

*Dora Kostakopoulou*

## **EUROPEAN UNION CITIZENSHIP AND MEMBER STATE NATIONALITY: RETHINKING THE LINK?**

That European Union citizenship remains an unfinished institution is beyond any doubt. Even its modest original content enshrined in the Treaty of European Union revealed this. Article 25 TFEU (formerly Article 22 TEC) has always carried the promise of the extension its material scope of Union citizenship by a unanimous decision of the Council in accordance with a special legislative procedure and after obtaining the consent of the European Parliament. Although this procedure has not been activated yet, EU citizenship has evolved. For more than a decade, the Court of Justice of the European Union (CJEU) has not hesitated to subject it to critical reflection and inquiry and to embark upon unknown and controversial terrains, thereby inviting both admiration and fierce criticism. European judges have taken quite seriously constitutionalisation of Union citizenship and sought to respond positively to citizens' needs and expectations. But as their decisions are guided by norms which often conflict with states' interest in unilateral migration control and the pursuit of power, governments have not hesitated to express their disapproval of what they perceive to be judicial policy-making.

Having said this, one must not overlook the fact that the Court's interventions have been uneven. While the material scope of Union citizenship has been adjusted in ways that are responsive to Union citizens' welfare needs and their concerns, its personal scope, that is, the question of how and under what conditions can EU citizenship be acquired and lost, has largely evaded critical reflection and adaptation. Access to EU citizenship has been premised on the possession or acquisition of Member State nationality and any attempt to loosen the grip of the latter on the former is hastily taken to signal an external intrusion into the sovereign domain of the Member States (- the so called creeping Communitarisation) or a threat of an aggressive Community take over. Sovereignty concerns have thus marked off the field of determination of nationality, which falls within

the exclusive competence of the Member States but must nonetheless be exercised with due regard to Community law,<sup>1</sup> from review by the Community institutions. And yet polarised positions and ‘either/or dualisms’ more often than not hide the complexity and potentialities inherent in relationships. For in relations of all sorts, not only does mutual dependence co-exist with mutual ‘relative’ autonomy, but also if the latter is denied or circumscribed within a very narrow margin then the relationship ceases to function properly. By analogy, although the relationship between EU citizenship and Member State nationality is one of dependence, if it is dogmatically asserted that dependence rules out the existence of relative autonomy in domain of either EU citizenship or national citizenship then the relationship is bound to exhibit cracks. With respect to MS nationality, the Court has made it clear that the Member States enjoy relative autonomy by upholding the international law maxim that determination of nationality falls within their exclusive jurisdiction, despite the anomalies that this creates in the field of application of EU law and its exclusionary implications with respect to the rights of long-term resident third country nationals.<sup>2</sup> In *Micheletti*, the Court confirmed that determi-

<sup>1</sup> \* This article is an abridged and amended version of *The European Court of Justice, Member State Autonomy and European Union Citizenship: Conjunctions and Disjunctions*, which was published in B. de Witte and Hans-W. Micklitz (eds.), *The European Court of Justice and the Autonomy of the Member States*, Intersentia, Leiden 2012.

Case C-369/90 *Micheletti and Others v. Delegacion del Gobierno en Catanbria* [1992] ECR I- 4329.

<sup>2</sup> The debate on the position of long-term resident third country nationals has highlighted the exclusionary effects of Union citizenship. For proposals to disentangle Union citizenship from state nationality and to award it to all persons residing lawfully in the territories of the Union for a certain period of time, see European Parliament (1989) Resolution on the Declaration of Fundamental Rights and Freedoms, A2-0003/89; (1989) Resolution on the Joint Declaration Against Racism and Xenophobia and an Action Programme by the Council of Ministers, A2-261/88; (1990) Resolution on Freedom of Movement for Non-EEC Nationals, A3-175/90, OJ C175, 16.7.90; (1991) Resolution on the Free movement of Persons A3-0199/91, OJ C 159/12-15, 17.6.91; ECSC (1991) Opinion on the Status of Migrant Workers from Third Countries 91/C 159/05, OJ C 159/12, 17 June 1991. Early academic literature on this subject includes: A. Evans, *Third Country Nationals and the Treaty on European Union*, “European Journal of International Law” 1994, No. 5, p. 199–219; D. O’Keefe, *Union Citizenship*, [in:] *Legal Issues of the Maastricht Treaty*, eds. D. O’Keefe, P. Twomey, Wiley, Chichester 1994; M. Martiniello, *European Citizenship, European Identity and Migrants: Towards the Postnational State?*, [in:] *Migration and European Integration: The Politics of Inclusion and Exclusion in Europe*, eds. R. Miles, D. Thranhardt, Pinter, London 1995, p. 37–52; D. Kostakopoulou, *Towards a Theory of Constructive Citizenship in Europe*, “Journal of Political Philosophy” 1996, No. 4, p. 337–358; H. Lardy, *The Political Rights of Union Citizenship*, “European Public Law” 1996, No. 2, p. 611–33; S. Peers, *Towards Equality: Actual and Potential Rights of Third Country Nationals in the European Union*, “Common Law Review” 1996, No. 33, p. 7–50; D. Kostakopoulou, *European Citizenship and Immigration After Amsterdam: Openings, Silences, Paradoxes*, “Journal of Ethnic and Migration Studies” 1998, No. 24 p. 639–656; *European Citizenship: An Institutional Challenge*, ed. M. La Torre, Kluwer Law International, The Hague 1998, and in particular the essays written by R. de-Groot, J. Monar, A. Castro Oliveira, R. Rubio-Marin, M.-J. Garot, A. Evans and Antje Wiener; D. Kostakopoulou, *Nested ‘Old’ and ‘New’*

nation 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 Community law<sup>3</sup>, and in *Kaur* it stated that ‘it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality<sup>4</sup>. 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*, the Court criticised the restrictive impact of such additional conditions for the recognition of nationality of a Member State. It ruled that the United Kingdom had an obligation to recognise a minor’s (Catherine Zhu) 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 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<sup>5</sup>.

But the ‘relative autonomy’ of the other party to this relationship, that is, of EU citizenship, has not been addressed in a systematic way yet. Does this mean that it should be ruled out a priori that EU citizenship may be relatively autonomous under certain conditions and within certain parameters even though it is activated by the possession of Member State nationality? Could it be argued that the Member States’ regulatory autonomy in nationality matters would be infringed, thereby leading to a violation of Article 20(1) TFEU, if EU citizenship were seen to survive if the MS nationality link which gave it rise in the first place ceased to exist? These questions were raised in *Rottmann*.<sup>6</sup>

Mr Rottmann, an Austrian national by birth, fearing arrest for suspected serious fraud, emigrated to Germany where he subsequently obtained citizenship by naturalization. He lost his Austrian nationality under Austrian nationality law, and, when the Austrian authorities revealed that he had been the subject

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*Citizenships in the EU: Bringing Forth the Complexity*, “Columbia Journal of European Law” 1999, No. 5, p. 389–413. For a recent account, see J. Shaw, *The Transformation of Citizenship in the European Union: Electoral Rights and the Restructuring of Political Space*, Cambridge University Press, Cambridge 2007.

<sup>3</sup> Case C-369/90 *Micheletti and Others v. Delegacion del Gobierno en Catanbria* [1992] ECR I- 4329.

<sup>4</sup> Case C-192/99 *R v. Secretary of State for the Home Department, ex parte Kaur* [2001] ECR I-1237, para 19.

<sup>5</sup> Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department*, Judgement of the Court of 19 October 2004.

<sup>6</sup> Case C-135/08 *Janko Rottmann v. Freistaat Bayern*, Opinion of AG Maduro on 30 September 2009.

of a criminal investigation for fraud and an arrest warrant, Germany revoked his naturalisation on the ground that he had received German citizenship fraudulently. Mr Rottman sought the annulment of this decision arguing that the deprivation of his German citizenship makes him stateless under public international law and that it would lead to loss of Union citizenship which is contrary to Community law. The preliminary ruling reference procedure was activated by the national court which required clarification on whether Community law prevented the loss of Union citizenship under the circumstances pertaining to the case in hand and whether either Germany or Austria had an obligation to comply with Community law. Advocate General Maduro made it clear that the case was not a purely internal matter falling outside the remit of application of Community law since it entailed the requisite cross-border dimension (points 9–13) and proceeded to elaborate on the scope of the Member States' obligation to comply with Community law in exercising their regulative autonomy in nationality matters (point 22 et seq). While the Advocate General eloquently pinpointed that EU citizenship and MS nationality are 'inextricably linked but also autonomous' (point 23), 'all rights and obligations attached to Union citizenship cannot be unreasonably limited' by the conditions pertaining to access to Union citizenship (point 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 (point 23), he proceeded to state that inferring that the withdrawal of nationality is impossible if it entails the loss of Union citizenship would violate Member State autonomy in this area and thus contravene Article 17(1) EC as well as Article 6(3) EU concerning the EU's obligation to respect the national identities of the Member States.<sup>7</sup>

Although the analysis provided by the Advocate General was significant and illuminating, it may be worthy to pause for a moment to reflect on his conclusion. In examining closely his Opinion, it seems to me that there exist two lines of argumentation that are congruent with the analysis up to point 23. The first, which is encapsulated in point 24, is that a MS cannot revoke one's naturalisation or withdraw one's nationality, if this results in the loss of Union citizenship. This, as the Advocate General has noted, would constrain statal autonomy in an area that falls within the Member States' exclusive jurisdiction. But the Advocate General overlooked a second possible argument; namely, that the MS can revoke naturalization or withdraw their nationality, provided, of course, that they comply with Community law, but Community law precludes the ensuring automatic loss of Union citizenship if a Union citizen is rendered stateless. In other words, the loss of Member State nationality would not automatically result in the forfeiture of Union citizenship, if the Union citizen concerned were rendered stateless. Indeed, given that EU citizenship is a dynamic

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<sup>7</sup> *Ibidem*, points 24 and 25.

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.

The Grand Chamber did not pursue this argument.<sup>8</sup> It made denationalisation (and naturalisation) decisions taken by the Member States subject to judicial review and a proportionality test,<sup>9</sup> thereby intruding in what was previously thought to be the Member States' core preserve of sovereign jurisdiction. 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 naturalization 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 invited 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 21<sup>st</sup> century. Although deceitful individuals should not be allowed to benefit from their own wrong, 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.

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 (and its Treaties) from which directly effective rights and obligations flow, is automatically denied of social and political standing in the Community legal order because a Member State decides to deprive him/her of nationality, however legitimate the reasons may be. After all, the Community law rights of free movement, residence and equal treatment do not come into view because one is a MS national (millions of MS nationals can not invoke these rights if their situations are purely internal, that is, they have not established links with Community law by engaging in activities with a cross-border dimension), but because a MS national has activated his Community law status. Accordingly, this status, which is not a status of subjection – as nationality is – but a status of participation in civil society, needs to be protected. This can be

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<sup>8</sup> Case C-135/08 Rottmann [2010] ECR I-1449.

<sup>9</sup> *Ibidem*.

done by recognizing that each person holding the nationality of a Member State is a citizen of the Union, but this status shall be unaffected by a subsequent loss of state nationality which renders the individual stateless.

True, critics may be quick to observe that national governments are likely to react negatively against such a conclusion fearing that EU citizenship might take over national citizenship. Such fears have been expressed in the past but they lack empirical foundations. One may recall the Declaration on Nationality of a Member State, annexed to the Final Act of the Treaty on European Union, which expressly stated, ‘the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned’.<sup>10</sup> Similar declarations were adopted by the European Council at Edinburgh and Birmingham. The Birmingham declaration confirmed that, in the eyes of national executives, Union citizenship constitutes an additional tier of rights and protection which is not intended to replace national citizenship – a position that found concrete expression in the amended Article 17(1) at Amsterdam<sup>11</sup> and the Lisbon Treaty.<sup>12</sup>

On close reflection, however, the above mentioned possibility does not threaten to replace national citizenship. Nor does it impinge upon 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 Community 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 Community 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 MS nationalities. But it would make a great deal of difference to mono-national EU citizens resident in another MS. It would also demonstrate in practice that EU citizenship is a fundamental status and that it matters. In what follows, I wish to defend such an argument on both analytical and legal grounds, namely, the fundamental status of Union citizenship (the EU citizenship norm) and the *effet utile* of Community 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 MS 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,

<sup>10</sup> OJ C 191, 29 July 1992.

<sup>11</sup> Bull. EC 10-1992 I 8.9. The Amsterdam Treaty added the statement that ‘Union citizenship shall complement national citizenship’ to Article 8(1) EC (Article 17(1) on renumbering).

<sup>12</sup> Article 9 of the Consolidated Version of the Treaty on European Union (TEU) states that ‘Citizenship of the Union shall be additional to national citizenship and shall not replace it’.



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 the maintenance of the full effectiveness of EU law<sup>13</sup> and Union citizens’ legal positions which are protected by it. It is recognized that an individual 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 Community 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 Community-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 (and doubts) about the EU’s capacity to deliver and to give meaning and depth to it. Accordingly, a system within which nested citizenships<sup>14</sup> 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, enrich their life chances and to enjoy adequate protection.

The survival of EU citizenship following the break down 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 ECJ’s rulings in *Michelletti* and *Kaur*. This tenet has

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<sup>13</sup> As the CJEU stated in Joined Cases C-46 and 48/93, the full effectiveness of Community rules and the effective protection of the rights which they confer are principles inherent in the Community legal order; *Brasserie du Pecheur v Germany and R v. Secretary of State for Transport ex parte Factortame* [1996] ECR I-1029.

<sup>14</sup> D. Kostakopoulou, *Nested ‘Old’ and ‘New’ Citizenships in the EU: Bringing Forth the Complexity*, “Columbia Journal of European Law” 1999, No. 5, p. 389–413; *Citizenship, Identity and Immigration in the European Union: Between Past and Future*, Manchester University Press, Manchester 2001.

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 thereby facilitating the attainment of the Union's objectives pursuant to the doctrine of *effet utile* (the principle of effectiveness) and the fundamental status of Union citizenship.<sup>15</sup> For the full effectiveness of Union law would be impaired and the protection of the rights granted by Article 21 TFEU would be weakened, if in being an apatrides 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.

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European Union citizenship is an evolving, experimental institution set within a framework that is constantly in motion. As both observers of, and participants in, such a restless framework, we often struggle to comprehend how institutional change has taken place, how it affects domestic policies and the subsequent development of European norms and how it shapes actors' conduct. In this respect, it might be wise to eschew dogmas and political fixity and to have an open mind as to who advances citizens' rights, creates openings and unlocks potentialities which may be frustrated by unnecessary barriers. And we should not forget that 'national ways of doing things' and 'statal autonomy' have often disempowered citizens and been used to justify the raw force of restrictive and coercive practices. Bettering citizens' life chances, meeting their needs and enhancing their protection should not be perceived as a matter of accident or rebellion, praise

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<sup>15</sup> AG Maduro has acknowledged that 'any standard of Community law may be invoked' – not only the general principles of Community law and human rights, in the exercise of state jurisdiction in matters of acquisition and loss of nationality (point 28). Relevant academic literature includes: S. Hall, *Loss of Citizenship in Breach of Fundamental Rights*, "European Law Review" 1996, No. 21, p. 129; Nationality, *Migration Rights and Citizenship of the Union*, Martinus Nijhoff, Dordrecht 1995; G.-R. De Groot, *The Relationship Between the Nationality Legislation of the Member States of the European Union and European Citizenship*, [in:] *European Citizenship...*, p. 115–148; *Towards a European Nationality Law, Migration, Integration and Citizenship*, Vol. 1, ed. H. Schneider, Forum Maastricht, Maastricht 2006.

Compare also Case C-265/95 *Commission v France* [1997] ECR I-6959; Case C-300/01 *Salzmann* [2003] ECR I-4899; Cases C-145/04 *Spain v UK* [2006] ECR I-7917 and C-300/04 *Eman and Sevinger v College van burgemeester en wethouders van Den Haag* [2006] ECR I-8055.



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or blame of the ECJ, defective exercise of jurisdiction and an anomalous bypassing of democratically elected legislatures. Instead, it should be seen as a natural part of the evolving trajectory of European Union citizenship and of the need to realizing its potential to create an inclusive community in the European Union.