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HAS THE EUROPEAN COURT OF JUSTICE CHALLENGED MEMBER STATE SOVEREIGNTY IN NATIONALITY LAW?

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European Union citizenship and Member State nationality: updating or upgrading the link?

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Although legal and political phenomena are dynamic processes, we often tend to view them as static. So when change occurs, we feel surprised and unprepared. Additionally, despite the facts of being rooted in time and experiencing its complex and evolving dimensions on an everyday basis, more often than not time eludes us. Psychologists suggest that this is due to human beings' "mental laziness", that is, to our tendency to bracket out difficult and unfamiliar thoughts. The "cognitive fluency" of our brains thus designates "easy" thoughts as more important, preferable or true.

But mental laziness and cognitive fluency are irreconcilable with the process of European integration. All those involved in it, be they institutional actors and policy-makers, observers or students, have to display an intense mental alertness and a willingness to examine all the roads taken as well as not taken. The evolution of European Union citizenship and its remarkable judicialisation over the last fifteen years are cases in point. Inspired by the constitutionalisation of Union citizenship at Maastricht, European judges have expanded its material scope, thereby reflecting European citizens' needs and expectations and, by so doing, inviting both admiration and criticism from different quarters. But the case law concerning the personal scope of Union citizenship remained relatively underdeveloped and modest for nearly two decades. It is only recently, in *Rottmann*, that clarification emerged on the *Micheletti* ruling that the Member States' (MS) competence in the determination of nationality, which is the basis for the possession or acquisition of EU citizenship, should be exercised with due regard to Community (now Union) law.

Commencing with *Micheletti*, the Court confirmed that determination of nationality falls within the exclusive competence of the Member States, but it went on to add that this competence must be exercised with due regard to the requirements of EU law, and in *Kaur* it stated that 'it is for each Member State, having due regard to EU law, to lay down the conditions for the acquisition and loss of nationality'.[45] Accordingly, nationals of a Member state should be able to exercise their rights to free movement without impediments imposed by additional regulations adopted by other Member States. In *Chen*,[46] the restrictive impact of such additional conditions for the recognition of nationality of a Member State was criticised. It ruled that the United Kingdom had an obligation to recognise a minor's (Catherine Zhu's) Union citizenship status even though her Member State nationality had been acquired in order to secure a right of residence for her mother (Chen), a third country national, in the United Kingdom. Since Catherine had legally acquired Irish nationality under the *ius soli* principle enshrined in the Irish Nationality and Citizenship Act 1956 and had both sickness insurance and sufficient resources, provided by her mother, the limitations and conditions referred to in what was then Article 18 EC and laid down by Directive 90/364 had been met, thereby conferring on her an entitlement to reside for an indefinite period in the UK. In *Rottmann*, whose facts and implications have been laid bare in the other contributions to this forum, the CJEU held that the 'due regard to EU law' proviso:

> 'does not compromise the principle of international law previously recognised by the Court, and mentioned in paragraph 39 above, that the Member States have the power to lay down the

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45 See above n14.

46 See above n19.

> conditions for the acquisition and loss of nationality, but rather enshrines the principle that, in respect of citizens of the Union, the exercise of that power, in so far as it affects the rights conferred and protected by the legal order of the Union, as is in particular the case of a decision withdrawing naturalisation such as that at issue in the main proceedings, is amenable to judicial review carried out in the light of European Union law' (para. 48).

One cannot but observe that this case law on the personal scope of Union follows an orderly pattern. Not only have European judges affirmed the Member States' competence in matters of nationality, but they have also emphasised the need for national authorities to exercise their authority in ways that do not compromise the integrity of the Union legal order and its effectiveness. In this respect, *Rottmann* does not produce any surprises. Rather, it follows the principle set out in *Micheletti* in such a linear way, such that if we wished to make a pictorial representation of the case law, we would see that all of these cases cluster on the same axis. This clustering pattern delineates the normative and material characteristics of a system relying on the interaction between the national and the supranational, national citizenship and EU citizenship, without affirming an explicit or implicit hierarchy of statuses.

The relative autonomy of Member States in nationality matters

Without a doubt, the Member States enjoy what may be called, a "relative autonomy" in the determination of the conditions for the acquisition and loss of nationality since the Court upholds the international law maxim that determination of nationality falls within the MS exclusive jurisdiction, but demands that the exercise of this jurisdiction is congruent with EU law. Since the mid-1990s, scholars have remarked that EU law would be infringed if national citizenship laws violated the general principles of EC law, including fundamental rights and the solidarity clause, by failing to consult with Brussels about the possible inclusion of third country nationals into their national population as well as the possible exclusion of a part of their population. Certain Member States have also displayed a mature appreciation of their relative autonomy in nationality matters by either facilitating the naturalisation of non-national EU citizens who are resident on their territory or removing denationalisation clauses in cases of long-term residence abroad and naturalisation in another Member State.

What can be reasonably inferred from the Member States' relative autonomy in this field is that neither do the Member States enjoy untrammelled authority and can thus criticise the *Rottmann* ruling for infringing on their competence in nationality withdrawal nor is EU citizenship a superior status that cannot be lost as a consequence of Member State law . Both these assertions would immediately transform a relation of mutual coordination and interaction between national and EU citizenships into a hierarchical relationship of superior and subordinate statuses. Indeed, the Court did not state that withdrawal of nationality, which has the effect of bringing about the loss of EU citizenship, is precluded by European Union law, as Golynker mentions in her contribution. What it stated is that when the loss of EU citizenship is at stake, national courts have to examine the proportionality of the withdrawal decision in light of the fundamental status of Union citizenship as well as in light of national law (para. 55), by considering whether the 'loss is justified in relation to the gravity of the offence committed by that person, to the lapse of the time between the naturalisation decision and the withdrawal decision and to whether it is possible for that person to recover his original nationality.'(para. 56).

By stating so, the Court is inviting national authorities to consider seriously whether the long-established principle of denationalisation on the ground of fraudulent naturalisation or misrepresentation, which remains 'in theory, valid' (para. 55) is appropriate, that is, whether it goes beyond the degree necessary in the public interest since punishment of the individual concerned via criminal law provides a less restrictive alternative and appears to be more consonant with the realities of the 21st century. Although deceitful individuals should not be allowed to benefit from their own

wrong doing, if they have made a country the hub of their activities for a number of years and have been enmeshed within the socio-economic fabric of the society, withdrawal of nationality is an extremely heavy penalty since it does not merely punish the 'offender', but crushes him/her, erases his/her status and destroys his/her relations.

Is this all there is? The relative autonomy of Union citizenship: an argument

Having examined the intimate connection between national citizenship and EU citizenship and what Member States' relative autonomy in nationality matters implies, it may be worth reflecting on whether some form of relative autonomy could be applied to the other pole of the relationship, that is, to EU citizenship. While Advocate General Maduro eloquently pinpointed in his Opinion that EU citizenship and MS nationality are 'inextricably linked but also autonomous' (para. 23), 'all rights and obligations attached to Union citizenship cannot be unreasonably limited' by the conditions pertaining to access to Union citizenship (para. 23) and that national rules determining the acquisition and loss of nationality must be compatible with EU rules and must respect the rights of EU citizens (para. 23), he proceeded to state that inferring that the withdrawal of nationality is impossible if it entails the loss of Union citizenship would violate MS autonomy in this area and thus contravene ex-Article 17(1) EC (now Article 20 TFEU) as well as Article 6(3) EU concerning the EU's obligation to respect the national identities of the MS (now, in a changed form, Article 4(3) TFEU). The Court, on the other hand, paid too much attention to the issue of naturalisation by deception (paras 50- 54) and very little attention to two other important considerations; namely, the fact that naturalisation in the MS of residence can bring about the loss of nationality in the MS of origin thereby contravening the free movement provisions of the Treaty and the international law obligation of preventing statelessness. Had the CJEU given more weight to these considerations, a pathway leading to transformational change could have been opened.

In the remainder of this contribution, I would like explore such a pathway by putting forward the argument that the MS can withdraw nationality, provided, of course, that they comply with EU law, but that EU law precludes the automatic loss of Union citizenship if a Union citizen is rendered stateless. In other words, loss of MS nationality would not automatically result in the forfeiture of Union citizenship, if the Union citizen concerned were rendered stateless. Given that EU citizenship is a dynamic concept and institution and a fundamental status, a certain degree of autonomy as far as Union citizenship is concerned is required in order to preserve the link between the citizen and the Union and his/her place in the European community of citizens. Arguably, it is not fair that a Union citizen, who has established a multitude of relations and connections in a Member State other than his/her state or origin and a link directly with the Union from which directly effective rights and obligations flow, is automatically denied social and political standing in the EU legal order because a Member State decides to deprive him/her of nationality, however legitimate the reasons may be. After all, the EU law rights of free movement, residence and equal treatment do not come into view because one is a Member State national (millions of Member State nationals cannot invoke these rights if their situations are purely internal, that is, they have not established links with EU law by engaging in activities with a crossborder dimension), but because a Member State national has activated his EU law status. Accordingly, this status, which is not a status of subjection - as nationality is - but a status of participation in civil society and the political life of the Union, needs to be protected. This can be done by recognizing that the status of citizen of the Union shall be unaffected by a subsequent loss of state nationality which renders the individual stateless.

On close reflection, this argument neither contravenes the Declaration on Nationality of a Member State nor threatens to replace national citizenship. Nor does it in any way impinge upon Member State autonomy which is clearly manifested in the act of deprivation of citizenship. It merely maintains the legal effects of Union citizenship and safeguards the rights that individuals derive directly from EU law, thereby enabling a stateless EU citizen to continue to enjoy the freedoms guaranteed by the

Treaty and the protection afforded to him/her by EU law, including security of residence, respect for family life and the maintenance of the relations (s)he has established. True, this would be of little use to persons holding two or more Member State nationalities. But it would make a great deal of difference to mono-national EU citizens resident in another Member State. It would also demonstrate in practice that EU citizenship is a fundamental status and that it matters.

The argument could be defended on both analytical and legal grounds, namely, the fundamental status of Union citizenship (the EU citizenship norm) and the *effet utile* of EU law. Analytically, the argument in favour of the independent legal effect of EU citizenship in the event of statelessness can be derived from the intersystemic relation between EU citizenship (A) and Member State nationality (B) as well as the nature of their interaction. By the latter, I mean the perception of the interaction as process-driven and dynamic. In most relations of dependence where A can only be activated by B, it would be incorrect to conclude that all properties and effects of A are contained by B. B may be the triggering mechanism or the source of A, but it can bear little or no relation to other parts of A and their reconfiguration at any time. I take this to be the true meaning of "additionality" or "complementarity" or "existing alongside": it delineates a degree of relative autonomy and, by no means, implies that A and B cannot function apart. Additionality cannot entail a logic of complete subsumption of Union citizenship to the extent that it automatically disappears when Member State nationality is lost. To assert the latter would be tantamount to distorting the relation of complementarity or additionality and replacing it with a relation of complete subjugation. Such a relation of subordination may please state-centrists, but it would not be congruent with the principle of maintaining the full effectiveness of EU law and Union citizens' legal positions which are protected by it. It is recognised that an individual who has activated EU law by crossing borders has the status of an EU citizen in addition to the status of a Member State national. The former has been granted to him by virtue of EU law and authenticates all the rights (s)he derives in the host Member State. A national decision depriving him/her of nationality interferes with his/her EU-based legal position and his/her free movement rights, thereby depriving them of full force and legal effects. A Union citizen may thus find himself/herself stripped of all his/her rights overnight, totally unprotected in the territory of the host Member State and bereft of Union citizenship.

In addition, all intersystemic relations are dynamic, that is, they entail a process-driven dimension in response to endogenous and exogenous pressures and possible discrepancies. As we have seen in the previous section, the relation between national citizenship and EU citizenship constitutes no exception. EU citizenship has become a fundamental status of Union citizens who have increasing expectations about the EU's capacity to deliver and to give meaning and depth to it. Accordingly, a system within which nested citizenships overlap, interact, impact on each other, but also retain their relative autonomy and independent properties, would create the preconditions for citizens to develop their potential, to enrich their life chances and to enjoy adequate protection.

The survival of EU citizenship following the breakdown of the link between an individual and a Member State as a default option in cases of statelessness does not challenge the Member States' definitional monopoly over nationality and their autonomy to withdraw nationality on the ground of fraudulent naturalisation. It is thus consonant with the CJEU's rulings thus far. This tenet has no boundary-testing effects: it does not call into question the boundaries of national belonging. Nor does it undermine national identities. It merely ensures that the rights that EU law has conferred on individuals remain fully effective, facilitating thereby the attainment of the Union's objectives pursuant to the EU law doctrine of *effet utile* (the principle of effectiveness) and the fundamental status of Union citizenship. For the full effectiveness of EU rules would be impaired and the protection of the rights granted by former Article 18 EC would be weakened if in being an apatride and thus a person without 'the right to have rights', according to Arendt, one's Union citizen status were erased automatically. Conversely, as long as the fundamental status of Union citizenship and the *effet utile* of EU law are kept in the forefront of the analysis, a stateless person would continue to

receive the protection of EU law, maintain his/her associative ties and be a participant in the European Union public. My main worry, here, is that if we look in the wrong place for European citizenship, it will become devoid of significance.