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**The Legal Construction of Membership: Nationality
Law in Germany and the United States***

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Abstract

The argument of this paper is that several empirical puzzles in the citizenship literature are rooted in the failure to distinguish between the mainly legal concept of nationality and the broader, political concept of citizenship. Using this distinction, the paper analysis the evolution of German and American nationality laws over the last 200 years. The historical development of both legal structures shows strong communalities. With the emergence of the modern system of nation states, the attribution of nationality to newborn children is ascribed either via the principle of descent or place of birth. With regard to the naturalization of adults, there is an increasing ethnization of law, which means that the increasing complexities of naturalization criteria are more and more structured along ethnic ideas. Although every nation building process shows some elements of ethnic self-description, it is difficult to use the legal principles of *ius sanguinis* and *ius soli* as indicators of ethnic or non-ethnic modes of community building.

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THE LEGAL CONSTRUCTION OF MEMBERSHIP: NATIONALITY LAW IN GERMANY AND THE UNITED STATES

Mathias Bös

*Der Paß ist der edelste Teil von einem Menschen.
Er kommt auch nicht auf so einfache Weise zustande wie ein Mensch.
Ein Mensch kann überall zustande kommen, auf die leichtsinnigste Art
und ohne gescheiterten Grund, aber ein Paß niemals.
Dafür wird er auch anerkannt, wenn er gut ist,
während ein Mensch noch so gut sein kann
und doch nicht anerkannt wird.
(Bertold Brecht, Flüchtlingsgespräche)*

*(The passport is the finest part of a person.
It comes, as well, not so easily into being as a person.
A person can be brought about everywhere, in the most lighthearted way
and without any good reason, but never a passport.
Therefore a passport is recognized, if it is a good one,
whereas a person might be as good as possible
and is nevertheless not recognized.)*

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1. Nationality laws and membership in the nation state

In May 1999 both houses of the German parliament passed a reform act of the German nationality law based on a combination of the principal of *ius soli* and *ius sanguinis*. With this step, Germany adopted a nationality law similar to most other countries in Europe and North America. This development clearly surprised some social scientists, such as Rogers Brubaker, who noted in 1992: "...there is no chance that the French system of *ius soli* will be adopted; the automatic transformation of immigrants into citizens remains unthinkable in Germany." (Brubaker, p 185)

This contradiction of an informed prediction by social facts begs the question: How does a path-breaking and highly sophisticated analysis like Brubaker's yield such an inaccurate conclusion? The lack of conceptual clarity among two sets of concepts are potential contributors: On the one hand, the concepts of nationality and citizenship are confused and, on the other hand, naturalization criteria for newborn children and adults are not distinguished.

The argument of this paper is that several empirical puzzles in the citizenship literature are rooted in the failure to distinguish the mainly legal concept of nationality with the broader, political concept of citizenship. In making this case I elaborate on the following two patterns that have emerged in nationality laws over the last 200 years.

1. With the emergence of the modern system of nation states, the attribution of nationality to newborn children is ascribed either via the principle of descent or place of birth. This pattern indicates that ascribed criteria are increasingly used to define the status of nationality and that the implementation of ascribed criteria is not necessarily rooted in ethnicity.
2. With regard to the naturalization of adults, there is an increasing ethnization of law, which means that the increasing complexities of naturalization criteria are more and more structured along ethnic ideas, which are sociologically called ethnic. Nevertheless these criteria are more and more achievable.¹

These trends contradict one still widespread assumption in social sciences; namely, that within the development of western societies there is an ongoing shift from using ascribed and particularistic definitions to implementing achieved and universalistic criteria. This paper will demonstrate that, contrary to this assumption, the implementation of particularistic and ascribed patterns is at the heart of the development of national constituted societies. In advancing the argument, it is

¹ Other patterns, which are important but cannot be analyzed here, are the nearly complete elimination of statelessness, the implemented equality between men and women, and the increasing density of international law. For first overview see de Groot 1989, Bös 1997.

important to appreciate universal/particularistic and achieved/ascribed not as poles of one dimension,² but as four attributes of the definition of a situation that mutually enhance each other in the development of the modern nation state.

In this paper, nationality laws are examined in detail for the German and the United States cases. The USA and Germany are chosen because their real and assumed differences in nationality law provide interesting comparisons. The legal system of the USA is in the tradition of the common law, whereas the German system is based on statute law. The USA is seen as a country of open immigration, with ethnicity emerging as an internal differentiation. By contrast, Germany exemplifies the prototype of a closed, ethnic homogeneous “non-immigration” country. The empirical materials of this paper are legal texts, as well as commentaries by legislators and political scientists. The main focus of this paper centers on the meaning structure of the legal texts. In conducting the analysis care is taken to separate the discourse from the legal system as a whole; although some hints are given in the text, it is not always clear in which ways the described legal norms are applied. Moreover, the law and the legal system interact with other spheres of society since laws are the output of complex interaction between political and legal processes. Given these interactions, the final legal text usually reflects only parts of the original normative ideas of the different actors involved in this process and, as importantly, the law often shapes social action in ways not foreseen by the legislative process. Some of these complex interactions are explored in the second part of this paper.

The paper proceeds in two steps: First, the paper provides a short sketch of the terms and decision rules employed in German and American nationality laws and describes the main steps in the historical development of nationality law concerning newborn children and adults. In the second part of the paper some sociological interpretations of the evolution of ascribed and achieved criteria in nationality law are provided. The paper concluded with a note on the relation between ethnicity and the nation state.

2. Nationality law in Germany and the USA

Who belongs to a nation state and who does not? This question may sound simple, but has generated a vast spectrum of ideas as to how membership in a state can or should be acquired. One

² The idea that the development of the nation state is a linear process from particular and ascribed to universal and achieved definitions of the situation is one the myths of modernization theory (Wehling 1992). Wood (1968), referring to Parsons and his pattern variables, demonstrates that only the pair diffuse - specific can be seen as poles of one dimension. Nonetheless, the often biased reception of Parsons concerning his pattern variables is too often dogmatic since Parsons himself recognized the increasing use of ascribed characteristics within modern societies (Parsons 1975).

answer to this question consists of the legal regulations, which determine who has a certain nationality and who not. These regulations are usually laid down in nationality or citizenship laws and constitutions. Nationality laws emerged from the separation of the globe into (at least assumed) structurally equal political units - the nation state; or, to put it in more fashionable sociological terms, the segmentary differentiation of the world into nation states. In this process nationality laws represent bordenization processes that regulate which human being belongs to one unit or the other (see Bös 1997, Nassehi 1990).

The development of nationality law is closely linked to the development of the nation state in Western Europe and North America. After the decline of the Roman Empire, explicit membership regulations were largely unknown for political and territorial units in continental Europe. One of the few codifications of membership regulations was done during the re-organization of continental Europe with the Peace of Westphalia. Here an *ius domicilii* was introduced, which simply regulates that everybody who lives on the territory of a sovereign has to be considered as a subject of this sovereign (Thedieck 1989). Many important developments concerning membership regulations took place in European cities.³ In North America, Native Americans developed complex and differentiated membership regulations outside the framework of nation states before Europeans conquered the continent.⁴ At the beginning of the conquest, America was a large patchwork of different colonial laws with huge territories where European law was either disputed or simply not implemented. With the increasing dominance of the British colonies in North America the British colonial law gained more and more importance (Smith 1997).

2.1 Terms and rules of categorization

Within the development of nation states, two concepts emerged to categorize people into political-territorial units: nationality and citizenship.

1. The legal term nationality, in German “Staatsangehörigkeit”, refers to membership in a state according to national and international law.
2. The political term citizenship, in German “Staatsbürgerschaft”, describes membership in a nationally constituted society.

Although the focus of this paper is on nationality and nationality laws, it is necessary to separate the legal concept of nationality from the more general political concept of citizenship. Imagine a

3 For a summarizing discussion see e.g. Riedel 1979.

4 For a more detailed account of membership regulation in Native American tribes see e.g. Trigger 1978 on the social and political organizing of the Iroquois.

nationally constituted society where all people living on the territory are nationals of the respective nation state and are able to participate in all spheres of society equally. In such a society there is no difference between nationality and citizenship. Despite the fact that the congruency of nationality and citizenship is only an imagined one, both terms are usually used synonymously. Especially in the English everyday language, nationality and citizenship are often used interchangeably, e.g. to nationality law is often referred to with expression citizenship law.⁵

Most perspectives within sociology are associated with the British sociologist Thomas H. Marshall (1992). Here citizenship is seen as a specific status configuration⁶ within a nationally constituted society. From such a perspective, citizenship and nationality can - at least to some degree - vary independently (see Wenzel/ Bös 1997), with many dimensions referring to the status configuration of citizenship (like the right to work, equal legal treatment etc.) being allocated to non-nationals. Similarly, nationals can be excluded from full citizenship, as in the case of voting rights for children or, in former times, for women. Generally speaking, citizenship refers to all legal regulations and status allocations, which regulate the participation of individuals in the political, legal, economic, social and cultural sphere. In this sense citizenship is the legally defined part of the complex system of memberships that each individual develops within a society. Nationality is a status configuration as well, but only refers to the personal relation of an individual to the political system.

Nationality and citizenship are different concepts, although there are some “overlapping” sets of statuses that might simultaneously fall into the categories of citizenship and nationality, like political rights associated with nationality. Furthermore, nationality is a very important basic status, basic in a sense that nationality is necessary in order to have full citizenship. Most important is

5 Of course there are many other, mainly social philosophical, endeavors to differentiate between the two terms. For example, consider the many normative ideas on “good citizenship”, which implies rights and duties. It is evident that, within this literature, not all nationals are good citizens. The discussion on the rights and needs of different groups within society for political participation has to be mentioned as well, the keywords here are “the politics of recognition” (Taylor/Gutmann 1992) or “multiculturalism” (Kymlicka 1995). Regardless of their big differences, all these diagnoses are premised on the idea that neither all persons living on a given territory are nationals nor that all nationals can equally practice their citizenship rights.

6 Status is a concept with a rich tradition within sociology. It is often associated with the name Ralph Linton (1936) and refers to the position of a human being in relation to others within a given social context. In sociology mostly three overlapping perspectives are used: *First*, status means the rights and duties of person like as, for example, in the concept of the status group. *Secondly*, status refers to the differential valuation of criteria associated with occupation, power, or property as, for example, in the context of social inequality. *Thirdly*, status is used within role theory to describe the specific position within social structure associated with a set of role expectations (father, electrician etc.). Within the described perspectives (and in this paper) status is mainly seen as a legal position to which specific valuations and role expectations are connected. The term configuration refers to the fact that, within different social contexts, different statuses are occupied which often have typical combinations (like the American full-time employed husband). As a summary and a re-conceptualization of ideas related to the term status, see Turner 1988.

the unrestricted right to stay that is connected to nationality, which can be at least in some cases withdrawn from non-nationals. Separating citizenship and nationality as different status configurations does not mean, however, that they do not interact. Nevertheless, for further analysis it is essential not to blur the distinction between nationality and citizenship because, from a sociological point of view, they refer to different membership mechanisms that display different historical dynamics.

In focusing more closely on nationality, the next question is: What are the basic legal principles, which structure the classification of nationals and non-nationals? These regulations are mainly found in nationality laws and constitutional regulations of nationality. In the case of Germany, naturalization regulations are in the foreigners' law ("Ausländergesetz") as well; whereas, in the case of the United States, the naturalization and immigration law is combined. Three processes have to be regulated by law: acquiring nationality by birth, acquiring nationality by naturalization of adults and losing nationality.

According to the legal system, three basic principles or status allocation mechanisms are involved: (1) *ius soli* – the territorial principle, (2) *ius sanguinis* – the principle of descent, (3) *ius domicilii* – the principle of residence. Two principles⁷ regulate how nationality is acquired by birth. First is the principle of *ius sanguinis* from Latin 'sanguis' for blood, which means the law of descent; second is the principle of *ius soli* from Latin 'solum' for soil, the law of the territory. Both legal principles are derived from the definition of a state by international law, which says a state consists of a people, a territory and a governmental authority (Kimminich 1984, Hannappel 1986). This allows each state to regulate different kinds of actions on its territory, e.g. ascribing nationality in the case of birth. Through this definition a personal connection exists between each national and the state. Citizens outside the territory still belong to the people of the state and, accordingly, their children can be declared citizens of a state, even if they were born outside the territory. Logically, the simultaneous application of both principles may lead to statelessness and/or to dual citizenship. Apart from the acquisition of nationality by birth, humans can become members of a state by naturalization. Here a modification of the *ius soli* principle is used, stemming from its original form *ius domicilii*, from Latin 'domicilium' for domicile. In this case, the residence of a person is used as a criterion to attribute nationality. Typically, however, many different additional criteria must be met in order to be naturalized. Every nationality law regulates the loss of nationality, as well. According to international law and the declaration of human

⁷ This categorization refers to modern the legal systems, which differentiate between the naturalization of newborn children and adults, a differentiation that was developed within the evolution of the modern nation state.

rights, everyone has the right to have a nationality and nationality cannot be withdrawn without the consent of the individual.

Various rights and duties follow from the legal identification of someone as a national. For instance, only nationals have full security of residence and the right of diplomatic protection. Adult nationals have full rights of political participation, especially to run for a political office. Moreover, in the US and Germany, nationality means having full occupational liberty, full social benefits, and complete protection from extradition (see Wiessner 1989). On the other hand the duties connected to nationality are few. Potentially, the most prominent is the duty of military service. However, it is the case that in the United States alien residents are not generally exempt from military service (Neumann 1998), and progressively more countries no longer require obligatory military service. All other duties, from obeying the law to paying taxes, have to be fulfilled by all people living in the territory of a nation state, regardless of the nationality (see Wiessner 1989).

Nationality law can be divided into two areas, which are usually separated within the legal texts as well. On the one hand, nationality law regulates the acquisition of nationality by birth and, on the other hand, it regulates naturalization and the loss of nationality for adults. Historically this distinction is reflected in ideas about natural-born subjects and acquired subjects (e.g. Kettener 1978); although continuities between pre-national and national membership definitions, which refer to the personal relation between the individual and the system of domination, should not be overstated.

2.2 Acquiring nationality by birth

The American nation building process was driven by the increasing differences of ideological and material interests between Britain and the colonies. Nevertheless, many ideas of the British legal system survived in America. One of the earliest important regulations on the allocation of nationality to newborn children for the Anglo-Saxon common-law was the comment of judge Cook on the subjectship of the Scotsman, Robert Calvin, in 1608. Cook argued that being born within the territories of the crown or descent from British subjects establishes subjectship (i.e. eternal allegiance to crown) and all rights connected with this status.⁸ With this judgment, Judge Cook formulated not only the Anglo-Saxon version of the *ius soli* and *ius sanguinis*, he also introduced the term naturalization, the idea that, with the recognition of a person as a subject, he or she gets his natural place within society (see Smith 1997: 40). “Although over time there was some con-

⁸ Calvin’s Case and the *ius soli* and *ius sanguinis* of British subjects, were modified for British subjects of the colonies, so that subjects of the colonies did not have the same rights as people of Great Britain. This difference was of

troversty over details of the law, English jurists consistently maintained that either birth or descent could identify the natural-born subject. In modern analytical terms, the system combined the principles of the *ius soli* (birthplace) and the *ius sanguinis* (descent) in determining subjectship.” (Kettner 1978: 15) With this case the strong tradition of *ius soli* and *ius sanguinis* was established in the English legal system, which was later reflected in American legal norms.

In continental Europe nation building was closely linked to the French revolution and Napoleon. The predecessor of many regulations concerning nationality in continental Europe was the Code Napoléon⁹ of 1804 (see Grawert 1973). Based on the different constitutions of the French Revolution, these regulations codified the nationality of newborn children a mixture of *ius soli* and *ius sanguinis*. Although the *ius soli* regulations were not fully spelled out, they were seen as an established right based on *ius domicilii* (see Hecker 1980: 7).¹⁰ Many continental European countries, including the south of Germany and Italy, implemented the regulations of the Code Napoleon.

For the legal system of the German Reich, the Prussian law was of crucial importance. With the law of 1842 “On the Acquisition and Loss of the Quality as a Prussian subject as well as on the entrance in a Foreign Civil Service”¹¹ Prussia established an *ius sanguinis a patre* and in the case of an illegitimate child an *ius sanguinis a matre* (see Franz 1992: 238). The law influenced the Prussian dominated North German Confederation (Norddeutscher Bund), and later on the “Nationality Law of the German Empire and States” of the German Reich in 1871. In the time between 1871 and 1913 the different nationality laws of the German states were still operational and used for naturalization (Thedieck 1989). Especially in the south of Germany, these regulations were quite liberal. Accordingly, it is not appropriate to speak about one single nationality law until the revision of the law in 1913, the “Nationality Law of the German Empire and States” (Reichs- und Staatsangehörigkeitsgesetz - RuStAG) of July 22nd 1913, which was operational until 1999 (Fahrmeir 1999).¹² With the law of 1913 the allocation of German nationality was processed for legitimate and legitimized children of German fathers with an *ius sanguinis a patre*.

course as well a reason for the Declaration of Independence. The legal principles laid down by Judge Cook were nevertheless *mutatis mutandis* operational for the determination of membership within the colonies (Smith 1997).

⁹ Originally this law was called Code Civil des Français. In 1807 this code was officially called Code Napoléon, the name which is most commonly used in the literature on legislative history (Hecker 1980: 1).

¹⁰ On the importance of the Code Napoléon and its diffusion through continental Europe see e.g. Hecker 1980, de Groot 1989 or Bös 1997.

¹¹ All translations of the laws are by the author

¹² The interesting field of German colonial law, which provided nationality law with an important drive towards a direct membership within the German Reich, cannot be explored within this paper, see Thedieck 1989.

The American constitution included only a few regulations on nationality (see next section). With the Naturalization Act of 1790, a statute *ius sanguinis a patre* was established. Until 1868 *ius soli* was only general legal opinion in the tradition of the British common-law. With the 14th constitutional amendment, a constitutional *ius soli* was codified. “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside ” (Constitution, amend. 14). The phrase “and subject to the jurisdiction thereof” excludes children of foreign diplomats, children who were born on foreign ships within American waters, as well as of women who followed foreign troops. Furthermore, until 1887 Native Americans were excluded (Neumann 1998). But basically, by the end of the 19th century, America had implemented a statute mixture of an *ius sanguinis a patre* and an *ius soli* in order to regulate the naturalization of children in all states. With respect to nationality, the Civil War solved a central problem of all federal systems, namely, who is allowed to regulate nationality. It determined that a person’s relation to the central government is more important than a person’s relation to the state. The Jim Crow era demonstrates that the impact of this development on the whole complex of citizenship was not as direct as many contemporaries thought. In the period between the two world wars, only a few changes were made concerning the regulations with respect to the nationality of children. During this period the USA introduced the first elements of gender equality. In 1934, the Congress legislated an *ius sanguinis a matre et a patre*, but only for the second generation, arguing that parents should have sufficient connection to the USA if their child were to be naturalized. Children who acquired citizenship by *ius sanguinis* were required to take residence in the US in order to keep their nationality; although this regulation was eliminated in 1978 (Neumann 1998).

Concerning the regulations for children, German nationality law was fairly stable after the Second World War as well. With the founding of the German Federal Republic in 1949, all amendments and changes of the German Nationality Law by the national socialist government were cancelled, but the law itself remained in effect. The German Nationality Law was still retained, despite the fact that it was only a patchwork of legal regulations. International law was the main reason for this retention. The German Federal Republic was considered as the legal successor of the German Empire, so legal regulations of the former German Empire could be maintained. By sticking to the old law, West Germany was still able to define the people of East Germany as German citizens. Any new nationality law that would have included such an inclusion would have been against international law, because no state is allowed to declare the whole people of another state to its own nationals (Neumann 1998: 263). Changes within West German nationality law after World War II were mainly due to §3.2 of the new basic law that grants equal rights to men and women. Children of German mothers who were married to stateless fathers were still treated according to the *ius sanguinis a patre*, which means they became stateless as well. This was

changed in 1962 by court decision. In 1974 a full *ius sanguinis a patre et a matre* was established (see Hecker 1990: 146 pp.).

The constitution of the German Democratic Republic included only a few statements on nationality.¹³ §19 of the constitution from 1968 stated in addition that citizenship (meant is here nationality) shall be regulated by a separate law. Until 1967 this law was the same RuStAG as that of the German Federal Republic. In 1967 a new nationality law was granted: “The Law on Citizenship of the German Democratic Republic” (“Gesetz über die Staatsbürgerschaft der Deutschen Demokratischen Republik”)¹⁴. §5 regulates an *ius sanguinis a patre et a matre* for newborn children who would have been stateless an *ius soli* was codified.

Until the new law in 1999 the most important regulations on nationality in the German Federal Republic after unification can be summarized as follows: German nationality is allocated by an *ius sanguinis a patre et a matre*. The acquisition of German nationality via *ius sanguinis* did not exclude the acquisition of other nationalities (Neumann 1998: 264). In May of 1999 both houses of the German parliament ratified a new nationality law that came into effect on January 1st 2000 (see Bundesregierung 1999). In addition to the still existing *ius sanguinis* regulations, an *ius soli* for children was implemented, if the parents resided legally at least for eight years in Germany. At the age of 23 these children have to decide if they want to opt for German nationality; if they do, they lose their second nationality. Dual nationality for children of binational marriages is still tolerated.

The main components of today’s American nationality law can be summarized as follows: In the British legal tradition, American nationality is acquired through *ius soli*, which was made constitutional by the 14th Amendment in 1868. For children of foreign sovereigns and children born on foreign vessels, the *ius soli* is not applied, and there are some special regulations for American territories and possessions, as well. Since the first nationality act there is an *ius sanguinis a patre et a matre*, but only if the parents have resided for at least 10 years within the US. This regulation

13 §1.4 of the constitution of the GDR from 1947 stated the often cited and cryptical sentence: “There is only one German nationality” (“Es gibt nur eine deutsche Staatsangehörigkeit”). According to the decision of the SED party conventions, this sentence meant a unified status of nationality within the territory of the GDR (Riege 1986). Of course it is also possible to interpret this paragraph in reference to a shared German nation (Judt 1998: 494).

14 The term citizen (“Staatsbürger”) was used in derivation from the West German and the international usage. It was used in the same way as in the constitution of the German Democratic Republic. This was done because it was argued that there is a special relation between the citizen and the state (“besondere Staat-Bürger-Beziehung”) within socialist countries. For an account of these strange arguments see Riege 126 ff. On the discussion of the different ideas of the relation between the citizen and the state in East and West Germany, see Luchterhand 1990.

is eased, for example, for people who serve in the US forces or are employed by the government. American nationality is acquired when a child is legitimized.¹⁵

The story of implementation an *ius soli* and *ius sanguinis* is a quite simple and straightforward, since both developed out of an *ius domicilii* with the emergence of special regulations for children. With respect to children, today's German and U.S. American nationality laws show both a mixture of *ius soli* and *ius sanguinis*. These two legal mechanisms were in principle invented at the beginning of the nation building process, but their implementation was elaborated and spelled out over the course of time.

2.3 Acquiring and loosing nationality as an adult

The history of the regulations concerning the acquisition or loss of nationality for adults is much more complicated. In North America, parallel to the British colonial law, many colonies implemented their own naturalization regulations and developed new ideas about acquiring nationality (Kettner 1978: 65-130). These were mainly versions of *ius domicilii* for free white persons.¹⁶ Since this situation led to the naturalization of many "obnoxious" aliens, as Madison puts it in one of the Federalist Papers (42), a general regulation for the USA was established: Sect. 8 of the constitution which states: "The Congress shall have the power to establish an uniform rule of naturalization..." Besides this general statement only three minor regulations are in the constitution which affect the political rights of naturalized persons making it impermissible for someone born abroad to become American president. However such persons can become senators after 9 years, and congresspersons after 7 years of US nationality. With the Naturalization Act of 1790, naturalization of adults was possible for "free white persons" who had "good moral character" and supported the constitution of United States; and dependent minors were naturalized with their parents (Smith 1997, Neumann 1998).

With the Declaration of Independence all British subjects became nationals of the American Federation, at least from the American point of view. Nevertheless, it was uncertain if British subjects could be naturalized by another country; which was one of the main reasons (besides some diplomatic misjudgments) for the American British war of 1812. Great Britain stuck to the legal point that allegiance to the crown lasted for a subject's entire whole life and, therefore, it

¹⁵ In addition there are some special regulations for American territories. These regulations refer mostly to American Samoa und Swain's Island, on which American nationals still live without Americans citizenship rights (Neumann 1998: 252-53).

¹⁶ The long, complex and interesting story of nationality and citizenship before the American independence cannot be told here. For a summary see Smith 1997 or Kettner 1978. For a classical study on the development of the status for African Americans see Handlin 1948.

was logical that the crews of seized American ships could be used as soldiers of Great Britain.¹⁷ With the Naturalisation Act of 1870, Great Britain recognized that the eternal allegiance to the crown of British subject could be terminated by naturalization. Since 1855 women who married in American nationals were automatically naturalized, if they belong to the group of persons who could be naturalized according to law. African Americans, Indians and Chinese were excluded. Later on American courts came to the conclusion that women who marry a foreigner lost their nationality.

Contrary to continental Europe, a large set of immigration regulations were developed in America. Near the end of the last century several exclusion acts were issued: criminals, prostitutes, lunatics, and persons who could become a public burden were not allowed to enter US territory. In 1882 immigration of Chinese people was stopped for 10 years by the “Chinese Exclusion Act”, which was finally discarded in 1943. 1924 began the time of the quotas. The number of immigrants of a given nationality was limited to 3% of the population already residing in the US (Hutchinson 1981).¹⁸

For Germany, the constitutions of the French Revolution and the Code Napoléon were important for the development of regulations concerning the naturalization of adults and the loss of nationality. The documents contain the full catalog of different criteria for acquiring and losing nationality and, as importantly, they contain the distinction between the concept of nationality and citizenship rights. In 1913 a major set of legal regulations were passed including regulations specifying that women lost their nationality by marrying someone without German nationality, that foreigners who served in German administration, schools or churches became German, that naturalization required living in Germany, being economically independent, and without criminal record. The regulations also specified that nationality could be lost by individual declaration or through an administrative act. For example, if someone outside Germany did not obey the orders of a German court or the military administration their status could be revoked. With this law German nationality was no longer lost after 10 years of non-legitimized stay abroad (Weidelener/Hemberger 1991: 2).

17 This problem of the categorization of British and American subjects was not solved before the middle of the 19th century, with the introduction of the Bancroft treaties, which were, in fact, a whole system of the bilateral treaties between United States of America and other countries (Hannappel 1986). Some of the treaties were concluded between the United States and different German states. The Bancroft system was not fully discarded as until 1981 and can be interpreted as one important example of the negotiation of membership regulations on the international level (Hannappel 1986: 28).

18 1924 was as well the year of the Indian citizenship act which finally declared all Indians born in the United States to nationals. For a more detailed account of citizenship and nationality for Indians see e.g. Davies 1994.

The National Socialists changed the German nationality law according to their political and ideological goals. In 1933, instantly after the election of Adolf Hitler as Reichskanzler, laws were enacted to repeal naturalization and to withdraw nationality. In the beginning these laws were mainly used to withdraw nationality from politically unwanted persons; later they were used to withdraw nationality from Germans of Jewish religion (Franz 1992: 242). In 1934 the nationality of the different German states was discarded and one unified German nationality was finally implemented. In 1935 the opportunities to naturalize foreigners were discarded. Whereas in the RuStAG most paragraphs were simply canceled, the racist citizenship laws were codified in other legal bodies, especially in the so-called “Nürnberger Gesetzen” (see Brubaker 1992: 165 pp.).

In reaction to the excesses under National Socialism, nationality was anchored in the German Basic Law (Grundgesetz). Thus, Article 16.1 of the Basic Law stipulates that nationality can only be revoked through a law and only against the wishes of a particular individual if such a revocation does not entail statelessness for that person. Furthermore, Article 116 was introduced to give people who were denationalized for racial, religious, or political reasons during the Nazi regime the opportunity for easy re-naturalization (Neumann 1994: 266). The article defines the well-known group of “ethnic Germans” as well. Germans in the sense of this regulation are refugees or displaced persons of German origin, who were living on the territory of the former German Reich. Despite the fact that this interim regulation is often used as an example for the strongly exclusive ethnic orientation of German nationality, this was not the intention of the founders of the German Basic Law.¹⁹ §116.2 served as a legal regulation to integrate refugees and displaced persons who were in fact ethnically different to the people living on German territory (Gerhardt/Hohenester 2000). This paragraph eased the immigration process after the Second World War, which was characterized by many tensions and arguments between the “West-Germans” and the “new arrived Germans”.

The definition of German nationality of the GDR included the provision that anyone who has (West-) German nationality could register as a citizen of the GDR. Naturalization is enacted if one lives permanently within the territory of the GDR and when he or she “by his personal behavior and his attitudes towards the state and societal order of the German Democratic Republic” (“durch sein persönliches Verhalten und seine Einstellung zur Staats- und Gesellschaftsordnung der Deutschen Demokratischen Republik”) shows him or herself worthy and if no other reasons were against granting nationality. Nationality is lost through renunciation, but only if it did not lead to statelessness (Riege 1986). The legal structure of the GDR is yet another example

¹⁹ See for this point the discussion on §116 in the basic law (Leibholz/Mangold 1951: 823 ff), especially the notes of Dr. Seebohm on §33 (Leibholz/Mangold 1951: 309 ff).

that discrimination and inequality can usually not directly be inferred from nationality law since similar nationality laws say little about the material content of the respective citizenship.

The situation before the new law of 1999 can be summarized as follows: Germans who lived outside Germany could keep their nationality for generations, since the ten-year period that led to the loss of German nationality was abolished in 1914 (Fahrmeir 1999). German nationality was lost by acquiring another nationality. If the other nationality was acquired during the residence on the territory of Germany, German nationality was only lost if a special bilateral treaty existed.²⁰ Persons who were naturalized under §116.2 could keep their second nationality in order to have the opportunity to return to their home country (Neumann 1998: 268-69). The naturalization of adults required criteria such as “good way of living”, no criminal record, legal residence in Germany, and economic independence. Details were regulated in complex and restrictive administrative orders (see Neumann 1998: 265). Easier naturalization was possible for spouses of German nationals. In 1990 the naturalization rules in the foreigners law were simplified and, in 1992, together with the introduction of a more restrictive asylum law, a formal right of naturalization was introduced and the naturalization of immigrants via *ius domicilii* was possible.

Parallel to this law the more inclusive regulations which derived from §116.2 in the basic law were modified. A quota for ethnic Germans was introduced and in 1994 a language test was implemented (Münz et al.: 27). §116.2 is still the basis for immigration of many people from Eastern Europe. These people mostly emigrated long before the foundation of the German Reich so they never had any German nationality. This means that the often-cited ethnic Germans are in fact not a case for *ius sanguinis*. *Ius sanguinis*, in the legal sense, means the allocation of nationality to a child according to the nationality of the parents. By definition, the principle of *ius sanguinis* cannot be used in the case of ethnic Germans. The legal concept the “ethnic German” is not only not related to *ius sanguinis*, it is as well not applicable to all people with German ethnic origins. According to the Federal Law of Displaced Persons (Bundesvertriebenengesetz), an ethnic German is someone who has been prosecuted, displaced or in any other way deprived from his citizenship rights because of his or her German descent. In the law itself this is simply regulated by naming the countries in which such practices were known.²¹ Therefore, it is incor-

20 German nationality could be kept outside Germany as well, if the German authorities considered this as in the interest of Germany or if the person would have suffered severe disadvantages by denaturalization.

21 §1.2, section 3 says: “displaced persons are people, who are, as German citizens or members of the German people (3) after the end of the displacement has left or leave East German areas that are currently under foreign administration, Gdansk, Estonia, Latvia, Lithuania, the Soviet Union, Poland, Czechoslovakia, Hungary, Rumania, Bulgaria, Yugoslavia, Albania and China,“ („Vertriebener ist auch, wer als deutscher Staatsangehöriger oder deutscher Volkszugehöriger (3) nach Abschluß der allgemeinen Vertreibungsmaßnahmen die zur Zeit unter fremder Verwaltung stehenden deutschen Ostgebiete, Danzig, Estland, Lettland, Litauen, die Sowjetunion, Polen, die

rect to think that ethnic Germans in the legal sense are all people on the globe with German ancestors. After unification it surely would have been time to eliminate these regulations, which were implemented as interim rules for the time after the Second World War. Unfortunately this has not been done (see Neumann 1998: 271).

To return to the legal system of the USA. First, changes within the restrictive legal system of the twenties were introduced in the fifties. Most of the regulations for naturalization are currently based on the nationality and immigration act of 1952, which combined naturalization and immigration regulations in one act. Discrimination based on gender, race or marital status was explicitly prohibited. For naturalization, a knowledge of English, fundamental US-history and good moral character were required. Moreover, a long list of ideological requirements was established, including, for example, that the applicant should not be anarchist or communist. In the Hard Celler Act of 1965, all nationality quotas were abolished. This act started the process of increased diversification of American immigration. Today the main group of naturalized citizens arrives under the category of family unification (Ueda 1994).

The principle regulations of naturalization are: lawful admittance to permanent residence, five years continuous residence, good moral character during the previous five years, attachment to the constitutional principle, being “well-disposed to the good order and happiness of the United States”, basic knowledge in speaking, reading and writing English, knowledge of basic US-history and government, and an oath of allegiance. With this oath the new citizen renounces former allegiances but there is no formal loss of former nationality required.²² People who deserted from the US army or try to get citizenship to avoid military service in their country of origin are excluded. There are many clauses, which refer to the political ideas of the would-be citizen, that are seen as a criterion for exclusion. For the loss of nationality, there are no direct constitutional statements, but according to Supreme Court, nationality acquired under the Fourteenth Amendment cannot be withdrawn unless an individual wants it. Naturalized citizens cannot lose their nationality, but government may challenge the legality of the naturalization process. Acquiring a different nationality does not always lead to the loss of the American nationality. Nevertheless, US nationality is lost by the decision of an individual to emigrate and acquire nationality in another country (see Neumann 1998).

Tschechoslowakei, Ungarn, Rumänien, Bulgarien, Jugoslawien, Albanien und China verlassen hat oder verläßt, ...“ (nach Weidener/Hemberger 1991: 159, translation by MB))

²² For people who made special contribution to national security, naturalization is easier. Spouses of American nationals are naturalized after three years, persons who work with American military can be naturalized faster and nationality can directly be given by the Congress.

This situation is, from a legal point of view, not very different from the new German legal structure. With the new law a right of naturalization is acquired after eight years of legal residence, the applicant must be in favor of the basic law, economically independent, without criminal record and should have some basic knowledge of German language. He or she has to give up any former nationality if this is not considered as a special hardship (“besondere Härte”) by German authorities. Dual citizenship is accepted in the case of the naturalization of citizen of the European Union. Multiple nationalities can be passed on to the children of multinationals. How these regulations will be implemented is an open question, since there surely will be still large differences between various German states. These regulations can be seen as the legal reaction to the implementation of the guest worker system at the end of the 50s. With this law, the tendency towards the implementation of naturalization regulations based on *ius domicilii*, which started at the beginning of the 90s, continued. With that, Germany returned to a legal structure that is quite similar to most other continental European countries.

Despite the fact that German and American nationality were codified within totally different legal frameworks, strong structural similarities can be seen. The following section describes some of the similarities.

3. Some patterns in American and German nationality law

Who belongs to a nation state and who does not? This question is usually posed in two situations, either when a child is born or when someone wants or has to change his or her state membership. In the first case, nation states apply a combination of *ius soli* and *ius sanguinis*. In the second case, nation states develop a catalog of criteria in order to determine who has a right or chance to get nationality and who does not. Both types of regulations were basically implemented with the emergence of the modern nation state but elaborated and refined within the course of time. Parallel with these developments, the status of nationality was differentiated from the complex of citizenship.

3.1 The increasing differentiation between nationality and citizenship

Today nationality is a largely homogeneous and universal status within the nation state. Leaving aside some minor exceptions, concepts like race, gender or wealth are not longer used to differentiate between different types of nationality within the nation state. This development makes it even more important to differentiate between nationality and citizenship, because citizenship rights are still not homogeneous and universal for people living on the territory of the nation state. Nationality is much more reduced to its external function of closure for nationally constituted societies, whereas internally the broad concept of citizenship can be used to describe the

status configurations of individuals in respect to different spheres of society. In addition this increasing de-linking of nationality and citizenship is the flip side of a process, which is often described in the citizenship literature as the emergence of “post-national citizenship” (see e.g. Soy-sal 1994).

Two different processes within the implementation of nationality in Germany and the USA are evident: the increasing inclusiveness of the concept of nationality and the increasing de-differentiation of the nationality status. Examples for increasing inclusiveness cover the incorporation of groups living as “non-nationals” on the territory of the nation state like Natives or guest workers. One example of the increasing de-differentiation of the nationality status is the increasing equality between men and women. Both processes are also good examples of the de-linking of nationality and citizenship. Of course, it was an important step for African Americans in the middle of the 19th century and for women at the beginning of the 20th century to acquire equal nationality status, but these legal breakthroughs had little effect on the equality of citizenship rights for both groups.

The most obvious internal de-differentiation process of nationality is the increasing centralization of nationality. In both countries nationality emerged from political membership in the different states, which formed federations that later became the German or U.S.-American nation state. Despite the fact that from the beginning both nation states tried to implement a unified nationality, it took until the civil war in America and in Germany until the First World War before it is appropriate to talk about a unified nationality.²³ That this de- differentiation process is by no means a feature of every nation building process is exemplified in the case of France, where no federal elements are contained in the statuted nationality regulations of the constitutions of the French Revolution or the Code Napoleon. Again, the development of citizenship shows a different dynamic. In general, federalism is much stronger in the US than in Germany, so that we can find in the US a strong differentiation, within level and structure, of the welfare system between the different states. In the U.S. and Germany, the educational system that provides important part of social rights are under the authority of the different states. Obviously a nation-wide homogenization process of citizenship took place in both countries as well, but this homogenization process is not as strong and far-reaching as in the case of nationality.

Nationality laws are bordernization processes of collectivities that control who belongs to a collectivity and who belongs not. Nationality law has, as the interface between the political system and the population, two control functions: On the one hand it insures that the world population is separated largely congruently with the segmentary differentiation of the political world system.

On the other hand it partially structures the internal participation in the political system. Because of the increasing inclusion of all groups within the nation state, (e.g. the implementation of voting rights for women and African-Americans or the right for guest workers to be naturalized), the function of nationality law of stabilizing internal structures of inequality decreases. Generally speaking, the main manifest function of nationality law lies within stabilization of international inequality (see Bahr et al. 2000).

Given the fact that about 2.5 % of the world population lives outside their country of birth or nationality, for about 97% of the individuals on earth nationality is ascribed by birth (Migration News, May 2000). So ascribed nationality is by far the “common case”, whereas to achieve nationality as an adult is a comparatively rare case, despite the increasing absolute number of migrants. Concerning citizenship, the situation is again more complicated; some parts of this status configuration are ascribed to all citizens, like the right of due legal treatment, while other rights, like unemployment benefits, are partially achieved. Nevertheless, the achieved and ascribed components of nationality deserve some further exploration.

3.2 The implementation of *ius soli* and *ius sanguinis*

With the emergence of the modern system of nation states the attribution of nationality to newborn children developed as ascribed characteristics attributed via descent or place of birth. The historical development of every regulation of membership started with the *ius domicilii*. The earliest version of the German (French influenced) and the American (British influenced) nationality law did not codify these principle directly, they simply assumed that these norms are operational. In particular, with the first coherent formulation of the *ius soli* principle, Calvins Case in 1608, the strong connection between this principle and the idea of subjectship is demonstrated.

Although descent as a marker of subjectship or serfdom was quite common in medieval Europe, a clear-cut *ius sanguinis* only emerges with the development of the nation state. At least in the legal sense, it is not the continuation of images of blood relationship of Germanic or American tribes. If we want to detect the legal roots of these norms, we have to look at the rules of heritage within royal houses. The allocation of the British crown, for example, has been regulated via an *ius sanguinis* since 1351. Since then, it was possible that descendants of the British royal house can become rulers of Britain even if they are not born within British territory (see Dummet/Nicol 1990). *Ius sanguinis* regulations are the expression of the idea that there is a relation between the individual and political system of domination regardless of territory.

23 De jure one unified German nationality was finally implemented during the Third Reich.

The principles of *ius soli* and *ius sanguinis* are functional equivalents. Both principles try to assure that members of a political collectivity are socialized within this collectivity. This means that only those individuals are considered as belonging to nation state who learned the special way of living via the family or by living on the territory of the state. This is as well exemplified in the different special regulations. In the case of *ius soli*, children of diplomats as well as, in most cases, children of tourists and sometimes people who live for the first generation in the country, are excluded. The case of *ius sanguinis* has the “family effect” time limit in most of the cases. The passing of nationalities to children born outside the territory of the nation state is usually restricted to the first generation. That socialization leads to membership is epitomized in the well-known regulation that the American President has to be born within the territories of the USA. It was not imaginable for the former colonists that someone who was not born and raised among them could represent their interests appropriately within and outside the country.

Both *ius soli* and *ius sanguinis* are ascribed. Both are based on a relation between the individual and the political system, which is established by socialization independent from the individual will. At the beginning of the modern nation building process this was not at all self-evident. Or as John Locke put it: “A Child is born subject of no Country and Government. He is under his Father’s Tuition and Authority, till he comes to Age of Discretion; and then he is a Free-man, at liberty what Government he will put himself under; what ever body politick he will unite himself” (after Smith 1997: 79). Loyalty was owed by socialization to the family, and it took 200 years that this bond of solidarity was transferred to the nation state.

3.3 The ethnization of law

Concerning the naturalization of adults, one can speak of an ethnization of nationality law. According to international law every state has a large scope for determine the criteria of naturalization up to its own devices. Every state has to allow nationals (who are not criminals) to leave its territory if they want it. Immigration can be regulated largely autonomously.²⁴ In the famous Noteboom-Case of 1957 the international court in Den Hag decided that nation states are not totally free in allocating nationality; that is, nationality could not be sold. The judges developed the idea of the “genuine link” between the individual and the nation state. This “genuine link” can be detected by the certain criteria, but principally from the fact that the person naturalized

²⁴ This asymmetric condition within the international political system concerning the movement of people poses increasingly problems to the nationally structured world system. This is **typically captured** under the heading “refugee problem”. Norms of the nation state and of the international legal system deny states the right to exclude persons if there is danger for their lives. It is exactly this principle that – besides the principle of family unification – undermine the stabilization of international inequality by nationality (see Zolberg 1989).

stayed for a longer period of time within the territories of the nation state (Kimminich 1984). All regulations of naturalization can be read as an attempt to check this personal relation between a person and the state.

Nationality law defines the relation between the citizen and the state as a quality of a person. As a general trend, these criteria became more and more complex in the course of time. Nevertheless, these criteria are today surprisingly similar between the U.S. and Germany. Someone acquires the right to become German or American within a time period of two to eight years. The time span is usually shorter for people who had married an German or American national. The next test is if he or she behaves according to the desired way of life within the nation state, including working, having some money, supporting democracy, language knowledge, and being without a criminal record. This is often summarized with the phrase he or she should be “of good moral character

In the case of the criteria of naturalization of adults, a convergence exists with increasing differentiation of the criteria of naturalization. In which respect can this process be called ethnization? In the classical definition on ethnicity provided by Max Weber: “We shall call ‘ethnic groups’ those human groups that entertain a subjective belief in their common descent because of similarities of physical type or of customs or both, or because of memories of colonization and migration; this belief must be important for the propagation of group formation; conversely, it does not matter whether or not an objective blood relationship exists. Ethnic membership (*Gemeinsamkeit*) differs from the kinship group precisely by being a presumed identity, not a group with concrete social action, like the latter. In our sense, ethnic membership does not constitute a group; it only facilitates group formation of any kind, particularly in the political sphere. On the other hand, it is primarily the political community, no matter how artificially organized, that inspires the belief in common ethnicity. This belief tends to persist even after the disintegration of the political community, ...”. (Weber in Sollors 1996: 56) Similarities in customs together with a subjective belief in common descent²⁵, mostly used to propagated group formation in the political realm, are - according to Weber - central elements of ethnicity. These ideas are associated with

25 Disputed in definitions of ethnicity is often the concept of “common descent”. Nearly all definitions of ethnicity refer to a believed, specific, and shared origin of the group. (for an overview Sollors 1996 or Hutchinson/Smith 1996). Which specific characteristics of origin are chosen depends mainly on the subject of inquiry. Research on continental European societies defines ethnicity mostly more narrow, whereas research on North America works in a broader perspective, in some (mainly anthropological) research the term ethnicity is synonymous with the term culture. Important for this paper are two points: (1) Belief in shared collective origin does not necessarily exclude individual change of membership, as it can be seen in different phenomena like blood brotherhood and passing. (2) The increasing scientification of worldviews, has - roughly speaking - led to the evolution that blood relationship was emphasized from the 19th until the middle of the 20th century, since then the images of blood relation as a metaphor of origin loose importance in the self interpretation of an ethnic group (for the American case see Gossett 1997).

the nation state within the process of the formation of nationally constituted societies (see Wobbe 1996). Common political fate (in history and in future) is the most important reference point in order to buttress demands of solidarity within the nation state. Others can only be trusted to meet these demands if they share the same way of living and the same political project. In general, every nation building process is characterized by the projection of ethnic modes of community building into the political structure of the nationally constituted society (see Calhoun 1997).

The operational criteria for naturalization are usually: basic knowledge of a language, knowledge and approval of the political system, knowledge of history, and economic independence. These characteristics can be acquired, but this takes time. In the beginning, nationality laws were structured around the idea of *ius domicili* residents as the main criterion. Later on race and various political criteria were introduced. More and more criteria referring to certain lifestyle, knowledge of the language, and knowledge of history were eventually added. With the increasing differentiation of the criteria of naturalization for adults within nationality laws, particular ideas about cultural forms like: language, history, economy, and most of all the political system, were introduced. These criteria are, as well, all elements of an ethnic self-description, as defined by Weber, which means that naturalization criteria were more and more ethnized.

4. Nationality law and the universalization of particularism

The process of implementing regulations to determine nationality is sociologically of special importance, since it shows that there is no clear-cut trend within the development of the modern system of nation states towards achieved and universal criteria. More precisely, this process is marked by “the interpenetration of the universalization of particularism and the particularization of universalism” (Robertson 1992: 100). There are many definitions of particularism but all of them refer to the judgment in a situation according to specific group standards. Nationality is an interesting construct since it is special for every citizenry and, in this sense, particularistically defined, while at the same time it is universal human right. Or, to put it the other way around, every nation state has the universal right to set particularistic standards.

Many developments of nationality law not discussed in this paper refer to the universalization of membership criteria within the nation state. Besides efforts to abolish political discrimination by gender, race, ethnicity or economic performance within the nation state, some of these aspects have been or are still used as criteria to stabilize the external borders of the nationally constituted society. But these border maintenance processes are constantly under pressure. Or as Zygmunt Bauman puts it: “It was the nation-state itself, with its drive toward uniformity, the substance of the nation-building effort, that first raised the banner of universalism; but there was no clear rea-

son why that banner should not beckon the troops beyond the state-guarded boundaries” (1995: 152). On the other hand, discourses of national solidarity do refer to the specific quality of all human beings living within that nation, e.g. in connection with the welfare state or war. Much of the ability of a nation state to establish internally universal standards is based on these particularistic self-definitions. This distinction reflects the dispute between “impractical universalists” and “immoral particularists” (van Gunsteren 1994) regarding the varying structure of membership definitions within nationally constituted societies (Bös 1998).

When speaking about universalistic or particularistic aspects of law, it is important to keep in mind that this is not the same distinction as inclusive and exclusive. Economic performance, for example, can be easily defined by equal standards across the whole world. Nevertheless, to sell nationality for a high price is highly exclusive, because only a few rich people can afford it - a practice that is today called “special regulations for investors”. On the other hand, the ascribed German *ius sanguinis* was very inclusive at the beginning of the century and after Second World War. After the implementation of guest worker systems, it was exclusive as well.

Finally, a short note on the relation between ethnicity and nationality. Of course, not every cultural expression is ethnic; however, if such cultural expression is used to propagate membership in a group of common descent, then it fits into a sociological definition of ethnicity, especially if these criteria are used for political processes of community building (Weber 1985: 236). In this sense, there exists a wide spectrum of nationally relevant ethnic symbols, including the forms of political conduct (like liberal or republican), common historical experiences (like migration or wars) or simply the way of everyday live. From this perspective every nation state has ethnic components.

Some authors try to use nationality law as an indicator of the degree of ethnization of a nation state (e.g. Brubaker), using an equation like: German means *ius sanguinis* means ethnic. Such thinking leads to the question: How far are *ius sanguinis* and *ius soli* “ethnic” or “non-ethnic”? Both legal principles can be seen as referring to important elements of ethnic codes; in reference to territory or reference to blood relationship; both codes are part of the Western nation building process (see Smith 1986). The issue of using rules of categorization for newborn children as a specific case of an ethnic “conscience collective” is a difficult one. This issue implies that socially shared imaginations are in a direct and unmediated way reflected in legal codes. This is basically an argument of the sociology of law, as first developed in the book “On the social division of labor” by Emile Durkheim. He made this argument in the context of extremely long historical periods, as he compared the Roman law with the French law of the 19th century. It is highly plausible that for such totally different societal formations law is a good indicator for detecting differences in social norms. This argument is much less plausible if we compare cases that are

closer in time and space, like France and Germany over the last 200 years. Political discourses and legal rules in such shorter time spans are by no means always congruent. It was, for example, impossible to pass German nationality to children after ten-year residence abroad, between 1871 and 1914. Despite the fact that in the second half of the 19th century political discourses in Germany were strongly ethnized (Brubaker 1992), German bounds of blood had a surprisingly short time until their expiry date. The legal principles of *ius soli* and *ius sanguinis* are only difficult to employ either as an indicator for ethnic ideas or as the expression of ethnic ideas. Since these legal principles are used in some sociological work (e.g. Brubaker) as a central indicator for societal discourses, it is no surprise that this misjudgment generates wrong prognoses.

Regarding the interpretation of the rules of naturalization for adults, this is a much less urgent problem. In this case the legal code itself provides a whole set of criteria which as can be interpreted in sociological terms. Even if nation states do not see their own nationality laws in ethnic terms, as in the cases of France and the USA, they nevertheless use criteria which are similar to the sociological definition of ethnicity. The form of ethnic self-definition may differ between different nation states, but all nation states have ethnic components within their nationality law. In all countries nationality is seen as specific quality of a human being - a quality which is expressed in individual and particularistic standards of conduct (see Bös 1997).

Whatever the reasons for the described developments may be, it is clearly necessary to distinguish between the concept of nationality and citizenship. Using these distinctions it is evident that the structure of nationality law in Germany and the USA show strong communalities. In the evolution of the modern system of nation states, nationality of newborn children is ascribed either by descent or by place of birth. The increasing complex criteria of the naturalization of adults, which largely consists of achievable criteria, are more and more structured along ideas which in a sociological perspective ethnic.

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