lit.d, establishes that a person's entry to the Schengen-Area shall be refused if, *inter alia*, 'an alert has been issued in the SIS for the purposes of refusing entry.'[833] Again, a deported individual may of course attempt to illegally circumvent EU law and still re-enter the state in question, but doing so would make them liable to prosecution.

On this basis, I believe that we may conclude that there are sufficient grounds for considering nationality deprivation followed by expulsion an effective national-security tool, which may also successfully contribute to a state's broader counter-terrorism initiatives. However, as I have mentioned above, there are those who assert that, even if nationality deprivation were an effective tool in a nation's fight against terrorism – as I have suggested it is – this still fails to adequately consider the global reach of modern-day terrorism. Put bluntly, pushing terrorists from one state to another does not solve the problem. There is certainly truth in this observation, especially regarding the increasingly global impact of terrorism, the international spread of its multifaceted reasons and the connectedness of terrorist networks across borders. And yet, I would suggest that, while all states should of course cooperate on global welfare and security, their utmost concern may validly lie with the safety of their own citizens. Thus, if a state authority determines that the removal of a citizen from its community may safeguard that community best, I do not believe that considerations for the possible risks caused by that individual for a receiving other state of nationality ought to necessarily prevent the deprivation measure. In addition, however global in reach and organisation, terrorist groups do affect different nations in different ways, and the concrete risk they pose for a particular state is best assessed by that state itself – rather than by a well-meaning third nation evaluating its deprivation options.

The preceding pages have been dedicated to making a case for deprivation measures, in conjunction with an individual's expulsion, as effective instruments in a state's pursuit to protect national security and combat terrorism. However, as I have emphasised at the outset, I do not think that we ought to consider deprivation and deportation, by necessity, as a single entity

[832] Daniel Thym, *Stellungnahme für die Öffentliche Anhörung des Innenausschusses des Deutschen Bundestags am Montag, den 24. Juni 2019 über den Entwurf eines Dritten Gesetzes zur Änderung des Staatsangehörigkeitsgesetzes*, BT-Drs. 19/9736 v. 29.4.2019, p. 16.
[833] Article 6(1) lit. d of the Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

with a shared goal, nor should we assume that the principal goal pursued by most deprivation regimes is national security. Instead, as I have argued in my first and second chapters, in the EU and the UK, nationality deprivation is aimed, most centrally, at the legal severance of a civic bond of loyalty owed to the very foundations of democratic society and violated through terrorist conduct. Such a severance pursues, as its wider and more abstract goal, the safeguarding of the very same democratic foundations. So, how effective is nationality deprivation in achieving these two objectives? I propose that the answer is relatively short with regard to the measure's aim of severing a violated civic bond: since deprivation measures formally end the relationship of citizenship between a citizen and their state, in response to that citizen's most vital breach of this relationship, nationality deprivation achieves precisely what it sets out to do. With regard to its broader objective of safeguarding a state's democratic foundations, I propose that the measure's effectiveness resides in the commitment or civic loyalty that it demands from every citizen to the inviolability of certain core principles, including democratic values. To violate this commitment is to lose membership in the civic community. Here we might recall *Ghoumid and Others v. France* once more, where the ECtHR acknowledges that 'as a result of their actions [i.e. terrorist acts undermining the very foundation of democracy][834], such individuals may no longer enjoy the specific bond conferred on them by […] nationality'.[835] In this sense, nationality deprivation makes democratic values – at least to the extent of their non-violation – a condition of citizenship. This has clear and effective implications for the individual failing the democratic condition (they lose their citizen status), but also for the community at large, as the democratic fabric of the society is being stressed and strengthened.

iii. Least intrusive measure

As part of a proportionality assessment, we also need to evaluate whether nationality deprivation constitutes the least intrusive measure to effectively reach the goal it pursues. In my discussion of the (non)discriminatory force of deprivation measures above (Section III.1), I have already proposed a positive answer to this question; but let me add some more detail at this point.

Scholars have variously argued that there are less intrusive measures than nationality deprivation. Thus, as we saw in the work of Christophe Paulussen, critics have held, in particular, that the often exclusive applicability of deprivation powers to multi nationals suggests this

[834] ECtHR, *Ghoumid and Others v. France*, §72.
[835] ECtHR, *Ghoumid and Others v. France*, §50.

conclusion: '[i]f mono-citizens can be responded to in a less intrusive way, then why can these responses not also be applied to dual citizens?'.[836] The less intrusive alternatives that have been suggested, in this context, include administrative measures, such as passport confiscations, movement restrictions, and surveillance, or criminal punishments, such as incarceration.[837] Brian Carrey, for example, has asserted that a prison sentence was a less intrusive option that reached the same goals as nationality deprivation.[838]

In response, I would first like to stress once more that nationality deprivation does not pursue a punitive goal. Indeed, as I have argued in Chapter One (Section V.3.iii), it not even follows a broader, retributive agenda: rather than seeking a particular consequence for an individual's harmful acts, it aims to strengthen the civic community and principles harmed in the process. Nationality deprivation neither has a punitive intent nor does it preclude other state measures that pursue, and may effectively achieve, this goal. There is no reason why a criminal punishment, such as incarceration, should be suspended because of deprivation proceedings. Indeed, as we have seen in Chapter One (Section IV.3.i), many deprivation provisions require a preceding criminal conviction for certain severe crimes, which typically results in a significant prison term. In addition, we must observe that, in order to challenge the proportionality of deprivation measures, we need an alternative course of action that is not only less intrusive, but also equally effective in light of the aims pursued. As we have seen in Chapter One (Section V.3.iii) as well as the preceding section (III.3.ii), the aims of nationality deprivation are administrative in nature and not criminal. Thus, criminal measures, such as incarceration, may be largely disqualified as equally effective alternatives.

Bearing in mind the persistent scholarly focus on the perceived national-security agenda of deprivation powers, we may wonder if administrative measures, including surveillance, may provide more promising candidates to this end. This question also warrants our attention because of the scholarly claim, discussed in the preceding section, that surveillance within the country is more effective than monitoring an individual abroad. In this context, we already saw the UK Court in *U2 v. Secretary of State* for the Home Department stress the limitations of national surveillance. Furthermore, in both this case as well as *S1, T1, U1 and V1 v. Secretary of State for the Home Department*, the Court has explicitly confirmed that national surveillance

[836] Paulussen, "Towards a Right to Sustainable Security of Person in Times of Terrorism? Assessing Possibilities and Limitations Through a Critical Evaluation of Citizenship Stripping and Non-Repatriation Policies," 226. And: Paulussen, "Stripping foreign fighters of their citizenship: International human rights and humanitarian law considerations," 611.
[837] van Waas and Jaghai-Bajulaiye, "All citizens are created equal, but some are more equal than others," 425. Esbrook, "Citizenship unmoored: expatriation as a counterterrorism tool," 1320, 28.
[838] Carey, "Against the right to revoke citizenship," 901.

constitutes a less effective protection of national security than nationality deprivation followed by expulsion: the former 'would be decidedly second best when the underlying premise of the deprivation decisions is that it is the presence of the appellants in the United Kingdom which poses the threat to our national security'.[839] The Court also mentioned the greater expense and diversion of resources that such alternative measures entail. Similarly, Christian Barry and Luara Ferracioli have referred to the higher financial burden of incarceration and welfare costs.[840]

To my mind, the most important argument asserting that nationality deprivation is indeed the least intrusive measure is, yet again, the most central aim that the measure pursues. If we accept, as I have suggested we do, that the principal goal of nationality deprivation is the severance of the legal bond between citizen and state, there simply is no choice of equally effective alternatives. The termination of an individual's right to vote or the prohibition of their standing for election, for instance, target only individual aspects of someone's civic status and participation, but they may not achieve a full cancellation of their membership within the civic community. Nor can they assert the community's fundamental values and democratic constitution in quite the same way. By formally excluding those who have violated the principles at the very heart of a civic community, nationality deprivation strengthens the ties between the community and its membership to these very principles in a way that is hard to parallel in any of the alternative measures proposed.

iv. Proportionality in the narrower sense

The fourth and final criterion in a proportionality assessment is 'proportionality in the narrower sense'. It assesses whether a measure's legitimate aim is proportionate to the consequences it has for the individual. As Joshua Kerr has argued about the deprivation powers of the UK, '[u]ndoubtedly, the aim of protecting the vital interests of the UK is a legitimate one', but whether nationality deprivation 'is a proportionate means of achieving that aim is questionable'[841]. With a view to such criticism, this section argues that the impact caused by deprivation measures does not render them disproportionate.

I have already addressed the consequences of nationality deprivation for the individual concerned in my evaluation of the measure's severity in Chapter One (Section V.3.iv). At the

[839] UK Court of Appeal (Civil Division), *S1, T1, U1 and V1 v. Secretary of State for the Home Department* §44. And: *U2 v. Secretary of State for the Home Department*, §144: 'We do not consider that there is a choice of equally effective measures.'
[840] Barry and Ferracioli, "Can Withdrawing Citizenship Be Justified?," 1055.
[841] Josh Kerr, "Deprivation of citizenship, the Immigration Act 2014 and discrimination against naturalised citizens," *Journal of Immigration, Asylum and Nationality Law* 32, no. 2 (2018): 118, 23.

time, I analysed if this personal impact demanded that we re-consider our preceding assessment of the measure as administrative and regard it as criminal after all, due to its punitive effect. My analysis concluded that the consequences of nationality deprivation for the individual were, no doubt, very serious, but that they did not necessitate a punitive reinterpretation. Two arguments that supported this conclusion are also of particular relevance for an assessment of proportionality in the narrower sense: first, the observation that the terrorist conduct leading to deprivation already harmed the special status and relationship of citizenship that the deprivation measure would terminate; and, second, the important distinction between the deprivation decision and a possibly ensuing expulsion order. Thus, the consequences that nationality deprivation has on a person's life, and especially on their ties to a particular civic community, need to be regarded in light of the fundamental violation of these ties that their terrorist conduct has entailed. In this sense, the severity of the cut between citizen and state is not initially brought about by the deprivation measure, but by the citizen's acts themselves. The severed relationship they create is translated into a legally binding dissociation by nationality deprivation. Consequently, I would argue, the measure is not disproportionate. This is particularly true since nationality deprivation may not be equated with expulsion. In most MSs and the UK, the latter does not automatically follow upon the former, but requires separate administrative proceedings. A person deprived of their nationality, in the first instance, loses key rights of civic participation, but unless they are also expelled from the country (or subject to criminal prosecution at the time), they may well be able to continue a version of their former life.

Even in those cases in which expulsion immediately follows upon a deprivation decision, to the extent that it may be regarded a direct consequence of the latter, this does not, I propose, preclude proportionality. It only means that, in order for the measure to be proportionate, the relevant administrative authority (or court of appeal) needs to make (or evaluate) the deprivation decision based on a thorough consideration of the personal circumstances of the individual involved, including their ties to the depriving and possibly receiving state. The CJEU also ascribes the primary competence for such proportionality considerations, regarding both national and EU law, to the state issuing the deprivation decision: 'it is for the competent national authorities and the national courts to determine whether the loss of the nationality of the Member State concerned […] has due regard to the principle of proportionality'.[842] And as I have shown in my analysis of the (non)discriminatory nature of deprivation regimes, such considerations

[842] CJEU, *Tjebbes and Others v. Minister van Buitenlandse Zaken*, §40. See also: CJEU, *Rottmann v. Freistaat Bayern*, §55.

are regularly conducted as part of the relevant proceedings in the MSs and the UK (see Section III.1 of this chapter).

While the ECtHR does not evaluate proportionality in deprivation cases, it assesses the 'consequences of the revocation' for the individual in a fashion very similar to the concerns of proportionality in the narrower sense. Thus, in *Johansen v. Denmark*, the ECtHR concludes that the consequences of nationality deprivation for the individual involved did not amount to an undue violation of the Convention, especially of Article 8 ECHR (right to private life). In reaching this conclusion, the Court assessed a variety of different factors, including whether the deprivation decision left the individual stateless, without legal status or documents, and whether it disproportionately affected their daily life or that of their family.[843] In this particular case, expulsion was an expected consequence of the deprivation decision, and the Court thus also conducted a proportionality test for the expulsion order. Considering, in particular, the 'nature and seriousness of the offence and the risk posed to society' by the applicant as well as, broadly speaking, their relationship to Denmark and their other state of nationality (Tunesia), the Court found that their expulsion was proportionate.[844] Importantly, the ECtHR also noted that 'in respect of expulsion or risk of expulsion, the Court has never found that such, in itself, rendered a revocation of nationality in violation of Article 8 of the Convention,' and stressed the importance of whether 'revocation is a consequence of the applicant's own actions or choices' for the evaluation of both nationality deprivation and expulsion.[845] Here, we return to my argument above that, ultimately, the individual's terrorist activity is the root cause of the deprivation decision and any consequences it has.

In conclusion, we may observe that nationality deprivation applicable to terrorism in the MSs and the UK does not generally violate the principle of proportionality: as I have argued, the measure pursues a legitimate aim, it is effective in reaching this aim and the least intrusive state measure to do so; and, finally, I observed that also the measure's impact on the individual concerned does not deny proportionality: much rather, this impact is proportionate to the aim pursued.

[843] ECtHR, *Johansen v. Denmark*, §55. The CJEU lists similar aspects for enquiry in CJEU, *Rottmann v. Freistaat Bayern,* §56.
[844] ECtHR, *Johansen v. Denmark*, §54, §§72-85.
[845] ECtHR, *Johansen v. Denmark*, §54.

4. The principle of freedom of conscience

As we consider the lawfulness of nationality deprivation, there is a fourth legal principle we need to address, based on the scholarly criticism that the measure has attracted: freedom of conscience. In the non-legal literature, especially by political scientists, this issue with deprivation measures often arises as a different concept, namely the idea of a 'non-contingent' or 'robust and secure' citizenship.[846] Thus, Matthew Gibney has asked, '[i]s it legitimate for liberal societies to make the continued possession of citizenship contingent upon a certain standard of behavior?'[847] Such approaches embrace the belief that citizenship should be inalienable and, especially, independent from a citizen's performance. Naturally, such a belief clashes with the notion of a citizenship that presupposes loyalty to certain core principles or that demands, more specifically, a commitment to the inviolability of democratic values. However, as I have argued in Chapter Two (Section V), deprivation regimes rely on a liberal-republican understanding of citizenship that requires precisely such loyalty and commitment. In other words, nationality deprivation always entails, to a degree, a performance-based understanding of citizenship. Such an understanding is, by necessity, incompatible with those demanding a 'non-contingent' citizenship. At the very beginning of this chapter, I have made a similar point for the incompatibility of liberal-republican and rights-based approaches to citizenship. Yet, while I argued, at the time, that I would not address rights-based criticism of deprivation measures for this reason, I will engage with those who have challenged the measure's performance-based understanding of citizenship because their criticism also points to the interesting question of whether nationality deprivation interferes with freedom of conscience.

This principle is enshrined, for instance, in Article 9 ('freedom of thought, conscience and religion')) and captures the right of an individual to be free in their thoughts and beliefs from state interference. The notion of a civic loyalty to certain state values, whether implicit in the idea of nationality deprivation (as this thesis proposes) or explicit in the loyalty oaths demanded by many states as naturalisation requirements, is difficult to square with an absolute version of this right. Thus, critics have objected to precisely this aspect of citizenship loss and acquisition. Ulrich Wagrandl, for instance, has observed that loyalty oaths 'seem to infringe upon the freedom of conscience of Article 9 of the Convention, as [they] require one to transform legal

[846] Macklin, "The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?," 163. Matthew J. Gibney, "Deprivation of Citizenship Through A Political Lens: A Political Scientist's Perspective ", ed. The Institute of Statelessness and Inclusion, *The World's Stateless: Deprivation of Nationality* (2020). 207.
[847] Gibney, "Should Citizenship Be Conditional? The Ethics of Denationalization," 646.

obligations towards the state into moral ones.'[848] Liav Orgad has found even stronger words for such loyalty requirements, stressing their conflict with liberal democracy: '[t]he more loyalty liberal democracies demand, the less liberal they become. When liberal democracies appeal to "loyalty to the law" (allegiance) – and not just "conformity with the law" (obedience) – they challenge liberalism itself.'[849] Both scholars criticise that loyalty concepts demand not merely a citizen's legal commitment to the state, but their moral allegiance.

In this sense, one might argue that the performance-based drive of deprivation regimes suggests a violation of an individual's right to freedom of conscience. However, a return to Article 9 ECHR reveals that a state may interfere with this freedom in certain exceptional cases, especially if an individual's exercise of this right clashes with the protection of public safety and order or with the rights and freedoms of others. In addition, Article 17 ECHR ('prohibition of abuse of rights') stresses that conduct seeking to abolish the very rights that the Convention aims to protect may not itself claim protection under ECHR rights. The ECtHR has also regularly confirmed, in its jurisprudence, that the ECHR does not extend protection to acts that are 'manifestly contrary to the spirit of the Convention' or 'incompatible with democracy and/or other fundamental values of the Convention'.[850] In this light, let me stress, with Christian Joppke,[851] that the performance demanded by deprivation regimes for terrorist conduct is of a very specific and limited kind: it is the commitment to the very basic tenets of democratic society and only to the extent of their non-violability. The relevant deprivation grounds, in turn, only encompass their severest violations through terrorist crimes which have been acknowledged for their seriousness and constitutional subversiveness in domestic law, and thus clearly register as 'incompatible with … fundamental values of the Convention', as demanded by Article 17 ECHR. In addition, these violations may pose a more immediate threat to the safety, rights and freedoms of others and thus justify a limitation of the right to freedom of conscience also under Article 9 ECHR. In either case, nationality deprivation does not create a civic world demanding particular beliefs, thoughts or actions, but a world in which the most fundamental principles and values shared by the civic community may not be harmed.

[848] Ulrich Wagrandl, "Militant Democracy in Austria," *University of Vienna Law Review* 2, no. 1 (2018): 114-15, https://doi.org/10.25365/vlr-2018-2-1-95.
[849] Orgad, "Liberalism, Allegiance, and Obedience: The Inappropriateness of Loyalty Oaths in a Liberal Democracy," 100. Cf. Macklin, "The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?," 163.
[850] The ECtHR makes this point, for instance regarding hate speech, in: ECtHR, *Belkacem v. Belgium*, Application no. 34367/14, decision 27/06/2017.
[851] Joppke, "Terror and the loss of citizenship," 736.

5. The principle of international comity

In concluding our discussion of the lawfulness of deprivation regimes applicable to terrorism in the EU and the UK, let me address arguments relating to what we might call the principle of comity among nations.[852] This principle describes the commitment by different nations to recognize each other's law, territory, and sovereignty as well as to observe international courtesy and cooperation. It is important to note that such a principle, if we assume that it is legally binding,[853] cannot be invoked by an individual as a right against a state, but only between different states. Consequently, a state's violation of international comity cannot constitute an instance of unlawfulness in relation to an individual citizen and, as I have indicated at the very beginning of this chapter, this is the understanding of lawfulness that I am primarily concerned with. At the same time, comity-related criticism of nationality deprivation is so common in the scholarly literature that it warrants discussion.

Such criticism has focused either on the infringement caused by deprivation regimes of the sovereignty, territorial integrity and national security of other states or the failure of such regimes to contribute to international cooperation in the fight against terrorism. Regarding the first, the 2020 Draft Commentary to the Principles on Deprivation of Nationality by the Institute on Statelessness and Inclusion is particularly instructive. The Commentary argues that nationality deprivation and an individual's subsequent expulsion may have devastating effects on the receiving state: they not only export security risks to that state but threaten its sovereignty and territorial integrity. The Commentary extends this observation to situations in which the individual is already in another state, of which it does not hold citizenship, when the deprivation occurs.[854] In such cases, the Commentary argues, the depriving state violates its duty 'not to impinge upon the other's State sovereignty by frustrating its ability to expel an alien who entered its territory as a foreign citizen'.[855] Turkey saw itself faced with precisely such a scenario: when a (suspected) ISIS terrorist was deprived of their nationality by European nations, they remained in Turkey – a situation that Süleyman Soylu, the Turkish minister of the Interior commented as follows: 'Countries can't just revoke the citizenship of such ex-terrorists

[852] In the context of citizenship deprivation, this principle is also used in Joppke, "Terror and the loss of citizenship," 743. For further discussion of the principle, see Joel R. Paul, "The transformation of international comity," *Law and Contemporary Problems* (Article), 2008 Summer, 2008, 19-20, Gale, https://link.gale.com/apps/doc/A189704084/AONE?u=cambuni&sid=bookmark-AONE&xid=c01193df.

[853] This is not an uncontroversial assumption. As Paul notes, 'there is not even agreement that comity is a rule of law' (Paul, "The transformation of international comity," 19, 20.).

[854] Institute on Statelessness and Inclusion, *Draft Commentary to the Principles on Deprivation of Nationality as a Security Measure*, 90-92.

[855] Institute on Statelessness and Inclusion, *Draft Commentary to the Principles on Deprivation of Nationality as a Security Measure*, 92.

and expect Turkey to take care of them; this is unacceptable to us and it's also irresponsible […]. Turkey is not a hotel for foreign terrorists.'[856]

Recently, a related conflict arose between Australia and New Zealand.[857] In this case, the issue was not, as in Turkey, between a depriving and a receiving state, but between two states of citizenship of a dual national. When an individual with Australian and New Zealand citizenship joined ISIS and was subsequently caught by Turkish authorities for illegally entering their borders, the Australian government revoked the individual's Australian nationality, leaving them with only their New Zealand citizenship. Scott Morrison, the Australian Prime Minister at the time, defended this measure as follows:

> 'My job is Australia's interests. That's my job. And it's my job as the Australian Prime Minister to put Australia's national security interests first. I think all Australians would agree with that.'[858]

Jacinda Ardern, then the Prime Minister of New Zealand, expressed her dissatisfaction with Morrison's exclusive focus on Australian interests and condemned the notion of 'a race to revoke people's citizenship.'[859] As suggested by the Commentary above, Ardern regarded the Australian act as a transfer of problems from one state to another: 'New Zealand, frankly, is tired of having Australia exporting its problems', when 'do[ing] the right thing' would have meant for both states to take responsibility of their citizen.[860] Audrey Macklin has criticised nationality deprivation, in very similar terms, as an absurd and arbitrary race: '[t]o the loser goes the citizen.'[861] Rainer Bauböck and Vesco Paskalev, as well, speak of 'passing the buck', Christophe Paulussen and Martin Scheinin of 'moving the problem around like a hot potato'

[856] Süleyman Soylu quoted in Bethan McKernan, Turkey threatens to send foreign Isis suspects home from next week, The Guardian, 8 November 2019; Available at: https://www.theguardian.com/world/2019/nov/08/turkey-isis-suspects-repatriation-islamic-state (last accessed: 23/03/2023).
[857] A similar dispute arose between Spain and Switzerland: https://www.swissinfo.ch/eng/spain-sinks-swiss-plan-to-withdraw-citizenship-of-terror-suspect/45842332 (last accessed: 23/03/2023).
[858] Quoted by Praveen Menon and Colin Packham, New Zealand PM urges Australia to 'do the right thing' over terror suspect's citizenship, 16 February 2021. Available at: https://www.reuters.com (last accessed: 23/03/2023).
[859] Quoted by Praveen Menon and Colin Packham, New Zealand PM urges Australia to 'do the right thing' over terror suspect's citizenship, 16 February 2021.
[860] Quoted by Praveen Menon and Colin Packham, New Zealand PM urges Australia to 'do the right thing' over terror suspect's citizenship, 16 February 2021.
[861] Macklin, "Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien," 52. Cf. Macklin, "The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?."

and Christian Joppke quotes Voltaire's description of banishment as 'throwing into a neighbor's field the stones that incommode us in our own'.[862]

Such situations raise pressing questions about the distribution of responsibility among nations. Thus, Colin Yeo asks, with reference to the case of Shamima Begum, 'why should Bangladesh, a country the UK asserts she is a national of, be forced to admit her when she was not born there, has perhaps never visited and has no real connection other than through her parents? She was born in the UK and grew up in the UK; is she not therefore the UK's responsibility?'[863] This conflict about state responsibility is exacerbated by the nature of terrorism: unlike traitors, terrorists are typically not welcomed by any country, but rejected globally.[864] Thus, in David Miller's view, the '[t]strongest argument against revocation' is that the measure enables states to pass on the responsibility for their own security threats.[865] Highlighting the ensuing crux of responsibility, Rainer Bauböck proposes that we consider the hypothetical scenario of Germany or Austria deciding to 'posthumously' denationalise Adolf Hitler.[866] Christoper Bertram summarises the criticism that such considerations have raised for deprivation measures as follows: denationalisation 'undermines the international support for a just global order when states are prepared to offload responsibility for their own wayward members onto others, on the basis of legal technicalities.'[867]

The situation is made increasingly complex by the fact that also such 'wayward members' may insert themselves into the 'race to denationalise' between different states. Thus, three members of the infamous Rochdale grooming gang (Abdul Aziz, Adil Khan and Qari Rauf) recently challenged their deportation orders by the UK government, on the basis that they had already renounced their other nationalities, leaving them with UK citizenship as their only remaining nationality.[868] Given the existing legal safeguards against statelessness, Aziz, Khan and Rauf reasoned, they would not be able to lose their UK citizenship. However, only one of them (Aziz) could successfully rely on this argument, because he renounced his Pakistani citizenship before the Court of Appeal had ruled on his challenge to the initial deprivation decision

[862] Macklin, "The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?." Paulussen and Scheinin, "Deprivation of Nationality as a Counter-Terrorism Measure: A Human Rights and Security Perspective," 225-26. Joppke, "Terror and the loss of citizenship," 743-44.
[863] Colin Yeo, Some citizens are more equal than others, 18 April 2019, available at: https://www.counselmagazine.co.uk/articles/some-citizens-are-more-equal-than-others (last accessed: 23/03/2023).
[864] Joppke, "Terror and the loss of citizenship," 743-44.
[865] Miller, "Democracy, Exile, and Revocation," 269.
[866] Bauböck, "Whose Bad Guys Are Terrorists?," 204.
[867] Bertram, "Citizenship Deprivation: A Philosopher's Perspective," 195.
[868] Rochdale grooming gang members lose deportation appeal, https://www.bbc.com/news/uk-england-manchester-63404698 (last accessed: 23/03/2023).

issued against him.[869] The other two renounced their other nationalities too late for the argument to be valid.

States' conflicts over subjects of deprivation proceedings are even more acute if the depriving country not only issues a deprivation decision, but also pronounces a re-entry ban for the deprived individual while they are abroad. According to Guy S. Goodwin-Gill, this situation is critical for the individual involved (especially if they are also threatened by statelessness), but also for the state in which they are at the time.[870] Following Paul Weis, Goodwin-Gill has argued that such a re-entry ban violates a state's duty of readmission in light of another state's reasonable expectation that it has the right to 'return' an alien to their state of nationality.[871] The scholar goes yet a step further and suggests that, in such cases, the receiving state would be entitled to ignore the deprivation measure, and 'return' the citizen to their (former) country of citizenship.[872]

The argument of a duty of readmission has found its way into the court room. Thus, in *Islam v. Secretary of State for the Home Department* (2019), the UK's exercise of a deprivation power was challenged because the individual was abroad at the time, and nationality deprivation would thus 'offend[…] against the United Kingdom's obligation on returnability'.[873] The Court did not follow this line of argument due to the difference between the deprivation decision and the readmission decision, which, it emphasised, were separate decisions, with the latter commonly, but not necessarily, following upon the former.[874] In addition, the Court asserted that the lawfulness of the deprivation decision was not affected by the question of which country was willing to (re)admit the individual concerned.[875] In addressing this question, the Court observed that, if the state of the other nationality (Bangladesh, in this case) refused to take the individual after their deportation from Syria, 'the UK may have to take him.'[876]

I propose that the Court's judgment is applicable, not only to the case at hand, but also to the critical voices that I have sketched in the preceding paragraphs. The conflicts of sovereignty, territorial integrity and national security that may follow upon a deprivation decision are, no doubt, exceptionally problematic, especially the idea of an international 'race to denationalise'. At the same time, many of these conflicts arguably arise, not from the deprivation

[869] Rochdale grooming gang members lose deportation appeal, https://www.bbc.com/news/uk-england-manchester-63404698, (last accessed: 23/03/2023).
[870] Goodwin-Gill, "Mr Al-Jedda, Deprivation of Citizenship, and International Law," 12-13.
[871] Goodwin-Gill, "Mr Al-Jedda, Deprivation of Citizenship, and International Law," 12.
[872] Goodwin-Gill, "Mr Al-Jedda, Deprivation of Citizenship, and International Law," 12.
[873] *Islam v. Secretary of State for the Home Department*, §38.
[874] *Islam v. Secretary of State for the Home Department*, §§39.4,5.
[875] *Islam v. Secretary of State for the Home Department*, §39.5.
[876] *Islam v. Secretary of State for the Home Department*, §39.5.

decision as such, but from subsequent and separate administrative acts, which have different legal requirements, in the great majority of cases, and generally do not have to occur after a deprivation decision (even if they commonly do). Such separate administrative acts include, in particular, expulsion orders and re-entry bans. We have considered the difference between deprivation measures and expulsion orders above (see Chapter One, Section V.3.iii, V.3.iv and Chapter Three, III.3.iv). The lawfulness of these administrative decisions is a matter distinct from the lawfulness of nationality deprivation.

Indeed, as part of deprivation proceedings, national authorities often take into consideration what kind of ties the individual has to the depriving state, on the one hand, and the states of any further nationalities, on the other. Finland, for example, has recently added a new provision to the Finish Nationality Act to this effect. This provision (Section 33b) legally implements the necessity of a full assessment of the circumstances of an individual subject to deprivation proceedings. Thus, it includes the requirement that the deprivation decision (pursuant to Section 33a) be based on a comprehensive assessment of the individual's situation, especially of their residence, family ties, language skills, education, and employment. All of these are to serve as indicators of their relationship to Finland as well as to any other states of nationality.

A final criticism of deprivation regimes that may be grouped among concerns for international comity is the perceived failure of deprivation regimes to support the cooperation of states in their fight against terrorism. Thus, the Institute on Statelessness and Inclusion has argued that states violate their international obligations to bring terrorists to justice by (simply) depriving them of their nationality. More precisely, the Institute identifies a duty to cooperate in the fight against terrorism and a duty to investigate and punish terrorists for their actions, and it regards nationality deprivation as a possible breach of both.[877] Along similar lines, Rainer Bauböck and Vesco Paskalev have proposed that a state's failure to prosecute citizens who have committed terrorist crimes results in the state's violation of its duty to provide (international) security.[878] I do not find these arguments very convincing since they appear to assume that nationality deprivation, by necessity, replaces repressive measures of criminal law. However, this is not the case. As we have seen in Chapter One (Section IV.3.i), many jurisdictions in the MSs and the UK require, as one of their deprivation grounds, a prior conviction of

[877] Institute on Statelessness and Inclusion & EUI Global Citizenship Observatory, *'Instrumentalising Citizenship – In the Fight against Terrorism', Global Comparative Analysis of Legislation on Deprivation of Nationality as a Security Measure*, 6.
[878] Bauböck and Paskalev, "Citizenship Deprivation - A Normative Analysis," 16. Cf. Paulussen, "Towards a Right to Sustainable Security of Person in Times of Terrorism? Assessing Possibilities and Limitations Through a Critical Evaluation of Citizenship Stripping and Non-Repatriation Policies," 228.

terrorist crimes. In such cases, the individual would have to serve their criminal sentence, in addition to losing their nationality. If, by contrast, a state's deprivation legislation does not require a preceding criminal conviction, this does not mean, by any necessity, that the state waives its right to pursue criminal measures against a terrorist if it decides to deprive them of nationality. Even if the individual is located outside the jurisdiction of the depriving state, a state may still pursue criminal measures upon the return of the individual. In such cases, there may even be a particular interest, on the part of a different nation, to initiate criminal proceedings. Thus, in *Islam v. Secretary of State for the Home Department*, the Court recognizes the legitimate interest of foreign states to prosecute foreign nationals for crimes committed on their soil according to their respective laws.[879]

IV. The legitimacy of nationality deprivation

So far, this chapter has shown that nationality deprivation applicable to terrorism in the EU and the UK, as conceptualized in my first two chapters, is lawful in the eyes of national and international law, especially since it fulfils the criteria of non-arbitrariness and procedural fairness (if certain procedural safeguards are met) as well as the principle of proportionality. We could also see that scholarly objections to the measure as violating principles of international comity, non-discrimination or freedom of conscience were not ultimately convincing. The remainder of this chapter is dedicated to exploring the question of whether deprivation of nationality can be a legitimate state measure in a democracy. I have argued that lawfulness and legitimacy provide answers to different questions: while the first assesses whether a state measure complies with the applicable laws, the latter examines whether a state measure that is lawful, in principle, should be followed because it is an expression of justice, in a broader sense. While the preceding portion of this chapter has demonstrated that nationality deprivation applicable to terrorist conduct in the MSs and the UK is a lawful measure according to the standards of national and international law, my subsequent considerations will defend the measure's legitimacy in a democratic context.

We have seen, from the very beginning of this chapter, that much criticism of deprivation regimes has stressed their alleged incompatibility with (liberal) democracy. Thus, we saw scholars object to the undemocratic idea of citizenship suggested by deprivation measures, in the civic performance they require and the distinction between different groups of citizens they make, and we noted their criticism of the measure's undemocratic and arbitrary procedures as

[879] *Islam v. Secretary of State for the Home Department*, §43.

well as their condemnation of deportation and statelessness as cruel and undemocratic deprivation consequences. In the preceding sections of this chapter, I have countered much of this criticism and demonstrated, in particular, that the allegedly undemocratic failures of nationality deprivation did not constitute breaches of (inter)national law. In this final part of my third chapter, I will propose, in a more positive sense, that deprivation measures not only fail to unlawfully violate democratic principles, but that they may, indeed, derive legitimacy from a state's democratic constitution.

This argument will be closely linked to the aim of nationality deprivation that I have established in my first two chapters: as it seeks to sever a violated civic bond of loyalty to the basic tenets of the civic community, the measure strives, in particular, to safeguard democratic core values. Indeed, we have already seen, in my proportionality assessment above, that this pursuit is not only lawful, but legitimate. In the following sections, I will further corroborate this argument by grounding it in the idea of 'defensive democracy'. This term is meant to draw together several strands. It recalls the principle of 'militant democracy', which was coined in the 1930s and endorsed the right of a democracy to vehemently, and – if need be, undemocratically – fight antidemocratic political movements that seek its utter destruction; but the term also and deliberately moves beyond these historical origins and acknowledges a growing complexity: as I will show in greater detail below, the notion of democratic self-defence has become both wider in scope – targeting also those only threatening specific democratic values or principles without necessarily seeking democracy's annihilation – and more restrictive in the kinds of defensive measures it condones. What unites early expressions of militant democracy and later forms of democratic self-defence under the umbrella of defensive democracy is their shared conviction that it is both necessary, and a democratic state's responsibility, to support and maintain its democratic constitution. This is not an extraordinary or outlandish belief. In fact, most democracies today have some form of legal and/or political mechanism that supports their continued existence as democratic systems. For a case in point, we might think of the German 'Ewigkeitsklausel' and its enshrinement of the German free democratic order. As I will argue in this section, nationality deprivation responding to terrorist acts is an expression of the same state responsibility to defend its own democracy.

Before proceeding to making this point, let me briefly acknowledge the challenge of the task. Despite the currency of the idea across legislations today, it is not conceptually straightforward that a democracy should (be allowed to) defend itself if its democratic foundations

come under threat, especially if this threat originates within the democratic system.[880] Nor is it straightforwardly clear whether defensive democracy, even if we accept the legitimacy of the idea, may justify deprivation measures. As Ulrich Wagrandl has argued, 'neither expatriation, nor banishment, nor disenfranchisement are options for a liberal democracy worthy of that name'.[881] In his view, enemies of democracy 'are and must remain fellow citizens' best understood as 'adversaries, with whom there is a legitimate political struggle over the just constitution of state and society.'[882] In the following two sections, I will propose a different position and defend the legitimate role of nationality deprivation in a state's democratic self-defence.

1. The democratic paradox

The idea of defensive democracy arises from a central paradox within the democratic constitution: if democracy is the one mode of state governance that allows true equality and majority rule, regardless of the views the majority holds, it is faced with the dilemma of how to respond to those wishing to harm or abolish democracy itself. Marin Klamt describes this paradox as follows: 'if democracy is a concept of freedom that guarantees the rights of the individual, then how can it restrict these rights in the name of freedom, even if it is challenged existentially by enemies?'.[883] There are two main ways of approaching this dilemma: first, the belief that democracy needs to stay true to its principles, to the extent that it also accepts anti-democratic forces and, in the words of Karl Popper, is prepared even 'to tolerate intolerance'[884]; and, second, the conviction that democracy must not do so, but rather oppose those seeking to destroy it from within and defend itself against them.

The first approach is often described as 'democratic fundamentalism' or 'democratic proceduralism'.[885] A prominent representative of this view is Hans Kelsen, who asserted in 1932, that is, on the very eve of Hitler's coming to power in Germany, that democracy needed to be upheld, in its truest form, even when defeat was imminent.[886] In his essay 'Verteidigung der Demokratie' ('Defence of Democracy'), he describes this necessity as follows:

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[880] See Macklem, "Militant democracy, legal pluralism, and the paradox of self-determination," 488 and my considerations of democratic fundamentalism above.
[881] Wagrandl, "Militant Democracy in Austria," 99.
[882] Wagrandl, "Militant Democracy in Austria," 99.
[883] Martin Klamt, "Militant Democracy and the Democratic Dilemma: Different Ways of Protecting Democrat-ic Constitutions," in *Recht der Werkelijkheid - Tijdschrift voor de sociaalwetenschappelijke bestudering van het recht* ed. Fred Bruinsma and David Nelken (2007), 134, 37.
[884] Karl Popper, The Open Society and Its Enemies, Chapter 7 (1945).
[885] Alexander S. Kirshner, "Proceduralism and Popular Threats to Democracy," *Journal of Political Philosophy* 18, no. 4 (2010), https://doi.org/https://doi.org/10.1111/j.1467-9760.2010.00370.x.
[886] Hans Kelsen, "Verteidigung der Demokratie," in *Verteidigung der Demokratie:Abhandlungen zur Demokratietheorie*, ed. Matthias Jestaedt and Oliver Lepsius (Tübingen: Mohr Siebeck, 2006), 231.

> 'A supporter of democracy is in many ways similar to a caring doctor of a seriously ill patient: it is the doctor's obligation to continue the patient's treatment even though hope for recovery has waned almost completely.'[887]

After acknowledging the risks that threatened democracy at the time, from both left and right, Kelson emphasises that the only defence possible for supporters of democracy is to prove its opponents wrong and persuade them of its merits.[888] And if this fails and the 'ship' of democracy sinks, 'the hope alone remains that the ideal of freedom is indestructible and that its revival will be all the more powerful the deeper it has sunk'.[889] Kelsen vehemently denies the option of a more forceful democratic self-defence: '[a] democracy that tries to remain in place contrary to the will of the majority only through the use of measures of force ceases to exist.'[890]

At the same time, Kelsen recognizes that such a fundamental understanding of democracy can be exploited: in his view, to live up to its own ideals, democracy has to tolerate also anti-democratic forces, if they are democratically legitimized, and to guarantee their free development, even if they aim to abolish democracy itself.[891] And indeed, in Kelsen's day, the National Socialists gained power in Germany precisely by exploiting this weak spot of democracy. As Joseph Goebbels notoriously put the matter, 'this will always remain one of the best jokes of democracy, that it gave its deadly enemies the means by which it was destroyed.'[892] Consequently, it is little surprising that democratic fundamentalism has not remained without its critics: those who are advocates of democracy and still hold that there is an imperative for democratic self-defence, even if this means resorting to restrictive or undemocratic means.

This position was famously endorsed by Karl Loewenstein, a contemporary of Kelsen's and the 'father of militant democracy',[893] as the principle would become known.[894]

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[887] Kelsen, "Verteidigung der Demokratie," 231. Translated from German into English by the author of this thesis.
[888] Kelsen, "Verteidigung der Demokratie," 231.
[889] Kelsen, "Verteidigung der Demokratie," 231. Translated by the author of this thesis.
[890] Kelsen, "Verteidigung der Demokratie," 237.Translated by the author of this thesis. Similarly, Thomas Jefferson, "First Draft of the Inaugural Address (Mar. 4, 1801)," in *The Writings of Thomas Jefferson* ed. Paul Leicester Ford (1897), 1, 3.
[891] Kelsen, "Verteidigung der Demokratie," 237.
[892] Paul Joseph Goebbels, "Die Dummheit der Demokratie," in *Der Angriff – Aufsätze aus der Kampfzeit* (1935), 61. Translation by András Sajo, "From militant democracy to the preventive state?," *Cardozo law review* 27, no. 5 (2006): 2262. Also used by Gregory H. Fox and Georg Nolte, "Intolerant democracies," *Harvard international law journal* 36, no. 1 (1995): 1. Russell A. Miller and Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany: Third edition, Revised and Expanded* (Hauppauge: Duke University Press, 2012), 285.
[893] P. B. Cliteur and B. R. Rijpkema, "The Foundations of Militant Democracy," in *The State of Exception and Militant Democracy in a Time of Terror*, ed. M. G. Ellian A. (2012), 229.
[894] Karl Loewenstein, "Militant Democracy and Fundamental Rights, I," *The American political science review* 31, no. 3 (1937): 423, https://doi.org/10.2307/1948164. For later treatments of the concept, see for instance:

Loewenstein's work originates in the 1930s and responds to the rise of fascist governments in Europe at the time. More specifically, it addresses the strategic adaptation of fascist political movements to democratic systems and procedures, allowing them to take full advantage of the very institutions they seek to subvert in the process. In this light, Loewenstein argues that democracy is not only allowed to defend itself against fascism, but that it has an obligation to do so. In his words,

> 'If democracy is convinced that it has not yet fulfilled its destination, it must fight on its own plane a technique [fascism] which serves only the purpose of power. Democracy must become militant.'[895]

Firmly criticising the 'legalistic blindness' of democratic fundamentalism, as welcoming the 'trojan horse' of fascism and allowing antidemocratic forces to dismantle democracy unchallenged, '[u]nder cover of fundamental rights and the rule of law',[896] Lowenstein asserts the necessity of a more rigorous opposition: '[f]ire is fought with fire'[897]. Such an approach is justified, he points out, since antidemocratic political threats within the democratic system may be likened to enemies attacking the state from the outside. 'Fascism has declared war on democracy'.[898] In such a situation, he argues, democracy may rely on the famous adage of Léon Blum that 'during war legality takes a vacation', and rescue itself with 'every possible effort […] even at the risk and cost of violating fundamental principles', if this means 'ultimately preserving these very fundamentals'.[899]

In detailing the kind of rescue efforts this may entail, Loewenstein points especially to 'legislative measures' that may serve to exclude anti-democratic movements from the democratic process.[900] In his words, '[t]he most comprehensive and effective measure against fascism

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Macklem, "Militant democracy, legal pluralism, and the paradox of self-determination," 488. Paulien de Morree, "Rights and wrongs under the ECHR: The prohibition of abuse of rights in Article 17 of the European Convention on Human Rights" (2016), 148. Otto Pfersmann, "Shaping Militant Democracy: Legal Limits to Democratic Stability, Otto Pfersmann," in *Militant Democracy*, ed. András Sajó (The Hague: Eleven International Publishing, 2004), 34-35. Svetlana Tyulkina, *Militant democracy : undemocratic political parties and beyond / Svetlana Tyulkina*, 1st. ed. (London: Routledge, 2015), 34-35. Jan-Werner Müller, "Protecting Popular Self-Government from the People? New Normative Perspectives on Militant Democracy," *Annual review of political science* 19, no. 1 (2016): 2, https://doi.org/10.1146/annurev-polisci-043014-124054. See also Fox and Nolte, "Intolerant democracies."

[895] Loewenstein, "Militant Democracy and Fundamental Rights, I," 423.

[896] Loewenstein, "Militant Democracy and Fundamental Rights, I," 423.

[897] Karl Loewenstein, "Militant Democracy and Fundamental Rights, II," *The American political science review* 31, no. 4 (1937): 656, https://doi.org/10.2307/1948103.

[898] Loewenstein, "Militant Democracy and Fundamental Rights, I," 432

[899] Loewenstein, "Militant Democracy and Fundamental Rights, I," 432.

[900] Loewenstein, "Militant Democracy and Fundamental Rights, I," 431.

consists in proscribing subversive movements altogether'.[901] As a consequence, party-ban proceedings become a crucial instrument in Loewenstein's militant democracy and, indeed, they still tend to follow ideas of democratic self-defence in many European states today. It is important to note that, despite his sometimes categorical language (see his endorsement of a wartime suspension of legality), Loewenstein is well aware of the risk that curtailing democratic rights might pose to 'the very basis of its existence and justification'.[902] Thus, he emphasises that the prohibition of political parties must be based on thorough deliberation and the relevant legislative acts must be 'formulated very carefully in order to avoid open discrimination against any particular political movement'.[903] He also makes sure to stress that militant democracy must not lead to a ban on antidemocratic sentiment per se. Only if such sentiment crosses the line from being a mere theoretical exchange of ideas to an organised system with political aims, Loewenstein demands that effective preventive measures be put in place: 'while freedom of expression need not be withheld from antidemocratic individuals, antidemocratic parties must be denied protection under the right of free organisation and assembly.'[904] Within a framework of careful deliberation, Loewenstein thus allocates the force of militant democracy especially to its capacity to restrict what we might call the full access rights to the democratic community for those seeking to destroy it. This is well captured in an analogy he uses in an essay of 1946:[905]

> 'The constitutional-democratic state is operated by a set of rules to which those in the game subscribe. If a team on a football field declares that it will win the game by shooting the opposing team, it will certainly win it; but it would seem wiser to exclude the team from the field before it destroys the game and the rules.'

Here, Loewenstein stresses first that civic membership is intrinsically conditional (there are 'rules to which those in the game subscribe') and second that, if these conditions are severely violated, the need arises to terminate the membership in question by exclusionary measures. Both aspects are suggestive of the key characteristics of nationality deprivation responding to terrorist acts in the EU and the UK, as I have introduced them in this thesis. In this light, the following section will discuss, in greater detail, whether the notion of democratic self-defence may be applicable to nationality deprivation and give legitimacy to deprivation regimes.

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[901] Loewenstein, "Militant Democracy and Fundamental Rights, II," 645.
[902] Loewenstein, "Militant Democracy and Fundamental Rights, I," 431.
[903] Loewenstein, "Militant Democracy and Fundamental Rights, II," 646.
[904] Karl Loewenstein, "Freedom Is Unsafe without Self-Government," *The Annals of the American Academy of Political and Social Science* 243, no. 1 (1946): 49, https://doi.org/10.1177/000271624624300110.
[905] Loewenstein, "Freedom Is Unsafe without Self-Government," 48.

2. Defensive democracy and nationality deprivation

Of course, there are important differences between Loewenstein's militant democracy and deprivation regimes today, even if they both strive, as I have argued, to strengthen democracy. Thus, critics have been quick to point out that the term militant democracy is often applied today to situations that differ from those that characterised its original conception.[906] After all, Loewenstein wrote in a very particular historical setting – the rise of fascism in Europe – and called for democracy's adamant opposition to a very particular threat: antidemocratic political movements that operate under the cloak of procedural compliance with the aim of destroying the democratic system with the very tools it provides. At least on the surface, the threat to democracy posed by modern-day terrorism takes a very different shape: rather than by a covert infiltration of democratic institutions, it tends to be characterised by public acts of violence that openly attack the democratic community and plunge it into fear and momentary chaos. Nor does terrorism fall under the remits of traditional warfare which Loewenstein invokes as a point of reference for his militant democracy. As Shlomo Avineri has observed, especially with the fall of the Soviet Union and the wider collapse of Communist ideology, threats to democracy and its values tend to come no longer 'from internal organized political parties or an outside, ideologically-driven world power', but rather 'from obviously amorphous groups involved in what became known as a new kind of non-conventional asymmetric warfare'.[907] And yet, as Paulien de Morree observes, 'the distinction between anti-democratic actors operating within democracy and terrorists is not always that clear-cut'.[908] I would propose, in particular, that today's terrorists resemble the fascist political movements of Loewenstein's day in that they thrive, and become dangerous to democracy, to no significant part through their skillful abuse of the democratic system. They too deliberately take advantage of the rights guaranteed by democratic states in order to attack and subvert these very rights. And citizenship is one of the key guarantors of rights in this context.

We may find the legitimacy of a state's opposition to those abusing democracy confirmed in the European Convention on Human Rights and the case law of the ECtHR (and EComHR). Indeed, first signed in 1950, the Convention arose from a sprit not unlike Loewenstein's

[906] For a summary of recent criticism, see: de Morree, "Rights and wrongs under the ECHR: The prohibition of abuse of rights in Article 17 of the European Convention on Human Rights," 177-82. Avineri, "Introduction," 2.
[907] Avineri, "Introduction," 2. See also: Jan-Werner Müller, "Militant Democracy," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and András Sajó (Oxford: Oxford University Press, 2012), 1256 ('[w]ith the end of the cold war, definitions of the supposed enemies of democracy have become much more diffuse and difficult to establish').
[908] de Morree, "Rights and wrongs under the ECHR: The prohibition of abuse of rights in Article 17 of the European Convention on Human Rights," footnote 202

thinking. While Loewenstein sought to safeguard democracy on the verge of its corruption by fascism, the Convention was created, in part, to prevent that European democracies would fall, ever again, under antidemocratic rule. Thus, according to the Convention's drafters, one of its key purposes was to 'ensure that the states of the Members of the Council of Europe are democratic, and remain democratic'.[909] In other words, we might say that the Convention was conceptualized, from its beginning, as embracing defensive democracy. And, as we will see, while not referring to 'militant democracy' explicitly, the case law on the ECHR establishes a link between a state's prerogative to counter those who take undue advantage of its democratic liberties and the principle of a 'democracy capable of defending itself'. Importantly for our concerns, across the decades, the case law of the EComHr/ECtHR has applied the principle of democratic self-defence not only to its more traditional areas (party-ban proceedings), but also to states' counter-terrorism initiatives and disputes over civic loyalty much closer to the deprivation regimes at the core of this thesis. Thus, I propose, this case law allows us to cast a bridge of applicability between the idea of defensive democracy, which we saw first arise in Loewenstein's militant democracy, and modern-day deprivation measures applicable to terrorism in the EU and the UK.

We may begin to trace this connection by returning, once more, to the opposition to antidemocratic exploitations of democracy that I have identified as a common thread between Loewenstein's militant democracy and deprivation regimes today. Let us chart the ways in which this theme appears in the case law on the ECHR. In this context, the most crucial article of the Convention is Article 17 ('Prohibition of abuse of rights'). We have already touched upon this article in our assessment of the proportionality of deprivation measures and the legitimacy of their aim (Section III.3.i of this chapter). The article establishes an explicit prohibition of the exploitation of rights protected under the Convention in order to harm these very rights. The case law relating to this particular article originates in 1957, with a dispute over the national ban of a political party: *Communist Party (KPD) v. Germany*.[910] In this case, the German Communist Party argued that its dissolution by the German Federal Constitutional Court violated its rights under Articles 9, 10 and 11 ECHR. However, rather than assessing the alleged violations in detail, the Commission denied the application based solely on Article 17 ECHR. In its judgment, it observed that the relevant provision in German law, which allowed the dissolution

[909] A. Robertson (ed.), *Collected edition of the 'Travaux Préparatoires' of the European Convention on Human Rights, Vol. I-VIII* (The Hague: Martinus Nijhof, 1975-1985), 60. See also de Morree, "Rights and wrongs under the ECHR: The prohibition of abuse of rights in Article 17 of the European Convention on Human Rights," 179.
[910] EComHR, *German Communist Party v. Germany*, application no. 250/57, decision 20/07/1957, 5.

of an anti-constitutional movement, pursued a 'similar motive' to Article 17, which was a 'fundamental provision of the Convention [..] designed to safeguard the rights listed therein by protecting the free operation of democratic institutions'.[911] In this context, the Commission also cited preparatory work on the Convention which stressed that '[i]t is necessary to prevent totalitarian currents from exploiting, in their own interests, the principles enunciated by the Convention; that is, from invoking the rights of freedom in order to suppress Human rights'.[912] Here, we find a clear acknowledgement of the legitimacy of a state's restriction of democratic rights in order to challenge their abuse and safeguard the democratic system. More specifically, the Commission recognizes the validity of excluding antidemocratic elements from democratic participation; and, like Loewenstein, it considers party-ban proceedings a legitimate exclusion in this sense.

This traditional notion of defensive democracy gains in nuance and complexity as we turn to some of the later case law on Article 17. Here, we may think of *Refah Partisi (The Welfare Party) and Others v. Turkey* (2003). This case too concerns a national party ban, namely, the dissolution of *The Welfare Party* by the Turkish Constitutional Court and its judgment also confirms the validity of the ban. Yet, unlike the Commission before, the ECtHR conducts a much more detailed assessment of the restrictions of ECHR rights resulting from the party's prohibition under national law and stresses that 'compromise between the requirements of defending democratic society and individual rights is inherent in the Convention system'.[913] While thus calling for careful deliberation, on the one hand, the Court nonetheless emphasises the 'very clear link between the Convention and democracy', on the other, and stresses that 'no one must be authorised to rely on the Convention's provisions in order to weaken or destroy the ideals and values of a democratic society'.[914] Here, the ECtHR recalls the drafting intent of the Convention and flashes out, once again, the anti-abuse sentiment enshrined in Article 17 – which, as I have argued, is shared also by Loewenstein and deprivation regimes applicable to terrorism in the EU and the UK.

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[911] EComHR, *German Communist Party v. Germany,* 4. Similarly, in *Reisz v. Germany* (1997), the Commission confirmed that Article 18 of the German Basic Law shared a common purpose with Article 17 ECHR: it is the purpose of both 'to prevent them from deriving from the Convention a right to engage in any activity or perform any act aimed at destroying any of the rights and freedoms set forth in the Convention' (EComHR, *Reisz v. Germany,* application no. 32013/96, judgment 20/10/1997). Article 18 of the German Basic Law allows the German Constitutional Court to declare the forfeiture of an individual's constitutional rights in cases where the individual abuses these rights to combat the free democratic basic order. An English translation of the German Basic Law is available at: https://www.gesetze-im-internet.de.

[912] EComHR, *German Communist Party v. Germany,* 4.

[913] ECtHR, *Refah Partisi (The Welfare Party) and Others v. Turkey*, application nos. 41340/98, 41342/98, 41343/98 et al., judgment 13/02/2003, §96.

[914] ECtHR, *Refah Partisi (The Welfare Party) and Others v. Turkey,* §99.

At the same time, the judgment reveals a significant shift in the understanding of defensive democracy endorsed by ECHR jurisprudence. In *Refah Partisi (The Welfare Party) and Others v. Turkey,* the Court appears to have widened the scope of this idea, from the integrity of the democratic system to the protection of the core principles shared by a democratic community.[915] Thus, we may note that, in recognizing the Turkish party ban, the Court also accepted the government's argument that not only *Refah*'s intent to establish a Sharia-law system in Turkey, but also the party's broader opposition to secularism violated democracy: '[i]n the Government's submission, militant democracy required political parties […] to show loyalty to democratic principles, and accordingly to the principle of secularism'.[916] A related widening of scope is discernible elsewhere in the Court's judgment. Tellingly, it refers no longer merely to the 'free operation of democratic institutions', as the Commission had done before, but to 'the ideals and values of a democratic society'.[917] And we find yet another instantiation of this 'new paradigm of militant democracy'[918] in the Court's following observation:

> 'pluralism and democracy are based on a compromise that requires various concessions by individuals or groups of individuals, who must sometimes agree to limit some of the freedoms they enjoy in order to guarantee greater stability of the country as a whole'.[919]

Here, the ECtHR identifies a compromise at the core of pluralist democracy by which individual freedoms may need to take a subordinate position to the 'stability' of the community at large. This offers, I propose, not only further justification for the, at times, necessary restriction of individual rights in a democratic system, but also an acknowledgment of the commitment ('agree to limit') that each individual in a democracy must have towards their fellow members of the demos.

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[915] See also: de Morree, "Rights and wrongs under the ECHR: The prohibition of abuse of rights in Article 17 of the European Convention on Human Rights," 238.
[916] ECtHR, *Refah Partisi (The Welfare Party) and Others v. Turkey,* §62. On the extension of militant democracy to secularism, see also: Müller, "Militant Democracy," 1256. Patrick Macklem, "Guarding the Perimeter: Militant Democracy and Religious Freedom in Europe," *Constellations* 19, no. 4 (2012): 581, https://doi.org/10.1111/cons.12009. de Morree, "Rights and wrongs under the ECHR: The prohibition of abuse of rights in Article 17 of the European Convention on Human Rights," 239-40.
[917] See EComHR, *German Communist Party v. Germany,* 4
and ECtHR, *Refah Partisi (The Welfare Party) and Others v. Turkey,* §99.
[918] de Morree, "Rights and wrongs under the ECHR: The prohibition of abuse of rights in Article 17 of the European Convention on Human Rights," 239.See also: Macklem, "Guarding the Perimeter: Militant Democracy and Religious Freedom in Europe," 577.
[919] ECtHR, *Refah Partisi (The Welfare Party) and Others v. Turkey,* §99.

The Court's 'new paradigm' of defensive democracy marks an important step, I propose, from the more traditional concept of militant democracy, as coined by Loewenstein, towards the strengthening of democratic core principles pursued in deprivation regimes. In particular, the Court's reference to the protection of the 'ideals and values of a democratic society' and its endorsement of individuals' necessary agreement to self-limitation recall key characteristics of the civic loyalty that, as I have shown, is a central requirement of deprivation measures applicable to terrorism in the EU and the UK. The legitimacy of the connection between democratic self-defence and the notion of civic loyalty is further corroborated, yet again, by the case law of the EComHR and the ECtHR. Here, we must turn to those judgments that explicitly refer to, and acknowledge, the notion of a 'democracy capable of defending itself'. While this notion appears in several different contexts in the ECHR jurisprudence,[920] it also features prominently in disputes concerning national requirements for a citizen's 'duty of loyalty to the state'. We have already considered such 'loyalty cases' in Chapter Two (Section IV.3) as well as earlier in this chapter when we examined the legitimacy of the aim of deprivation measures. As we saw in both instances, irrespective of their ultimate decision in a particular case, the EComHR and the ECtHR always confirmed the legitimacy of a state's loyalty requirement by rooting it in the principle of a 'democracy capable of defending itself' and, thus, in a version of defensive democracy.

Intriguingly, we also saw that the relevant judgments underwent a shift very similar to the Court's approach to democratic self-defence that we traced so far. In the more traditional loyalty cases, the loyalty at stake was generally a loyalty owed by civil servants to their state and their alleged loyalty violations tended to consist of the membership in a political party under scrutiny for antidemocratic goals. Here, we may detect the individual aspect, as it were, of the party-ban proceedings so central to Loewenstein, but we may also note that these early cases generally confirmed the position of the applicants. As Chapter Two (Section IV.3) demonstrated, this was due to several factors, but perhaps it also suggests that there was still a certain hesitation, at the time, to extend the principle of democratic self-defence to individuals, rather than political movements.[921] As we saw, the situation was very different in the later loyalty cases: here, loyalty to the state and its core tenets was required, not from a particular subset of

[920] Running for office: ECtHR, *Rekvényi v. Hungary*, application no. 25390/94, judgment 20/05/1999; ECtHR, *Ždanoka v. Latvia*; restrictions of political speech: ECtHR, *Féret v. Belgium*, application no. 15615/07, judgment 16/07/2009; racist speech: ECtHR, *Ivanov v. Russia*, application no. 35222/04, decision 20/02/2007; prohibition of certain symbols: ECtHR, *Vajnai v. Hungary*, application no. 33629/06, decision 08/07/2008; criminal prosecutions: EComHR, *Kühnen v. Germany*, application no. 12194/86, decision 12/05/1988.
[921] See Loewenstein's related distinction in: Loewenstein, "Freedom Is Unsafe without Self-Government," 49.

the citizenry, but from all citizens, and loyalty violations specifically also included terrorist acts committed by individual citizens. We observed that this broadened understanding of loyalty was most clearly visible in *Ghoumid and Others v. France*. In this case, the ECtHR acknowledged that the applicants 'severed the bond of loyalty to France by committing particularly serious acts which, in the case of terrorism, undermine the very foundation of democracy.'[922] In addition, the Court stressed the 'grave threat' posed by terrorist acts and recognized states' desire to take a 'a firmer stand against individuals who had been convicted of a serious offence constituting an act of terrorism'.[923] It is not too much of a stretch to read this judgment as an expression of the new paradigm of democratic self-defence that we encountered above – only that, in the present case, the mode of self-defence is a deprivation decision responding to an individual's terrorist acts and the severe breach of loyalty they constitute to the state's democratic foundations.

In light of the preceding paragraphs, I believe that it is valid to conclude that defensive democracy, especially the new paradigm that we identified in the more recent jurisprudence on the ECHR, is very much applicable to the deprivation measures at the core of this thesis. In the eyes of the ECtHR, terrorism clearly constitutes a particularly severe threat to democracy and may legitimately lead to nationality deprivation, as one expression of a democracy's self-defence. In this sense, deprivation regimes responding to terrorism in the EU and the UK may indeed qualify as just state acts, even – or perhaps rather especially – in a democracy.

Let me emphasise that this does not mean that deprivation measures should be easily justified or, as Kent Roach has objected, simply 'on the promise of militant democracy allow[…] civil liberties to be infringed in the name of defending and saving democracy'.[924] Nor does it mean that deprivation measures as tools of defensive democracy should replace criminal punishments.[925] As I have argued before, deprivation measures are, in the very great majority of cases, distinct from criminal law and they should comply with the highest standards of proof and procedure. In the words of Peter H. Schuck, they must be 'robust in all respects', especially in their procedural safeguards.[926] In addition, only the most fundamental threats to democracy, constituted by terrorist conduct, ought to register as a violation of the civic loyalty that

[922] ECtHR, *Ghoumid and Others v. France*, §71. For the severity of terrorism, see also: ECtHR, *Othman (Abu Qatada) v. The United Kingdom*, application no. 8139/09, judgment 17/01/2012 (final: 09/05/2012), §183; ECtHR, *Johansen v. Denmark*, §50.
[923] ECtHR, *Ghoumid and Others v. France*, §50.
[924] Kent Roach, "Anti-Terrorism and Militant Democracy: Some Western and Eastern Responses," in *Militant Democracy*, ed. András Sajo (The Hague: Eleven International Publishing, 2004), 186.
[925] Müller, "Protecting Popular Self-Government from the People? New Normative Perspectives on Militant Democracy," 249-65.
[926] Schuck, "Should Those Who Attack the Nation Have an Absolute Right to Remain Its Citizens?," 177-79.

underpins deprivation provisions. This is no less valid if we regard nationality deprivation an expression of defensive democracy. As the ECtHR observes in *Zdanoka v. Latvia*, any state act relying on the principle of a 'democracy capable of defending itself' must find 'a compromise between the requirements of defending democratic society on the one hand and protecting individual rights on the other.'[927] This necessary compromise also applies to deprivation regimes.

V. Conclusions

The first two chapters of this thesis explored the legal nature of deprivation regimes applicable to terrorism in the EU and the UK, and clarified the key terms and concepts involved. In the process, we could establish that such deprivation measures generally pertain to administrative law and seek to sever the bond between the state and one of its citizens, in response to that citizen's fundamental breach of the loyalty they owe to the civic community and its core principles, including, in particular, its democratic constitution.

Following this understanding of deprivation regimes, this third and final chapter has been dedicated to analysing their lawfulness and legitimacy, in light of the persistent scholarly criticism in both regards. As we have seen, many scholarly objections to deprivation measures which first appear to address their legitimacy may indeed be recast as questions of legality. Consequently, my evaluation of the lawfulness of deprivation regimes has taken up the greatest part of this chapter. To conduct this evaluation, I established first that there is no general prohibition of nationality deprivation in international law, neither in international legal instruments nor in the jurisprudence of international courts. What I did find, instead, were criteria used by the courts to determine the lawfulness of a given deprivation provision. Thus, the ECtHR evaluates deprivation measures especially for their non-arbitrariness and procedural fairness and the CJEU conducts a proportionality test. Combining these criteria with the most prominent strands of scholarly criticism, I identified the following five lawfulness principles against which deprivation regimes need to be measured: 1. non-discrimination, 2. non-arbitrariness and procedural fairness, 3. proportionality, 4. freedom of conscience, 5. international comity.

My analyses revealed that deprivation measures, as set out in Chapters One and Two, pass the test of lawfulness in all five respects. Regarding the principle of non-discrimination, we noted that many provisions make a distinction of applicability between, broadly speaking, birth-right and naturalised citizens as well as between mono and multi nationals. I argued that the first distinction may be regarded discriminatory and could be avoided. While it reveals the

[927] ECtHR, *Žđanoka v. Latvia*, §100.

valid desire to make a difference between those who have only recently become citizens and those with long-standing community ties, this desire should better be met by means of a thorough examination of personal background during the deprivation proceedings. The second distinction, by contrast, became apparent as non-discriminatory: as I argued, it did make a difference between different groups of citizens, but it was justified in doing so due to the necessity of avoiding statelessness. Regarding the second lawfulness principle, non-arbitrariness and procedural fairness, we noted that there were, of course, a number of elements in which deprivation measures might fail this standard; but there was no reason why they should do so by necessity. Thus, I have stressed that the idea of deprivation regimes, as detailed in Chapters One and Two, is not incompatible with non-arbitrariness or procedural fairness; and, contrary to scholarly opinion, the relevant international case law does not reveal violations of either principle in the national provisions it has examined to date.

Our analyses of the proportionality of deprivation measures considered the legitimacy of their aim, their effectiveness in reaching this aim, their identity as being the least intrusive measure to do so as well as their proportionality in the narrower sense. On all four counts, deprivation regimes responding to terrorism in the MSs and the UK qualified as proportionate state acts. In this context, their legal nature and principal goal, as established in my first two chapters, were vital: if we understand nationality deprivation, as I propose we do, as the administrative severance of a violated bond of civic loyalty to certain fundamental principles, including the rule of law and democratic values, it pursues not only a legitimate aim in the eyes of international jurisprudence, but it is the only measure to effectively reach this aim. In light of scholars' persistent understanding (and criticism) of nationality deprivation as a national-security tool, I have also shown that, even in this case, we must concede the measure's effectiveness if combined with an expulsion order. Regarding the possible violation of the principle of freedom of conscience, I could show that deprivation regimes for terrorist conduct do indeed require that individuals commit to a certain civic performance, but only in a minimal sense: such regimes demand citizens' loyalty to the very basic principles of their community and only to the extent of their non-violation.

Finally, I have also examined deprivation measures in their compliance with international comity. While this principle certainly exceeds the idea of lawfulness in its more immediate sense, that is, between state and citizen, once again the relevant scholarly criticism has prompted me to examine the matter more closely. As we could see, in this context, scholars have objected to nationality deprivation either due to its undue infringement of the territorial integrity and sovereignty of another state or due to its alleged failure to support the global fight

against terrorism, by simply pushing unwanted citizens from one state to another. In response, I have acknowledged the absurdities of an international race to denationalise, but I have also pointed to two common misconceptions underpinning these two objections. First, as I have shown in my first chapter, nationality deprivation is not a measure of criminal law, nor does it preclude other measures of criminal law. Thus, a terrorist subject to deprivation proceedings is still liable to criminal prosecution and may well become part of an international cooperation to bring terrorists to justice. Second, as I have also detailed in Chapter One (Section V.3.iii), nationality deprivation is not to be equated with expulsion, and their lawfulness needs to be assessed separately. In particular, the possible negative effects arising for a state by another's expulsion of one of their former citizens does not deny the lawfulness of nationality deprivation in the first place.

In sum, these considerations revealed that deprivation measures applicable to terrorist conduct in the EU and the UK, as conceptualised in my first two chapters, are lawful state measures. Based on this conclusion, the final section of this chapter examined their legitimacy in a democratic context, and considered whether, in this particular setting, nationality deprivation may be considered not only legal, but also just. While my considerations of the measure's lawfulness primarily took the shape of a defence against arguments of its illegality, this final part took a more positive approach: by drawing on the concept of defensive democracy, it argued that deprivation measures are a valid element in a state's democratic self-defence, seeking to safeguard and strengthen democratic core values against those who fundamentally threaten them. To this end, I first introduced the idea of militant democracy, first conceived by Karl Lowenstein in the 1930s, and identified a related notion of democratic self-defence in the European Convention on Human Rights and the early case law of the EComHR. Subsequently, I traced this notion through the later jurisprudence on the ECHR to what has been called a 'new paradigm of militant democracy'. As part of this new paradigm, I have argued, the ECtHR has extended the legitimacy of defensive democracy also to deprivation measures for terrorist conduct and to those, in particular, that understand nationality deprivation, as I do, as the severance of a violated civic bond. In this light, nationality deprivation, conceptualized in the ways suggested by this thesis, became apparent as an expression of a state's just undertaking of democratic self-defence. In conclusion, this chapter has demonstrated that nationality deprivation responding to terrorism in the EU and the UK is, in principle, both lawful and legitimate.

CONCLUSIONS

In light of the vocal criticism that scholars have levelled against nationality deprivation responding to terrorist acts, this thesis has offered a tentative defence of the measure as a lawful and legitimate tool in state's democratic self-defence. As I have argued, much of the scholarly criticism derives from a few central misconceptions. The first and most prominent is the mistaken belief that nationality deprivation is a punishment, and a particularly harsh one at that. As I have demonstrated in my first chapter, deprivation measures in the EU and the UK are generally administrative in their legal nature, and not criminal.

We have seen that this not only applies to their procedural make-up, but also to their non-punitive purpose and consequences. Thus, I could show in my first chapter, as well as in the proportionality assessment of Chapter Three, that much of the perceived harshness of nationality deprivation as a response to terrorism is undercut by the severity of the initial terrorist acts. These acts have already fundamentally harmed the relationship between state and citizen that nationality deprivation would formally sever. Regarding the measure's purpose, we could observe in Chapter One that it does not seek to punish an individual for their acts. Nor does it pursue, first and foremost, a national-security agenda. As we have seen in Chapters One and Three, here lies another common scholarly misconception: imprecisely blending deprivation decisions and the expulsion orders that may follow upon them, scholars have criticised the ineffectiveness of nationality deprivation as a security tool. However, as I have shown, deprivation measures in the MSs and the UK are not, at their core, intended as security tools. Instead, they aim to terminate an individual's status of membership in the civic community: they formally sever the bond between the state and a citizen who, by their terrorist acts, has violated their civic commitment to the state's fundamental principles.

If understood in this way, nationality deprivation responding to terrorism in the EU and the UK relies on a few central elements, especially the idea of a citizen's duty of loyalty to the state and its core principles. As we have seen in Chapter Two, this idea presupposes a particular understanding of citizenship that includes both rights and obligations on the part of each citizen, and I have defended such an understanding with reference to a liberal-republican discourse of citizenship. In a detailed study of international legal instruments and case law, we also

observed that the duty of loyalty at the core of deprivation regimes needs to be defined very carefully: it is a commitment to the state community, rather than to a particular government, and to its most fundamental tenets, including democracy, human rights and the rule of law. It is also a commitment of omission, granting the inviolability of these tenets, rather than their active promotion. In addition, we noted that only the most extreme violations of this duty of loyalty may qualify as deprivation grounds and that terrorism generally registers as such an extreme violation. These observations served to suggest what deprivation regimes applicable to terrorism in the MSs and the UK are – and ought to be – like, based on the idea of nationality deprivation they all share and the legal instruments their states have subscribed to, especially the 1961 UN Convention on the Reduction of Statelessness and the European Convention on Human Rights.

On this particular understanding of nationality deprivation, namely, as a state's response to an individual's severe violation of their civic duty of loyalty to the inviolability of certain fundamental principles of the community, my thesis has based its defence of the measure, arguing that it is both lawful and legitimate. Regarding the former, I have shown that deprivation regimes generally comply with the legal standards of non-discrimination, non-arbitrariness and procedural fairness, proportionality, freedom of conscience, and international comity. Naturally, individual national provisions may still fail these lawfulness criteria in individual cases. And we have seen that sufficient procedural safeguards, the distinction between birth-right and naturalised citizens, and the principles of comity are critical aspects in this regard. But we have also seen that none of these provide unsurmountable challenges to the lawfulness of deprivation regimes. The final two, for instance, may find consideration in the detailed assessments of personal background and (inter)national ties included in many national deprivation proceedings. Nationality deprivation certainly needs to meet high standards of lawfulness – but, contrary to scholarly belief, I have argued that there is no reason why it should not be able to do so, in principle. It is not, by any necessity, unlawful *per se*. In fact, we could observe that international courts like the ECtHR and the CJEU generally endorse the lawfulness of national deprivation regimes.

The end of my third chapter has taken the defence of nationality deprivation yet a step further and argued that the measure is not just lawful, but also legitimate in a democratic context. While much criticism negates the compatibility of deprivation regimes with (liberal) democracy, I have proposed that such regimes may indeed serve and support democracy. More specifically, I have shown that nationality deprivation may be understood as an expression of defensive democracy, as originally conceptualized in Karl Loewenstein's militant democracy

and successively developed by the EComHR and ECtHR. In this light, the measure may be considered a tool of democratic self-defence: by establishing a loyalty requirement to the inviolability of democratic core principles for each individual citizen, nationality deprivation strengthens civic democracy. It creates a special link between citizenship and democracy.

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IV. Abbreviations

CJ-NA	Committee of Experts on Nationality
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights (= European Convention for the Protection of Human Rights and Fundamental Freedoms)
ECN	European Convention on Nationality
EComHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
EUDO	European Union Democracy Observatory

EUI	European University Institute
GLOBALCIT	Global Citizenship Observatory
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ILC	International Law Commission
ISI	The Institute on Statelessness and Inclusion
ISIL	Islamic State in Iraq and the Levant
ISIS	Islamic State in Iraq and Syria
MS(s)	Member State(s) of the European Union
PtiDP	Power to initiate deprivation proceedings
PtrDD	Power to render deprivation decisions
SIAC	Special Immigration Appeals Commission (UK)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees